EB-2007-0050

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an Application by Hydro One Networks Inc. filed an amended application pursuant to section 92 of the Act, for an Order or Orders granting leave to construct a 180 kilometres of double-circuit 500 Kilovolt electricity transmission line adjacent to the existing transmission corridor extending from the Bruce Power Facility in Kincardine Township to Hydro One's Milton Switching Station in the town of Milton (the "Leave to Construct Application").

EVIDENCE OF THE INTERVENER MÉTIS NATION OF ONTARIO

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DATE: 20010223
DOCKET: C34065

COURT OF APPEAL FOR ONTARIO

MCMURTRY C.J.O., ABELLA and SHARPE JJ.A.

BETWEEN :	)	
	)	
HER MAJESTY THE QUEEN	)	Lori Sterling, Peter Landmann,
	)	Peter Lemmond, for the Appellant, Her
Appellant	)	Majesty the Queen
	)	
- and -	)	Jean Teillet, Arthur Pape, for the
	)	Respondents
	)	
STEVE POWLEY and CHARLES POWLEY	)	Brian Eyolfson for Aboriginal Legal
	)	Services of Toronto, Robert MacRae for
	)	the Ontario Métis Aboriginal
	)	Association, Joseph Magnet for the
Respondents	)	Congress of Aboriginal Peoples, Clem
	)	Chartier for the Métis National Council
	)	
	)	**Heard:** January 10, 11, 12, 2001

On appeal from the judgment of Mr. Justice J. Stephen O'Neill, (2000), 47 O.R. (3d) 30, dismissing an appeal from the judgment of Mr. Justice Charles H. Vaillancourt, [1999] 1 C.N.L.R. 153, dismissing charges under the *Game and Fish Act*, R.S.O. 1990, c. G.1.

SHARPE J.A.:

OVERVIEW

[1] Steve Powley and his son Roddy (the "respondents") are of Métis descent. In October, 1993 they shot and killed a bull moose in the bush near Sault Ste. Marie. They did not have a moose hunting licence. They claim that they are members of the historic Métis community and that they have a right, protected by the *Constitution Act, 1982*, s. 35 to hunt for food without a licence.

[2] The respondents were charged with hunting and possessing a moose without a licence contrary to ss. 46 and 47(1) of the *Game and Fish Act*, R.S.O. 1990, c.G.1. They admitted hunting the moose, but asserted that the Act infringed their constitutional right. The trial judge, Vaillancourt J. of the Ontario Court of Justice (Provincial Division), found that a s. 35 right was established and that the infringement of the right was not justified. He dismissed the charges. O'Neill J. dismissed the Crown's appeal to the Superior Court of Justice.

[3] The Crown (the "appellant") appeals, with leave ((2000), 49 O.R. (3d) 94) to this court. The appellant submits that the respondents do not have an aboriginal right to hunt for food under s. 35 of the *Constitution Act, 1982*. The appellant also argues that if the respondents do establish a right to hunt for food, any infringement of their right is justified in the name of conservation, equitable sharing of a scarce resource, and social and economic benefit. In the event that the appeal is dismissed, the appellant asks that the effect of the judgment be stayed for a period of one year.

[4] Four groups, representing various aboriginal interests, were given leave to intervene in this appeal. Aboriginal Services of Toronto provides legal advice to aboriginals. The Congress of Aboriginal Peoples is a national organization representing Métis and off-reserve Indian[1] peoples, composed of twelve provincial and territorial affiliates. The Métis National Council was established in 1983 to represent the Métis Nation within Canada. It has participated in several First Ministers Conferences involving aboriginal issues and represented the Métis Nation during the Charlottetown constitutional sessions held in 1992. It is comprised of provincial member organizations, including the Métis Nation of Ontario ("MNO"). The Ontario Métis and Aboriginal Association ("OMAA") is a representative organization for non-status aboriginal people as well as Métis people in Ontario.

FACTS

(a) The Offence

[5] The respondents did not dispute the essential facts giving rise to the charges. That aspect of the trial proceeded on an Agreed Statement of Facts. It was agreed that at approximately 9:00 am, on October 22, 1993, the respondents shot and killed a bull moose in the immediate vacinity of Sault Ste. Marie. They took the moose to their residence in Sault Ste. Marie. The respondents did not have Ontario "Outdoor Cards" available to all hunters for a fee, nor did they possess a licence to hunt moose. Moose licences are limited in number and are allocated by lottery to those who apply. In place of the legally required tag, Steve Powley affixed a hand written tag to the ear of the moose stating the precise date, time, and place of the kill and indicating the ammunition

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1 In this judgment, I will use the word "Indian" in the same way it is used to describe one of the "aboriginal peoples of Canada" in the *Constitution Act*, 1982, s. 35(2).

used. He also stated "meat for the winter, my # is 4-088-1-0460" and signed his name. The number referred to Steve Powley's OMAA membership card.

[6] Later the same day, two conservation officers went to the respondents' residence to investigate. The respondents freely admitted what had occurred. The officers seized Steve Powley's gun and other items used for hunting, his OMAA card and the moose carcass. One week later the respondents were charged with unlawfully hunting moose without a licence and unlawful possession of a moose.

(b) Legislation and Regulatory Regime

[7] The Respondents were charged under the *Game and Fish Act*, R.S.O. 1990, c.G.1 (now the *Fish and Wild Conservation Act, 1997*, S.O. 1997, c. 41):

> **46.** No person shall knowingly possess any game hunted in contravention of this Act or regulations.
>
> **47.** (1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.

[8] The respondents rested their defence on the claim that as members of the Sault Ste. Marie Métis community, they had an "existing aboriginal" right to hunt, guaranteed by s. 35 of the *Constitution Act, 1982*:

> **35.**(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

[9] The respondents do not have status under the *Indian Act*, R.S.C. 1985, c.I-5 nor do they enjoy any treaty rights. Status Indians in the Sault Ste. Marie area have a treaty right to hunt for food pursuant to the 1850 Robinson-Huron Treaty. The treaty right to hunt for food is recognized in the 1991 *Interim Enforcement Policy* issued by the Ministry of Natural Resources under the *Game and Fish Act*, pursuant to which those who enjoy treaty rights are not prosecuted for what would otherwise amount to violations of the Act.

[10] While the *Interim Enforcement Policy* provides for negotiations for Métis hunting rights, there has been no agreement recognizing Métis rights. Representatives of the MNO have attempted to negotiate an agreement. A draft agreement was reached in 1994 between the MNO and officials in the Ministry of Natural Resources, but that agreement was not accepted by the then Minister, Howard Hampton. The major stumbling block from the Minister's perspective was that not all Métis belong to the MNO and, in the Minister's view, "it is difficult to develop an allocation for Métis harvest of large game while the issue of Métis representation in Ontario remains unresolved."

[11] The MNO has implemented its own provisional harvesting policy to organize and regulate a traditional Métis hunt under "Captains of the Hunt". The policy identifies conservation as a main objective. In September, 1996, the Deputy Minister of Natural Resources informed Tony Belcourt, President of the MNO, that the *Game and Fish Act* would be enforced against Métis hunters as the government had not been provided with adequate historical evidence from Métis communities to determine the existence, nature and scope of their claims. Uncertainty as to who qualifies as "Métis" for the purposes of s. 35 and the issue of representation of Métis interests has frequently been mentioned by federal and provincial officials in response to Métis demands. It is clear that the Ontario government has, to date, refused to recognize Métis people as having any special access to natural resources.

(c) The Respondents

[12] The respondents are direct descendents of the Lesage family, members of the historic Métis community in Sault Ste. Marie. Steve Powley is a registered member of OMAA and MNO. Roddy Powley does not have an OMAA membership card, but he was listed on Steve Powley's application form under the heading: "Identify any children under 18 for whom you wish to apply for Youth Membership."

(d) Background Historical Facts

[13] As the essential elements of the offence were admitted, the evidence led at the trial related to the respondents' claim of a s. 35 aboriginal right and the appellant's contention that any infringement of the right was justified. The evidence consisted of expert testimony relating to the history, culture and practices of the Métis people. Evidence was also led as to the contemporary situation of the Métis community in Sault Ste. Marie and the activities of OMAA and the MNO.

[14] Extensive historical evidence was led at trial with respect to the historic Métis community at Sault Ste. Marie. Dr. Arthur Ray, Professor of History at the University of British Columbia, an expert witness called by the respondents whose evidence was accepted by the trial judge, divided the history of the Sault Ste. Marie Métis into three parts following the "pre European contact" period; the "formative period" from the 1640s

to the 1790s; the "establishment period" from 1790-1850; and the "post treaty" period, from 1850 forward.

[15] The first Europeans visited the site of what is presently Sault Ste. Marie in the early 1600s when the area was occupied by Ojibway Indians. The way of life of the local Ojibway was based on a seasonal cycle of fishing from lakeside settlements during the "open water" season, and hunting and trapping in the interior during the winter.

[16] By the 1640s, French traders and missionaries began to travel regularly through the Upper Great Lakes, establishing a post at Sault Ste. Marie by 1650. Some of the French traders took on native spouses in "*mariages à la façon du pays*", with whom they had children of mixed European and native ancestry.

[17] The Métis presence in Sault Ste. Marie fluctuated in the 1700s. There is no record of a Métis community in the early years of the century. The Treaty of Paris in 1763 ended French-British hostility in this area and marked the formal transfer of New France to British sovereignty. With the signing of this treaty, the British started to move into the area, and the French and many of the Métis began to move west. Unions between Scottish employees of the Hudson's Bay Company and native women produced another strain of Métis children. By 1777, the settlement at Sault Ste. Marie had grown but still only consisted of approximately 10 houses. In 1797, the Jay Treaty confirmed that the St. Mary's River would serve as the border between the United States and British North America. The fur trade expanded at a rapid pace with intense competition between the Hudson's Bay Company and the North West Company.

[18] In the late 1700s, the mixed-blood families began to evolve into a new and distinct aboriginal people through a process known as ethno genesis. The high-water mark for the Great Lakes Métis at Sault Ste. Marie was the first half of the 19th century. During this period, the majority of the inhabitants of Sault Ste. Marie were of mixed ancestry, commonly referred to at the time as "half-breeds". Sault Ste. Marie is mentioned in the *Report of the Royal Commission on Aboriginal Peoples* (Ottawa, Royal Commission on Aboriginal Peoples, 1996) (the "RCAP Report") vol. 4, p. 220, along with Red River and White Plains in Manitoba, Batoche in Saskatchewan, and St. Albert in Alberta as one of "the better known" Métis settlements. Sault Ste. Marie was an important focal point for the Métis culture during this era. According to the RCAP Report vol. 4 at p. 260, "[t]he Métis community at Sault Ste. Marie, a hub of early fur-trade activity, has a particularly long and eventful history. It would appear, in fact, that the area was largely under Métis control from the late seventeenth to the mid-nineteenth century." The historic Métis community of Sault Ste. Marie is considered by the Métis National Council, and was accepted by the RCAP Report, as being part of the Métis Nation, the historic collective of Métis people who lived and still live in the "Métis Homeland" of north central North America.

[19] The Métis continued the subsistence hunting and fishing practices of their Ojibway ancestors, but at the same time occupied a distinctive niche in the fur trade economy as wage-earning labourers, independent traders, skilled tradespeople and small scale farmers. They evolved into a distinct aboriginal culture with its own community structures, musical tradition, mode of dress, and language - Michif - a blending of French, English and aboriginal sources.

[20] The RCAP Report vol. 4 at p. 199-200 described the economic contribution of the Métis as follows:

> The special qualities and skills of the Métis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures. Using their knowledge of European and Aboriginal languages, their family connections and their wilderness skills, they helped to extend non-Aboriginal contacts deep into the North American interior. As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Métis people contributed massively to European penetration of North America.

[21] Towards 1850, aboriginal dominance in the Sault Ste. Marie area began to wane under the pressures of European settlers. The village at Sault Ste. Marie was first surveyed in 1846. In 1849, a group of Indians and Métis from Sault Ste. Marie, dissatisfied with mining development on the Canadian side of Lake Superior, occupied a mining camp at Mica Bay. The incident prompted the Government of Canada to dispatch William Benjamin Robinson in 1850 to negotiate treaties. Robinson was instructed to "endeavour to negotiate for the extinction of the Indian title to the whole territory on the North and North Eastern coasts of Lake Huron and Superior."

[22] Robinson concluded the important Robinson-Huron Treaty of 1850. He refused to deal directly with the "half-breeds" but told the Ojibway chiefs they could share their treaty entitlements with the "half-breeds" if they wished.

[23] The government did, however, respond to one Métis demand. In 1852, the Crown made lands available for sale to the Métis inhabitants of Sault Ste. Marie at a favourable price. Many of the original Sault Ste. Marie Métis families, however, subsequently sold their lands and moved from the original town site. During the 1860s, Sault Ste. Marie was increasingly settled by Europeans and Americans. Between 1800 and 1885, some Sault Ste. Marie Métis migrated to the Red River area. Others moved to the United States. However, it is clear that the descendants of the original Métis families did not disappear from the Sault Ste. Marie area. Some remained in the town and others moved to smaller communities in the immediate area of Sault Ste. Marie. A significant

number of families joined the local Ojibway bands on the near-by Batchewana and Garden River reserves. By 1890, 191 of 285 Batchewana band members were Métis, as were 199 of 412 Garden River band members.

[24] The status of the Sault Ste. Marie Métis community following 1850 is a contested issue, and I will return to it in greater detail later. The presence of a distinct Métis community in the Sault Ste. Marie area was considerably less visible from the later years of the 19th century until the 1970s when Métis organizations were formed and the Métis people of the region began to assume a more visible profile. The constitutional debates of the 1980s and 90s brought about a strong assertion of Métis identity and Métis rights nationally, culminating in the inclusion of the Métis peoples in the *Constitution Act*, 1982, s. 35 and the draft Métis National Accord that formed part of the Charlottetown Accord in 1992.

[25] I propose to deal with the facts directly pertinent to the contentious issues in greater detail in my review of the trial judge's findings and in my analysis on an issue by issue basis. In broad outline, the respondents led evidence to the effect that there is a Métis community in Sault Ste. Marie, both historic and contemporary, that has had and continues to have a distinctive identity and culture, and that hunting for food has always been an integral part of that culture. The appellant's case was essentially that the historic Sault Ste. Marie Métis community dispersed in the mid to late 19th century, resulting in a break in continuity that is fatal to the claim of an aboriginal right. The appellants also argued that the right at issue was game specific and that during crucial periods, moose were virtually non-existent in the area and that as there was no Métis moose hunting, there was no established aboriginal practice, integral to Métis culture, capable of supporting the right claimed. As an alternative, the appellant submitted that any limitation of aboriginal right was justified in the name of conservation, equitable sharing of the resource with others, and social and economic benefits.

(e) Factual Issues

[26] Several issues raised by the appellant concern findings of fact made by the trial judge and upheld by the Superior Court judge on appeal. Given their importance, I have set out the trial judge's findings at some length. The reasons of the trial judge indicate that he gave the evidence careful and thorough consideration. The reasons of the Superior Court judge on appeal indicate that he also carefully considered the record and that he could find no basis upon which to interfere with the trial judge's factual findings.

[27] It is plainly not the role of this court to retry the case, particularly where the case has already gone through one level of appeal. It is well established that an appellate court will treat a trial judge's findings of fact with deference and will not interfere "unless it can be established that the trial judge made some palpable and overriding error which affected his assessment of the facts." *Stein v. Kathy K (The),* [1976] 2 S.C.R. 802 at 808.

This deferential standard of appellate review has been consistently applied to factual findings in cases dealing with aboriginal rights: in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 564-566. In *R .v N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672 at 689, Lamer C.J. stated "the findings of fact made by the trial judge should not, absent a palpable and overriding error, be overturned on appeal". Similarly in *R. v. Adams*, [1996] 3 S.C.R. 101 at 123-4, the Supreme Court held that deference to the trial judge's findings was appropriate unless they were "made as a result of a clear and palpable error." In *R. v. Côté*, [1996] 3 S.C.R. 139 at 178, the Court described its role on factual issues as follows:

> the role of this Court is to rely on the findings of fact made by the trial judge and to assess whether those findings of fact are both reasonable and support the claim that an activity is an aspect of a practice, custom or tradition integral to the distinctive culture of the aboriginal community or group in question.

Accordingly, the trial judge's factual findings are entitled to considerable deference before this court.

JUDGMENTS BELOW

(a) Provincial Court (Vaillancourt J., [1999] 1 C.N.L.R. 153)

[28] The first issue addressed by the trial judge was whether the respondents were Métis for the purposes of s. 35(2) of the *Constitution Act, 1982*. The trial judge reviewed various definitions of Métis and concluded that while no definition has gained universally acceptance, the following was appropriate:

> Without a universally accepted definition of Métis to be found, I shall attempt to distill a basic, workable definition of who is a Métis. Accordingly, I find that a Métis is a person of Aboriginal ancestry; who self-identifies as a Métis; and who is accepted by the Métis community as a Métis.

Applying this definition, and interpreting "aboriginal ancestry" to require proof of a genealogical link to the historic Sault Ste. Marie Métis community, the trial judge found that the respondents satisfied the test. They proved their descent from the historic Sault Ste. Marie Métis community and Steve Powley "has identified as a Métis and has been accepted by two organizations which represent contemporary Métis society, namely, the Ontario Métis Aboriginal Association and the Métis Nation of Ontario."

[29] The trial judge proceeded to assess the respondent's claim to a s. 35 aboriginal right in terms of the test established by the Supreme Court of Canada in *Van der Peet* at 549 and *R. v. Adams* at 117, holding that the right claimed must be an activity that is "an

element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right."

[30] The trial judge found that there was a visually, culturally and ethnically distinct Métis community in the area in and around Sault Ste. Marie that traced its roots to the marriages between early French fur traders and indigenous Ojibway women:

> It is clear from the totality of the historical documentation and evidence in connection thereto that the Métis people were a recognizable group that was closely associated with the local Indians. The Métis had created a distinctive lifestyle that was recognized by others.

[31] The trial judge found that the relevant time period for determining the existence of the Métis right to hunt was between 1815 and 1850, when the Europeans took "effective control" of the Great Lakes region. While the cases dealing with non-Métis aboriginal claims speak in terms of the period preceding contact with the Europeans, the trial judge found that approach had to be modified in the case of the Métis who trace their origins to the post-contact period.

> When one is examining the Upper Great Lakes area, it is necessary to carefully examine the concepts of "contact" and "effective control" as it relates to the original Indian society and the subsequent Métis community.
>
> First contact at Sault Ste. Marie between the Indians and the Europeans occurred when the French Jesuits established missions around 1615. As time passed, French traders frequented the area and in 1750, the Hudson Bay Company established its first fur trading post. Dr. Ray advised that the Ojibway may have actually met Europeans as much as a century before there was an actual meeting of the two cultures at Sault Ste. Marie. This would have occurred as a result of the Ojibway's extensive trading practices.
>
> Although there may have been contact, Dr. Ray's evidence would suggest that the Upper Great Lakes area was under almost exclusive tribal domination until at least 1815-1820. Sometime between 1815 and 1850, the area evolved into one where effective control passed from the Aboriginal peoples of the area (Ojibway and Métis) to European control. The unique Métis society was established and recognized for its distinctiveness. That being the case, one must determine

> whether hunting for food was a practice that was integral to the Métis society at the time when effective control of the area was taken over by the European based culture.

[32] The trial judge found as a fact that hunting was an integral part of the Métis culture prior to the assertion of effective control by the Crown.

> The evidence indicated that the Ojibway and Métis had always hunted and that this activity was an integral part of their culture prior to the intervention of European control. . . . The evidence makes it clear that prior to the 1820s that moose would have been part of the Ojibway and Métis diet. In fact, it would appear that the Aboriginal societies in the Sault Ste. Marie area were opportunistic when it came to hunting animals for their food or otherwise.

[33] The appellant led evidence to show that from approximately 1820, moose were very scarce in the Sault Ste. Marie area. It was the appellant's position that as there were no moose to hunt during a crucial period when the Métis society was flourishing, hunting moose should not be regarded as a distinctive part of the Métis culture. However, the trial judge rejected the appellant's contention that the respondents had to establish a game-specific right to hunt moose. The trial judge accepted the evidence of the respondents' expert, Dr. Ray, that the Métis economy was similar to the Ojibway economy and that the relative importance of fishing, hunting, trapping and collecting would depend on a number of factors in any given year. Cycles in the availability of fish and game had an impact on the activities in which they engaged. The trial judge found that one would have to "suspend common sense" to accept the appellant's proposition that the scarcity of moose during the period 1820 to 1890 eliminated moose hunting as part of the aboriginal culture.

> I take the position that just because a particular species is in short supply or temporarily in a state of great depletion that does not eliminate that particular animal as a hunted species by the Aboriginal group.
>
> The right to hunt is not one that is game specific. The evidence makes it clear that prior to the 1820's that moose would have been part of the Ojibway and Métis diet. In fact, it would appear that the Aboriginal societies in the Sault Ste. Marie area were opportunistic when it came to hunting animals for their food or otherwise.

[34] Relying on the evidence of census reports from the late 19th century and the evidence of several witnesses who testified as to past and current Métis practices and the importance of moose hunting, the trial judge found that the Métis practice of hunting for food had been continuous to the present.

> The Métis' right to hunt is derived from their customs, traditions and practices. Hunting, including the hunting of moose, was and continues to be an integral part of their culture.

[35] The trial judge found that there is a contemporary Sault Ste. Marie Métis society that is in continuity with the historic Métis community. The trial judge noted that the visibility of the Métis at Sault Ste. Marie waned after the Robinson-Huron treaty in 1850 when many Métis families moved on to reserves and into the surrounding areas. However, he rejected the contention that there had been a fatal break with the past. The trial judge accepted the evidence that discrimination and consequent shame had created a situation in which the local Métis people became "an invisible entity within the general population" and that it was only in the early 1970s "that individuals became more public as to their heritage." He rejected the contention that the community had disappeared. The trial judge found that it was not reasonable to limit the Métis community to the Sault Ste. Marie town site proper and that a more realistic interpretation for the purposes of considering the Métis identity and existence should encompass the surrounding environs, including the local Indian reserves.

[36] The trial judge concluded that the respondents had established the necessary ingredients for an aboriginal right to hunt for food within the meaning of s. 35(1) of the *Constitution Act, 1982* and that this right was infringed by sections 46 and 47(1) of the *Game and Fish Act*:

> In the case at bar, I find that the Métis aboriginal right to hunt moose and other game is interfered with by the regulatory scheme currently in place in Ontario....The Métis' right to hunt is derived from their customs, traditions and practices. Hunting, including the hunting of moose, was and continues to be an integral part of their culture.

[37] The trial judge found that the appellant had failed to justify the infringement of the s. 35 right. In the first place, he held that there was no evidence to warrant the disparity in treatment of status Indians, who were exempt from prosecution, and the Métis, who were accorded no recognition:

> The current regulatory scheme harms the Métis hunters as compared to the Indian hunters. Whereas the Indians may hunt outside officially sanctioned seasons, the Métis are prohibited. Shorter seasons have negative impact on the Métis' ability to harvest sufficient provisions for their families. . . . If the Métis are charged under the *Game and Fish Act* for hunting without a licence they may incur the expenses associated with defending themselves in court. . . .
>
> If the Métis exercise their Aboriginal rights without the benefit of a licence, they are not only putting themselves at risk of legislative sanctions but they are forced to skulk through the forests like criminals as opposed to hunters exercising their constitutional rights. . . .

