

Court File No. 28533

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

Between:

HER MAJESTY THE QUEEN

Appellant
(Respondent on Cross-Appeal)

-and-

STEVE POWLEY and RODDY CHARLES POWLEY

Respondents
(Appellants on Cross-Appeal)

-and-

**LABRADOR MÉTIS NATION, CONGRESS OF ABORIGINAL PEOPLES,
MATIS NATIONAL COUNCIL/MATIS NATION OF ONTARIO,
B.C. FISHERIES SURVIVAL COALITION,
BORIGINAL LEGAL SERVICES OF TORONTO,
ONTARIO MÉTIS ABORIGINAL ASSOCIATION,
ONTARIO FEDERATION OF ANGLERS AND HUNTERS,
MÉTIS CHIEF ROY E.J. DELARONDE,
NORTH SLAVE MÉTIS ALLIANCE
ATTORNEY GENERAL OF NEW BRUNSWICK,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NEWFOUNDLAND,
ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF CANADA**

Interveners

Respondents' Factum on Appeal

Jean Telliet & Arthur Pape

Pape & Salter, *barristers & solicitors*
460-220 Cambie Street
Vancouver, BC, V6B 2M9
Ph: 604 681-3002
Fax: 604 681-3050

Counsel for Respondents on Appeal
and Appellants on Cross-Appeal

Eduard J. Van Bommel

Gowling Lafleur Henderson LLP
Ste. 2600-160 Elgin Street
Ottawa, Ontario, K1P 1C3
Ph: 613 786-0212
Fax: 613 563-9869

Ottawa Agent for Respondents on Appeal
and Appellants on Cross-Appeal

-2-

TO: **The Registrar of this Court**

AND TO: **Ministry of the Attorney General**
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto, ON M5G 2K1

Burke-Robertson LLP
Barristers and Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Lori Sterling
Tel. (416) 326-4100
Fax (416) 326-4181
**Counsel for the Appellant,
Her Majesty the Queen**

Robert Houston, Q.C.
Tel (613) 236-9665
Fax (613) 235-4430
**Ottawa Agent for the Appellant,
Her Majesty the Queen**

AND TO: **Burchell Green Hayman Parish**
1800 - 1801 Hollis Street
Halifax, N.S. B3J 3N4

Gowfing Lafleur Henderson LLP
Barristers and Solicitors
Ste. 2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Bruce Clarke
Tel. (902) 423-6361
Fax (902) 420-9326
**Counsel for the Intervener,
Labrador Métis Nation**

Henry S. Brown, Q.C.
Tel (613) 233-1781
Fax (613) 563-9869
**Ottawa Agent for the Intervener,
Labrador Métis Nation**

AND TO: **Joseph Eliot Magnet**
357-57 Louis Pasteur Street
PO Box 450, Station "A"
Ottawa, ON K1N 6N5

Tel. (613) 562-5800 (ex. 3315)
Fax (613) 562-5124
**Counsel for the Intervener,
Congress of Aboriginal Peoples**

AND TO: **Clem Chartier and Jason Madden**
Métis National Council
350 Sparks Street, Suite 201
Ottawa, ON K1R 7S8

Tel. (613) 232-3216
Fax (613) 232-4262
**Counsel for the Interveners, the
Métis National Council and the
Métis Nation of Ontario**

Gowling Lafleur Henderson LLP
Barristers and Solicitors
Ste. 2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel (613) 233-1781
Fax (613) 563-9869
**Ottawa Agent for the Interveners
the Métis National Council and the
Métis Nation of Ontario**

AND TO: **J. Keith Lowes**
1800-10965 West Pender Street
Vancouver, BC V6E 2M6

Tel. (613) 232-3216
Fax (613) 232-4262
**Counsel for the Intervener,
The British Columbia Fisheries
Survival Coalition**

Fraser Milner Casgrain LLP
Barristers and Solicitors
1420-99 Bank Street
Ottawa, ON K1P 1H4

William T. Houston
Tel (613) 783-9600
Fax (613) 783-9690
**Ottawa Agent for the Intervener,
the British Columbia Fisheries
Survival Coalition**

AND TO: **Aboriginal Legal Services of
Toronto Inc.**
803-415 Yonge Street Ottawa,
Toronto, ON M5B 2E7

Brian Eyolfson
Tel. (416) 408-4041
Fax (416) 408-4268
**Counsel for the Intervener,
Aboriginal Legal Services of
Toronto**

South Ottawa Community Services
1355 Bank Street
ON K1H 8K7

Chantal Tie
Tel (613) 733-0140
Fax (613) 733-0401
**Ottawa Agent for the Intervener,
Aboriginal Legal Services of
Toronto**

-4-

AND TO: **Robert Macrae**
Barrister and Solicitor
188 Industrial Park Crescent
Sault Ste Marie, ON P6B 5P2

Tel. (705) 945-6090
Fax (705) 949-9431
**Counsel for the Intervener,
the Ontario Métis Aboriginal
Association.**

Gowling Lafleur Henderson LLP
Barristers and Solicitors
Ste. 2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel (613) 233-1781
Fax (613) 563-9869
**Ottawa Agent for the Interveners,
the Ontario Métis Aboriginal
Association**

AND TO: **Danson, Recht & Freedom**
2000-700 Bay Street
Toronto, ON M5G 1Z6
Ottawa, ON K1P 1C3

Timothy S. B. Danson
Tel. (416) 929-2200
Fax (416) 929-2192
**Counsel for the Intervener,
Ontario Federation of Anglers and
Hunters**

Gowling Lafleur Henderson LLP
Barristers and Solicitors
Ste. 2600 - 160 Elgin Street

Henry S. Brown, Q.C.
Tel (613) 233-1781
Fax (613) 563-9869
**Ottawa Agent for the Intervener,
Ontario Federation of Anglers and
Hunters**

AND TO: **Alan Pratt**
Barrister and Solicitor
R.R #1
Dunrobin, ON K0A 1TP

Tel. (613) 832-1261
Fax (613) 832-4978
**Counsel for the Intervener, Métis
Chief Roy E J. DeLaronde on
Behalf of the Red Sky Métis
Independent Nation**