[38] The trial judge also found that that the denial of the Métis right was not minimal nor was the infringement justified by the social and economic and other benefits of recreational hunting.

[39] The trial judge concluded, accordingly, that the respondents had established that their aboriginal right under s. 35 of the *Constitution Act, 1982*, had been infringed, and that the charges against them should therefore be dismissed.

(b) Superior Court (O'Neill J. (2000), 47 O.R. (3d) 30)

[40] The appellant appealed the dismissal of the charges to the Superior Court pursuant to the *Provincial Offences Act*, R.S.O. 1990, c. P. 33, s. 116. The Superior Court judge upheld the trial judge's crucial factual findings, rejected the contention that the trial judge had erred in law, and dismissed the appeal.

[41] The Superior Court judge rejected the appellant's contention that the trial judge had given s. 35 of the *Constitution Act, 1982* an overly generous interpretation:

> Surely, at the heart of s. 35(1), lies a recognition that aboriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as a people, on their lands. The Métis have aboriginal rights, as people, based on their prior use and occupation as a people. It is a matter of fairness and fundamental justice that the aboriginal rights of the Métis which flow from this prior use and occupation be recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. . . . In my view, the learned trial judge's reasons reflect both a review of, and a consideration

> for, the purposes underlying the inclusion of Métis people in s. 35(1).

[42] The Superior Court judge found that there was evidence to support the findings of the trial judge "that hunting was of central significance to the Métis, and integral to their distinctive society" and that, accordingly, there was no basis for disturbing those findings.

[43] The Superior Court judge also affirmed the trial judge's finding that there is today a local Métis community in continuity with the historic Métis community of Sault Ste. Marie:

> The issue of a local Métis community, and the respondents' membership or affiliation with the community, was vigorously debated and canvassed at the appeal hearing. It is not so easy to package up and describe a Métis community, as in this case, by comparison with, for example, a recognized Indian band occupying recognized reserve lands as defined under the *Indian Act*, R.S.C. 1985, c.I-5. Given governments' treatment of Métis people, it may seldom be the case that Métis rights will be found where there is a flourishing Métis community, as opposed to one that is only now beginning to put back together aspects of its culture.

[44] The Superior Court judge referred to the federal government's 1998 Statement of Reconciliation acknowledging that "attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values" and that past actions had eroded "the political, economic and social systems of Aboriginal people and nations."

> To deny people access to their constitutional rights because a community may now only be beginning to put together aspects of its identity and culture is to reward the very practices that the Statement of Reconciliation admits were wrong.

[45] After reviewing the testimony of the expert witnesses and several Métis witnesses, the Superior Court judge upheld the finding of the trial judge that there is a contemporary Métis community in Sault Ste. Marie that is in continuity with the historic Métis community of Sault Ste. Marie. The Superior Court judge also upheld the trial judge's finding that the respondents were part of that Métis community:

> In my view, the learned trial judge was correct, when he found, on all of the evidence, that the respondents were Métis who had been accepted into "contemporary Métis society", at the time that the offences were alleged to have taken place.

[46] However, the appeal court judge varied the trial judge's definition of Métis, removing the requirement that a person be of "genetic" aboriginal ancestry on the basis that such a requirement imposes an onerous genealogical research burden and because a community is defined by more than a person's blood-ties. He provided a more relaxed test for Métis identity:

> A Métis is a person who,
>
> (a) has some ancestral family connection (not necessarily genetic);
> (b) identifies himself or herself as Métis; and
> (c) is accepted by the Métis community or a locally-organized community branch, chapter or council of a Métis association or organization with which that person wishes to be associated.

[47] The Superior Court judge agreed with the trial judge's finding that the appellant had failed to justify the infringement of the respondents' s. 35 rights:

> How, one might ask, can the appellant justify the infringement of the respondents' aboriginal right to hunt for food, when the affected local Métis community has not been consulted, and when, even having regard for the valid legislative objective of conservation, hunting for recreation, sport and for food by others who are not aboriginal peoples as defined in s. 35(2) is currently permitted? As was stated by Chief Justice Lamer (as he then was) in *R. v. Adams*, *supra*, at pp. 134-35:
>
> > I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing *per se* is a compelling and substantial objective for the purposes of s. 35(1) . . . [T]he enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights, and cannot justify the infringement of those rights.

> For these reasons, I conclude that the learned trial judge was correct in finding that the infringement of the respondents' aboriginal right to hunt for food by ss. 46 and 47(1) of the Act was not justified, and accordingly, I would dismiss . . . this portion of the appeal.

[48] The Superior Court judge concluded his reasons by agreeing with the trial judge that it was imperative that immediate recognition be accorded to the constitutionally protected rights of the Métis people.

> [I]n my view, negotiation or mediation, processes, protocols and parameters must be established without any further delay, in order to identify, for the purpose of affirming and protecting, the s. 35(1) rights, in this case, of Ontario's Métis people.

ISSUES

[49] In view of the positions taken by the parties to this appeal, the issues to be decided are the following:

1. Should the appellant be permitted to introduce fresh evidence and to include certain material in its Books of Authorities?
2. What is the appropriate analysis for Métis aboriginal rights under s. 35 of the *Constitution Act, 1982*?
3. Did the trial judge and the Superior Court judge on appeal err in finding that the right is properly characterized as the right to hunt for food?
4. Did the trial judge and the Superior Court judge on appeal err in finding that the right claimed was a practice exercised by the historic Métis community at Sault Ste. Marie and was integral to the distinct culture of that community?
5. Did the trial judge and the Superior Court judge on appeal err in finding that there exists today a Métis community in continuity with the historic Métis community that continues to exercise the practice grounding the right and that the respondents are accepted as members of that community?
6. If the aboriginal right was established, did the trial judge and the Superior Court judge on appeal err in finding that the *Game and Fish Act* was not a justified limit on that right?

7. If the aboriginal right is established and the *Game and Fish Act* is not a justified limit on that right, should this court stay the operation of its order for a period of one year to allow the appellant to consult and develop a new moose-hunting regime that is consistent with the *Constitution Act, 1982*, s. 35?

ANALYSIS

Issue 1 ***Should the appellant be permitted to introduce fresh evidence and to include certain material in its Books of Authorities?***

(a) Fresh Evidence

[50] The appellant moves for leave to introduce the following items of fresh evidence on appeal:

1. An affidavit sworn by Linda Maguire, who is employed as Acting Big Game Draw Administrator in the Fish and Wildlife Branch of the Ontario Ministry of Natural Resources ("OMNR"), addressing the current availability and demand for adult moose in the vicinity of Sault Ste. Marie.

This evidence is led in support of the appellant's justification argument, particularly in light of the expanded definition of Métis given by the Superior Court judge on appeal.

2. An affidavit of Peter Lemmond, one of the appellant's counsel on this appeal, attaching a 1996 census table compiled by Statistics Canada addressing aboriginal origin information.

This evidence is also submitted with respect to the justification argument in light of the Superior Court judge's expansive definition of Métis.

3. A letter from M.M. MacDonald, the Registrar, Indian and Northern Affairs Canada, dated July 27, 2000 confirming that membership in the Batchewana band remains under the control of the Department of Indian and Northern Affairs and is governed by the registration procedures of the *Indian Act*.

This evidence is led to "clarify" the record with respect to rules of Band membership.

4. An affidavit sworn by Linda Gravelines, a Senior Economist employed by the Analysis and Planning Section of the Land Use Planning Section of the OMNR addressing the economic dimensions of moose hunting.

This evidence is also led in support of the appellant's justification argument.

[51] In *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775 the Supreme Court of Canada set out the preconditions for the exercise of the discretionary power to admit fresh evidence on appeal:

(1) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.
(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
(3) The evidence must be credible in the sense that it is reasonably capable of belief.
(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

This test was recently affirmed as applicable to constitutional cases in *Public School Boards' Association of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44.

[52] It was held in *R. v. Warsing*, [1998] 3 S.C.R. 579 at 609-10 that the first requirement, that of due diligence, may be "overborne by the interests of justice" and as Carthy J.A. stated in *R. v. C. (R.)* (1989), 47 C.C.C. (3d) 84 (Ont. C.A.), at p. 87, a failure to meet the due diligence requirement should not "override accomplishing a just result".

[53] With respect to the due diligence requirement, it should be noted, however, that the appellant was given an unusual indulgence at trial. After the respondents had led their evidence in support of a s. 35 right, the appellant asked for and was given a two-month adjournment to prepare its case.

[54] In my view, even on the most relaxed view of the due diligence requirement, item 4 should not be admitted. The economic benefits of moose hunting were clearly part of the appellant's case at trial. I am not satisfied that the failure to lead this evidence at trial has been adequately explained. In any event, given the nature of the regulatory scheme and the appellant's justification argument, which I will consider in detail later, this evidence could not affect the outcome of the case.

[55] I would also dismiss the motion to admit items 1 and 2. First, I am not satisfied that the evidence is in an admissible form. Neither Ms. Maguire nor Mr. Lemmond claim to have the necessary expertise to explain the data attached to their affidavits: see *Public School Board's Assn. of Alberta*, at 47. Second, and more importantly, this evidence could not affect the result. The appellant's justification argument is based primarily on conservation. Other aboriginal hunters who enjoy treaty rights are allowed unrestricted hunting rights, and conservation concerns have not reached the stage where non-aboriginal hunters are forbidden access to the resource. The number of potential Métis

hunters might have a bearing on the justifiability of a scheme that gave some recognition to Métis hunting rights, but limited them in the name of conservation. However, that is not the scheme at issue here. In these circumstances, I do not accept the submission that this evidence could affect the result.

[56] I would also dismiss the application to admit item 3. The letter from Mr. MacDonald is not sworn. Second, the evidence is not relevant to any issue before the court. The respondents do not claim status under the *Indian Act* and the appellant does not suggest that they have status. The rules for membership in the Batchewana band have no bearing on the result in this appeal.

(b) Material in Appellant's Factum and Books of Authorities

[57] The respondent objects to certain material referred to in the appellant's factum and included in the books of authorities. The material falls into the following categories:

1. Academic articles;
2. Statements of defence filed by the federal crown in a number of cases; and
3. Information taken from the websites of the Department of Indian and Northern Affairs and OMAA.

[58] The appellant submits that this material should be admitted as evidence of "legislative facts", or in the alternative, as fresh evidence.

[59] Dean Peter Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Carswell, 1992) at p. 57-10 provides the following helpful discussion of the proof of facts in constitutional cases:

> The general rule is that a court may make findings of fact based on either sworn evidence or judicial notice. Judicial notice may be taken only of "facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy". Because the requirements of judicial notice are so restrictive, any dispute about facts must be resolved by a court on the basis of sworn evidence, using the rules regarding the burden and standard of proof to deal with gaps or conflicts in evidence.
>
> In principle, the general rules regarding the proof of facts in litigation ought to apply to constitutional cases no less than to non-constitutional cases, and they ought to apply to both

> "adjudicative facts" and "legislative facts". Adjudicative facts (sometimes called "historical facts") are facts about the immediate parties to the litigation: who did what, where, when, how, and with what motive or intent? Legislative facts (sometimes called "social facts") are the facts of the social sciences, concerned with the causes and effects of social and economic phenomena. Legislative facts are rarely in issue in most kinds of litigation, but they are often in issue in constitutional litigation...
>
> Legislative facts obviously cannot be proved by the testimony of eyewitnesses, but they can be proved by the opinion testimony of persons expert in the relevant field of knowledge. Like other witnesses, experts are subject to cross-examination, and their testimony may be contradicted by the testimony of other experts. These safeguards provide some assurance of the reliability for factual findings of controverted legislative facts .... A finding of legislative fact is not normally as dependent on assessments of credibility of witnesses, and, at least in some cases, the appellate court may be in as good a position as the trial judge to weigh competing social-science evidence.

[60] In *Public School Board's Assn. of Alberta,* at 47, Binnie J. addressed the distinction between a legislative fact and an adjudicative fact and the test for judicial notice:

> Adjudicative facts are those that concern the immediate parties and disclose who did what, where, when, how and with what motive and intent. Legislative facts are direct to the validity or purpose of a legislative scheme under which relief is being sought. Such background material was originally put before the courts of the United States in constitutional litigation through what became known as the Brandeis brief. As Sopinka J. pointed out in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at p. 1099:
>
> > Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general

> nature, and are subject to less stringent admissibility requirements...

[61] There can be little doubt that in constitutional cases, appellate courts have in some cases allowed considerable latitude for the admission of new materials relating to legislative facts: see for example *R. v. Parker*, (2000) 49 O.R. (3d) 481 (C.A.); *Ford v. Quebec* (A.G.), [1988] 2 S.C.R. 712; *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713, *R. v. Seo* (1986), 54 O.R. (2d) 293 (C.A.). It has become common practice for parties to include in factums and books of authorities a wide range of published scholarly writing providing background and analysis of social, economic and other policies relevant to the legislative and regulatory scheme at issue. This material is often of great assistance, but does not, of course, relieve the parties of the obligation to prove controversial facts in the usual way. As Binnie J. remarked in *Public School Board's Assn. of Alberta,* at 47:

> The usual vehicle for reception of legislative fact is judicial notice, which requires that the "facts" be so notorious or uncontroversial that evidence of their existence is unnecessary. Legislative fact may also be adduced through witnesses. The concept of "legislative fact" does not, however, provide an excuse to put before the court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested.

(i) Academic articles

[62] The appellant should be allowed to refer to academic articles dealing with the purpose and interpretation of the *Constitution Act*, 1982, s. 35. No doubt many such articles may make controversial factual assertions. That appears to be the case here. Plainly, such assertions do not become evidence, especially where they concern facts that are disputed and that were the subject of consideration on the evidence at trial. A party cannot escape the obligation to prove controversial facts at trial by filing academic writings as "authorities" on appeal. With that caveat as to the use that may be made of the articles, I would allow the appellant to include in its book of authorities two articles to which objection was taken by the respondents, namely Thomas Flanagan " Métis Aboriginal Rights: Some Historical and Contemporary Problems", in Boldt, Menno and Long, Anthony J., *The Quest for Justice: Aboriginal People and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) and Brian Schwartz, *First Principles, Second Thoughts: Constitutional Reform with respect to the Aboriginal Peoples of Canada*, 1982-84 (Kingston: Institute of Intergovernmental Relations, 1985).

[63] The appellant also seeks to include a number of articles by historians relating to the history of the Métis. In many cases, material of this nature would be unobjectionable and would provide the court with useful background information relating to matters of

uncontroversial historical fact. However, in this case, the history of the Métis is very much at issue. Indeed, in this case, the history of the Métis is a more a matter of adjudicative than legislative fact. At trial the appellant put the respondents to strict proof of the historical facts needed to support their s. 35 claim. The respondents led detailed evidence on Métis history in the form of expert evidence. That evidence was tested and challenged by the appellant by way of cross-examination. The appellant called some historical evidence of its own, but essentially took the position at trial that the respondents failed to prove certain vital facts.

[64] In my view, the appellant should not now be permitted, under the guise of including articles in a book of authorities, to adduce evidence to supplement the record it was prepared to rest on at trial. These articles would not help this court to understand the purpose and social context of the legislation at issue nor do they involve uncontroversial legislative facts. The articles relate to the specific issues that were litigated at trial and should not be admitted here.

[65] To some extent, the weakness in the appellant's position is revealed by its alternative position that if not included in the book of authorities, the articles should be admitted as fresh evidence. On that point, I find that the appellant has failed to satisfy the due diligence test. Further, the material is not in a form that would make it admissible, particularly as the respondents would be deprived of the right to challenge it by cross-examination in the way that the appellant challenged their experts.

(ii) Statements of defence filed by the Federal Crown in a number of cases

[66] The appellant seeks to introduce pleadings filed by the Federal Crown in four separate court cases. The appellant submits that the pleadings are provided as there are no final court decisions setting out the federal position and that they are necessary so that this court can be made aware of interests and positions of the parties not represented. It is submitted that three of the pleadings satisfy the due diligence requirement. These pleadings were dated in 1999, and as such were not available at trial.

[67] In my view, the pleadings should not be admitted. To the extent they are offered as proof of facts, pleadings are inherently controversial in nature and of no evidentiary value. To the extent they are submitted as an invitation to the court to divine the position the Federal Crown might have taken had it intervened, they should not be admitted. The Federal Crown had notice and declined to participate in this appeal. I agree with the respondents that in those circumstances, it is not appropriate for the Provincial Crown to attempt to put forward a position on behalf of the Federal Crown.

(iii) Information taken from the websites of the Department of Indian and Northern Affairs and OMAA

[68] The appellant seeks to introduce materials obtained from websites to establish the membership rules of the Batchewana and Garden River bands, and the names of the current chief and councillors of those bands. The appellant also seeks to introduce information with respect to the number of Aboriginal people the OMAA purports to represent, the advice that OMAA provides to its members with respect to harvesting rights, OMAA's definitions of Métis, and evidence as to the certificates that OMAA issues to its members with respect to harvesting.

[69] The appellant submits that this material comes from federal, public documents and that the facts are notorious and uncontroversial. The appellant says that as the material has been updated since the trial it satisfies the due diligence requirement of the fresh evidence test.

[70] In my view, the material related to the Batchewana and Gardern River Bands is not in an admissible form, is irrelevant to the issues before the court and should not be admitted.

[71] The OMAA website material does not qualify as uncontroversial legislative fact of which judicial notice might be taken. It directly relates to the parties and issues being litigated. There is a dispute between the parties as to existence of a Métis community in Sault Ste. Marie and the extent to which OMAA represents that community. This was a live issue at trial. A witness familiar with OMAA rules and policies was called by the respondents and cross-examined by the appellant. The appellant had every opportunity to deal with these matters at trial, but for whatever reason, chose not to.

[72] Moreover, the fact that the websites have been updated is not sufficient to satisfy the due diligence requirement. As Binnie J. stated at 51 of *Public School Board's Assn. of Alberta:*

> The post trial "up-dated" statistics do not provide a bootstrap to get into the record other statistical evidence which, with due diligence, might have been led at trial. Lack of due diligence is fatal to this aspect of the application.

[73] Accordingly, I would dismiss the appellant's motion to introduce fresh evidence on appeal and allow only the two articles dealing with the interpretation of s. 35 to be included in the appellant's books of authorities.

Issue 2 ***What is the appropriate analysis for Métis aboriginal rights under s. 35 of the Constitution Act, 1982?***

(a) <u>The *Constitution Act*, 1982, s. 35</u>

[74] Aboriginal rights are guaranteed by s. 35 of the *Constitution Act, 1982*. It is clear from the text of s. 35 that the Métis peoples of Canada had, as of the date of the

enactment of the section, "existing" rights, and that those rights have now acquired constitutional protection. There is little jurisprudence dealing directly with the nature of the rights of the Métis peoples guaranteed by s. 35.[2] Métis claimants have succeeded in establishing claims at the trial level in a number of cases in Manitoba, Saskatchewan and Alberta: *R. v. McPherson* (1992), 82 Man. L.R. (2d) 86 (Prov. Ct.) , reversed (1994), 111 D.L.R. (4th) 278 (Man. Q.B.); *R. v. Morin and Daigneault*, [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.), affirmed (1997), 159 Sask. R. 161 (Q.B.); *R. v. Ferguson,* [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct.), affirmed [1994] 1 C.N.L.R. 117 (Alta. Q.B.); *R. v. Desjarlais*, [1996] 1 C.N.L.R. 148 (Alta. Prov. Ct.) 113; Compare *R. v. Blais*, [1996] 3 C.N.L.R. 109 (Prov. Ct.); affirmed [1998] 4 C.N.L.R. 103; leave to appeal granted [1999] 2 W.W.R. 445 (Man. C.A.). However, this is the first case on the subject to be decided by an appellate court.

[75] I begin with a cautionary note. At such an early stage of development in this area, a provincial appellate court must approach its task with due regard to the importance and complexity of aboriginal rights. It is impossible to define the rights of an entire people within the confines of one case. As the record in this case so amply demonstrates, claims of aboriginal rights are intensely fact specific, and involve a close, careful and detailed scrutiny of events long past. Recognition of a right on one set of facts does not necessarily mean that the right will be made out on the next set of facts. We must guard against the temptation to pronounce broadly upon all possible aspects of the rights of the Métis people and should instead confine ourselves to what is necessary for the resolution of the case before us. While the parties and the intervenors invited us to pronounce upon many issues of fundamental importance, we are here to decide this case. A full articulation of the shape and subtle contours of constitutionally protected Métis rights will undoubtedly unfold over time in the usual incremental fashion of the common law. Accordingly, I have confined my reasons to what I conceive to be necessary and appropriate for a proper legal resolution of the case before us, deliberately leaving to another day some of the interesting propositions that were advanced by the parties and the intervenors.

[76] As the appellant pointed out, it would be literally possible to interpret s. 35 narrowly and limit the rights of the Métis peoples to treaty rights. However, the appellant concedes that the constitutionally protected rights of the Métis peoples are not restricted to rights acquired by way of treaty. The appellant does not, however, concede that the respondents have made out a relevant constitutionally protected aboriginal right, and submits that the respondents' claim cannot withstand scrutiny under a proper application of the principles developed for non-Métis aboriginal rights.

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2 The decision of this court in *R. v. Perry* (1997), 33 O.R. (3d) 705 dealt with the claim that exclusion of Métis from the *Interim Enforcement Policy* amounted to a denial of s. 15 equality rights but did not deal with s. 35.

[77] As with all constitutional rights, the interpretation of aboriginal rights calls for a purposive approach. Two fundamental purposes for the constitutional protection of aboriginal rights have been identified. The first purpose is the recognition and respect for the prior occupation of the land by distinctive aboriginal societies. As Dickson C.J. and La Forest J. explained in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and as was held in *Guerin v. R.*, [1984] S.C.R. 335 at 376, aboriginal rights are "derived from the Indians' historic occupation and possession of their tribal lands". In *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1054, Lamer C.J. stated that recognition of the legal significance of prior occupation is deeply rooted in our common law tradition and was reflected in the policy of the British crown from the earliest days of European settlement. Lamer C.J. referred to the judgment of Marshall C.J. in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (U.S.S.C.) at 548-9, stating that Great Britain considered these indigenous societies "as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged." In *Van der Peet* at 538-9, Lamer C.J. reiterated that the fundamental rationale for aboriginal rights is the simple fact that aboriginal people were here first, "living in communities on the land, and participating in distinctive cultures, as they had done for centuries."

[78] It is apparent that when analyzing Métis claims, the implications of their distinctive feature as the post-contact descendants of both the Indians and the early European visitors has to be considered. I will return to the question of a distinctive purposive interpretation for Métis rights after outlining the other aspects of the approach taken by the Supreme Court of Canada with respect to aboriginal claims generally.

[79] The second fundamental underlying purpose of s. 35 aboriginal rights, as expressed by Lamer C.J. in *Van der Peet* at 539, is that the provision provides "the constitutional framework through which the fact that aboriginals live on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown." Section 35 provides the bridge that facilitates the recognition and respect for prior occupation by the aboriginal peoples on the one hand and the reality of Crown sovereignty on the other.

[80] In addition to these two fundamental purposes for s. 35, it has been held that "a generous, liberal interpretation of the words in the constitutional provision is demanded" (*Sparrow* at 1106, *Van der Peet* at 536). Dickson C.J. and La Forest J. described s. 35 in *Sparrow* at 1108 as "a solemn commitment that must be given meaningful content...The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship." As has been so often stated in relation to legislation, treaties and constitutional provisions defining aboriginal rights, a generous and liberal interpretation is called for as the honour of the Crown is at stake.

[81] As I have mentioned, this is the first case to reach the appellate level dealing with the rights of the Métis peoples under s. 35. There is, of course, an extensive and well-developed body of jurisprudence on the nature and extent of non-Métis aboriginal harvesting rights and of the extent of their constitutional protection under s. 35. It is essentially to that body of jurisprudence that the parties have turned for guidance on this important issue. I propose to outline the approach taken with respect to aboriginal harvesting rights, to identify the specific issues that have to be addressed in this case, and to consider how the approach has to be modified or adapted to deal with the claims of the Métis.

(b) The Test for s. 35 Harvesting Rights.

[82] In a series of cases, starting with *Sparrow* and continuing with many others, principally *R. v. Van der Peet*, and its companion cases, *R. v. Gladstone*, [1996] 2 S.C.R. 723 and *R .v N.T.C. Smokehouse Ltd.*, the Supreme Court of Canada established a test for the assessment of s. 35 aboriginal harvesting rights.

(i) The *Sparrow* Test

[83] *Sparrow* establishes four steps, only two of which are in dispute in this appeal.

[84] First, the applicant must demonstrate that he or she was acting pursuant to an aboriginal right. I will have much more to say about this first step, the discrete elements of which were elaborated in *Van der Peet* and which is plainly in dispute here.

[85] Second, the court must determine whether the right was extinguished prior to the enactment of s. 35. It is not part of the appellant's case that any right of the respondents has been extinguished and accordingly, it will not be necessary for me to consider this step.

[86] Third, the court must determine whether the right has been infringed. It is conceded by the appellant that if the respondents have a right to hunt for food, that right is infringed by the law at issue here, and it follows that I need not consider this step any further.

[87] Fourth, the court must determine whether the Crown can justify the infringement. As I have noted, in the event that a right is established, the appellant relies on the defense of justification and accordingly, I will have to consider the fourth step of *Sparrow*.

(ii) The *Van der Peet* Test

[88] The fundamental issue in this appeal is whether the trial judge and the Superior Court judge on appeal erred in finding that the respondents were acting pursuant to an aboriginal right. The parties agree that the starting point for determining the respondents' claim of constitutionally protected rights is the general test for s. 35 harvesting rights laid

down by the Supreme Court of Canada in *Van der Peet* at 549, where the Court held that the determination of an aboriginal right is to proceed in two stages. The first (at 551) is to "identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right." The appellant attacks the trial judge's characterization of the claim as the right to hunt and asserts that it should be characterized more specifically as the right to hunt moose. This issue is potentially determinative of the appeal and I will consider it in detail.

[89] The second stage (at 549) is to determine whether the applicant can show that the claim is based upon "a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." To satisfy this stage of the test, the applicant must prove that the practice was that of an existing aboriginal community prior to European contact. The parties agree that this stage must be modified to take into account the distinctive history of the Métis peoples, but they disagree precisely how. The appellant concedes that allowance has to be made for the fact that Métis communities obviously emerged post-contact, but argues that any Métis claim of aboriginal right must be based on the pre-contact practices of the Métis' Indian ancestors. The respondents argue that so long as the practice of the Métis community was established before the assertion of effective European control, it qualifies for consideration as the basis of a s. 35 right.

[90] An important aspect of the *Van der Peet* test for aboriginal rights under s. 35 is that the rights are communal in nature: *Van der Peet,* at 540; *Sparrow,* at 1111-2; *R. v. Sundown*, [1999] 1 S.C.R. 393 at 412. Aboriginal rights do not belong to individuals but are community-based, and accordingly, can only be exercised by those individuals who are members of the rights bearing community. A significant corollary of the communal nature of aboriginal rights, as explained in *Van der Peet,* at 559, is that the rights specific to the site and the history of each particular community are "not general and universal; the scope and content must be determined on a case-by-case basis. The existence of the right will be specific to each aboriginal community." The claimant must show continuity of the contemporary community and its practice with the historic community and its practices: *Van der Peet*, at 556; *Gladstone* at 747; *Côté*, at 183.

[91] The communal nature of the right gives rise to several issues here, namely whether the practice was "integral" to Métis culture, whether there is sufficient continuity from the historic Métis community to the contemporary one and whether the respondents are in fact members of the relevant community

(c) Applying the *Van der Peet* test to Métis Claims

[92] All aboriginal rights are rooted in a common source and they must be determined by common legal principles. However, rights based upon prior occupation are bound to vary from one community to the next. In their specific content and realization, the rights

of Canada's aboriginal peoples are as varied as the rich histories, cultures and practices of the many distinctive aboriginal communities across the land: see *Gladstone* at 769.

[93] A diversity in the specific content of aboriginal rights is also to be expected from the recognition in s. 35 of three distinct "aboriginal peoples", the Indian, the Inuit and the Métis. It seems inevitable that although they are rooted in a common principle, the specific rights of distinctive peoples will reflect their distinctiveness.

[94] The Métis peoples were not here before contact between the Indian or Inuit peoples and the Europeans. The very concept of prior occupation that lies at the heart of aboriginal rights necessarily requires modification to deal with the distinctive history of the Métis. The Supreme Court of Canada adverted to this in *Van der Peet* when enunciating the test for s. 35 aboriginal claims. *Van der Peet* dealt with a claim by one of Canada's "Indian" peoples whose rights derive from historic occupation and use prior to the coming of the Europeans. Lamer C.J., at 558, explicitly recognized that the test for Indian rights was not necessarily determinative of Métis rights and warned that the test must be read carefully in relation to the claims of Métis people whose origins, history and culture is both indigenous and European:

> Although s. 35 includes the Métis within its definition of 'aboriginal peoples of Canada'.. the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined are not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, traditions and customs of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.

[95] The appellant agrees that the requirement in *Van der Peet* that there be an existing aboriginal community prior to European contact must be modified to deal with Métis claims. The appellant accepts that a period of time must be allowed post-contact to enable Métis communities to come into existence. It was found by the trial judge, and it is more or less common ground between the parties, that the Métis society flourished in the Sault Ste. Marie area from the early years of the 19th century until 1850 and the signing of the Robinson-Huron Treaty. The appellant submits that the cut-off date for the assessment of Métis practices should be the date of effective Crown sovereignty and for the purpose of the appeal is content to have that date fixed at 1850.

[96] The respondents accept that there must be a cut-off date but say that it should be determined by the date of "effective control" by the European settlers, 1850. As the parties agree on the date, in the present case nothing turns on this difference, if any, between the assertion of sovereignty and effective control.

[97] It was submitted by one of the intervenors, the Congress of Aboriginal Peoples, that the date to assess the existence of the community and the practice at issue is the date of Confederation, July 1, 1867. In my view, postponing the date to a point well after the assertion of sovereignty and effective control is supported neither by the case law nor by any discernable relevant principle and I would reject it.

[98] There is, however, a fundamental difference between the parties with respect to the application of the *Van der Peet* pre-contact practice, custom or tradition requirement. The appellant argues that the fundamental purpose of recognizing and respecting the historic pre-contact occupation of aboriginal communities must be the governing factor, even with respect to the rights of the Métis peoples. The appellant says that recognition of prior occupation is the central and indispensable rationale for the protection of aboriginal rights. Without it, there can be no basis for an aboriginal right. The appellant submits, accordingly, that to establish an aboriginal right, a Métis claimant must show that the right claimed is founded on a practice carried on by the claimant's pre-contact Indian ancestors. It is the appellant's position that while the Métis community and its practices should be assessed as of 1850, only practices that were also practices of the Métis' pre-contact Indian ancestors are capable of supporting a s. 35 right. The result, if the appellant's submission is accepted, is that Métis claims are, in effect, derivative of and entirely dependant upon the claims of their aboriginal ancestors.

[99] The respondents submit that Métis rights are not derivative of the practices of their pre-contact Indian ancestors, and that it is the practices of the Métis peoples themselves that were integral to the Métis way of life before the time of effective European control that provides the source for Métis rights. This argument was adopted by the intervenors and finds support in Catherine Bell, "Métis Constitutional Rights in s. 35(1)" (1997), 36 Alta. L. R. 180. In oral argument, counsel referred to a "golden

moment" when a "snap shot" would be taken prior to effective European control to capture the practices integral to the Métis culture. That "snap shot" would determine the rights protected by s. 35.

[100] On the facts of the present case, it is not necessary to decide this question. It is conceded by the appellant that the Ojibway ancestors of the Sault Ste. Marie Métis did engage in the practice of moose hunting and accordingly, even if the Métis right depends upon a pre-contact practice, the issue will not be determinative of this case. On the other hand, this issue goes to the heart of the nature of Métis rights protected by s. 35 and to some extent, informs the entire interpretive and analytic exercise.

[101] For the purposes of this case, the following observations will suffice. The constitution formally recognizes the existence of distinct "Métis peoples", who, like the Indian and Inuit, are a discrete and equal subset of the larger class of "aboriginal peoples of Canada." It seems to me that, in keeping with the interpretive principles to which I have already referred, we must fully respect the separate identity of the Métis peoples and generously interpret the recognition of their constitutional rights. The rights of one people should not be subsumed under the rights of another. To make Métis rights entirely derivative of and dependant upon the precise pre-contact activities of their Indian ancestors would, in my view, ignore the distinctive history and culture of the Métis and the explicit recognition of distinct "Métis peoples" in s. 35. As explained by the RCAP Report vol. 4 at p. 220, the culture of the Métis was

> derived from the lifestyles of the Aboriginal and non-Aboriginal peoples from whom the modern Métis trace their beginnings, yet the culture they created was no cut-and-paste affair. The product of the Aboriginal-European synthesis was more than the sum of its elements; it was an entirely distinct culture.

[102] I agree with Dale Gibson, "General Sources of Métis Rights", RCAP Report, vol. 4, Appendix 5A at 281, that while Métis rights "spring from the same source as First Nation Aboriginal Rights" they should not be seen as "subordinate to those rights". The *Van der Peet* judgment explicitly reserved for future consideration the purposive interpretation of Métis rights, and we should not slavishly apply the pre-contact requirement to peoples who only came into existence post-contact.

[103] Of course, one cannot ignore that s. 35 protects "aboriginal" rights and that is the aboriginality of the Métis that is constitutionally protected. As Dale Gibson observed, *supra* at 281, it seems difficult to justify "an entirely distinct second order of Aboriginal rights held by new social entities that did not exist when the European-based order first asserted jurisdiction."

[104] As the Métis culture was not a mere "cut and paste" affair, it may well be difficult in some cases to determine whether a Métis practice, custom or tradition was inherently aboriginal in nature. There is, however, a discernable conception of aboriginal rights arising from the distinctive relationship the aboriginal peoples have with the lands and waters of their traditional territories, and one would expect the nature of Métis rights to correspond in broad outline with those of Canada's other aboriginal peoples.

[105] In the light of this framework for the interpretation of the s. 35 rights of the Métis peoples, I will now proceed to consider the specific elements of the *Van der Peet* test and whether they are met on the facts of the present case.

Issue 3 ***Did the trial judge and the Superior Court judge on appeal err in finding that the right is properly characterized as the right to hunt for food?***

[106] The appellant submits that the respondents' claim for an aboriginal right must be characterized specifically as the right to hunt moose and that the lower courts erred in characterizing the right in terms that are not game-specific. The respondents submit that the trial judge and the Superior Court judge on appeal correctly characterized the right in more general terms as the right to hunt for food.

[107] The correct characterization of the right could determine the result of this appeal given the evidentiary record and the findings of the trial judge. The Ojibway ancestors of the Métis did hunt moose, as did the Sault Ste. Marie Métis in the late 1700s and early 1800s. However, it was precisely during the crucial early part of the 19th century, when the Métis community flourished, that moose and most other big game was in short supply. The evidence led at trial established that by the 1820s until well after 1850, the moose population in the area was in serious decline as a result of the frenetic activities of the fur trade. Deer were also scarce. The only big game available for hunting was bear. It follows that on this record, if the respondents can only succeed by showing that the pre-1850 Métis community engaged in moose hunting and that moose hunting was an integral aspect if Métis culture, they would have the difficult task of overcoming the fact that precisely at the point when the community was flourishing, there were few if any moose to hunt. On the other hand, the trial judge found that subsistence hunting remained an important activity and that the hunting practices of the Métis have to be seen as an element of a flexible subsistence economy capable of adapting to cyclical changes in the availability of fish and game. If the right is classified as non-game specific hunting, the claim may be more readily made.

[108] In *Van der Peet* at 551-553, Lamer C.J. addressed the issue of how the claim of a right is to be characterized. As Lamer C. J. observed, and as the situation in the present case so clearly shows, the correct characterization of the claim is important as it defines the issue to which the evidence must be directed. Lamer C.J. at 552 described the factors to be taken into account in the following manner;

> To characterize an appellant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right.

Lamer C.J. went on to observe at 553 that the characterization of the claim

> ...must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.

[109] In a later case, *R .v. Pamajewon,* [1996] 2 S.C.R. 821 at 834, it was said that the right has to be characterized "at the appropriate level of specificity" so as to avoid "excessive generality".

[110] Characterization of the right must be approached in manner that accords with the Supreme Court's general direction that the aboriginal perspective must be taken into account in cases involving claims of aboriginal rights: see *Van der Peet* at 550 per Lamer C.J.: "In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right"; *Sparrow* at 1112 per Dickson C.J. and La Forest J.: "[It is] crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."

[111] In my view, to characterize the right in the game specific terms suggested by the appellant would give undue emphasis to the regulatory concerns of today and pay insufficient attention to the aboriginal perspective. The right to hunt moose is at issue here because the regulation of moose hunting is the focus of the statutory prohibition. To insist that the traditional aboriginal practice grounding the modern right must conform precisely to the terms of the modern regulatory regime risks ignoring the aboriginal perspective. A traditional aboriginal practice may involve what is, from the aboriginal perspective, a single identifiable activity that has a particular meaning or significance to the aboriginal community. From a modern regulatory perspective, that same activity may be viewed as a collection of discrete practices that are accorded disparate treatment. We should not characterize the right solely from the modern regulatory perspective.

[112] There was expert evidence, accepted by the trial judge, that from the aboriginal perspective, the activity was simply hunting. The trial judge found that the Métis and their Ojibway ancestors hunted moose when there were moose to be hunted but as he put it, they were "opportunistic" when it came to hunting. They took the animals the land had to offer. If the respondents can demonstrate that the activity of "opportunistic" hunting was an integral part of the Métis culture, an issue to which I will next turn, that practice is sufficient to ground the right asserted in this case.

[113] The approach taken by the trial judge and upheld on appeal by the Superior Court judge comports with the direction indicated in *Van der Peet*. The game-specific approach advocated by the appellant would require claims of aboriginal right to be determined *exclusively* through the lens of modern regulatory concerns and without regard to the aboriginal perspective. Clearly, the governmental statute or regulation is one factor, but equally, it cannot be the only factor.

[114] While it would appear that little explicit attention has been paid to this issue in the decided cases beyond the general principles set out above from *Van der Peet*, the case law supports the approach taken by the trial judge. In *Pamajewon*, the characterization found to be excessively general was a broad and general right to use and manage traditional aboriginal lands. This was found unacceptable in a case asserting a right to run a casino. By contrast, the Supreme Court of Canada has with striking regularity characterized claims as the right to hunt or fish for food, without reference to a specific species. In *Van der Peet* itself, at 563, the court described the right claimed as "an aboriginal right to exchange fish for money or for other goods." In *Adams*, at 122 Lamer C.J. stated "the appellant's claim is best characterized as a claim for the right to fish for food in Lake St. Francis." Similarly, in *Côté*, at 176, Lamer C.J. characterized the claim as "an aboriginal right to fish for food within the lakes and rivers" of the relevant territory. In *Sparrow*, at 1101, Dickson C.J. described the right at issue as "the existing aboriginal right to fish for food and social and ceremonial purposes." In *Gladstone*, at 744 the claim was more specifically characterized as "the exchange of herring spawn on kelp for money or other goods" but the practice itself was so unusual and specific that it is difficult to know how else it could be described. In treaties and treaty cases, the right is commonly characterized as to the right to hunt or fish for food: see *R. v. Marshall,* [1999] 3 S.C.R. 456 at 466.

[115] I conclude that the trial judge and the Superior Court judge on appeal did not err in law by characterizing the right at issue in this case as the right to hunt for food without reference to a specific species.

Issue 4 ***Did the trial judge and the Superior Court judge on appeal err in finding that the right claimed was a practice exercised by the historic Métis community at Sault Ste. Marie and was integral to the distinct culture of that community?***

(a) Hunting by the Historic Métis Community

[116] The trial judge made clear findings of fact that the historic Métis community at Sault Ste. Marie engaged in the practice of hunting. The Superior Court judge on appeal found that the trial judge had made this finding after a careful review of the evidence and that the finding was supportable. I agree. There was evidence before the trial judge to support these findings. In particular, I refer here to the evidence of Dr. Ray who based his report and testimony on archival and other contemporary sources. The trial judge accepted Dr. Ray's evidence that the Métis economy was similar to the Ojibway economy and that the Métis essentially carried on the subsistence hunting and gathering activities of the Ojibway. As Dr. Ray explained, both cultures took what the land had to offer. The scarcity of large game did not mean that as a society, the Métis abandoned hunting. In the period when moose and deer were scarce, they continued to hunt small game and to some extent bear. When game was scarce, they turned to fishing. The Métis, like the Ojibway, simply modified their hunting and fishing activities as required by cycles in the availability of game. Both societies had diversified economies that were "the key to their survival...To live off the land, you had to have flexibility. You had to shift your hunting and fishing strategies as the resource cycles shifted." Dr. Ray testified that the scarcity of moose did not eliminate the importance of hunting to the Métis. When pressed on the point in cross-examination he was clear: "I will not accept the proposition that a whole generation went by without game hunting." As Dr. Ray explained, and as the trial judge found, "You can't hunt what's not there." Indeed, the evidence shows that when the moose population increased later in the 19th century and in the 20th century, the Métis hunted moose.

(b) Hunting as Integral to Métis Culture

[117] The trial judge also made a clear finding that "hunting was an integral part of the Métis culture prior to the assertion of effective control by the European authorities." In answer to the direct question whether hunting was integral to the Métis society, Dr. Ray gave an affirmative answer:

> Q. One must question, Dr. Ray, can you say that hunting is integral to the Métis society here?
>
> A. It certainly was ... at that time it was an integral part of it and I would say that...the trouble I have with a question like that is it segments the economy which is a...which is a distortion of the reality. The economy was based on the right to live off the land, whether it meant hunting, fishing,

> trapping and the relative importance of any one of those activities in any year over a period of years would depend on the game cycles, economic conditions and so on, so that that was...to me the hunting right is bundled into those rights. I don't think they could have understood, I'm certain...neither the Métis or the Ojibway would have probably found it hard to imagine that, how can we be allowed to do one and not the other? ... and so, yes, I would say as a bundle of livelihood rights, it would have been a part of it and I don't imagine they would have considered it separated out.

[118] The appellant attacks the trial judge's finding that hunting was integral to the Métis culture on two grounds. First, the appellant submits that the trial judge failed to distinguish between the culture and practices of the Ojibway and the Métis. It is the appellant's contention that while the evidence may have established that moose hunting was integral to the Ojibway culture, it did not survive as a practice integral to the Métis. Second, the appellant argues that the trial judge erred by applying too lax a test of "integral". The appellant's position is that during the crucial years of the first half of the 19th century, moose hunting was virtually non-existent and hunting generally was at best a "marginal" activity. The appellant says that the trial judge simply set the bar too low in concluding that hunting played a sufficiently significant aspect of the Métis culture to satisfy the integral test.

[119] In my view, the trial judge did not err by placing some weight on the pre-contact Ojibway practice when considering the importance of hunting to their Métis descendants. On a purely factual level, the evidence supports the trial judge's finding that there was a connection and continuity in the practices of the two communities. In the early years of the 19th century, when the Métis community of Sault Ste. Marie was emerging, the Métis continued the practice of their Ojibway predecessors of hunting moose. The only change was the scarcity of moose from the 1820s forward.

[120] While the Métis are recognized in s. 35 as distinct "peoples", they are peoples with bicultural origins. No culture, however distinctive, is free from the influences of those who came before. The distinctive Métis culture necessarily drew heavily upon the aboriginal ancestors of the Métis. When one is attempting to identify the "aborignal" rights that are protected by s. 35, I find it difficult to see why one should be *precluded* from taking into account the traditional practices of the "aboriginal" ancestors in assessing their significance to the later culture. Indeed, the appellant has submitted that a practice will qualify for s. 35 purposes *only* if it was a practice of the aboriginal ancestors of the Métis. I do not accept that proposition, and neither do I agree with the somewhat contradictory submission that pre-contact practices have no relevance.

[121] The "integral" requirement was explained in *Van der Peet,* at 553-554 in the following terms:

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.
>
> This aspect of the integral to a distinctive culture test arises from the fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1). [emphasis in original]

[122] The appellant places particular emphasis on the following passage from *Van der Peet*, at 560 stating that the practice, custom or tradition relied on as the foundation of an aboriginal right must have been a "defining feature" of the culture of the particular aboriginal community and not have been merely incidental:

> In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an

> incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

[123] The appellant also places heavy reliance on the fact that Dr. Ray agreed that in the period just before 1850, hunting was a "marginal" activity. This admission, it is submitted, is fatal to the claim of an aboriginal right under the *Van der Peet* test requiring that the practice be "integral" to qualify for s. 35 protection.

[124] Dr. Ray's characterization of hunting as "marginal" must be read in proper context. He explained that for most of the 19th century, game was scarce and that indeed, in the period just before 1850, some Ojibway and Métis were literally starving. As a result, the aboriginal peoples in the area, both Ojibway and Métis, relied more heavily on fishing. Hunting was marginal, not because it ceased to have importance for the Métis culture, but rather because there was very little game to hunt. When Dr. Ray stated that hunting was a marginal activity at this time, he was simply acknowledging that fishing was the resource relied on because big game was scarce. He testified that this was so for both the Ojibway and the Métis:

> You had to shift your hunting and fishing strategies as the resource cycles shifted in response to game population cycles. ...it's clear that hunting pressures caused part of this trouble, but it's also a known fact that all game species go through cyclical population fluctuations irregardless of whether or not they're being hunted or trapped. ...flexibility is the key and in the interior area this meant, among other things, that they had to depend on things other than the large game in the hunting economy.

[125] Demonstrated reliance on a practice for subsistence purposes has been held to be sufficient to meet the "integral to their distinct society" test. In *Adams*, at 128 the Supreme Court of Canada recognized that while fish were not significant to the Mohawks for spiritual or cultural reasons, fish "were an important and significant source of subsistence for the Mohawks. This conclusion is sufficient to satisfy the *Van der Peet* test." I would also note that the Supreme Court of Canada has recognized that there may be gaps in continuity of a practice that are not fatal to the establishment of an aboriginal

right. In *Van der Peet* at 557, it was noted that "the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions which existed prior to contact." Trial judges were directed to adopt "flexibility regarding the establishment of continuity."

[126] In my view, on this record, there is evidence capable of supporting the trial judge's finding that hunting was integral to the culture of the Métis. In the early years of the century, the Métis essentially continued the practices of the Ojibway and hunted moose. In the mid-19th century when game was scarce, the Métis, like their Ojibway cousins, turned to fishing for sustenance, but they did not abandon hunting. A hallmark of both societies was the ability to adapt in the face of scarcity in order to avoid starvation. The temporary scarcity of moose and other big game did not eradicate the hunting habits that the Métis had inherited from their Ojibway ancestors. It merely put moose hunting in suspension until the cycle turned and the big game returned.