Gowling Lafleur Henderson LLP
Barristers and Solicitors
Ste. 2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Tel (613) 233-1781
Fax (613) 563-9869
**Ottawa Agent for the Intervener,
Métis Chief Roy E. J. DeLaRonde
on behalf of the Red Sky Métis
Independent Nation**

AND TO: **Attorney General of New
Brunswick**

Gowling Lafleur Henderson LLP
Barristers and Solicitors
Ste. 2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Henry S. Brown, Q.C.
Tel (613) 233-1781
Fax (613) 563-9869
**Ottawa Agent for the Intervener,
Attorney General of New
Brunswick**

AND TO: **Attorney General of British
Columbia**

Burke-Robertson LLP
Barristers and Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2

Robert Houston, Q.C.
Tel (613)236-9665
Fax (613)235-4430
**Ottawa Agent for the Intervener,
Attorney General of British
Columbia**

AND TO: **Attorney General of Manitoba**

Gowling Lafleur Henderson LLP
Banisters and Solicitors
Ste. 2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Eduard J. Van Bommel
Tel (613) 233-1781
Fax (613) 563-9869
**Ottawa Agent for the Intervener,
Attorney General of Manitoba**

AND TO: **Attorney General of Alberta**

Gowling Lafleur Henderson LLP
Barristers and Solicitors
Ste. 2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Tel (613) 233-1781

Fax (613) 563-9869

**Ottawa Agent for the Intervener,
Attorney General of Alberta**

AND TO: **The Attorney General of Canada**
Associate Deputy Minister's Office
Department of Justice
284 Wellington Street
Ottawa, ON K1A 0H8

**Deputy Attorney General of
Canada**

Department of Justice

284 Wellington Street

Ottawa, ON K1A 0H8

Ivan Whitehall, Q.C.
Michael Morris
Barbara Ritzen
**Counsel for the Attorney General
of Canada**

Per: Graham Garton, Q.C.

Tel (613) 957-4842

Fax (613) 954-1920

**Ottawa Agent for the Attorney
General of Canada**

AND TO: **Attorney General of Saskatchewan**

Gowling Lafleur Henderson LLP
Barristers and Solicitors
Ste. 2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

Tel (613) 233-1781

Fax (613) 563-9869

**Ottawa Agent for the Intervener,
Attorney General of Saskatchewan**

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1. This is the first case to reach this Court that will consider the Aboriginal rights of the Métis under s. 35 of the *Constitution Act, 1982*.
2. The Respondents, Steve Powley and his son Roddy Charles Powley, (“the Powleys”) were charged with unlawfully hunting moose and unlawful possession of moose meat on October 22, 1993, contrary to ss. 46 and 47(1) of the *Game & Fish Act*. The facts with respect to the hunting and possession were entered into evidence at trial by way of an Agreed Statement of Facts. The Powleys asserted that they were Métis and that their hunting and possession were the exercise of an Aboriginal and/or treaty right to hunt *qua* Métis.
Game & Fish Act, R. S. O. 1990, c. G- 1, ss. 46 & 47(1) (Appellant's Book of Authorities ["ABA"], Vol. II, Tab B1); *Agreed Statement of Facts*, Exhibit 1 (Appellant's Appeal Record ["AAR"] Vol. II Tab 38).
3. At trial, Vaillancourt J held that the Powleys had established an Aboriginal right to hunt, *qua* Métis, pursuant to s. 35 of the *Constitution Act, 1982* and that the Crown had failed to justify its statutory and regulatory infringement of the Métis right. The trial judge made the following findings of fact.
 - a. The Powleys are Métis. They are genealogically descended from the historic Métis community at Sault Ste Marie, they self-identify as Métis, and have been accepted by the Sault Ste Marie Métis. community as members of that community. (pp. 1017-1018)
 - b. There was an historic Métis community at Sault Ste Marie that began to evolve in the mid 17th century. The Sault Ste Marie area was largely under Métis control from the late 17th to the mid-nineteenth century. The Métis community at Sault Ste Marie was visually, culturally and ethnically distinct. (pp. 1020, 1021, 1024)
 - c. The Sault Ste Marie Métis community is not confined to the town-site proper and encompasses the surrounding environs. There is an existing Métis community at Sault Ste Marie that is in continuity with the historic one. (pp. 1015, 1016, 1018, 1021)
 - d. Hunting was of central significance and integral to the distinctive Métis historic community at Sault Ste Marie and continues to be an integral part of the contemporary Métis community at Sault Ste Marie. (pp. 1025-1027)
 - e. The hunting practices of the historic Métis community at Sault Ste Marie were not game specific nor did they distinguish between large-game and small-game hunting. (pp. 1025-1026)
 - f. The regulatory scheme infringed the Powleys' Aboriginal right to hunt as Métis. (pp. 1028-1031)
 - g. The infringement of the regulatory scheme was not justified. (pp. 1031-1033) *Reasons for Judgment of the Trial Judge* ["*Trial Judgment*"] (AAR, Vol. III, Tab 59)

4. The Crown's appeals were dismissed by both the Ontario Superior Court of Justice and by a unanimous panel at the Court of Appeal. Both appeal courts, after a careful review of the evidence, upheld the trial judge's findings of fact, and concluded that he made no palpable or overriding errors.