[127] Accordingly, I am of the view that there is no basis for this court to interfere with the conclusion of the trial judge and the Superior Court judge on appeal that the right claimed was a practice exercised by the historic Métis community at Sault Ste. Marie and was integral to the distinct culture of that community.

Issue 5 Did the trial judge and the Superior Court judge on appeal err in finding that there exists today a Métis community in continuity with the historic Métis community that continues to exercise the practice grounding the right and that the respondents are accepted as members of that community?

(a) Continuity with the Historic Métis Community

[128] The appellant attacks the finding of the trial judge that there exists today a Métis community in continuity with the historic Métis community. There seems little doubt that by 1900 the Métis no longer comprised a visible community within the town of Sault Ste. Marie. However, it is equally clear that the Métis did not simply disappear from the Sault Ste. Marie area. There remained a significant Métis presence, especially on the nearby reserves and to some extent in the area surrounding the town.

[129] The issue is whether this significant change in the nature of the Métis presence in the area after 1850 represented a dispersal of the community that is fatal to the respondents' assertion of an aboriginal right to hunt. In concluding that it did not, the trial judge made two critical findings, both of which are attacked by the appellant. First, the trial judge found that it was appropriate to consider Métis presence in the area immediately surrounding Sault Ste. Marie, especially the neighboring Indian reserves, and not to restrict the inquiry to the town site of Sault Ste. Marie proper. Second, the trial judge took into consideration certain social and political factors that discouraged a

visible Métis presence and impeded the growth or development of an independent and distinctive Métis community.

[130] I note at the outset that the appellant does not say that the Métis people simply disappeared from the Sault Ste. Marie area. In its factum (at paragraph 135) the appellant puts it as follows:

> by the later half of the 19th century, the Batchewana and Garden River bands had become the new home for many who had formerly lived in the historic Métis community. The bands carried on certain aspects of the Métis culture and traditional practices, blended with Ojibway culture and practices. Today, many well-known names from the historic Sault Ste. Marie community are carried on by members of both of these bands, including both chiefs and several counsellors.

[131] The appellant's own expert witness at trial, Gwenneth Jones, described the situation as follows:

> There are many of these families who appear on the nearby Indian Reserves after 1850. Some of them moved to outlying areas such as Bruce Mines or the townships that are immediately outside of Sault Ste. Marie.

In her written report, Dr. Jones stated:

> Although the families in the town of Sault Ste. Marie became somewhat more diffused through the city as the nineteenth century went on, recognizable clusters of mixed-blood descendants were still present in the 1901 census. Other Aboriginal and non-Aboriginal residents of areas such as St. Joseph's Island and Garden River were also able to identify readily a "half-breed" and "Indian" population. *While this evidence is not conclusive, it is suggestive of a separate community of Métis families persisting in the vicinity of Sault Ste. Marie at least into the twentieth century*. (emphasis added)

[132] The appellant argues that the shift in focus of the Sault Ste. Marie Métis community from the town before 1850 to the nearby Indian reserves after the signing of the Robinson-Huron treaty in 1850 represented a fatal rupture with the past. In my view, it was open to the trial judge on this record to reject the contention of the appellant that

the Métis community merged into the bands. First, not all Métis moved to the reserves. Even the report of the appellant's expert witness Dr. Jones makes this clear: "judging from...entries in the 1901 census, several hundred people of mixed Aboriginal/non-Aboriginal ancestry continued to reside at the Sault at this time, both on and off the Indian Reserves." Second, there was evidence that even those who did move to the reserves tended to be viewed as Métis, both by the Ojibway Band members and by government officials. As noted by the RCAP Report vol. 4 at 261, after 1875, the government "made a major effort to eliminate Métis people from the rolls."

[133] The respondents called lay witnesses who testified as to the continuing Métis community in the 20th century. On the whole, the evidence indicates that while to some extent, the focal point for the Métis became the Batchewana and Garden River reserves, the Métis and their distinctive culture were not completely assimilated within the reserves and that a local Métis community persisted in the Sault Ste. Marie area, albeit with a significantly diminished profile.

[134] In assessing whether the Sault Ste. Marie Métis community maintained sufficient existence and continuity with the past to qualify for recognition for rights purposes, the trial judge took into account certain social and political forces antithetical to the Métis. Among these were the explosive and dramatic events concerning the Métis in Western Canada in 1870 at Red River and 1885 in Saskatchewan. There was evidence that the Métis were at times rejected as full members of both aboriginal and non-aboriginal societies. The respondents led the evidence of Olaf Bjornaa who testified that he and his sister were denied access to the reserve school because they were not "Indian" but were also rejected by the town school because they were too "Indian". There was considerable evidence from lay and expert witnesses that the Métis people have been the victims of discrimination, ostracism and overt hostility from the 19th century forward. That sorry history is fully documented by the RCAP Report vol. 4, Chapter 5.

[135] I do not accept the appellant's submission that the trial judge erred in taking these historical factors into account in his assessment of whether the Métis community survived. I agree that the fact of discrimination does not excuse aboriginal claimants from demonstrating the existence of a modern-day community in continuity with the historic community. However, I do not accept that as a fair characterization of the trial judge's reasoning. The trial judge had to assess historical evidence concerning a specific community and to decide whether or not that community had perished. In making that assessment, he was surely entitled to take into account the relevant historical context. On the basis of the historical evidence, he found that the Métis were the "forgotten people" and that although their community became "invisible" it did not disappear. The "invisibility" or relative lack of profile of the Métis community was explained not by its disappearance, but by the fact that powerful social and political factors discouraged visibility and that the community reacted accordingly. It is simply not possible to assess the resilience of the Métis community without taking into account the historical context

in which it existed and the pressures to which it was subjected. As the RCAP Report concluded, vol. 4 at 227:

> Some Canadians think that Métis Nation's history ended on the Batoche battlefield or the Regina gallows. The bitterness of those experiences did cause the Métis to avoid the spotlight for many years, but they continued to practice and preserve Métis culture and to do everything that was possible to pass it on to future generations.

[136] Not only was the trial judge entitled to take into account the evidence of the severe prejudice and discrimination inflicted upon the Métis: it is my view that it would have been quite wrong for him to ignore it. The constitutional recognition of the existence of the Métis as one of Canada's aboriginal peoples may not be capable of redressing all the wrongs of the past, but it cannot be that when interpreting the constitution, a court should ignore those wrongs. As noted by Dickson C.J. and La Forest J. in *Sparrow*, at 1103, "[f]or many years, the rights of the Indians to their aboriginal lands – certainly as legal rights – were virtually ignored." It is undeniable that past practices, including those of government, have weakened the identity of aboriginal peoples by suppressing languages, cultures and visibility. It would be completely contrary to the spirit of s. 35 to ignore these historical facts when interpreting the constitutional guarantee. For this reason, the continuity test should be applied with sufficient flexibility to take into account the vulnerability and historic disadvantage of the Métis. The trial judge was entitled to conclude that the Sault Ste. Marie Métis community had suffered as a result of what was at best governmental indifference, and to take the historically disadvantaged situation of the Métis into account when assessing the continuity of their community.

[137] Accordingly, I agree with the Superior Court judge on appeal that it was open on the record for the trial judge to conclude that there was a continuing Métis presence in the Sault Ste. Marie area, and that to an extent sufficient for the purposes of s. 35, the Métis maintained their distinctive community in continuity with the past.

(b) The Effect of "Taking Treaty"

[138] The respondents' ancestors were among those who moved to the reserve. They accepted the benefits of the treaty and acquired status as band members. The respondents' Métis ancestor, Eustache Lesage, left Sault Ste. Marie with many other Métis in the 1850s and joined the Batchewana Band, with the result that his descendants' membership in the band community was thereafter controlled by the *Indian Act*. In 1918, Steve Powley's grandmother Eva Lesage lost her band membership by marrying a non-Indian,

with the result that her descendants are not band members and the respondents cannot benefit from the band's communal rights.

[139] According to the appellant, the move of the respondents' ancestors to the Band ruptured their necessary continuity with the historic Métis community. The appellant submits that as the respondents' Métis ancestors accepted the benefits of the treaty, they lost any rights they may have had as Métis. I do not understand the appellant to suggest that by "taking treaty", the Métis formally or legally surrendered their aboriginal rights. Nor does the appellant say the Métis rights were legally extinguished. Such a proposition would, in any event, be contrary to the historical record. Robinson, the treaty commissioner, refused to deal with the Métis as a group. He told the Métis that individuals could "take treaty" if the Ojibway Chiefs agreed, but it was never suggested that a consequence of taking treaty would be the extinguishment of their Métis identity. There is also no evidence that Métis individuals were advised that they needed to make an election either to stay Métis or take treaty. Indeed, E.B. Borron, commissioned in 1891 by the province to report on annuity payments to the Métis, was of the view that Métis who had taken treaty benefits remained Métis and he recommended that they be removed from the treaty annuity lists. In my view, it was legally open to the Métis to accept treaty benefits without thereby surrendering their aboriginal rights. If those aboriginal rights are otherwise maintainable, I fail to see how those rights were lost by the move to the reserves.

(c) Continuity of the Practice of Hunting

[140] I also find that there was evidence to support the trial judge's finding that hunting has continued to be an important aspect of Métis life. Census records from the late 19th century show some Métis as "hunters". Lay witnesses testified as to the importance to the Métis of harvesting activities, including the food hunt. There was evidence of contemporary practices, including communal hunting, that Métis families prefer the food they get from the hunt, that they rely to a large degree upon their hunting for food, and that they share the product of the hunt. There was also evidence of the efforts of contemporary Métis organizations to organize hunting under local "Captains of the Hunt." It is my view that there is evidence in the record to support the trial judge's very clear factual finding that hunting continues to this day to be an important aspect of the life of the Sault Ste. Marie Métis community.

[141] I note finally on this point that the respondents were hunting in the immediate vicinity of Sault Ste. Marie. It was not disputed by the appellant that if the respondents do enjoy a constitutionally protected right, they were within the territorial limit for hunting by members of the Sault Ste. Marie Métis community.

(d) Community acceptance

[142] The appellant submits that the trial judge erred in finding that there was adequate proof that the respondents were accepted as members of the local Métis community. It is the appellant's submission that the trial judge's finding on this point was based exclusively upon Steve Powley's OMAA and MNO membership, and that membership in these associations falls short of what is required.

[143] The respondents did not testify at trial. They were not, of course, required to do so. However, this was not a case where the respondents stood on their right to silence. They admitted the essential facts of the offence by way of an Agreed Statement of Facts. They asserted a constitutional right and had the onus of proving that right. While I recognize that an accused person has the right not to testify and that the decision to call or not to call an accused will often involve difficult tactical considerations for counsel, where a defense is based on the assertion of an aboriginal right, it remains an essential element of the defense to establish the claimant of the right is a member of the aboriginal community.

[144] I agree with the submission of the appellant that, without more, membership in OMAA and/or MNO does not establish membership in the specific local aboriginal community for the purposes of establishing a s. 35 right. Neither OMAA nor the MNO constitute the sort of discrete, historic and site-specific community contemplated by *Van der Peet* capable of holding a constitutionally protected aboriginal right.

[145] On the other hand, it seems to me that membership in these organizations provides at least some evidence of community acceptance. It would be wrong to expect the same type of evidence one might expect in a case asserting the rights of an established Indian band. Métis communities do not have a formal legal structure or organization. They are not recognized under the *Indian Act* and they have no bodies analogous to band councils that are recognized or funded by the government. They are communities based on history, kinship and shared practices. They are clearly looser in structure than Indian bands that enjoy treaty and other s. 35 rights. Proof of membership in such a community is bound to be to a large extent impressionistic.

[146] While in his reasons, the trial judge made reference only to Steve Powley's formal OMAA and MNO membership as proof of community acceptance, there was other evidence in the record capable of supporting the finding. There was evidence from witnesses active in Métis affairs of the existence of a Métis community at Sault Ste. Marie. The evidence of Art Bennett, Steve Powley's first cousin, is of particular significance on the issue of community acceptance. Bennett was active in OMAA in the early 1990s and was President of Zone 4, the area of the province that includes Sault Ste. Marie. He explained the relationship between the Métis community and OMAA. Bennett did not claim that OMAA itself was the community. He testified that the Métis community "was always here...just not organized" and that OMAA "brought us together

politically." Bennett described his Métis family roots as well as the history of the Métis community and its practices.

[147] It is against this background evidence from a family member active in Métis affairs and a leader in the local Métis community, that Steve Powley's membership in OMAA must be considered. In his capacity as President of Zone 4, Bennett approved Steve Powley's application for membership in OMAA. On the application, Powley gave his reason for claiming aboriginal rights "to preserve my aboriginal heritage and the right to harvest natural resources that my family has done since time immemorial." In approving the application, Bennett wrote that Powley was "a first cousin" and "direct descendant of Leonard Lesage."

[148] In my view, this evidence goes beyond proof of a formal membership in a province-wide association that includes status, and non-status Indians as well as non-aboriginal members. It provides some evidence of membership in the local Sault Ste. Marie Métis community and is capable of supporting the trial judge's finding that Steve Powley was accepted as a member of the local Métis community. As for Roddy Powley, the OMAA application form completed by Powley included a space to "Identify any children under 18 for whom you wish to apply for Youth membership" and Steve Powley entered his son's name.

[149] While it might have been preferable to have direct evidence from the respondents as to their membership in and acceptance by the local Métis community, I cannot say on this record that there was "palpable and overriding error" in the trial judge's factual finding of community acceptance.

(e) Who is a Métis for Purposes of s. 35?

[150] It is common ground among the parties and the intervenors that at a minimum, self-identification and community acceptance are required attributes of community membership for purposes of asserting a s. 35 right. The more difficult issue is whether it is necessary to establish a direct genealogical link to the historic Métis community that is the source for the s. 35 right.

[151] There is no uniformly accepted definition of who is a Métis and certainly no precise test for Métis status for the purposes of s. 35. As the evidence in this case shows and as noted by the RCAP Report, there are many individuals, including some in the Sault Ste. Marie area, who identify as Métis but who do not have a genealogical connection to an historic Métis community.

[152] One reason for competing definitions of Métis is undoubtedly that different definitions may well be appropriate for different purposes. The RCAP Report's recommended definition was intended primarily to define membership for purposes of nation to nation negotiations. That definition may or may not be appropriate for s. 35. I

agree with the submission of the Métis National Council that the test of who can exercise s. 35 harvesting rights may not define who the Métis Nation and its members are for all other purposes.

[153] The appellant asks this court to adopt the test enunciated by the trial judge, requiring proof of ancestral connection. The appellant, however, does not dispute the trial judge's finding that the respondents did establish genealogical descent from the historic Sault Ste. Marie Métis community. The respondents take the position that it is not necessary for this court to determine the issue and that it should leave the issue to be decided in another case where the specific fact situation arises. That position is supported by the Métis National Council.

[154] Aboriginal Legal Services of Toronto, Congress of Aboriginal Peoples and OMAA ask that we accept the broader definition accepted by the Superior Court judge on appeal. In its submission, Congress of Aboriginal Peoples emphasized the need for a clear definition to facilitate government action on Métis rights.

[155] I agree with the respondents that this is not the appropriate case to determine whether or not proof of ancestry is necessary. As it is undisputed that the respondents are able to trace their ancestry to the historic Sault Ste. Marie Métis community, they satisfy the most demanding test. Consequently, this issue was not fully canvassed at trial, nor indeed, was it dealt with to any significant extent before this court. The issue is one of obvious importance to the full definition and scope of Métis rights protected by s. 35 and in my view, its resolution should await a case where the issue is germane to the result and is fully argued by the parties.

[156] Accordingly, I am of the view that there is no basis for this court to interfere with the conclusion of the trial judge and the Superior Court judge on appeal that there exists today a Métis community in continuity with the historic Métis community that continues to exercise the practice and that the respondents are accepted as members of that community.

Issue 6 If the aboriginal right was established, did the trial judge and the Superior Court judge on appeal err in finding that that the* Game and Fish Act *was not a justified limit on that right?

[157] It is well established that s. 35 rights, like other rights protected by the constitution, are not absolute. Aboriginal rights are not subject to s. 1 of the *Charter*, but they may be limited if the limitation satisfies the test of justification established in *Sparrow*. As the respondents have established their s. 35 right, and as the appellant does not deny that if a right is established, the *Game and Fish Act* infringed that right, the onus shifts to the appellant to justify the infringement.

[158] The regulatory regime governing moose hunting may be described as follows. Under the Act and Regulations, the province is divided into wildlife management units. The moose population is monitored in each unit and target populations are established. Entitlement to hunt moose is determined by the establishment of hunting seasons and a licensing and tag allocation system. Any hunter subject to the Act who wishes to hunt moose may purchase an "Outdoor Card" with a moose hunting validation sticker. This entitles the holder to harvest a calf moose in any management unit in the province where there is an open season. There is no limit on the number of "Outdoor Cards" issued. The rationale for not limiting the number of moose calves harvested is that they are difficult to locate, they form the largest demographic segment of the moose population, and they experience a very high natural mortality rate. If a hunter wishes to harvest an adult bull or cow moose, he or she must also obtain a tag that is gender and management unit specific. The Ministry determines the number of tags that will be available on the basis of its assessment of the moose population in each wildlife management unit. The demand for adult moose tags greatly exceeds the number available. They are allocated through an annual draw. As already noted, there is in place an *Interim Enforcement Policy* that exempts status Indians who enjoy treaty hunting rights. The Ministry does not know how many moose are harvested by status Indians.

[159] In *Sparrow*, at 1113-4, the Supreme Court of Canada enunciated the applicable legal test where the Crown seeks to justify limits on an aboriginal right to hunt wildlife or fish:

> First, is there a valid legislative objective....The objective of the department in setting out the particular regulations would be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> ...
>
> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here...the guiding interpretive principle...is [that] the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

[160] This test has been consistently applied in the post *Van der Peet* harvesting rights cases: *R. v. Nikal*, [1996] 1 S.C.R. 1013 at 1064, 1065; *Gladstone*, at 762; *Adams*, at 133; *Côté*, at 189.

[161] The principle objective relied on by the appellant as justifying the limitation on the aboriginal right is conservation. The objective of the *Game and Fish Act* is stated in s.3:

> to provide for the management, perpetuation and rehabilitation of the wildlife resources in Ontario, and to establish and maintain a maximum wildlife population consistent with all other proper uses of lands and waters.

[162] The appellant led evidence to show that the moose population in the wildlife management unit in which the respondents shot a moose is below what is considered to be a satisfactory level. There was also evidence that the demand for moose in the area greatly exceeds what government biologists consider to be available for harvest. Conservation has been found to be a valid legislative objective: see eg. *Sparrow*, at 1113; *Gladstone*, at 775. I do not understand the respondents to dispute that conservation is an important objective capable of justifying a limit on s. 35 rights.

[163] Accordingly, I pass to the second stage and consider whether the right has been limited in a manner in keeping with the fiduciary duty of the Crown. In *Sparrow* at 1115, Dickson C.J. and La Forest J. considered the allocation of a right to harvest for food where conservation is the legislative objective. They adopted the scheme of priority originally stated in *Jack v. R.*, [1980] 1 S.C.R. 294 at 313, namely, that while conservation has priority over the aboriginal right, "the burden of conservation measures should not fall primarily upon the Indian fishery....With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen."

[164] I agree with the findings of the trial judge and the Superior Court judge on appeal that the appellant failed to satisfy the second branch of the justification test. The regulatory scheme fails to accord *any* recognition or priority to the Métis right. In my view, this is fatal to the contention that the limitation is in keeping with the Crown's trust-like relationship with the Métis people. First, in relation to other holders of aboriginal rights - Indians who enjoy a treaty right to hunt - the current scheme places Métis rights holders at an obvious disadvantage. Indian hunting rights are given full recognition while those of the Métis are completely ignored. While I accept that conservation may justify some restriction on the protected right, I fail to see how the legislative objective of conservation can justify this blatant disparity in treatment between the two rights-holders.

[165] Second, in relation to non-aboriginal hunters, Métis rights holders are given no priority. The failure to attach any weight whatsoever to the aboriginal right flies in the face of the principle that aboriginal food hunting rights are to be accorded priority.

[166] While the *Interim Enforcement Policy* contemplates negotiations with the Métis community, I fail to see how a bald promise that has not been acted on can justify limiting a constitutional right. As I have already noted, efforts to negotiate an agreement have been sporadic at best. I do not accept that uncertainty about identifying those entitled to assert Métis rights can be accepted as a justification for denying the right. The appellant has led no evidence to show that it has made a serious effort to deal with the question of Métis rights. The basic position of the government seems to have been simply to deny that these rights exist, absent a decision from the courts to the contrary. While I do not doubt that there has been considerable uncertainty about the nature and scope of Métis rights, this is hardly a reason to deny their existence. There is an element of uncertainty about most broadly worded constitutional rights. The government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain. The appellant failed to satisfy the trial judge, the Superior Court judge on appeal, and has failed to satisfy me that it has made any serious effort to come to grips with the question of Métis hunting rights.

[167] The appellant also relied on a secondary objective, described by the trial judge as "the social and economic benefit to the people of Ontario derived through a combination or recreational hunting and non-hunting recreation." The trial judge rejected this objective, referring to *Adams*, at 134 where Lamer C.J. rejected the enhancement of sports fishing per se as a sufficiently compelling objective. Lamer C.J. found at 134 that it was not shown that sports fishing had a sufficiently meaningful dimension to warrant overriding a protected right:

> On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights, and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct aboriginal cultures. Nor is it aimed at the reconciliation of aboriginal societies with the rest of Canadian society, since sports fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (*Gladstone*, supra at para 74) to warrant the limitation of aboriginal rights.

[168] In my view, "the social and economic benefit to the people of Ontario derived through a combination of recreational hunting and non-hunting recreation" is at a level of such generality as to be virtually incapable of constituting a valid legislative objective for the purposes of limiting a s. 35 right. It amounts to little more that an assertion that the government considers its regulatory scheme to be in the general public interest. I agree with the trial judge that the appellant has failed to establish this as a valid legislative objective for purposes of limiting the s. 35 right. In any event, for the reasons I have already explained in relation to conservation, the failure to give any priority to Métis hunting is fatal to the assertion that the right has been limited in a manner consistent with the fiduciary duty of the Crown.

[169] In argument before this court, the appellant sought to establish the "equitable sharing of the resource" as a secondary legislative objective. Assuming, without deciding, that it is open to the appellant to advance this objective at this stage of the proceedings, I find that it should be rejected on two grounds. First, I am not persuaded that without more, an appeal to "equitable sharing" can amount to a valid legislative objective if, in fact, what is left of the resource after conservation measures is insufficient to satisfy the aboriginal right to harvest for food. As noted by Lamer C.J. in *Gladstone* at 764, it may well be that where commercial harvesting rights are at stake, the objective of sharing the resource with non-aboriginal commercial interests may be accepted as there is no inherent limit with respect to the exercise of commercial rights. However, this case involves the right to hunt for food and does contain an inherent limit. In any event, even if "equitable sharing" does amount to a valid legislative objective, the present scheme cannot be justified as being consistent with the Crown's trust-like duty. It accords no recognition to the Métis right, in stark contrast to the blanket exemption given status Indians. I fail to see how a scheme that creates such an obvious imbalance between rights holders, and gives the Métis no priority over those who have no constitutional right to hunt can possibly be described as "equitable" or in keeping with the crown's trust-like duty.

[170] For these reasons, I conclude that the trial judge and the Superior Court judge on appeal did not err in finding that that the *Game and Fish Act* was not a justified limit on the respondents' s. 35 right to hunt for food.

Issue 7 ***If the aboriginal right is established and the* Game and Fish Act *is not a justified limit on that right, should this Court stay the operation of its order for a period of one year to allow the appellant to consult and develop a new moose-hunting regime that is consistent with the* Constitution Act, 1982, *s. 35?***

[171] The appellant concedes that if the respondents are successful, their convictions must be set aside and acquittals entered. However, the appellant asks this court to stay the operation of its order for a period of one year to allow the appellant to consult with

the Métis communities and other aboriginal interests and to develop a new moose hunting regime that is consistent with the *Constitution Act*, 1982, s. 35.

[172] In my view, this court has jurisdiction to stay the operation of its order for a stated period. In *R. v. Feeney*, [1997] 2 S.C.R. 13, the Supreme Court of Canada found that a warrant was required to effect an arrest in a dwelling. The failure to obtain a warrant was held to have violated the appellant's *Charter* rights, resulting in his conviction being set aside. On an application for a rehearing, [1997] 2 S.C.R. 117, the Court maintained the effect of its judgment with respect to the appellant, but found that there should be "a transition period", and "that the operation of that aspect of the judgment herein relating to the requirement for a warrant to effect an arrest in a dwelling is stayed for a period of six months..." The period of the stay was later extended: [1997] 3 S.C.R. 1008. I note as well that although the Supreme Court did not decide the issue in *R. v. Marshall*, [1999] 3 S.C.R. 533, at 540 it clearly left open the question of its jurisdiction to grant a stay in cases concerning aboriginal harvesting rights.

[173] In my view, in the circumstances of this case, a stay is appropriate. I reach that conclusion for the following reasons. At issue here is the conservation and allocation of a scarce natural resource. As is clear from the discussion of the justification issue, this is not a situation where the constitutional right inevitably prevails over all other considerations. *Sparrow* and the cases that follow make clear that conservation of a scarce natural resource is of paramount concern. In the appropriate circumstances, conservation may trump the aboriginal right. Indeed, the very existence of the aboriginal right may depend upon conservation measures being taken. The demand for the scarce natural resource may exceed what nature can supply.

[174] There are a number of important factors bearing upon the allocation of this scarce natural resource that cannot be determined by this court in the context of this specific case. It is not possible for this court to determine what impact the recognition of s. 35 Métis rights will have on demand for this scarce natural resource. I have found that the respondents are entitled to exercise a s. 35 right to hunt for food, but it is not possible to determine, on the record before us, how many others qualify for this right. As I have already explained, aboriginal rights are specific to each particular community and to each particular site. These rights are rooted in history and they can only be determined after a detailed assessment of the history and practices of the specific community.

[175] The design of an appropriate regulatory regime must take a number of factors into account. In addition to conservation, the s. 35 rights of the Métis have to be reconciled with the rights of other aboriginal groups. While aboriginal food hunting rights must be given priority, the interests of recreational hunters and the tourism industry are also entitled to consideration. In short, s. 35 Métis rights are an important factor that the government of Ontario must respect in designing an appropriate regulatory regime, but they are not the only factor. The courts have an important role in assessing the balance

struck by the government in the design of its regulatory scheme, but courts cannot design the regulatory scheme.

[176] Recognition of Métis hunting rights adds a significant element that must be factored into the regulatory scheme, and now that Métis rights have been recognized, the government must proceed with immediate dispatch to establish a scheme that accords due respect and recognition to those rights.

[177] A stay should facilitate consultation and negotiation between the government and the aboriginal community. Both the trial judge and the Superior Court judge urged the government and representatives of the Métis peoples to enter good faith negotiations with a view to resolving s. 35 claims. I endorse their suggestion. It is my hope that this judgment in favour of the respondents, together with the stay requested by the appellant, will together serve as an incentive to the parties to embark upon negotiations. Professor Kent Roach, *Constitutional Remedies in Canada,* looseleaf (Aurora: Canada Law Book, 2000) at 15.80 suggests that courts should have negotiation in mind when designing remedies and that in certain circumstances a stay may be justified to that end:

> In the first instance, courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests. The aim of this negotiation process should be consensual decision-making or treaty making.

Professor Roach further states at 15.70:

> ...a temporary transition period would allow the difficult and interconnected problems of devising a new relationship between the parties to be achieved through negotiation, a process that is much more flexible than adjudication. Governments would be given reasonable opportunities to comply with court's constitutional rulings. More importantly, First Nations would participate in the formulation of the remedy, something that is consistent with the purpose of aboriginal rights.

[178] While I recognize that the Métis peoples may well have already waited far too long for recognition of their rights, I am of the opinion that in the interests of conservation, consultation, and an orderly transition to a regime that respects Métis rights, a further brief delay is justified.

CONCLUSION

[179] I have concluded that the respondents have demonstrated that they have a significant link with the historic Métis community of Sault Ste. Marie, that they are members of that community, and that they are thereby entitled to exercise an aboriginal right to hunt for food within the hunting territory of that community. I would accordingly dismiss the appeal from the judgment of the Superior Court judge affirming their acquittal by the trial judge. The respondents are entitled to acquittals. However, I would grant the appellant's request for a stay of this judgment for a period of one year to allow the appellant to consult with stakeholders and develop a new moose-hunting regime that is consistent with the *Constitution Act*, 1982, s. 35.

""Robert J. Sharpe J.A."
"R.R. McMurtry C.J.O. I agree"
"R.S. Abella J.A. I agree"

RELEASED: February 23, 2001

R. *v.* Powley, [2003] 2 S.C.R. 207, 2003 SCC 43

Her Majesty The Queen *Appellant/respondent on cross-appeal*

v.

Steve Powley and Roddy Charles Powley *Respondents/appellants on cross-appeal*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Labrador Métis Nation, a body corporate, Congress of Aboriginal Peoples, Métis National Council ("MNC"), Métis Nation of Ontario ("MNO"), B.C. Fisheries Survival Coalition, Aboriginal Legal Services of Toronto Inc. ("ALST"), Ontario Métis and Aboriginal Association ("OMAA"), Ontario Federation of Anglers and Hunters ("OFAH"), Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation, and North Slave Métis Alliance *Interveners*

Indexed as: R. *v.* Powley

Neutral citation: 2003 SCC 43.

File No.: 28533.

2003: March 17; 2003: September 19.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Constitutional law — Aboriginal rights — Métis — Two members of a Métis community near Sault Ste. Marie charged with hunting contrary to provincial statute — Whether members of this Métis community have constitutional aboriginal right to hunt for food in environs of Sault Ste. Marie — If so, whether infringement justifiable — Constitution Act, 1982, s. 35 — Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

The respondents, who are members of a Métis community near Sault Ste. Marie, were acquitted of unlawfully hunting a moose without a hunting licence and with knowingly possessing game hunted in contravention of ss. 46 and 47(1) of Ontario's *Game and Fish Act.* The trial judge found that the members of the Métis community in and around Sault Ste. Marie have, under s. 35(1) of the *Constitution Act, 1982*, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Superior Court of Justice and the Court of Appeal upheld the acquittals.

Held: The appeal and cross-appeal should be dismissed.

The term "Métis" in s. 35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life. The purpose of s. 35 is to protect practices that were historically

important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture. In applying the *Van der Peet* test to determine the Métis' s. 35 entitlements, the pre-contact aspect of the test must be adjusted to take into account the post-contact ethnogenesis and evolution of the Métis. A pre-control test establishing when Europeans achieved political and legal control in an area and focusing on the period after a particular Métis community arose and before it came under the control of European laws and customs is necessary to accommodate this history.

Aboriginal rights are communal, grounded in the existence of a historic and present community, and exercisable by virtue of an individual's ancestrally based membership in the present community. The aboriginal right claimed in this case is the right to hunt for food in the environs of Sault Ste. Marie. To support a site-specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence. The trial judge's findings of a historic Métis community and of a contemporary Métis community in and around Sault Ste. Marie are supported by the record and must be upheld.

The verification of a claimant's membership in the relevant contemporary community is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. Self-identification, ancestral connection, and community acceptance are factors which define Métis identity for the purpose of claiming Métis rights under s. 35. Absent formal identification, courts will have to ascertain Métis identity on a case-by-case basis taking into account the value of community self-definition, the need for the process of identification to be objectively verifiable and the purpose of the

constitutional guarantee. Here, the trial judge correctly found that the respondents are members of the Métis community that arose and still exists in and around Sault Ste. Marie. Residency on a reserve for a period of time by the respondents' ancestors did not, in the circumstances of this case, negate their Métis identity. An individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights, absent collective adhesion by the Métis community to the treaty.

The view that Métis rights must find their origin in the pre-contact practices of their aboriginal ancestors must be rejected. This view in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The historical record fully supports the trial judge's finding that the period just prior to 1850 is the appropriate date for finding effective European control in the Sault Ste. Marie area. The evidence also supports his finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850. This practice has been continuous to the present.

Ontario's lack of recognition of any Métis right to hunt for food and the application of the challenged provisions infringes the Métis aboriginal right and conservation concerns did not justify the infringement. Even if the moose population in that part of Ontario were under threat, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs. Further, the difficulty of identifying members of the Métis community should not be exaggerated so as to defeat constitutional rights. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and

priority allocations. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt.

While the Court of Appeal had jurisdiction to issue a stay of its decision, which has now expired, no compelling reason existed for issuing an additional stay.

Cases Cited

Applied: *R. v. Van der Peet*, [1996] 2 S.C.R. 507; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

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APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (2001), 53 O.R. (3d) 35, 196 D.L.R. (4th) 221, 141 O.A.C. 121, 152 C.C.C. (3d) 97, [2001] 2 C.N.L.R. 291, 40 C.R. (5th) 221, 80 C.R.R. (2d) 1, [2001] O.J. No. 607 (QL), affirming a decision of the Superior Court of Justice (2000), 47 O.R. (3d) 30, [2000] 1 C.N.L.R. 233, upholding a judgment of the Ontario Court (Provincial Division), [1999] 1 C.N.L.R. 153, 58 C.R.R. (2d) 149, [1998] O.J. No. 5310 (QL). Appeal and cross-appeal dismissed.

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Jean Teillet and *Arthur Pape*, for the respondents/appellants on cross-appeal.

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Joseph Eliot Magnet, for the intervener the Congress of Aboriginal Peoples.

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Written submissions only by *J. Keith Lowes*, for the intervener the B.C. Fisheries Survival Coalition.

Written submissions only by *Brian Eyolfson*, for the intervener the Aboriginal Legal Services of Toronto Inc.

Robert MacRae, for the intervener the Ontario Métis and Aboriginal Association.

Written submissions only by *Timothy S. B. Danson*, for the intervener the Ontario Federation of Anglers and Hunters.

Alan Pratt and *Carla M. McGrath*, for the intervener the Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation.

Written submissions only by *Janet L. Hutchison* and *Stuart C. B. Gilby*, for the intervener the North Slave Métis Alliance.

The following is the judgment delivered by

THE COURT —

I. Introduction

1 This case raises the issue of whether members of the Métis community in and around Sault Ste. Marie enjoy a constitutionally protected right to hunt for food under s. 35 of the *Constitution Act, 1982*. We conclude that they do.

2 On the morning of October 22, 1993, Steve Powley and his son, Roddy, set out hunting. They headed north from their residence in Sault Ste. Marie, and at about 9 a.m., they shot and killed a bull moose near Old Goulais Bay Road.

3 Moose hunting in Ontario is subject to strict regulation. The Ministry of Natural Resources ("MNR") issues Outdoor Cards and validation stickers authorizing the bearer to harvest calf moose during open season. People wishing to harvest adult moose must enter a lottery to obtain a validation tag authorizing them to hunt either a bull or a cow in a particular area, as specified on the tag. The number of tags issued for a given season depends on the calculations of MNR biologists, who estimate the current adult moose population and the replacement rate for animals removed from the population. The validation tag requirement and seasonal restrictions are not enforced against Status Indians, and the MNR does not record Status Indians' annual harvest. (See *MNR Interim Enforcement Policy on Aboriginal Right to Hunt and Fish for Food* (1991).)

4 After shooting the bull moose near Old Goulais Bay Road, Steve and Roddy Powley transported it to their residence in Sault Ste. Marie. Neither of them had a valid Outdoor Card, a valid hunting licence to hunt moose, or a validation tag issued by the MNR. In lieu of these documents, Steve Powley affixed a handwritten tag to the ear of the moose. The tag indicated the date, time, and location of the kill, as required by the hunting regulations. It stated that the animal was to provide meat for the winter. Steve Powley signed the tag, and wrote his Ontario Métis and Aboriginal Association membership number on it.

5 Later that day, two conservation officers arrived at the Powleys' residence. The Powleys told the officers they had shot the moose. One week later, the Powleys

were charged with unlawfully hunting moose and knowingly possessing game hunted in contravention of the *Game and Fish Act*, R.S.O. 1990, c. G-1. They both entered pleas of not guilty.

6 The facts are not in dispute. The Powleys freely admit that they shot, killed, and took possession of a bull moose without a hunting licence. However, they argue that, as Métis, they have an aboriginal right to hunt for food in the Sault Ste. Marie area that cannot be infringed by the Ontario government without proper justification. Because the Ontario government denies the existence of any special Métis right to hunt for food, the Powleys argue that subjecting them to the moose hunting provisions of the *Game and Fish Act* violates their rights under s. 35(1) of the *Constitution Act, 1982*, and cannot be justified.

7 The trial court, Superior Court, and Court of Appeal agreed with the Powleys. They found that the members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting regulations. Steve and Roddy Powley were therefore acquitted of unlawfully hunting and possessing the bull moose. Ontario appeals from these acquittals.

8 The question before us is whether ss. 46 and 47(1) of the *Game and Fish Act*, which prohibit hunting moose without a licence, unconstitutionally infringe the respondents' aboriginal right to hunt for food, as recognized in s. 35(1) of the *Constitution Act, 1982*.

II. Analysis

9 Section 35 of the *Constitution Act, 1982* provides:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

10 The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent. The Royal Commission on Aboriginal Peoples describes this evolution as follows:

> Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. Economics played a major role in this process. The special qualities and skills of the Métis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures. . . . As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Métis people contributed massively to European penetration of North America.
>
> The French referred to the fur trade Métis as *coureurs de bois* (forest runners) and *bois brulés* (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Métis (whose culture had early roots) were originally called "livyers" or "settlers", those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland. The Cree people expressed the Métis character in the term *Otepayemsuak*, meaning the "independent ones".
>
> (*Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4, at pp. 199-200 ("*RCAP Report*"))

The Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry: "What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis" (*RCAP Report*, vol. 4, at p. 202).

11 The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of "the Métis". However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis "peoples", a possibility left open by the language of s. 35(2), which speaks of the "Indian, Inuit and Métis peoples of Canada".

12 We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis "people", or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.

13 Our evaluation of the respondents' claim takes place against this historical and cultural backdrop. The overarching interpretive principle for our legal analysis is a purposive reading of s. 35. The inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.

14 For the reasons elaborated below, we uphold the basic elements of the *Van der Peet* test (*R. v. Van der Peet*, [1996] 2 S.C.R. 507) and apply these to the respondents' claim. However, we modify certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims.

A. *The Van der Peet Test*

15 The core question in *Van der Peet* was: "How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?" (para. 15, *per* Lamer C.J.). Lamer C.J. wrote for the majority, at para. 31:

> [W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

16 The emphasis on prior occupation as the primary justification for the special protection accorded aboriginal rights led the majority in *Van der Peet* to endorse a pre-contact test for identifying which customs, practices or traditions were integral to a particular aboriginal culture, and therefore entitled to constitutional protection. However, the majority recognized that the pre-contact test might prove inadequate to capture the range of Métis customs, practices or traditions that are entitled to protection, since Métis cultures by definition post-date European contact. For this reason, Lamer C.J. explicitly reserved the question of how to define Métis aboriginal rights for another day. He wrote at para. 67:

> [T]he history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.

17 As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to

colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

18 With this in mind, we proceed to the issue of the correct test to determine the entitlements of the Métis under s. 35 of the *Constitution Act, 1982*. The appropriate test must then be applied to the findings of fact of the trial judge. We accept *Van der Peet* as the template for this discussion. However, we modify the pre-contact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

(1) Characterization of the Right

19 The first step is to characterize the right being claimed: *Van der Peet*, *supra*, at para. 76. Aboriginal hunting rights, including Métis rights, are contextual and site-specific. The respondents shot a bull moose near Old Goulais Bay Road, in the environs of Sault Ste. Marie, within the traditional hunting grounds of that Métis community. They made a point of documenting that the moose was intended to provide meat for the winter. The trial judge determined that they were hunting for food, and there is no reason to overturn this finding. The right being claimed can therefore be characterized as the right to hunt for food in the environs of Sault Ste. Marie.

20 We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.

(2) Identification of the Historic Rights-Bearing Community

21 The trial judge found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850. We find no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal. The record indicates the following: In the mid-17th century, the Jesuits established a mission at Sainte-Marie-du-Sault, in an area characterized by heavy competition among fur traders. In 1750, the French established a fixed trading post on the south bank of the Saint Mary's River. The Sault Ste. Marie post attracted settlement by Métis — the children of unions between European traders and Indian women, and their descendants (A. J. Ray, "An Economic History of the Robinson Treaties Area Before 1860" (1998) ("Ray Report"), at p. 17). According to Dr. Ray, by the early 19th century, "[t]he settlement at Sault Ste. Marie was one of the oldest and most important [Métis settlements] in the upper lakes area" (Ray Report, at p. 47). The Hudson Bay Company operated the Sault Ste. Marie's post primarily as a depot from 1821 onwards (Ray Report, at p. 51). Although Dr. Ray characterized the Company's records for this post as "scanty" (Ray Report, at p. 51), he was able to piece together a portrait of the community from existing records, including the 1824-25 and 1827-28 post journals of HBC Chief Factor Bethune, and the 1846 report of a government surveyor, Alexander Vidal (Ray Report, at pp. 52-53).

22 Dr. Ray's report indicates that the individuals named in the post journals "were overwhelmingly Métis", and that Vidal's report "provide[s] a crude indication

of the rate of growth of the community and highlights the continuing dominance of Métis in it" (Ray Report, at p. 53). Dr. Victor P. Lytwyn characterized the Vidal report and accompanying map as "clear evidence of a distinct and cohesive Métis community at Sault Ste. Marie" (V. P. Lytwyn, "Historical Report on the Métis Community at Sault Ste. Marie" (1998) ("Lytwyn Report"), at p. 2) while Dr. Ray elaborated: "By the time of Vidal's visit to the Sault Ste. Marie area, the people of mixed ancestry living there had developed a distinctive sense of identity and Indians and Whites recognized them as being a separate people" (Ray Report, at p. 56).

23 In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim. Here, we find no basis for overturning the trial judge's finding of a historic Métis community at Sault Ste. Marie. This finding is supported by the record and must be upheld.

(3) Identification of the Contemporary Rights-Bearing Community

24 Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community. The trial judge found that a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850. While we take note of the trial judge's determination that the Sault Ste. Marie

Métis community was to a large extent an "invisible entity" ([1999] 1 C.N.L.R. 153, at para. 80) from the mid-19th century to the 1970s, we do not take this to mean that the community ceased to exist or disappeared entirely.

25 Dr. Lytwyn describes the continued existence of a Métis community in and around Sault Ste. Marie despite the displacement of many of the community's members in the aftermath of the 1850 treaties:

> [T]he Métis continued to live in the Sault Ste. Marie region. Some drifted into the Indian Reserves which had been set apart by the 1850 Treaty. Others lived in areas outside of the town, or in back concessions. The Métis continued to live in much the same manner as they had in the past — fishing, hunting, trapping and harvesting other resources for their livelihood.
>
> (Lytwyn Report, at p. 31 (emphasis added); see also J. Morrison, "The Robinson Treaties of 1850: A Case Study", at p. 201.)

26 The advent of European control over this area thus interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices, as evidenced by census data from the 1860s through the 1890s. Dr. Lytwyn concluded from this census data that "[a]lthough the Métis lost much of their traditional land base at Sault Ste. Marie, they continued to live in the region and gain their livelihood from the resources of the land and waters" (Lytwyn Report, at p. 32). He also noted a tendency for underreporting and lack of information about the Métis during this period because of their "removal to the peripheries of the town", and "their own disinclination to be identified as Métis" in the wake of the Riel rebellions and the turning of Ontario public opinion against Métis rights through government actions and the media (Lytwyn Report, at p. 33).

27 We conclude that the evidence supports the trial judge's finding that the community's lack of visibility was explained and does not negate the existence of the contemporary community. There was never a lapse; the Métis community went underground, so to speak, but it continued. Moreover, as indicated below, the "continuity" requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself, as indicated below.

28 The trial judge's finding of a contemporary Métis community in and around Sault Ste. Marie is supported by the evidence and must be upheld.

(4) Verification of the Claimant's Membership in the Relevant Contemporary Community

29 While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers. As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified. In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable. In addition, the criteria for Métis identity under s. 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors. This is not an insurmountable task.

30 We emphasize that we have not been asked, and we do not purport, to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35. We therefore limit ourselves to indicating the important components of a future definition, while affirming that the creation of appropriate membership tests before disputes arise is an urgent priority. As a general matter, we would endorse the guidelines proposed by Vaillancourt Prov. J. and O'Neill J. in the courts below. In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance.

31 First, the claimant must self-identify as a member of a Métis community. This self-identification should not be of recent vintage: While an individual's self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.

32 Second, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement in the absence of more extensive argument by the parties in a case where this issue is determinative. In this case, the Powleys' Métis ancestry is not disputed.

33 Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis 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 Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

34 It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

35 In this case, there is no reason to overturn the trial judge's finding that the Powleys are members of the Métis community that arose and still exists in and around Sault Ste. Marie. We agree with the Court of Appeal that, in the circumstances of this case, the fact that the Powleys' ancestors lived on an Indian reserve for a period of time does not negate the Powleys' Métis identity. As the Court of Appeal indicated,

"E.B. Borron, commissioned in 1891 by the province to report on annuity payments to the Métis, was of the view that Métis who had taken treaty benefits remained Métis and he recommended that they be removed from the treaty annuity lists" ((2001), 53 O.R. (3d) 35, at para. 139, *per* Sharpe J.A.). We emphasize that the individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights. It will depend, in part, on whether there was a collective adhesion by the Métis community to the treaty. Based on the record, it was open to the trial judge to conclude that the rights of the Powleys' ancestors did not merge into those of the Indian band.

(5) Identification of the Relevant Time Frame

36 As indicated above, the pre-contact aspect of the *Van der Peet* test requires adjustment in order to take account of the post-contact ethnogenesis of the Métis and the purpose of s. 35 in protecting the historically important customs and traditions of these distinctive peoples. While the fact of prior occupation grounds aboriginal rights claims for the Inuit and the Indians, the recognition of Métis rights in s. 35 is not reducible to the Métis' Indian ancestry. The unique status of the Métis as an Aboriginal people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Métis communities.

37 The pre-contact test in *Van der Peet* is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land. By analogy, the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive

existence and relationship to the land. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.

38 We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The right claimed here was a practice of both the Ojibway and the Métis. However, as long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact.