Reasons for Judgment of the Ontario Superior Court of Justice ["Ont. SC Judgment"] (AAR, Vol. VIII, Tab 60); *Reasons for Judgment of the Court of Appeal for Ontario* ["Ont. CA Judgment"] (AAR, Vol. VIII Tab 62)

5. The Appellant states in its factum that Ontario issued tags that would result in no more than moose being harvested in Wildlife Management Unit ("WMU") 36 for 1993-1994. The Appellant has only cited the bull-moose target. The Appellant neglected to inform this Court of the targets or tags issued for cows, the free access to calves, or of the actual estimates of the harvest taken in 1993. Further, there are two WMUs that are relevant to the moose harvest in the Sault Ste Marie area – WMU s.35 and 36. Although not in this chart form, the following evidence with respect to the moose population -in those WMUs was entered at trial:

	1983 Target Population	1978 Bull & Cow Population	1993 Bull & Cow Harvest	1993 Bull & Cow Targets	1993 Bull & Cow Tags Issued	1993 Bull & Cow Harvest	1996 Estimated Population
WMU 35	3500	1500	296		1228	283	1900
WMU36	2000	600	86	200	89	1600	
Total	5500	2100	382		1428	372	3500

Information re: WMU 36, Exhibit 62 (AAR, Vol. VII Tab 62 at p. 916); *Information re: WMU 35, Exhibit 61* (Respondents. Appeal. Record ["RAR"], Vol. III, Tab 47, pp. 383 -384, 389); *Information re: Bull Targets, Tags & Harvests, Exhibit 64* (AAR, Vol. 7, Tab 57 at pp.962, 966,970)

6. According to evidence provided by the Appellant, the moose harvest targets are set by MNR "in a broad brush manner across the province, with little recognition of factors that might change the potential for target achievement in various management units." Targets are a goal only and were set in 1983, based on estimated populations from the late 1970s, and have never been revised. Targets do not indicate the health or actual population of a specific WMU. The evidence shows that although the moose population has not met the target population set in 1983, the moose population has in fact increased in size by approximately 60% since 1978. In 1993, the Ontario Ministry of Natural Resources ("NINX) gave out by

province-wide. There are no restrictions on the number of moose calves that can be hunted, other than the requirement of purchasing an Ontario Outdoors Card.

Guidelines for Moose Harvest Planning (AAR, Vol. 7, Tab 58, p. 986 at lines 30-40); *Testimony of Scott Jones* (RAR, Vol. I, Tab 1, p. 1-2)

7. According to the evidence of Scott Jones, the Crown's expert, MNR does not count or estimate the status Indian harvest. Accordingly, the Indian harvest is not a factor that is taken into account in any way in establishing or setting targets or allocations.

Testimony of Scott Jones (RAR Vol. I, Tab 1, pp. 4-5)

8. According to the evidence, the 1996 Census showed that there were 3,410 Aboriginal people in the Sault Ste Marie area - 2,490 Indians and 920 Métis.

Sault Ste. Marie Star Clipping re: Aboriginal Population, Exhibit 19 (AAR, Vol. 2, Tab 40); For additional Census data as it relates to Métis across Canada see *Royal Commission on Aboriginal Peoples* ["RCAP"], Vol. IV, *Métis Perspectives*, Exhibit 21 ["*Métis Perspectives*"] (AAR, Vol. K, Tab 41 at p. 287 (lines 10-30))

9. The regulatory scheme at issue in the case at bar is governed by the *Game & Fish Act* and the *Interim Enforcement Policy* ["IEP"]. The *Game & Fish Act* provides no recognition, allocation or accommodation of any Aboriginal rights. The IEP was initially implemented in 1991 following this Court's decision in *R. v. Sparrow*. It generally exempts harvesting by "Status Indian people" except for certain species and under very specific circumstances. The trial and all appeals have been conducted on the basis that the IEP was in full force and effect at the time of the offence in 1993.

IEP, Exhibit 15 at (RAR, Vol.III Tab 36)

10. The *Game & Fish Act* does not recognize Métis as having any Aboriginal or treaty rights. The IEP purports only to accommodate Métis harvesting rights pursuant to a negotiated agreement. No such agreement with Métis has ever been successfully negotiated. MNR only agreed once to enter into such negotiations and ever since has refused to enter into negotiations to enable the application of the *IEP* for Métis.

Game & Fish Act (ABA, Vol. II, Tab B1); *IEP*, Exhibit 15 (RAR, Vol. III, Tab 36); *Testimony of S. Jones* (RAR, Vol. I, Tab 2, p. 6) for non-application of *IEP* to Métis [Note that the Trial Transcripts omit the word 'not', which was corrected in Trial Transcripts, Vol. VI pp. 3 -4]; *Testimony of A.. Belcourt* (RAR, Vol. I Tab 3, pp. 7-13); *Letter from Hon. H. Hampton to A.*

Belcourt re: Northwest Hunt Agreement and Ontario's refusal to enter into negotiated agreement with Métis, Exhibit 12 (RAP, Vol. M Tab 3 5); *Letter from Hon. Chris Hodgson, Minister of Natural Resources* for Ontario's denial that Métis have any right of access to resources, Exhibit 17. (RAP, Vol. III, Tab 3 7)

Part II: Points in Issue

11. There are 5 issues before this Court:

Issue #1: The purpose for including Métis in s. 35 in the, *Constitution Act, 1982*.

Issue #2: The test to determine the existing Aboriginal rights of the Métis.

Issue #3: Application of the test to the facts in this case

Issue #4: Justification

issue #5: Remedies

Part III: Argument

12. The Appellant has made various arguments about the test for Métis rights in s. 35(1) of the *Constitution Act, 1982*. It is submitted that these are best considered following a full and principled discussion of the reasons for the inclusion of Métis in s. 35(2).

13. Section 35 is unique in two ways. The first is the very enactment of S. 35. There is no other country that has given constitutional protection to the Aboriginal and treaty rights of its Aboriginal peoples. The result is that the jurisprudence of other countries, which is largely concerned with statutory entitlements of individuals, has little value with respect to the analysis of the rights of the Aboriginal peoples protected under s. 35. The constitutional recognition and affirmation of Aboriginal and treaty rights in s. 35 has inspired a rich and uniquely Canadian jurisprudence with respect to Aboriginal rights.

14. The second unique aspect of s. 35 is the designation of a people who arose after the date of contact with Europeans, as one of the "aboriginal peoples of Canada." This second aspect - the inclusion of the Métis - will also require this Court to develop its own jurisprudence.

Issue 41: The purpose for including Métis in s. 35 of the *Constitution Act, 1982*

15. In *Van der Peet* this Court established the test for determining the Aboriginal harvesting rights of Indians. In addressing the Aboriginal rights of Sto:lo Indians, Lamer CJC held that,

The time period that a court should consider in identifying whether the right claimed meets the

standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights,

R v. Van der Peet, [1996] 2 S.C.R. 507 (ABA, Vol. 1, Tab A1 at pp. 554-555 (para 60))

16. This Court is now faced with a new question. What is the appropriate test to determine an Aboriginal right claimed by the Métis? In *Van der Peet*, both McLachlin J. (as she then was) and L'Heureux-Dubé J., in dissent, cautioned that the majority's test excluded Métis.