39 The pre-control test requires us to review the trial judge's findings on the imposition of European control in the Sault Ste. Marie area. Although Europeans were clearly present in the Upper Great Lakes area from the early days of exploration, they actually discouraged settlement of this region. J. Peterson explains:

> With the exception of Detroit, Kaskaskia and Cahokia, the French colonial administration established no farming communities in the Great Lakes region. After 1763, only partly in response to the regionwide resistance movement known as Pontiac's Rebellion, the British likewise discouraged settlement west of Lake Ontario. Desire to keep the peace and to monopolize the profits of the Great Lakes Indian trade were the overriding considerations favouring this policy. To have simultaneously encouraged

> an influx of white farmers would have upset both the diplomatic alliance with the native inhabitants inherited from the French and the ratio between humans and animals on the ground, straining the fur-bearing capacities of the region.
>
> (J. Peterson, "Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815", in *The New Peoples: Being and Becoming Métis in North America* (1985), 37, at p. 40)

This policy changed in the mid-19th century, as British economic needs and plans evolved. The British sent William B. Robinson to negotiate treaties with the Indian tribes in the regions of Lake Huron and Lake Superior. One of his objectives as Treaty Commissioner was to obtain land in order to allow mining, timber and other development, including the development of a town at Sault Ste. Marie (Lytwyn Report, *supra*, at p. 29).

40 The historical record indicates that the Sault Ste. Marie Métis community thrived largely unaffected by European laws and customs until colonial policy shifted from one of discouraging settlement to one of negotiating treaties and encouraging settlement in the mid-19th century. The trial judge found, and the parties agreed in their pleadings before the lower courts, that "effective control [of the Upper Great Lakes area] passed from the Aboriginal peoples of the area (Ojibway and Metis) to European control" in the period between 1815 and 1850 (para. 90). The record fully supports the finding that the period just prior to 1850 is the appropriate date for finding effective control in this geographic area, which the Crown agreed was the critical date in its pleadings below.

(6) Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture

41 The practice of subsistence hunting and fishing was a constant in the Métis community, even though the availability of particular species might have waxed and waned. The evidence indicates that subsistence hunting was an important aspect of Métis life and a defining feature of their special relationship to the land (Peterson, *supra*, at p. 41; Lytwyn Report, *supra*, at p. 6). A major part of subsistence was the practice at issue here, hunting for food.

42 Peterson describes the Great Lakes Métis communities as follows at p. 41:

> These people were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between. By the end of the last struggle for empire in 1815, their towns, which were visually, ethnically and culturally distinct from neighbouring Indian villages and "white towns" along the eastern seaboard, stretched from Detroit and Michilimackinac at the east to the Red River at the northwest.
>
> . . .
>
> . . . [R]esidents [of these trading communities] . . . drew upon a local subsistence base rather than on European imports . . . . [S]uch towns grew as a result of and were increasingly dominated by the offspring of Canadian trade employees and Indian women who, having reached their majority, were intermarrying among themselves and rearing successive generations of métis. In both instances, these communities did not represent an extension of French, and later British colonial culture, but were rather "adaptation[s] to the Upper Great Lakes environment." [Emphasis added.]

43 Dr. Ray emphasized in his report that a key feature of Métis communities was that "their members earned a substantial part of their livelihood off of the land" (Ray Report, *supra*, at p. 56 (emphasis deleted)). Dr. Lytwyn concurred: "The Métis of Sault Ste. Marie lived off the resources of the land. They obtained their livelihood from hunting, fishing, gathering and cultivating" (Lytwyn Report, at p. 2). He reported that "[w]hile Métis fishing was prominent in the written accounts, hunting was also an important part of their livelihood", and that "[a] traditional winter hunting

area for the Sault Métis was the Goulais Bay area" (Lytwyn Report, at pp. 4-5). He elaborated at p. 6:

> In the mid-19th century, the Métis way of life incorporated many resource harvesting activities. These activities, especially hunting and trapping, were done within traditional territories located within the hinterland of Sault Ste. Marie. The Métis engaged in these activities for generations and, on the eve of the 1850 treaties, hunting, fishing, trapping and gathering were integral activities to the Métis community at Sault Ste. Marie.

44 This evidence supports the trial judge's finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850.

(7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted

45 Although s. 35 protects "existing" rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities. A certain margin of flexibility might be required to ensure that aboriginal practices can evolve and develop over time, but it is not necessary to define or to rely on that margin in this case. Hunting for food was an important feature of the Sault Ste. Marie Métis community, and the practice has been continuous to the present. Steve and Roddy Powley claim a Métis aboriginal right to hunt for food. The right claimed by the Powleys falls squarely within the bounds of the historical practice grounding the right.

(8) Determination of Whether or Not the Right Was Extinguished

46 The doctrine of extinguishment applies equally to Métis and to First Nations claims. There is no evidence of extinguishment here, as determined by the trial judge. The Crown's argument for extinguishment is based largely on the Robinson-Huron Treaty of 1850, from which the Métis as a group were explicitly excluded.

(9) If There Is a Right, Determination of Whether There Is an Infringement

47 Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever (appellant's record, at p. 1029). This lack of recognition, and the consequent application of the challenged provisions to the Powleys, infringe their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community.

(10) Determination of Whether the Infringement Is Justified

48 The main justification advanced by the appellant is that of conservation. Although conservation is clearly a very important concern, we agree with the trial judge that the record here does not support this justification. If the moose population in this part of Ontario were under threat, and there was no evidence that it is, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. While preventative measures might be required for conservation purposes in the future, we have not been presented with evidence to support such measures here. The Ontario authorities can make out a case for regulation of the aboriginal right to hunt moose for food if and when the need arises. On the available evidence and given the current

licensing system, Ontario's blanket denial of any Métis right to hunt for food cannot be justified.

49 The appellant advances a subsidiary argument for justification based on the alleged difficulty of identifying who is Métis. As discussed, the Métis identity of a particular claimant should be determined on proof of self-identification, ancestral connection, and community acceptance. The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.

50 While our finding of a Métis right to hunt for food is not species-specific, the evidence on justification related primarily to the Ontario moose population. The justification of other hunting regulations will require adducing evidence relating to the particular species affected. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land.

B. *The Request for a Stay*

51 With respect to the cross-appeal, we affirm that the Court of Appeal had jurisdiction to issue a stay of its decision in these circumstances. This power should continue to be used only in exceptional situations in which a court of general

jurisdiction deems that giving immediate effect to an order will undermine the very purpose of that order or otherwise threaten the rule of law: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. We note that the Powleys' acquittal would have remained valid notwithstanding the stay. It was, however, within the Court of Appeal's discretion to suspend the application of its ruling to other members of the Métis community in order to foster cooperative solutions and ensure that the resource in question was not depleted in the interim, thereby negating the value of the right.

52 The initial stay expired on February 23, 2002, and more than a year has passed since that time. The Court of Appeal's decision has been the law of Ontario in the interim, and chaos does not appear to have ensued. We see no compelling reason to issue an additional stay. We also note that it is particularly important to have a clear justification for a stay where the effect of that stay would be to suspend the recognition of a right that provides a defence to a criminal charge, as it would here.

III. Conclusion

53 Members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food under s. 35(1). This is determined by their fulfillment of the requirements set out in *Van der Peet*, modified to fit the distinctive purpose of s. 35 in protecting the Métis.

54 The appeal is dismissed with costs to the respondents. The cross-appeal is dismissed.

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. G.1, 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.

APPENDIX

Relevant Constitutional and Statutory Provisions

Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46 and 47(1)

46. No person shall knowingly possess any game hunted in contravention of this Act or the regulations.

47. (1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.

Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Appeal dismissed with costs. Cross-appeal dismissed.

Solicitor for the appellant/respondent on cross-appeal: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Pape & Salter, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the intervener the Labrador Métis Nation: Burchell Green Hayman Parish, Halifax.

Solicitor for the intervener the Congress of Aboriginal Peoples: Joseph Eliot Magnet, Ottawa.

Solicitor for the interveners the Métis National Council and Métis Nation of Ontario: Métis National Council, Ottawa.

Solicitor for the intervener the B.C. Fisheries Survival Coalition: J. Keith Lowes, Vancouver.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Solicitor for the intervener the Ontario Métis and Aboriginal Association: Robert MacRae, Sault Ste. Marie.

Solicitors for the intervener the Ontario Federation of Anglers and Hunters: Danson, Recht & Voudouris, Toronto.

Solicitor for the intervener the Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation: Alan Pratt, Dunrobin, Ontario.

Solicitors for the intervener the North Slave Métis Alliance: Chamberlain Hutchison, Edmonton; Burchell Green Hayman Parish, Halifax.

Case Name:

R. v. Laurin

Between
Her Majesty the Queen, and
Marc Laurin, Shawn Lemieux and Roger Lemieux

[2007] O.J. No. 2344
2007 ONCJ 265
North Bay Court File Nos. Roger Lemieux 05-1884, 05-1885, 05-1886 and 05-1887; Shawn Lemieux 05-210 and Mark Laurin 04-2270

Ontario Court of Justice
G.P. Rodgers J.

Heard: March 22-23, June 16, October 13, November 2 and 27, 2006 and February 16, 2007.
Judgment: June 1, 2007.
(36 paras.)

Aboriginal law — Aboriginal rights — MÚtis — Constitution Act, 1982, s. 35, recognition of existing aboriginal and treaty rights — Three MÚtis accused charged with fishing-related offences — Accused argued charges violated terms of agreement between Minister of Natural Resources and MÚtis Nation of Ontario, whereby MÚtis with Harvester Card permitted to harvest wildlife or fish for personal consumption or social or ceremonial purposes in their respective traditional or treaty territories — Card identified relevant territory of cardholder — Dispute arose between MNR and MNO as to geographic scope of Agreement — Agreement silent as to any geographic limitations — Reliance on territorial designation on Card signified that MNR accepted such designation for purposes of Agreement — Charges ultimately stayed.

Aboriginal law — Fishing rights — Regulation of — Three MÚtis accused charged with fishing-related offences — Accused argued charges violated terms of agreement between Minister of Natural Resources and MÚtis Nation of Ontario, whereby MÚtis with Harvester Card permitted to harvest wildlife or fish for personal consumption or social or ceremonial purposes in their respective traditional or treaty territories — Card identified relevant territory of cardholder — Dispute arose between MNR and MNO as to geographic scope of Agreement — Agreement silent as to any geographic limitations — Reliance on territorial designation on Card signified that MNR accepted such designation for purposes of Agreement — Charges ultimately stayed.

Constitutional law — Canadian constitution — Aboriginal rights — Three MÚtis accused charged with fishing-related offences — Accused argued charges violated terms of agreement between Minister of Natural Resources and MÚtis Nation of Ontario, whereby MÚtis with Harvester Card permitted to harvest wildlife or fish for personal consumption or social or ceremonial purposes in their respective traditional or treaty territories — Card identified relevant territory of cardholder — Dispute arose between MNR and MNO as to geographic scope

of Agreement — Agreement silent as to any geographic limitations — Reliance on territorial designation on Card signified that MNR accepted such designation for purposes of Agreement — Charges ultimately stayed.

Application by the three accused for a stay of proceedings on the basis that the charges laid against them violated the terms of an agreement reached between the Minister of Natural Resources (MNR) and the MÚtis Nation of Ontario (MNO). In July 2004, the MNR and the MNO entered into an agreement whereby the government would issue a limited number of Harvester Cards to MÚtis persons that allowed the cardholder to harvest wildlife or fish for personal consumption or for social or ceremonial purposes in the cardholder's traditional or treaty territory, subject to safety and conservation concerns (the Agreement). The Harvester Card identified the harvester and the traditional territory where harvesting was authorized for that person. The Agreement was not a final agreement, but an interim one. A dispute arose between the MNR and the MNO as to the geographic scope of the Agreement. The two sides disagreed regarding where traditional MÚtis communities were located in Ontario. The MNR disputed the existence of MÚtis communities south and east of Sudbury while the MNO argued that traditionally there were MÚtis communities that existed south and east of Sudbury. The accused had been charged with offences in this geographically disputed area. Thus, the issue to be decided by the court was whether the laying of the charges against the accused violated the Agreement between the MNR and the MNO.

HELD: If the accused were valid card holders and were harvesting in their card designated territories, and there were no safety or conservation concerns, then they were entitled to believe that they would not be charged as per the Agreement. The Agreement itself was silent as to any geographic limitations. There was no mention of the Agreement only applying north and east of Sudbury. Further, the reliance on Harvester Cards, which explicitly contained the territorial designation of the cardholder, signified that the MNR accepted such designations for the purpose of the Agreement. Thus, laying charges against a valid cardholder who was harvesting in the territory designated on the card would breach the terms of the Agreement. The accused were later determined to be valid cardholders and thus the charges against them were stayed.

Statutes, Regulations and Rules Cited:

Constitution Act, 1982, s. 35

Counsel:

Nicholas Adamson and Paul Gonsalves for the Respondent.

Jean Teillet and Jason Madden for the Applicants Marc Laurin, Shawn Lemieux and Roger Lemieux.

¶ 1 **G.P. RODGERS J.**:— Marc Laurin, Shawn Lemieux and Roger Lemieux are Métis. On separate dates in 2003 each man was found fishing on the French River by officers of the Ministry of Natural Resources. Marc Laurin was ice fishing on January 18, 2003. Shawn Lemieux was ice fishing on March 7, 2003. Roger Lemieux was fishing on June 28, 2003. Each individual was

charged with fishing violations just before the 2 year limitation period for such offences expired.

¶ 2 These Defendants have applied for a Stay of Proceedings. They assert that the M.N.R.'s decision to prosecute violates the terms of an agreement reached on July 7, 2004 between the Minister of Natural Resources and the Métis Nation of Ontario.

The July 7, 2004 Agreement

¶ 3 The July 7th agreement was concluded by Mr. Tony Belcourt, President of the Métis Nation of Ontario and Mr. David Ramsey, Minister of Natural Resources for Ontario.

¶ 4 It provides:

> "1. MNO and MNR agree that MNO will issue a maximum of 1250 Harvester's Cards for this year. The number of 1250 is for this year only. A mutually agreeable process for a change in this number will be developed subject to research and evaluation of the Harvesters Card system.
> 2. The MNR will apply the *Interim Enforcement Policy* (IEP) to those valid Harvesters Card holders who are harvesting food, within their traditional territories and pursuant to the safety and conservation values set out in the IEP in a manner which is identical with its application to First Nations.
> 3. This Interim Agreement will be for two years with the intention that it will be extended by mutual consent until a final agreement is in place.
> 4. Both sides agree that an independent evaluation of the MNO Harvesters Card system will be performed based on mutually agreeable terms of reference."

¶ 5 The Interim Enforcement Policy (IEP) was developed by the Ontario government in response to the Supreme Court of Canada decision in *R. v. Sparrow*. Its stated objective was to "minimize the number of instances where aboriginal people are in conflict with the Government of Ontario".

¶ 6 The IEP at first sets out the essence of the policy and then identifies exceptions to the policy. The general policy is set out in paragraph 1:

> "An aboriginal person who identifies himself or herself as such, harvesting or transporting wildlife or fish as food for personal consumption and for social and ceremonial purposes, shall not be subject to enforcement procedures except as set out below.
> Throughout the province this policy applies to an aboriginal person harvesting wildlife or fish for personal consumption or social or ceremonial purposes in the area which was the subject of the treaty under which he or she is entitled to benefits. In addition, where First Nations have a tradition of harvest beyond the boundaries of such treaty areas or where treaties do not explicitly recognize traditional harvesting rights, this policy will apply within areas in which they have a tradition of such harvest. Boundaries of such traditional harvesting areas will be clarified through future negotiated agreements. In the interim, best efforts should be made to outline traditional harvesting areas, ...

¶ 7 Immediately after the July 7, 2004 agreement was reached the MNR and the MNO began to differ regarding its meaning.

¶ 8 The MNO immediately informed its members that the agreement meant that Harvester Card holders would not be charged with harvesting activities carried out within traditional harvesting areas as signified by the Harvesters Card.

¶ 9 The Ministry considered the MNO's interpretation of the agreement to be geographically over-inclusive. In a letter to Mr. Belcourt dated July 19, 2004 Minister Ramsey wrote:

> "I am very pleased that we were able to reach an historic agreement regarding Métis hunting rights in Ontario ...
> As we discussed at our meeting, the Supreme Court decision of *R. v. Powley* was a landmark decision for the Métis. The Ontario government remains committed to acting in a manner consistent with that ruling. By doing so, we can ensure that we are proceeding in a legally defensible manner. (emphasis added) We must ensure that the maximum 1250 Harvester's Cards to be issued this year are to individuals and in areas, (emphasis added) that would currently withstand scrutiny under the tests set out in the *Powley* decision.
> ... Clarity on the specific terms of our interim agreement, including its geographic scope (emphasis added) and the sharing of harvest information must be reached quickly in order to avoid unnecessary conflict and confusion as your members undertake their harvesting activities."

¶ 10 The July 7, 2004 agreement was concluded after lengthy negotiations between the MNR and MNO. This process was in response to the Ontario Court of Appeal's decision in *R. v. Powley, 53 O.R. (3d) 35* delivered on February 23, 2001. These negotiations have been described variously by both sides as "bitter", "fractious" and "adversarial".

¶ 11 Ultimately the *Powley* case was decided by the Supreme Court of Canada in 2003, *R. v. Powley [2003] 2 S.C.R. 207, [2003] S.C.J. No. 43 (S.C.C.)*. The Court in its ruling determined that:

1. Métis harvesting rights are communal.
2. These rights are site specific. They can be exercised by community members only in the harvesting territory of the right bearing community.
3. To qualify as a section 35, rights bearing community a Métis community must satisfy certain conditions.

    a) It must have been in existence before effective European control of the area.
    b) The harvesting practise must have been integral to the distinctive culture of the Métis community.
    c) The Métis community must have continued to exist, and continued the harvesting practice.

4. Individuals asserting a Métis right must:

a) self identify as Métis.
b) be accepted by the contemporary Métis community descended from the historic community as a member of that community and,
c) demonstrate a genealogical connection to the historical Métis community.

5. Membership in a Métis organization is not sufficient, in itself to demonstrate membership in a rights-bearing Métis community and entitlement to section 35 rights. ("Section 35 rights" refers to S. 35 of the *Constitution Act, 1982* which provides in part: 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.)

¶ 12 Minister Ramsey by letter of July 19, 2004 insisted that the July 7, 2004 agreement be implemented in a way that was consistent with the comprehensive requirements of the *Powley* test.

¶ 13 By July 2004 it was clear that the MNO and the MNR were in conflict over where rights bearing Métis communities existed in Ontario. The government's position at that time was that there was insufficient evidence of Métis communities that would meet the Powley test in areas south and east of Sudbury. They remain steadfast in that position. (It is of interest to note that notwithstanding S. 35 of the *Constitution Act 1982* as recently as 2003 the MNR maintained that the Métis had no special right to harvest food anywhere in the province. "Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever." (*R. v. Powley (S.C.C.) Para 47*)

¶ 14 The MNO has maintained that there are Métis communities south and east of Sudbury that meet the *Powley* test. Indeed as of July 2004 the MNO had issued approximately 950 Harvesters Cards. Over 50% of those cards were issued for harvesters living in the "Mattawa/Nipissing" and "Georgian Bay" areas; territory clearly south or east of Sudbury. All three Defendants were found fishing in the French River area which the MNO considers to be in the "Mattawa/Nipissing" harvesting territory.

¶ 15 The MNO Harvesters Card system was implemented in 1995. An MNO citizen must apply for a Harvesters Card. There are approximately 12,000 registered MNO citizens. As indicated currently the MNO has issued 950 Harvesters Cards. Each Harvesters Card or Certificate identifies the harvesters and designates the MNO designated traditional harvesting territory for that individual. Printed on the back of each card are these words: "The bearer of this card is authorized to harvest plants, fish and wildlife in his/her traditional or treaty territory in accordance with the terms and conditions of the Métis Nation of Ontario's Harvesting Policy under the direction of the Captains of the Hunt".

Analysis

¶ 16 The narrow issue to be determined is whether the laying of these charges violated the terms of the July 7, 2004 agreement between the Métis Nation of Ontario and the Ministry of Natural Resources. For the reasons expressed below I conclude that if these Defendants were

indeed valid Harvester Card holders at the time of harvesting and if their Harvester Cards designated that they were authorized to fish in the Mattawa/Nipissing territory then these charges violate the letter and the spirit of the July 7, 2004 agreement.

¶ 17 The July 7, 2004 agreement was not intended to be a final agreement. This is explicit in its wording. Paragraph 3 reads:

> "This Interim Agreement (emphasis added) will be for two years with the intention that it will be extended by mutual consent until a final agreement is in place."

¶ 18 It is clear that the July 7, 2004 agreement was intended to facilitate further research and discussion toward an eventual permanent agreement.

¶ 19 The parties' agreement to rely on the MNO Harvester Card system for this two year interim period is highly significant. In essence the government was prepared in the short term to accept the legitimacy of the Harvester Card system and the MNO citizen registry upon which it was based. This short term reliance was conditional on there being an opportunity for the Ministry to research and evaluate the Harvester Card system.

¶ 20 The Harvester Card system, however, does not simply identify the harvester. It designates the traditional territory where harvesting is authorized. By accepting the legitimacy of the Harvester Card system I find the Ministry also agreed implicitly to accept on a without prejudice basis the territorial designation on each card. Paragraph 2 of the agreement reads:

> "The MNR will apply the *Interim Enforcement Policy* (IEP) to those valid Harvesters Card holders who are harvesting food, within their traditional territories ..."

¶ 21 This agreement to rely on the Harvesters Card system in the short term included reliance on an essential feature of that system; the harvesting territory designation.

¶ 22 As of July 7, 2004 the MNO issued 950 Harvesters Cards. At least 475 of these cards were issued for areas south and east of Sudbury; areas the Ministry did not recognize as containing Métis communities meeting the *Powley* test. On July 7, 2004 the parties agreed that as many as 1250 Harvesters Cards could be issued that year. There is no reference anywhere in the July 7, 2004 agreement to geographical limits apart from the harvesting being restricted to traditional territories.

¶ 23 The stated objective of the Interim Enforcement Policy that the agreement invoked was:

> "to minimize the number of instances where aboriginal people are in conflict with the Government of Ontario".

¶ 24 The Minister's agreement to potentially increase the number of Harvester Cards issued with the knowledge that over half of the cards issued to that date were for areas the Ministry did not accept as containing rights-bearing communities is a strong indicator that the Minister in good faith was prepared to stand down on this issue in the short term and accept the territorial

authorization that the Harvester Card system provided.

¶ 25 To agree to the issuing of a greater number of cards without being ad idem on where those cards were mutually considered valid authorizations to harvest would be little more than an agreement to increase the number of instances where aboriginal people are in conflict with the Government of Ontario. This is exactly the opposite objective of the Interim Enforcement Policy which the July 7, 2004 agreement purported to apply to the Métis.

¶ 26 I conclude that the agreement's silence regarding geographical application and its reliance on and expansion of the Harvesters Card system signifies that the parties agreed to accept the validity of the territorial designation of the Harvesters Cards for the purposes of implementing the Interim Enforcement Policy. It is unlikely that the parties by way of the July 7, 2004 agreement intended to ratchet up the conflict that had already developed.

¶ 27 This interpretation of the meaning of the agreement is also consistent with a principled approach mandated by the Supreme Court of Canada later in 2004 in *Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73 (CanLii)*. In that decision Chief Justice McLachlin held at paragraph 16:

> "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples .... It is not a mere incantation, but rather a core precept that finds its application in concrete practices."

At paragraph 17:

> "The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which is stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

At paragraph 19:

> "The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of 'sharp dealing'."