Moreover, when examining the wording of the constitutional provisions regarding aboriginal rights, it appears that the protection should not be limited to pre-contact or pre-sovereignty practices, traditions and customs. Section 35(2) of the *Constitution Act, 1982* provides that the "aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada" Obviously, there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between natives and Europeans ... Section 35(2) makes it clear that aboriginal rights are indeed guaranteed to Métis people. As a result, according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s. 35(1).

Van der Peet, *supra* per L'Heureux-Dubé J (ABA, Vol. I, Tab A 1 p. at 598 (para 169))

Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs, of the aboriginal people in question ... One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right.

My concern is that we not substitute an inquiry into the precise moment of first European contact -- an inquiry which may prove difficult -- for what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example ... in parts of the west of Canada, over a century elapsed between the first contact with Europeans and imposition of "Canadian" or "European" law. During this period, many tribes lived largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aboriginals in this interval should not be considered in determining the nature and scope of their aboriginal rights. This approach accommodates the specific inclusion ins. 35(1) of the *Constitution Act, 1982* of the aboriginal rights of the Métis people, the descendants of European explorers and traders and aboriginal women.

Van der Peet, *supra* per McLachlin J. (ABA Vol. I, Tab A1 at pp. 634-635 (paras. 247-248))

17. The majority acknowledged this problem and addressed it as follows,

Although s. 35 includes the Métis within its definition of "aboriginal peoples of Canada", and thus seems to link their claims to those of other aboriginal peoples under the general heading of "aboriginal rights", 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

..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. 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.

Van der Peet supra per Lamer C.J.C. for the majority (ABA, Vol.I, Tab A1 at pp. 558-559. (para 67)).

18. The case at bar now presents this Court with an opportunity to decide the principles for defining Métis rights under s. 35 and to answer the following questions - Who are the Métis? In what sense are the Métis “Aboriginal”? For what purpose are the Métis included in s. 35? Are Métis rights determined on the basis of the pre-contact practices of their Indian ancestors? What is the appropriate test for determining the Aboriginal rights of the Métis?

Who are the Métis?

19. We begin this discussion with a note of caution – this is not a case about all of the Métis in Canada. The evidence at trial focused on the Métis of the Upper Great Lakes generally and more specifically on the Métis community at Sault Ste Marie, Ontario. It is their history, their existence and their rights that are in issue.
20. The evidence shows that the Sault Ste. Marie Métis community is part of the Métis Nation, but there was no detailed evidence adduced at trial about the history or the geographic scope of the entire Métis Nation. This is one of the reasons for the Powleys’ submission that this Court should not attempt to comprehensively define the Métis in this case.

For evidence re: Sault Ste. Marie as part of the Métis Nation, see *Métis Perspectives* (AAR, III, Tab 41 at p. 303 (lines 10-20)) and *Testimony of A. Belcourt* (RAR, Vol. 1, Tab 4, pp. 14-16). For a more complete history of the Métis Nation see *Métis Perspectives* (AAR., Vol. III, Tab 41 at pp. 303-314). Also see *Ont. CA Judgment* re: no need to define Métis for all purposes (AAR, Vol. VIII, Tab 62 at pp. 1147-1148)

21. The Métis are part of a dynamic and complex Aboriginal landscape in Canada. There are many factors that have contributed to the complexity. Contributory factors internal to the

and environmental impacts are also contributory factors. Changes to the *Indian Act*, which have contributed greatly to the complexity of the Aboriginal landscape, can be directly attributed to the arrival of Europeans. Regardless of the source of change, the fact is that the Aboriginal landscape has never been monolithic or geographically static. Some Aboriginal peoples have relocated, new Aboriginal peoples have arisen and some have disappeared.

22. The Métis are one of the new Aboriginal peoples. They are the product of mixed marriages between Europeans and Indians. While most of the English language historical and legal documents refer to the Métis as "half-breeds," they are also referred to in the historical record as freemen, Canadian, voyageur, chicot, michif, or bois brûlé. All witnesses at trial used the term Métis in preference to the pejorative and misleading historical term "half-breed".

...The problem with the term Half-breed ... It implies that just half of this and half of that is what a Métis is. It overlooks the fact that the Métis culture was a creative result of a mixing of those two in language, art and song and a way of life, so it wasn't just half this and half that ...

Testimony of Dr. Ray, Trial Transcripts (RAR, Vol. I, Tab 5, p. 126)

For evidence on the different historical and contemporary terminology used to describe Métis see: *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, pp. 17-20); *An Economic History of the Robinson Superior Area Before 1860*, Exhibit 30 ["*Ray Report*"] (AAR, Vol. IV, Tab 42 at pp. 473-476); *Métis Perspectives* (AAR, Vol. III, Tab 41 at pp. 284-286).

23. In order to understand who the Métis in Sault Ste Marie are, it is necessary to look at all of the Aboriginal peoples in the Upper Great Lakes. The evidence shows that the historic Aboriginal presence in the Upper Great Lakes changed over time. Prior to contact, it was the territory of several Aboriginal peoples including the Cree, Ojibway and Huron nations.

For a map showing the tribal distributions at time of contact (circa 1615) see *Ray Report*, Supporting Documents: Charles Bishop, *The Northern Ojibway and The Fur Trade*, Exhibit 31 (RAR, Vol. III, Tab 39). In addition, for a general map of the Great Lakes and Southern Ontario (circa 1850) see *Historical Atlas of Canada* (RBA, Vol. III, Tab 4 1).

24. The trial judge held that the first European contact in the Upper Great Lakes was the arrival of the Jesuits in- 1615. The evidence also showed that beginning in the 1640s there was significant change in the Aboriginal population of the Upper Great Lakes. There were two major changes. The first was the Iroquois disruptions that led to the dispersal of the Hurons and the Ojibway. The second was the emergence of a new Aboriginal people - the Métis.

difficulties with choosing a specific date within the “contact” concept see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, pp. 44-46).

25. Beginning in 1649 the Iroquois disruptions led initially to the dispersal of the Huron Nation and also caused the dispersal of some of the Ojibway groups who were established in the area. By the early 19th Century some of these Ojibway had migrated to Northern Ontario and Manitoba - areas that, prior to contact had been Cree territory. The evidence also showed other southeastward dispersals of the Qjibway from the Upper Great Lakes area.

Testimony of Dr. Ray, Trial Transcripts, Vol. II pp. 178-180 (RAR, Vol. I Tab 5); *Ray Report*, supra (AAR, Vol. IV, Tab 42 at p. 484). Also see map showing the Iroquois disruptions (1660-1666): *Ray Report*, Supporting Document: *Historical Atlas of Canada*, Exhibit 31 (RAR, Vol. III, Tab 41) and *Ray Report*, Supporting Document: *Handbook of Northern American Indians* (RAR, Vol. III, Tab 40) for post-1821 arrival of Qjibway in the north.

26. The second change began in the mid-1600s with the intermarriages, *à la facon du pays*, between Qjibway women and the French or half-breed fur traders. The evidence shows that these French or half-breed fur traders were not promoting colonial or settler culture, or Imperial power, and did not seek to claim dominion over the Ojibway. The half-breed traders had French/Iroquois heritage and soon established themselves as individual members of the Aboriginal world in the Upper Great Lakes. Beginning with inter-marriage with Ojibway women and successive generations of inter-Métis marriages, the Métis evolved into a distinct people. This cultural evolution process is known as ethnogenesis. Dr. Ray identified the ethnogenesis period for the Métis in the Upper Great Lakes as 1640-1790.

Testimony of Dr. Ray, (RAR, Vol., I Tab 5, pp. 28-53, 80) re: ethnogenesis of Métis. Also see *Testimony of Dr. Ray* (RAR, Vol.. II Tab 6, p. 185, 201) re: Iroquois ancestry of Métis.

27. The Appellant states at least six times in its factum (paras. 23, 65, 66, 67, 74, 75) that the Upper Great Lakes Métis generally, and the Sault Ste Marie Métis specifically, did not develop a society of their own until the mid 19th century. There is no evidence to support the Appellant's statements. According to the uncontradicted evidence of Dr. Ray, by the 1760s the Métis had already evolved into Aboriginal communities in the Upper Great Lakes. The evidence shows that the Métis people in the Upper Great Lakes had a regional identity and culture.

... I don't know of any historian that would deny the presence of the Métis, let's put it that way. They're here ... the nature of the fur-trade economy, the nature of movements of the people, the

existence of both nucleated and kind of dispersed communities, ... the voyageurs ... clearly played a role in the formative aspects of a regional Métis culture here in the Great Lakes area ... *Testimony of Dr. Ray* (RAR, Vol. I Tab 5, p. 83)

Q. (cross-examination) ... if the particular group moves from area to area to area to area, does that not work against the establishment of a community in a geographical sense?

A. Well, what it did according to Jackie Peterson, it created a regional Métis community in the whole Upper Lakes because these families are moving and some parts of the families stay based here in Sault Ste. Marie, they also established communities along into Wisconsin, so they established a network of communities. It doesn't mean that the original community ceases to exist. They're simply creating a regional culture and this is what happened in the Great Lakes by all accepted scholarship. *Testimony of Dr. Ray* (RAR, Vol. I, Tab 6, p. 176)

For Métis at Sault Ste. Marie development periods see *Testimony of Dr. Ray* (RAR, Vol. I Tab 5, p. 35). For Métis population beginning to emerge in the Sault Ste Marie area in the 1640s-1650s see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, pp. 48-53) and *Ray Report* (AAR, Vol. IV, Tab 42, p. 484-487). For undisputed presence of Métis communities since the 18th century and by the end of the formative period (1790s) see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, p. 83). For coming of Nor Westers (1760s) see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, p. 72). For Métis as a community, not just individuals by at least the coming of the Nor Westers (1760s) see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, pp. 79-80). For all accepted scholarship on Métis development see *Testimony of Dr. Ray* (RAR, Vol. II, Tab 6, p. 186). For the establishment of a Métis regional community in the Great Lakes area see *Testimony of Dr. Ray* (RAR, Vol. II Tab 6, p. 176) and *Ray Report*, Supporting Documents: Jacqueline Peterson, *Many Roads to Red River ["Peterson Article"]* (AAR, Vol. IV., Tab 44 at p. 603).

28. The Métis were recognized as one of the Aboriginal peoples in the Upper Great Lakes. They were visually, culturally and ethnically distinct - both from their Ojibway neighbors and from the few non-aboriginal settlers who lived in the region.

It is indisputable that the distinct Métis communities of Ontario - in locations as widespread as Burleigh Falls (near Peterborough), Moose Factory (on James Bay), Sault Ste. Marie and Rainy River (in the north and west of Thunder Bay) - have long and unique histories, as well as indisputable claims to recognition of their Aboriginal origins and entitlements. The 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.

Métis Perspectives (AAR, Vol. III Tab 41 at pp. 340-343)

...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.

Peterson Article (AAR, Vol. IV, Tab 44 at p. 592); *Testimony of Dr. Ray* (AAR, Vol. I Tab 5, pp. 79, 121-122, 23 9). Also see map of Métis communities surrounding Great Lakes in *Peterson Article* (AAR, Vol. IV, Tab 44 at p. 594).

29. It is submitted that all the evidence supports the conclusion of the trial judge, that since at least 1760 the Métis were one of the distinct Aboriginal peoples in the Upper Great Lakes generally and in the Sault Ste Marie area particularly. This distinct Aboriginal people are variously referred to as the Métis community or Métis society of Sault Ste Marie, which reflects their regional identity and the trial judge's finding that it was unreasonable to restrict the community to Sault Ste Marie proper.

For problems related to the use of term "community" with respect to Métis identity. see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, pp. 79-84)

30. The trial judge also found that the Métis society continues to exist to the present day, albeit in a less visible manner. All witnesses at trial recognized the continuity of the Métis community at Sault Ste Marie - including the Crown's expert.