At paragraph 37:

> "... Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate."

¶ 28 There is some recognition on the part of the MNR that the MNO's claim of the existence

of communities satisfying the *Powley* test south and east of Sudbury was at least arguable. On October 5, 2004 Mr. Dave Payne, MNR chief negotiator wrote to Mr. Gary Lipinski, chief negotiator for the MNO. He noted:

> "... the four points need to be implemented to reflect the likely geographic limits of historic Métis communities and their harvesting areas in Ontario."
> On the basis of historical research presently available to Ontario, if the four points are to be implemented in a manner consistent with *Powley*, MNR would generally recognize only those Métis subsistence harvesting activities occurring north of the Sudbury region.
> In the interests of reaching agreement for the interim, the MNR is prepared to consider implementing the interim harvesting agreement on the basis of currently available information (emphasis added) and MNO's assertion of historic Métis communities in the Sudbury, North Bay, and Mattawa and Penetanguishene areas. This must, however, be accompanied by a commitment to immediately pursue collaborative research addressing these areas (and, in particular, agreement to give researchers access to sources that are uniquely accessible to the MNO and its members) so as to resolve uncertainties in respect to these areas. Ontario is of the view that this would serve as a reasonable and defensible basis (emphasis added) for extending the effective application of the Interim Enforcement Policy to these areas, until such time as the further research could be completed."

¶ 29 The offer contained in the October 5, 2004 letter was not well received but it does acknowledge that recognition of potential harvesting rights in North Bay and Mattawa was reasonable and defensible in the short term. I agree with this assessment. That acknowledgement in my view, signified an obligation to at least consult and in this case to accommodate pursuant to *Haida*. Here the MNO was asserting a yet unproven claim that Métis communities south and east of Sudbury met the *Powley* test. An agreement to respect the Harvesters Card system until such claims could be researched was not merely legally defensible but a highly principled response, consistent with *Haida*.

¶ 30 I interpret the July 7, 2004 agreement as follows:

1) The agreement was intended to be an interim agreement to facilitate further research regarding the MNO registry and Harvester Card system.
2) The parties agreed to rely on the short term on a without prejudice basis on the validity and legitimacy of the MNO Harvester Card system including its harvesting territory designation. This was in my view what made the agreement "historic".
3) If a valid Harvester Card holder was harvesting within the territory designated by his/her card, the Interim Enforcement Policy would apply and no charges would be laid for matters not raising safety or conservation concerns.
4) The agreement is silent concerning a north and west of Sudbury application. Such a meaning cannot be implied.

¶ 31 I find that the laying of charges (not involving safety or conservation issues) against any valid Harvester Card holder, harvesting in the territory designated on the card, within two years of

the July 7, 2004 agreement would be a breach of the terms of that agreement. Further, I find that if indeed Mr. Lemieux, Mr. Laurin and Mr. Lemieux were valid card holders, harvesting in their card designated territories prior to July 7, 2004; they were entitled to believe they would not be charged after that agreement was made.

Stay of Proceedings

¶ 32 Superior Court Justice Hill recently in *R. v. M.(R.) 83 O.R. (3d) 349 at paragraph 44* writes:

> "As noted in *R. v. Goodwin [1981] N.S.J. No. 61, 43 N.S.R. (2d) 106 (S.C.) at paragraphs 12-13*, respecting an agreement that is not unconscionable:
>
> > The Crown was under no duty to make any bargain ... It may be that the bargain should not have been made ... However, it was made and ... it must be honoured. Plain honesty and fairness demand that the agreement not be now repudiated.
> > A bargain is a bargain and, if the Crown does not wish to be bound by it, the simple solution is to make no bargain at all."

¶ 33 The Courts have a residual discretion to remedy an abuse of the Court's process. This must only be in the "clearest of cases amounting to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. (*R. v. Power [1994] 1 S.C.R. 601 paragraph 11*) Prosecutorial bad faith or flagrant impropriety is not invariably a prerequisite for an abuse of process finding *R. v. M.(R.) Supra p. 400.*

¶ 34 The Court should be careful not to second guess the Crown's motives or decisions, however in this case I have concluded that to proceed with these charges would be unfair to the point that it would be contrary to the interest of justice.

¶ 35 The laying of these charges contravened an agreement made by no less than a Minister of the Crown not to prosecute valid Métis Harvester Card holders harvesting in their traditional territories as defined by their cards. If indeed these Defendants possessed valid Harvesters Cards at the time of their fishing for the territories where they fished, the proceedings against them should be stayed.

¶ 36 This ruling is limited to the issue of whether these prosecutions amounted to a violation of the July 7, 2004 Interim agreement which expired in July of 2006. I have made no ruling regarding the merits of any claim that the Mattawa/Nipissing area contains section 35 rights bearing Métis communities. That has yet to be determined, ideally between the parties themselves.

G.P. RODGERS J.

NOTE: On June 12, 2007 the parties agreed that all three Defendants were valid Harvester Card Holders at the time of harvesting. Accordingly, all charges are stayed against each Defendant.

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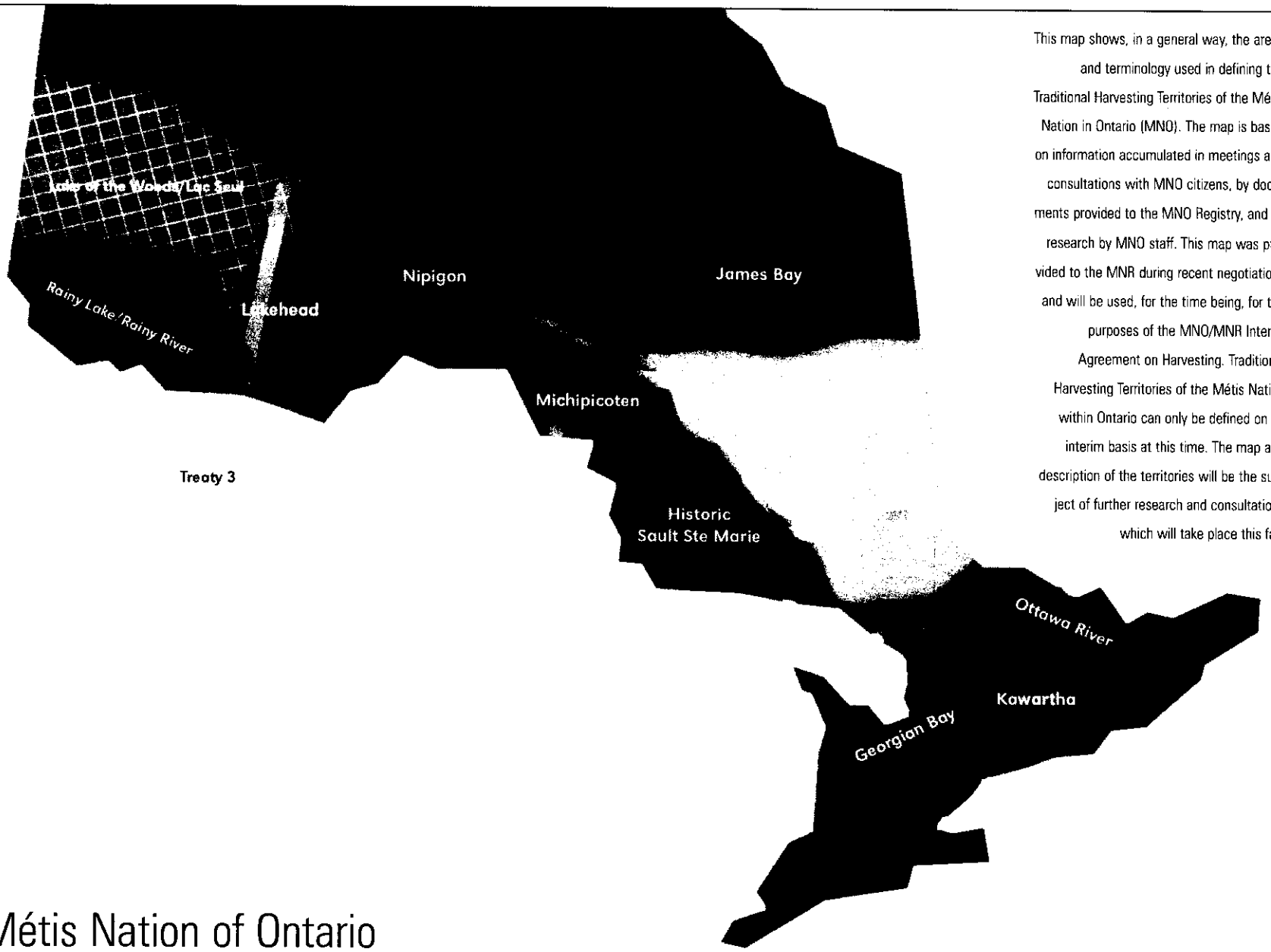
Points of Agreement for an Interim MNR/MNO Harvesting Agreement

1. MNO and MNR agree that MNO will issue a maximum of 1250 Harvester's Cards for this year. The number of 1250 is for this year only. A mutually agreeable process for a change in this number will be developed subject to research and evaluation of the Harvesters Card system.
2. The MNR will apply the *Interim Enforcement Policy* (IEP) to those valid Harvesters Card holders who are harvesting for food, within their traditional territories and pursuant to the safety and conservation values set out in the IEP in a manner which is identical with its application to First Nations.
3. This Interim Agreement will be for two years with the intention that it will be extended by mutual consent until a final agreement is in place.
4. Both sides agree that an independent evaluation of the MNO Harvesters Card system will be performed based on mutually agreeable terms of reference.



This map shows, in a general way, the areas and terminology used in defining the Traditional Harvesting Territories of the Métis Nation in Ontario (MNO). The map is based on information accumulated in meetings and consultations with MNO citizens, by documents provided to the MNO Registry, and by research by MNO staff. This map was provided to the MNR during recent negotiations and will be used, for the time being, for the purposes of the MNO/MNR Interim Agreement on Harvesting. Traditional Harvesting Territories of the Métis Nation within Ontario can only be defined on an interim basis at this time. The map and description of the territories will be the subject of further research and consultations which will take place this fall.

Métis Nation of Ontario

Traditional Harvesting Territories

July 13, 2007

PROVINCE AND MÉTIS NATION OF ONTARIO TO RENEW DISCUSSIONS
Joint News Release

THUNDER BAY – The Ontario government and the Métis Nation of Ontario (MNO) are committed to renewed discussions on Métis harvesting, Minister of Natural Resources David Ramsay and MNO President Tony Belcourt announced in Thunder Bay at the MNO Annual Assembly.

"Ontario is committed to respecting Métis food harvesting rights," Ramsay said. "We look forward to undertaking renewed discussions with the Métis Nation of Ontario."

"MNO is prepared to work with MNR in a spirit of cooperation," said Belcourt. "We have always been committed to conservation and to a working relationship with the Ontario government."

A recent Ontario Court of Justice decision stayed charges against three men who held harvesting cards issued by the Métis Nation of Ontario. Ontario will not appeal the decision of the court.

Today at the Métis Nation of Ontario assembly in Thunder Bay, Minister Ramsay and President Belcourt committed to a renewed relationship and will work together respecting the July 7, 2004 agreement.

FOR MORE INFORMATION

Media Enquiries

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Minister's Office
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Katelin Peltier
Acting Manager of Communications
Métis Nation of Ontario
Cell: *613-859-7130*

MÉTIS NATION OF ONTARIO
COMMUNITY COUNCILS

1 Kenora Métis Community Council
Kenora

2 Northwest Métis Nation of Ontario
Dryden

3 Sunset Country Métis
Fort Frances

4 Thunder Bay Métis Council
Thunder Bay

5 Geraldton & Aree Métis Council
Greenstone

6 Timmins Métis Council
Timmins

7 Temiskaming Métis Council
Haileybury

8 Northern Lights Métis Council
Cochrane

9 Chapleau Métis Council
Chapleau

10 Historic Sault Ste Marie Métis Council
Sault Ste Marie

11 North Shore Métis Council
Thessalon

12 Sudbury Métis Council
Sudbury

13 North Bay Métis Council
North Bay

14 Ottawa Regional Métis Council
Ottawa

15 Georgian Bay Métis Council
Midland

16 Moon River Métis Council
Mactier

17 Grey/Owen Sound Métis Council
Owen Sound

18 Sanguingue Métis Council
Port Elgin

19 MNO Region 8 Office
Toronto

20 Credit River Métis Council
Brampton

21 Oshawa Métis Council
Oshawa

22 Grand River Métis Community Council
Kitchener

23 Hamilton/Wentworth Métis Council
Hamilton

24 Niagara Regional Métis Council
Welland

25 Windsor/Essex Métis Council
Windsor

the Métis Nation of Ontario

the Métis Nation of Ontario

INFORMATION ON CONSULTING WITH THE ONTARIO MÉTIS COMMUNITY

FALL 2007

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TABLE OF CONTENTS

the Métis Nation of Ontario

A. The Métis People

The Métis Nation

Prior to Canada's crystallization as a nation in west central North America, the Métis people emerged out of the relations of Indian women and European men. The initial offspring of these Indian and European unions were individuals who possessed mixed ancestry. Subsequent intermarriage between Métis women and Métis men resulted in the genesis of a new Aboriginal people with a distinct identity, culture and consciousness – the Métis.

Distinct Métis communities emerged, as an outgrowth of the fur trade, along parts of the freighting waterways and Great Lakes of Ontario, throughout the Northwest and as far north as the McKenzie River. The Métis people and their communities were connected through the highly mobile fur trade network, seasonal rounds, extensive kinship connections and a collective identity (i.e. common culture, language, way of life, etc.).

Today, the Métis people continue to constitute a distinct Aboriginal nation largely based in west central North America. The Métis Nation grounds its assertion of Aboriginal nationhood on well-recognized international principles and law. It has a shared history, a common culture (song, dance, dress, national symbols, etc.), a unique language (Michif, with various regional dialects), extensive kinship connections from Ontario westward, a distinct way of life, a traditional territory and a collective consciousness.

The Métis Nation Homeland

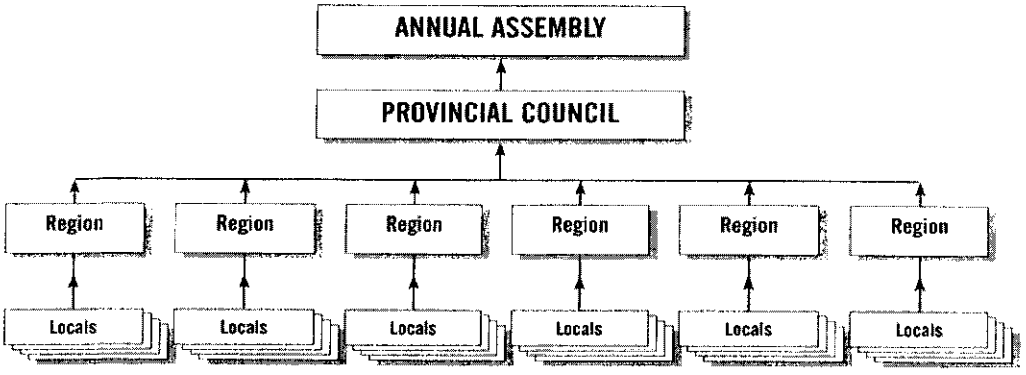
The Métis Nation's Homeland is based on the traditional territory, within west central North America, on which the Métis people have historically lived and relied. This traditional territory roughly includes Ontario, Manitoba, Alberta, Saskatchewan, British Columbia and the Northwest Territories and goes into the northern United States (i.e. North Dakota, Montana).

Regional Métis Governments

Today, the Métis Nation is represented through democratically-elected, province-wide governance structures from Ontario westward; namely, the Métis Nation of Ontario, Manitoba Métis Federation, Métis Nation-Saskatchewan, Métis Nation of Alberta and Métis Nation British Columbia.

The Métis people mandate these governance structures through province-wide ballot box elections held at regular intervals for regional and provincial leadership. Métis citizens are represented and participate in these Métis governance structures by way of elected "locals" or "community councils" as well as provincial assemblies held annually. Also, all of these provincial governance structures have established infrastructures through which youth and women are represented and participate within the affairs of their respective regional Métis government.

MODEL GOVERNING MEMBER GOVERNANCE STRUCTURE



Métis Nation Citizenship

After years of consultation, in September 2002, the Métis people adopted a national definition of Métis for citizenship within the Métis Nation:

> Métis means a person who self-identifies as Métis, is of historic Métis Nation Ancestry, is distinct from other Aboriginal Peoples and is accepted by the Métis Nation.

Based on this definition, it is estimated that there are 350,000 to 400,000 Métis Nation citizens in Canada. The Métis Nation is now in the process of uniformly implementing this definition across the Homeland.

Métis Demographics in Canada

Although the Canadian Census has never accurately reflected the Métis Nation's population, in 2001, the Métis population, as set out in the Census, from Ontario westward was 262,785. Based on these statistics, the Métis now represent 26% of the total Aboriginal population in Canada. The 2001 Census further reports that one-third of the Métis population is under the age of fourteen and two-thirds of the Métis population live in urban centers.

B. The Métis Nation of Ontario

The Métis people have a long, rich and proud history within Ontario. Historic Métis communities have existed and continue to exist along the waterways of Ontario, around the Great Lakes and throughout the province.

In the 2001 Census, a total of 48,340 individuals in Ontario identified as having Métis ancestry. Métis represent approximately 25% of the total Aboriginal population in the province.

The Métis Nation of Ontario (MNO) was established in 1993 to represent Métis who are the descendants of historic Métis settlements throughout Ontario. The MNO also represents Métis living in Ontario from other Métis settlements located throughout the Métis Nation homeland in western Canada. The MNO is the only province-wide Métis representative body in Ontario that is recognized by the provincial and federal governments.

Since 1993, the MNO has grown and evolved into a well-established and highly regarded representative body for the Ontario Métis population. The MNO has developed Métis-specific governance structures and institutions that meet the needs of the Ontario Métis population and have continued to push forward on the Métis people's self-government aspirations and objectives. The MNO's governance structures and institutions are described in more detail below.

Registry

The MNO has established a centralized Registry of Métis citizens that is located in Ottawa. This Registry is based on the national definition for citizenship in the Métis Nation that has been adopted by Métis governments from Ontario westward.

Since 1993, a total of 17,000+ individuals have applied to the MNO for citizenship. In 2007, a total of 12,000+ of those applicants (over the age of 16 years) have been approved for citizenship. The rest of those applicants (some 3,500+) have 'pending' applications due to missing information or documentation in the application, with the remaining applications being refused because they do not meet the MNO's citizenship requirements. Since children under the age of 16 years are not currently registered by the MNO, it is estimated that the MNO represents over 40,000 Métis throughout Ontario.[1]

Governance Structures

At the provincial and regional level, the MNO is governed by a democratically elected Provisional Council of the Métis Nation of Ontario (PCMNO) which consists of 19 Métis citizens who are elected by province-wide ballet box elections every three years. The MNO has an Electoral Code and an independent Chief Electoral Officer is appointed every three years in order to manage the MNO elections.

[1] This number is based on the Census Canada assumption that on average each registered MNO household has 2.2 children under the ages of 16 years.

The PCMNO is made up of a 5 member Executive (President, Chair, Vice-Chair, Secretary/Treasurer and Senator), along with 9 Regional Councilors, a Post-Secondary Student representative, the Chair of the Métis Nation of Ontario Youth Council (MNOYC) and 3 Senators. The MNO President appoints portfolio holders in women's issues, education, training, environment, justice, health, natural resources, housing, bilateral and tripartite processes and self-government from amongst the PCMNO.

In addition, each year the MNO holds an Annual General Assembly where MNO citizens from throughout the province are able to attend in order receive updates on the MNO's yearly progress and to provide ongoing direction to the MNO's leadership in between elections.

At the local level, MNO citizens are represented by MNO Community Councils throughout the province. These Community Councils receive their mandate, through Community Charter Agreements, to represent MNO citizens with specified geographic areas. These Community Councils are required to hold regular public meetings and ballot box elections pursuant to their Community Charter Agreements. The MNO has approximately 30 Community Councils throughout the province. A map of that includes the names and locations of these Community Councils is attached as **Appendix A**.

Harvesters Policy

In 1995, the MNO established its own *Harvesters Policy* to facilitate the Métis harvest in Ontario. The *Harvesters Policy* sets out conservation and safety rules for Métis harvesters to follow, along with criteria for MNO citizens to meet in order to be issued a MNO Harvesters Card by the MNO Registry.

These Harvesters Cards enable Métis harvesters to harvest for food within their traditional territory under the authority of the *Harvesters Policy*. A map setting out these traditional Métis harvesting areas is attached as **Appendix B**. In addition, the Métis harvest is overseen by appointed Captains of the Hunt. For additional information on the recognition of the MNO Harvesters Card system by the Ontario Government see section below on Métis Rights in Ontario.

Program and Service Delivery

The MNO has also built an impressive province-wide service delivery structure to meet the needs of its citizens and communities. Current MNO branches include: Health Services Branch; Training Initiatives Branch; Housing Branch; Youth Branch and the Communication Branch. Through these branches, the MNO maintains over 30 service delivery points across the province, administers over $12 million annually and employs 150+ employees across the province. For additional information on the programs and services offered by the MNO see the MNO's website at www.metisnation.org.

Institutions

The MNO has also established a series of Métis institutions to support its overall goals and aspirations. These include the MNO Cultural Commission (a federally-registered charity to support Métis cultural development), the MNO Development Corporation (a for-profit corporation to support Métis economic development and self-sufficiency) and the Métis Voyageur (a quarterly newspaper that is distributed to every MNO household throughout the province).

Relationships with Governments and First Nations

The MNO is the only province-wide Métis representative body in Ontario that is recognized by the provincial and federal governments. It is the Ontario affiliate of the Métis National Council which represents the Métis Nation at the national and international levels.

Pursuant to Ontario's *New Approach to Aboriginal Affairs*, the MNO is engaged in a Bilateral Process with the Ontario Government through the Ontario Secretariat for Aboriginal Affairs. As a part of this Bilateral Process, the MNO, along with the Chiefs of Ontario, meets annually with the Premier. The MNO also meets regularly with the Minister for Aboriginal Affairs, related to MNO-Ontario bilateral issues. The Ontario Government also participates in a MNO-Ontario-Canada tripartite process.

The Government of Canada provides limited annual support to the MNO to represent the interests of the Métis people throughout all of Ontario. As well, the Government of Canada participates in a MNO-Ontario-Canada tripartite process.

The MNO also has positive relations with First Nation groups throughout the province. In 2004, the MNO signed a Protocol Accord with the Chiefs of Ontario which establishes an ongoing relationship, along with bi-annual meeting. The MNO has a Nation-to-Nation Relationship Agreement with the Anishnabek Nation. As well, the MNO's leadership regularly meets with regional First Nation leaders to discuss areas of joint interest.

C. Métis Rights in Ontario

In 1982, the Métis people were recognized as one of the three Aboriginal peoples in Canada and their rights were protected in Canada's Constitution. Section 35 of the *Constitution Act, 1982* states:

> (1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Since it creation, the MNO has been at the forefront of the advancement of the Métis rights agenda in Ontario and throughout Canada. The MNO initiated and supported the historic *Powley* case, which recognized and affirmed the constitutional rights of the Métis people, from trial to the Supreme Court of Canada.