For evidence of continuity from 1850-1900 see *Testimony of G. Jones* (RAR, Vol. II Tab 7, pp. 269-270); *Characteristics of pre-1850 and Métis Families in the Vicinity of Sault Ste. Marie, 1860-1925*, Exhibit 55 ["*Jones Report*"] (AAR, Vol. VI Tab 54 at p. 765 (lines 3 0-40)); *Historical Report on Métis Community at Sault Ste. Marie*, Exhibit 39 ["*Lytwyn Report* '] (AAR, Vol. IV, Tab 47, pp. 644-645); *Testimony of Art Bennett* (RAR, Vol. II, Tab 8, p. 271); *Testimony of O. Bjornaa* (RAR, Vol. II, Tab 9, p. 272)

In what sense are the Métis Aboriginal?

31. The Métis are Aboriginal for two reasons. First, while the Métis have mixed Indian and European ancestry, the distinct Métis society is an Aboriginal culture. It evolved as a unique cultural response to the North American environment and was not based on a European model. Second, the Métis saw themselves as Aboriginal and others (including the Crown) saw them and treated them as Aboriginal.

Métis Culture is Aboriginal

32. The Métis have European and Indian ancestry and their culture is a unique and creative blend of the two cultures. This unique blend created a culture with characteristics that are more identifiably Aboriginal than European.

33. The Métis relationship to land and their economy is firmly based in the Aboriginal model. The Métis society did not constitute an agricultural society. While they valued property, they did not base their lifestyle or economy on individual property ownership. Rather, they were highly mobile. The Métis self identified with a territory that was defined by their hunting,

fishing, gathering and trading activities. They harvested by means of a seasonal round that took them to various parts of their territory - from summer lakeside fishing camps to interior winter hunting grounds. Through marriage and trade they entered into extensive economic and social relationships with other Aboriginal peoples. Historically their political and organizational structures were minimal and established primarily to protect and assert their territories, culture and rights. Their kinship structures, on the other hand, formed the basis of the Métis society and were extensive. They had a regional identity that reflected those kinship ties and a highly mobile relationship to their territory. The Métis were largely exogamous and had kinship ties that extended at least as far as Red River.

For seasonal round see *Testimony of Dr. Ray* (RAR, Vol. I Tab 5, pp. 81, 105-109, 112-113, 116 and Vol. 111, Tab 6, p. 192-194). For non-agricultural society see *Testimony of Dr. Ray* (RAR, Vol. I Tab 5, pp. 116-118, 132-133). For low value on individual property ownership see *Peterson Article* (AAR, Vol. IV, Tab.44, p. 603). For kinship ties to Red River see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, p. 143). For a general description of Métis and Ojibway economy see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, p. 145, 148). For kinship ties in the Upper Great Lakes see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, p. 80). For Métis assertion of rights see *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, p. 147) and Tab 6, p. 194). For sharing of territory with Ojibway see *Testimony of Dr. Ray* (RAR, Vol. II, Tab 6, p. 199).

34. The Métis educational system or means of cultural transmission, as with Indian cultures, is an oral tradition that is uniquely based in story, song, language and their life on the land.

...one of the central features of Métis culture is a very distinctive musical tradition ... it was partly how the[y] self-identity and community acceptance was carried out through the songs, who's named in the songs, how they're sung and so on it's clear that by Kohl's time, [1855]... one of the things that really strikes him about the Métis is this musical tradition. He goes on at some length about it and it's clear that this is a tradition well in place, well developed, it's obviously got ... quite a deep historical root and it undoubtedly goes back at least into the late ... 18th Century ... and the important point is we shouldn't think of it as just music. It's part of oral tradition. It's part of oral culture in a song fashion.

Testimony of Dr. Ray (RAP, Vol. I, Tab 5, pp. 120-121). For Métis distinctive dress and spiritual values see *Testimony of Dr. Ray* (RAR, Vol. II, Tab 6, p. 212). For more on distinct Métis language (Michif), culture, traditions, dress and values see *Métis Perspectives* (AAR, Vol. III Tab 41, pp. 303, 322-326)

35. By the late 1820s, the Métis population in the Great Lakes area was approximately 10,000-15,000 - equal to or even larger than the populations of most of the Indian tribes in the area.

Peterson Article (AAR, Vol. IV, Tab 44, p. 603). Also see *Testimony of Dr. Ray* (RAR, Vol. II, Tab 6, pp. 237-240).

36. The Métis culture is an Aboriginal culture. It grew out of shared group experiences

and characteristics and in response to the Upper Great Lakes environment, where it evolved from 1640 to at least 1815 without settler influences - a period of some 175 years.

These people [the Métis] were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. [T]hese communities did not represent an extension of French, and later British colonial culture, but were rather "adaptation[s] to the Upper Great Lakes environment."

Peterson Article (AAR, Vol. IV, Tab 44, p. 592)

Métis Self-identify as Aboriginal

37. The distinct Métis culture that arose in the Upper Great Lakes was clearly distinguishable from the Ojibway culture.

... when one thinks about ... outsiders ... why do they even mention at all Métis ... especially when there's a Métis living in an Indian community or Sault Ste. Marie as a Métis community for passers-by who aren't spending a lot of time here, there have to be visual ... things that are apparent right on the surface that would mark these people off ... cause someone just passing through, [they] don't know the genealogy of everybody they're seeing and you can't assume that certainly on racial appearances ... you're dealing with a Métis ... so one can only assume that there are ... these cultural symbols such as Kohl is describing here that set these people off... when people bothered to describe them, [they] described them ... as a separate people.

Testimony of Dr. Ray (RAR, Vol. I, Tab 5, p. 122)

38. The Métis culture was also clearly distinguishable from the non-Aboriginal settler culture that later established itself in the Upper Great Lakes,

I think the important thing here is to remember that there is an outside community and an inside community. Inside, meaning the Aboriginal community at Sault Ste. Marie was made up of people who we now know as Indians or Status Indians and we now call Métis and who were called Half-breeds in the historical records. And then there was the outside community, those that were wanting in and these included the mining companies, they included the Hudson's Bay Company, they included the Government agencies and the Church, although that's sort of a little bit different situation. So, that we have an existing community on the ground and we have these outside people...

Testimony of Dr. Lytwyn (RAR, Vol. II, Tab 10, p. 273); *Testimony of Dr. Ray* (RAR, Vol. I, Tab 5, p. 84); *Métis Perspectives* (AAR, Vol. M Tab 4 1, pp. 340-3 43).

39. The Métis also saw themselves as Aboriginal.

Q. Dr. Ray, did the Métis as you understand at that time, did they think they were Native people?

A. Yes, they believed they had a Native right and interestingly, the Vidal and Anderson Report

agrees that they had a claim, that they were here, they were people that were rooted in the land that had a right. Yes. I think they definitely did.

Testimony of Dr. Ray (RAR, Vol. I, Tab 5, p. 147); *Testimony of A. Belcourt* (RAR, Vol. II, Tab 11, p. 274). *Testimony of Dr. Lytwyn*, for Métis historically aligning themselves politically with other Aboriginal peoples re: Pontiac Uprisings (RAP, Vol. II Tab 12, pp. 275-277); *Testimony of Dr. Ray* re: Mica Bay Incident (RAR, Vol. I, Tab 5, p. 147); *Métis Perspectives* (AAR, Vol. M Tab 41, pp. 309 (lines 30-40)) re: Riel 'Rebellion' in Saskatchewan.

40. It is submitted that all of these characteristics show that the Métis society was a distinct Aboriginal culture and that it was part of the Aboriginal landscape.

What is the purpose for including the Métis in s. 35 of the Constitution Act, 1982?

41. This Court has held that the Aboriginal rights recognized and affirmed by s. 35(1) are to be understood as the means by which the Constitution recognizes the fact that, prior to the arrival of Europeans in North America, the land was already occupied by distinctive aboriginal societies, and second, as the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. Section 35 affords constitutional protection to the doctrine of Aboriginal rights and in so doing gives legal force to Aboriginal peoples' traditional relationship to their homelands.

Van der Peet, supra (ABA, Vol. I, Tab A 1, pp. 541 and 547-548 (paras. 37 and 43))

42. It is submitted that the Aboriginal rights recognized and affirmed by s. 35(1) for the Métis are also to be understood as the means by which the Constitution recognizes their prior occupation of the land as a distinct Aboriginal people, and by which that prior occupation is reconciled with the assertion of Crown sovereignty.
43. This Court has held that, for Indians, prior occupation relates to the time of contact because they were here living in distinct societies at the time Europeans arrived. It is submitted that the Métis are also prior occupiers of the land as a distinct Aboriginal people, but at a different time. The Métis were here as an Aboriginal people, in possession, at the time when the Crown came under a lawful obligation to implement the equitable principles articulated in the Royal *Proclamation of 1763*. This means that the Crown's obligations arose in various areas of Canada, on a case-by-case basis, when non-Aboriginal third parties began to conduct activities that interfered with the land-related aspects of the way of life of the Aboriginal peoples then in possession.

44. It is submitted that this is the, relevant time for three reasons. First, it provides a purposive

analysis of s. 35 that allows this Court to breathe life into the interests that s. 35 is meant to protect for the Métis. Second, it reflects the facts of history - that the Métis were in possession as a distinct Aboriginal people at the time when the Crown did in fact take their lands. Third, it is at this time that a substantive legal obligation arises - to implement the equitable principles in the *Royal Proclamation*.

Prior Occupation & the Royal Proclamation

45. The Métis community in Sault Ste Marie had already evolved into a distinct society and were in possession of their lands by the time the Crown's obligation to implement the equitable principles articulated in the *Royal Proclamation* arose. While the evidence at trial was with respect to the Métis at Sault Ste Marie and in the Upper Great Lakes, it is also submitted that this same principle - that the Métis were in prior possession when the Crown's *Royal Proclamation* obligations arose - would apply to the Métis Nation as a whole.

46. The evidence shows that by the 1760s there were Métis communities established in the Upper Great Lakes. The Métis were close allies of the French and were influential in the events that precipitated the implementation of the *Royal Proclamation*.

For establishment of Métis communities by 1760 see citations above in this Factum above at para 27. For French alliance of the Métis and Métis participation in events that precipitated the *Royal Proclamation, 1763* see citations below in this Factum below at para 48. See also RCAP Report, Vol. I, *Looking Forward, Looking Back*; Ch. 5 [hereinafter "*Looking Forward*"], (RBA, Vol. II, Tab D 1, pp. 111- 119).

47. In 1763, at the end of the Seven Years War, New France was ceded to the British Crown in the Treaty of Paris. With the formal capitulation by France, Britain inherited a growing discontent among the Aboriginal peoples of the Great Lakes. The British had recently discontinued the French practice of reaffirming *Peaceful relations with the Aboriginal peoples by means of the symbolic giving of presents. In particular they had discontinued giving guns and ammunition. This withdrawal of weapons fed suspicions among the Aboriginal peoples that the British were about to implement a military takeover and that they would lose their lands.

Testimony of Dr. Lytwyn (RAR, Vol. II, Tab 13, pp. 278-279); *Looking Forward* (ABA, Vol. II Tab DI, pp. 113-114); Brian Slattery, "Hidden Constitution" in Menno Boldt and Anthony

Long, eds., *Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: U of T Press, 1995) (RBA, Vol. II, Tab B1, p. 120)

48. The Pontiac Uprisings in the summer of 1763 reinforced British concerns about the need to secure peaceful relations with the Aboriginal peoples, including the Métis.

...The accounts of that summer of 1763 come from a few sources, but they're consistent showing that Aboriginal people were united in their actions against the British, that they were lead by an inspirational Chief by the name of Pontiac, an Ottawa Chief, from the Detroit area, but they also included many other nations and ... not only were the Ottawa, Ojibway, Potawatamy, Winedot, Shawnee, Miami, even the Six Nations involved in this, but Métis people were facilitating this and there's a tremendous amount of documentary records beginning in this time period suggesting that the Métis people in the Detroit area and the Upper Great Lakes area in general had developed communications with the French through the Mississippi River, Illinois country as well, and that there were rumours that were abounding in the summer of 1763 French officials for a military campaign that and thereafter that the Métis were interceding with would bring the French military back to North America through the Mississippi and up through the Upper Great Lakes ... General Amhurst who was the British military commander in North America, his letters are informative, suggesting that he saw the Métis at Detroit and other places as people not to trust and people that were inspiring this.. uprising. The uprising ends rather peacefully in the end of 1763 coincidentally with the onset of the winter hunt... and what happened after that was a series of negotiations between Aboriginal people and representatives of the British Crown to try to prevent future outbreaks of a similar nature and to remedy the cause ... that had provoked the so-called Pontiac Rebellion... the Royal Proclamation issued in October of 1763 arose out of the Pontiac turmoil but had its deeper roots as well.