In September 2003, the Supreme Court of Canada, in *R. v. Powley,* [2003] 2 S.C.R. 207, confirmed that Métis communities in Ontario have existing Aboriginal harvesting rights that are protected by s. 35 of the *Constitution Act, 1982.* This decision followed Métis victories at the Ontario Court of Justice, the Ontario Superior Court of Justice and the Ontario Court of Appeal.

In July 2004, following the release of the *Powley* decision and negotiations, the MNO and the Ontario Ministry of Natural Resources (MNR) entered into a MNO-MNR Harvesting Agreement to accommodate Métis harvesting in Ontario. This Agreement provided that the MNR would recognize the MNO Harvesters Card system. As a result, MNO Harvesters Card holders to harvest for food in their traditional territories, consistent with conservation and safety rules, without fear of harassment or charges, while the MNO and MNR worked on longer term research and identification issues.

Unfortunately, in the Fall of 2004, the MNR unilaterally re-interpreted the terms of the MNO-MNR Harvesting Agreement to exclude over 50% of the MNO Harvesters Card holders by drawing an arbitrary line around Sudbury. Métis living south of the MNR's line began to be charged. In response, the MNO launched an application for a stay of proceedings in *R. v. Laurin, Lemieux and Lemieux* (a case where 3 MNO Harvesters Card holders were charged south of the MNR's line) based on the MNO-MNR Harvesting Agreement.

On June 12th, 2007, Justice Rodgers of the Ontario Court of Justice, delivered his judgment in *R. v. Laurin, Lemieux and Lemieux* and granted stays of proceedings to Messrs. Laurin, Lemieux and Lemieux based on the MNO-MNR Harvesting Agreement. A copy of the court's decision in is attached at **Appendix C**.

The court held that the MNO-MNR Harvesting Agreement was to apply to all of the MNO's traditional harvesting areas, not just areas north of Sudbury. The court also found that the MNO-MNR Harvesting Agreement represented the MNR's acceptance of the MNO Harvesters Policy and Cards as a means to accommodate credible Métis harvesting rights claims in the interim, as the parties worked together on longer term issues. Further, the court held that the MNO-MNR Harvesting Agreement was legally enforceable and must be respected by the MNR and the Ontario Government.

On June 19th, 2007, the Ontario Government informed the MNO that it would not be appealing the court decision in *R. v. Laurin, Lemieux and Lemieux*. In July 2007, the MNO and MNR announced renewed negotiations on Métis harvesting and access to resources issues (i.e. forestry, trapping, etc.).

As a result of these developments, it is important to note that both the Ontario Government and Ontario courts have now recognized proven and asserted Métis rights claims throughout the province. Based on the credibility of these claims, the Ontario Government has entered into an accommodation with the Métis people covering their identified traditional harvesting areas. These traditional harvesting areas cover most of the province of Ontario. The scope of these traditional harvesting areas are outlined in the map below:

D. Consultation and Accommodation with Métis in Ontario

The Law of Consultation and Accommodation

In the *Powley* decision, the Supreme Court of Canada confirmed that Métis have rights that are protected by s. 35 of the *Constitution Act, 1982*. The Supreme Court articulated the purpose of s. 35 for the Métis, confirmed the "status of Métis people as full-fledged rights-bearers" and affirmed that the Crown has similar duties and obligations to the Métis people and their rights as it does to Indian and Inuit peoples.

In 2004, in the *Haida Nation* and *Taku River* decisions, the Supreme Court of Canada confirmed that s. 35 requires the Crown to consult with Aboriginal peoples and, where appropriate, accommodate credible Aboriginal rights claims where the Crown has real or constructive knowledge of the potential existence of Aboriginal rights or title. The Supreme Court held that s. 35 and the Honour of the Crown requires "[t]he potential rights embedded in these [unresolved but asserted] claims" to be "determined, recognized and respected" through a process of reconciliation between the Crown and Aboriginal peoples. This reconciliation is to be achieved through negotiations, resulting in accommodations and agreements between the Crown and Aboriginal peoples. Since 2004, courts across the country have confirmed that the principles articulated in *Haida* and *Taku* apply equally to the Métis people and their rights (proven and asserted).[2] In Ontario, this has been recently confirmed in *R. v. Laurin*, [2007] O.J. No. 2344 (O.C.J.).

It is also important to note that the Supreme Court of Canada has confirmed that the duty to consult and accommodate is not solely triggered by an Aboriginal people who possess a defined land base, are in land claim negotiations or are in litigation to establish Aboriginal title. In the *Haida Nation* and *Taku River* decisions, the court's review of the "source" of the duty to consult and accommodate flowed through landmark cases like *R. v. Sparrow*, *R. v. Van der Peet*, *R. v. Badger* and *R. v. Marshall*. In all of those cases, the Aboriginal claims in question related to harvesting rights and the traditional territories those rights are tied to, not just reserve lands. Without question, harvesting rights and the protection and preservation of those rights trigger the Crown's duty to consult and accommodate.

Equally important, in *Delgamuukw v. British Columbia*, the Supreme Court of Canada confirmed that Crown actions that affect Aboriginal harvesting rights attract one of the highest consultation standards:

> Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulation in relation to aboriginal lands.[3]

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[2] See *Labrador Métis Nation v. Newfoundland and Labrador*, [2006] N.J. No. 213 (N.L.S.C.); *R. v. Kelley*, [2007] A.J. No. 67 (A.B.Q.B.).

[3] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at par. 186.

Métis Consultation and Accommodation in Ontario

Since 2004, the Ontario Government has done little to ascertain or fulfill its consultation obligations to the Métis people in the province. In February 2007, the President of the MNO wrote to the Premier of Ontario, along with the Ontario Cabinet, outlining the Métis Nation's concerns. More specifically, in April 2007, the President of the MNO wrote to the Ministry for Energy further outlining the Métis Nation's concerns. Both of these letters have gone unanswered.

The MNO has finalized a contribution agreement with the Ministry for Aboriginal Affairs for resources (approximately $100,000.00) to undertake consultations with the Ontario Métis community on the Ontario Government's draft *Guidelines for Ministries on Consultation with Aboriginal Peoples Related To Aboriginal And Treaty Rights*. To date, no other Ontario line Ministries have provided resources for engagement vis-à-vis consultation and accommodation.

It is also important to note that the Métis have inequitable capacity to engage on consultation activities at the local level in comparison to First Nations. The Department of Indian Affairs and Northern Development (INAC) does not provide any funding to MNO Community Councils and only limited capacity funding to the MNO (approximately $130,000.00 annually).

Further, Métis communities have never been provided funding from the federal or provincial governments to undertake Traditional Land Use Studies (TLUS) or historic research to ascertain traditional Métis land use. As such, Métis are place at a greater disadvantage than First Nation because they do not have access to even the most basic base line data on Métis land use patterns in order to respond to inquiries from project proponents or government.

the Métis Nation of Ontario

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November 27, 2007

Rita Burak
Chair
Hydro One Inc.
483 Bay Street, 15th Floor
Toronto, ON M5G 2P5

Dear Ms. Burak:

RE: CONSULTATION WITH THE MÉTIS PEOPLE IN ONTARIO

As President of the Métis Nation of Ontario (MNO), I am writing to you to register my concern with the lack of consultation with rights-bearing Métis communities throughout the province in relation to Hydro One's current operations and future initiatives.

The MNO represents the citizens of the Métis Nation living in Ontario as well as rights-bearing Métis communities throughout the province. The MNO obtains its mandate through a democratic, Métis-specific, governance structure which includes a centralized citizenship Registry based in Ottawa, over 30 Chartered Community Councils across the province (a map listing these Council is enclosed) and a Provisional Council that includes regional and provincial representation elected by ballot box every three years. Currently, the MNO has over 13,000 registered citizens (over the age of 16 years) with an additional 5,000 citizenship applications pending. Based on conservative Statistics Canada averages that each Canadian household has 2.2 children, the MNO's current Registry represents over 41,000 Métis individuals (adults and children) living in Ontario. The MNO is also recognized by both the provincial and federal government, as representing the Métis people in this province.

In 1982, the Métis people were recognized as one of the three Aboriginal peoples in Canada and our rights were protected within s. 35 of the *Constitution Act, 1982*. In September 2003, the Supreme Court of Canada, in *R. v. Powley,* [2003] 2 S.C.R. 207 (S.C.C.), confirmed that the Métis are a full fledged rights-bearing people and that the Métis community in the Sault Ste. Marie region have a constitutionally protected food harvesting right that is grounded in the Métis people's special relationship to the land. In July 2004, based on credible Métis harvesting rights claims throughout the province, the Government of Ontario entered into a province-wide harvesting accommodation agreement with the MNO. For your information, I am attaching a copy of a map that identifies the traditional Métis harvesting areas that have been recognized as a part of the MNO-Ontario accommodation agreement. This agreement was recently upheld by the Ontario Court of Justice in *R. v. Laurin, Lemieux and Lemieux*, [2007] O.J. No. 2344 (O.C.J.), and remains in place today.

/...2

As you are also likely aware, in 2004, in a case called *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.), the Supreme Court confirmed that s. 35 of the *Constitution Act, 1982*, requires the Crown to consult with Aboriginal peoples, and, where appropriate, accommodate credible Aboriginal rights claims where the Crown has real or constructive knowledge of the potential existence of Aboriginal rights or title and where the Crown is contemplating actions that may affect those recognized or asserted Aboriginal rights. It is important to note that in the *Haida Nation* case, the Supreme Court of Canada also confirmed that the duty to consult and accommodate is not solely triggered by an Aboriginal people who possess a defined land base, who are in land claim negotiations or who are in litigation to establish Aboriginal title. The Supreme Court's review of the "source" of the duty to consult and accommodate flowed through landmark cases like *R. v. Sparrow*, *R. v. Van der Peet*, *R. v. Badger* and *R. v. Marshall*. In all of those cases, the Aboriginal claims in question related to harvesting rights and the traditional territories those rights were tied to, not just Indian reserve lands. Simply put, harvesting rights and the protection and preservation of those rights, trigger the Crown's duty to consult and accommodate.

The MNO recognizes that the discharge of the duty to consult and accommodate the Métis people in Ontario lies with the Crown. Hydro One is in a unique position in light of being 100% owned by the Government of Ontario, having its Board of Director appointed by the province and being bound by Ministerial directives. However, irrespective of the exact status of Hydro One in light of its relationship with the Crown, all private sector proponents have a role to play in ensuring Métis communities are engaged and informed. For example, the Ontario Energy Board has recently issued a draft Aboriginal Consultation Policy that requires all proponents to provide information in their future applications to the Board on how the Aboriginal communities who may be affected by the projects being proposed by proponents have been consulted. You should also be aware that the MNO has also written to the Ontario Premier and the Ontario Cabinet registering our concerns on the lack of consultation with rights-bearing Métis communities.

With that said, I believe there is an urgent need for the MNO and Hydro One to meet in order to identify how Hydro One can begin to be engage and consult Métis communities in Ontario, in relation to current and future Hydro One initiatives that have the potential to affect Métis rights, lifestyle and way of life in this province. This meeting will also provide the MNO with an opportunity to provide Hydro One with additional information on the Ontario Métis community, the MNO's unique governance structures in this province and our ideas on how the Métis Nation can establish a working relationship with Hydro One. If you are agreeable to such a meeting please have you office contact Pete Lefebvre, MNO's Executive Director, at 613-798-1488 or via email a pierrel@metisnation.org. I look forward to hearing from you.

Sincerely yours,

Tony Belcourt
President

Encs. Map of MNO Community Councils
Map of Métis Traditional Harvesting Areas

the Métis Nation of Ontario

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March 31, 2008

Rita Burak
Chairperson
Hydro One Networks Inc.
483 Bay Street, 15th Floor
Toronto, Ontario
M5G 2P5

Dear Ms. Burak:

RE: MÉTIS CONSULTATION ON BRUCE-MILTON TRANSMISSION LINE

I am writing further to the Métis Nation of Ontario's (MNO) initial letter to Hydro One Networks Inc. (HONI) in November 2007, as well as, the MNO's meetings with HONI representatives on February 11th and March 27th, 2008, in relation to engaging and consulting with the Métis community whose rights, interests and way of life may be affected by HONI's proposed Bruce to Milton Transmission line (the "Project").

At these meetings, the MNO has provided HONI with extensive information on the Métis people in Ontario, our communities, our governance structures as well as our rights and interests in area the Project could potentially affect. The MNO believes these meetings were positive and productive. At these meeting, the MNO has also outlined other unique issues and concerns to HONI representatives, including:

- In 2003, Métis rights were recognized and affirmed by the Supreme Court of Canada in *R. v. Powley*. Grounded on the *Powley* case, as well as, the principle later articulated by the Supreme Court of Canada in the *Haida Nation* and *Taku River* cases, the MNO entered into an agreement with the Ontario Ministry of Natural Resources, which accommodates Métis harvesting rights within identified Métis traditional harvesting areas based on credible claims. The Project is within one of those territories – Georgian Bay. Due to the fact that the rights-bearing Métis community in this region have already been accommodated by the Crown, it is the MNO's position that adequate consultation requires more than just simply providing information on the Project to the rights-bearing community. It requires providing the Métis community an opportunity to ascertain and assess the potential impacts of the Project on Métis rights, harvesting practices and way of life in this territory.

.../2

- All Métis citizens apply to the MNO's centralized registry in Ottawa. The MNO represents all of these citizens, wherever they live in the province. The MNO then enters into charter agreements with MNO Community Councils to represent Métis citizens in a defined geographic area. MNO Community Councils do not define the rights-bearing community. There may be members or a rights-bearing Métis community that are not within the geographic scope of a Community Council, but that does not negate that those citizens have equal rights to Métis who may live within a MNO Community Council's jurisdiction. All affected Métis rights-holders must, at the very least, be provided an opportunity to have they view known and participate.

- The MNO has a substantial Métis population in the Georgian Bay traditional territory – well over 3,000 Métis citizens. This territory largely covers the MNO's Region 7, but also extends into parts of Region 8 and 9. The MNO also has a significant number of active traditional resource users in this region – over 300 MNO Harvesters Cards have been issued.

- Unlike First Nation citizens, who may live largely on identifiable reserve lands, Métis rights-holders live in settlements, towns and cities throughout the territory. Moreover, while those Métis may live in one location, they may harvest throughout the region at issue (i.e. the Georgian Bay region as identified by the map provided to HONI by the MNO, which forms part of the MNO's harvesting agreement with the Ontario Ministry of Natural Resources).

- The Crown has never undertaken a Métis traditional land use study and has never provided support to the MNO to undertake such a study in order to identify Métis land use, harvesting practices, sacred places, Métis cemeteries, etc. in the region. As such, the MNO is very concerned that Métis harvesting practices or use of land in the region has not been considered in the development of the Project.

- Unlike First Nations, MNO Chartered Community Councils receive no core funding support from either the federal or provincial governments. Many Councils lack the capacity to formally assess and respond to materials sent to them by HONI. As well, many MNO Community Councils have forwarded material received to the MNO Head Office, however, the MNO also has limited capacity in this area to assess the materials, respond to them or engage with HONI in a sustainable manner. The MNO does not believe it is fair that this lack of capacity to respond would be interpreted that the Métis community is not interested in knowing about or concerned about the Project.

- The MNO is concerned that HONI's communications efforts on the Project do not reach the Métis community. Many Métis citizens in recently held community consultation were not aware of the project and its potential implications (i.e. increasing energy development projects in the Bruce region, potential nuclear new build, etc.).

.../3

- The MNO does not have the budget lines or ability to continue to engage with Hydro One without capacity support. It is the MNO's position that the Crown has an obligation to ensure the potentially affected Aboriginal groups are able to participate in consultation processes. Currently, the MNO's only options to continue its engagement with HONI are to go into a deficit or to end its engagement with HONI. Neither of these options are acceptable to the MNO. The MNO believes that if HONI has been delegated procedural consultation obligations from the Crown, it should bear the responsibility to provide reasonable support for the Métis community to be engaged and assess the implications of the Project. Moreover, HONI is the one that will likely ultimately secure a financial benefit from the Project, not the MNO. The MNO should not have to bear the expense of ensuring the Crown's constitutional duties are fulfilled to the Métis community.

Following our February 2008 meeting, the MNO provided a draft Engagement Protocol to HONI. This Protocol set out a number of engagement and relationship building initiatives as well as specific activities in order to enable the Métis community to assess the potential implications of the Project on Métis rights, interests and way of life. While MNO and HONI work towards finalizing a protocol, the MNO has also requested a good faith payment of $75,000.00 to cover costs already incurred and to complete the following activities:

- Conduct a harvest survey of Métis traditional resource users in the region in close proximity to the Project,
- Direct mail out to Métis citizens living in the region providing them with information on project as well as opportunity to contact MNO with questions, concerns, etc about the Project.
- Insert in Métis Voyager on Project,
- Allocate a percentage of MNO staff person's time to act as point of contact on project for MNO citizens and HONI, and
- Retaining required consultant, legal advice, etc. to accomplish the items listed above.

The MNO believes this request is reasonable in light of its abovementioned concerns and the fact that HONI's application before the Ontario Energy Board for the Project (EB-2007-0050) continues to move forward. Moreover, to date, the MNO has shown good faith by incurring unbudgeted costs to engage HONI on its Project. The MNO has paid for several officials to travel to Toronto in order to attend two meetings at HONI's office and has retained a lawyer to attend these meetings with us and to provide advice and develop the abovementioned protocol. We believe it is now time for HONI to reciprocate this good faith in order to ensure the Métis community is engaged. The MNO would also note that in HONI's responses to the interrogatories of intervenors in EB-2007-0050, engagement protocols and arrangements have already been reached with some First Nations groups. The MNO sees no reason why similar arrangements should not be entered into with the Métis community.

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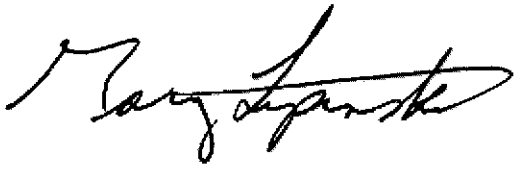
Further, in my recent meeting with the Honourable Gerry Phillips, Minister for Energy and Mr. Peter Wallace, the Deputy Minister for the Ministry or Energy, it was conveyed to the MNO that the Ministry's position on these issues is that any consultation with Aboriginal peoples must be inclusive of Métis. I am copying Minister Phillips, along with the Honourable Michael Bryant, Minister for Aboriginal Affairs, this letter in order to ensure the Crown is aware of the MNO's requests and concerns. Simply put, the MNO is now looking for HONI to provide support to ensure the fair inclusion and participation of all Aboriginal groups in its work related to the Project.

Finally, as indicated in our most recent meeting with HONI representatives, the MNO is also interested in exploring entering into an ongoing, longer-term relationship protocol with HONI in order to provide sustained capacity for our relationship, since many of HONI's future activities and contemplated project have the potential of affecting other Métis communities throughout the province. We would note the Manitoba Métis Federation's agreement with Manitoba Hydro as a 'best practice'. This agreement is referred to in the report of the Agency Review Panel on Phase II of its review of Ontario's provincially owned electricity agencies. We would like to explore building a similar sustained relationship with HONI. However, in order to be comfortable in developing that longer-term relationship, the MNO is looking to HONI to recognize the need for the Métis to be able to engage in the immediate work outlined above.

To date, we have found our engagement with HONI extremely positive and we look forward to continuing to build on that. We write this letter in that spirit. The MNO is very aware that Aboriginal groups have reciprocal responsibilities to ensure their concerns and issues are known to proponents. We are clearly setting those out in this letter. As well, since it is the Crown who is ultimately responsible for ensuring the duty is fulfilled, we have copied the Ontario Government on this letter to ensure it is aware of our issues, concerns and requests.

The MNO looks forward to hearing from HONI on these issues. Please have your officials contact Mr. Pierre Lefebvre at the MNO's head office in Ottawa in order to follow up on this matter.

Sincerely yours,



Gary Lipinski
Chair
Métis Nation of Ontario

c.c. Honourable Gerry Phillips, Minister of Energy
Honourable Michael Bryant, Minister for Aboriginal Affairs
MNO Executive
MNO Regional Councilors, Regions 7, 8 and 9

AUG 2 8 2007

Minister of Energy

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Ontario

AUG 2 7 2007

Dr. Jan Carr
Chief Executive Officer
Ontario Power Authority
1600–120 Adelaide Street West
Toronto, Ontario
M5H 1T1

Dear Dr. Carr:

Re: Procurement of up to 2,000 MW of Renewable Energy Supply

I write in connection with my authority as Minister of Energy in order to exercise the statutory power of ministerial direction that I have in respect of the Ontario Power Authority (the "OPA") under section 25.32 of the *Electricity Act, 1998* (the "Act").

As you are aware, the government has established a series of targets for the addition of new renewable energy supply, culminating with the goal of doubling Ontario's renewable energy capacity to 15,700 megawatts (MW) by 2025. These targets were relayed to the OPA in the Supply Mix Direction of June 2006.

In order to meet the government's renewable supply targets, the Ministry of Energy put in place an initiative to procure new renewable energy supply through competitive procurements that targeted medium- to large-sized renewable energy generation facilities, and a Standard Offer Program for small facilities that are 10 MW and under in size.

Through ministerial directions issued in November 2005, responsibility for administering contracts for over 1,300 MW of new renewable energy supply was assigned to the OPA. These contracts were the result of two completed Requests for Proposals, developed and administered by the Ministry of Energy during 2004 and 2005.

In addition, in a letter of March 21, 2006, then Minister of Energy, the Honourable Donna Cansfield, directed the OPA to assume responsibility for exercising the powers and performing the duties of the Crown under the Standard Offer Program.

I understand that the OPA has identified that there is potential for up to 2,000 MW of additional new renewable generation to come into service by 2015 from projects that are greater than 10 MW in size. In light of the required lead time for consultation with First Nation and Métis peoples, environmental and municipal approvals, and construction, the procurement of these resources needs to occur by 2011.

. . . /cont'd

Pursuant to section 25.32 of the *Electricity Act, 1998*, and with the objectives of ensuring electricity supply and mitigating the environmental impacts of electricity production, I hereby direct the OPA to assume, effective as of the date of this letter of direction, responsibility for exercising the powers and performing the duties of the Crown in regard to the acquisition of up to 2,000 MW of new renewable electricity supply from projects that are greater than 10 MW in size.

The OPA in establishing eligibility requirements may wish to refer to the three earlier procurements by Ontario for renewable energy, the first two of which were also assigned to the OPA in November, 2005. Although the third procurement was suspended, I am providing you with the procurement documents as I believe they provide useful and relevant information that the OPA may wish to consider in the development of the procurement documents.

In the course of the consultation process on the Integrated Power System Plan, the OPA heard from First Nation and Métis peoples their desire to be consulted in the planning of electricity projects.

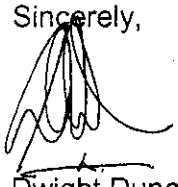
It is my view that First Nation and Métis peoples should be consulted early in the planning and development stages for the new renewable energy projects under this 2,000 MW direction. As such, I direct that the OPA develop guidelines and processes to ensure that appropriate consultation with First Nation and Métis peoples takes place. The Crown will continue to assess the adequacy of the consultation, including whether there is accommodation, where appropriate, for impacts that the specific projects may have on Aboriginal or treaty rights.

I request that the OPA work towards commencing consultation on the design of the first procurement for approximately 500 MW of new renewable energy supply by the end of 2007.

It is expected that, as a consequence of this direction, the OPA will enter into such contracts with suppliers as necessary to implement the initiative.

This Directive shall be effective and binding as of the date hereof.

Sincerely,



Dwight Duncan
Minister