Testimony of Dr. Lytwyn (RAR, Vol. II, Tab 14, pp. 280-286); *Looking Forward* (RBA, Vol. II Tab D1, pp. 115-119); Peter Hogg and Mary Ellen Turpel, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Minister of Supply and Service Canada, 1993) (RBA, Vol. II Tab B2, pp. 10-15).

49. In order to quell the discontent, the British called a meeting at the Crooked Place (Niagara) in the summer of 1764, which was intended to secure peace, friendship and trust with the Aboriginal people and in particular with France's former Aboriginal allies. The meeting was also intended to impress the Aboriginal people with an unprecedented show of wealth. The Crown distributed over £20,000 worth of presents. Over 2,000 Aboriginal people, many from thousands of miles away, attended the meeting that summer. Most of the Aboriginal people from the Great Lakes attended the meeting. Notably, Pontiac himself did not attend.

Testimony of Dr. Lytwyn (RBA, Vol. II Tab 15, pp. 287-289). Also see John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) (RBA, Vol. II, Tab B3, pp. 155-172) and Brian Slattery, "Understanding Aboriginal Rights" (1983) 66 C.B.R. 727 (RBA, Vol. II, Tab B4, pp. 733-734).

50. It was at the Niagara meeting that the British "proclaimed" the policy with respect to

Aboriginal people in the *Royal Proclamation*. The policy recognized Aboriginal peoples as autonomous political units capable of entering into negotiations and agreements with the Crown. It also recognized that Aboriginal peoples were entitled to continue in possession of their territories, including their hunting and fishing grounds, unless or until they ceded them to the Crown. The *Royal Proclamation* and the Royal Instructions that followed set out the equitable principles under which Aboriginal territories could be ceded. These equitable principles guided treaty making.

For legal status of *Royal Proclamation* see *Calder v. Attorney General of B. C.*, [1973] S.C.R. 316 (per Hall J. in dissent) (RBA, Vol. I Tab A1, pp. 394-395); *Hidden Constitution, supra* (RBA, Vol. II, Tab A1, p. 120); *Understanding Aboriginal Rights, supra* (ABA, Vol. II, Tab B4, p. 736); *Partners in Confederation, supra* (RBA, Vol. II, Tab B2, pp. 13-18).

51. The *Royal Proclamation* clearly distinguished between Crown/Aboriginal relations and Crown/settler relations. The settler colonies were governed by explicit grants. In contrast, Aboriginal peoples were recognized as distinct political entities whose rights did not arise from Crown grants.

Partners in Confederation, supra (RBA, Vol. II Tab B2, pp. 18-19)

52. The equitable principles in the *Royal Proclamation* were not new. They were the consolidation of previous British and French practices. However, the meeting at Niagara was the occasion for the official announcement of the policy to the Aboriginal peoples. That meeting is viewed as important by Aboriginal peoples.

Wampum at Niagara, supra (RBA, Vol. II, Tab B3, p. 155); *Partners in Confederation, supra* (RBA, Vol. II, Tab B2, pp. 18-19)

53. The practice of giving presents that was re-established by the British at Niagara in 1764 confirmed the nation-to-nation relationship reflected in the *Royal Proclamation*. The practice was continued each year after that at various locations including Manitouwaning on Manitoulin Island. This ceremony remained an important event that reaffirmed the Crown's commitment to the principles of the *Royal Proclamation* and to the protection of Aboriginal peoples. Presents were distributed annually to all Aboriginal peoples who attended - including the Métis.

Testimony of Dr. Lytwyn (AAR, Vol. II, Tab 16, pp. 290-291); *Ray Report* (AAR, Vol. IV, Tab 42, p. 541)

54. The first application of the Crown's *Royal Proclamation* obligations was in the southern

Great Lakes area, for the purchase of the right of passage over the Niagara Portage. The Crown did not implement its *Royal Proclamation* obligations in the Upper Great Lakes until the late 1840s. Until that time the British had discouraged any land transfers to settlers in an attempt to quell the Aboriginal fears with respect to their lands in the Upper Great Lakes. *Testimony of Dr. Lytwyn* (AAR, Vol. II, Tab 17, p. 292). For note of policies that discouraged settlers in the Upper Great Lakes see *Peterson Article* (AAR, Vol. IV, Tab 44, p. 592)

55. While Britain may have formally asserted sovereignty over the Upper Great Lakes region in 1763 with the *Treaty of Paris*, this had no substantial effect on the Métis economy, culture, or way of life. Following 1763, distinct Métis communities in the Upper Great Lakes continued to grow and prosper. It is also notable that the assertion of sovereignty had no effect on the actions of the Crown in this area for 80 years or three generations. *Ray Report* (AAF, Vol. IV, Tab 42, p. 533-535); *Peterson Article* (AAR, Vol. IV, Tab 44, P.603)

56. After the imposition of the Canada/USA border in 1794, and again after the War of 1812, Aboriginal groups migrated north into Canada from their previous territories in the United States. The evidence shows that until 1815, the area was largely under Ojibway and Métis control. When the Crown sought to make a treaty in the Upper Great Lakes in the late 1840s, it was advised by the Hudson Bay Company Chief Trader, John Swanston that the Aboriginal peoples then in possession were the Ojibway and the Métis.

... at present I am not certain whether the Government will acknowledge the rights and claims of the half breeds, to a share of the payments to be made for the land about to be ceded by the Indians of Superior, but should hope they would, as many of them have much juster claims than the Indians, they having been born and brought up on these lands, which is not the case with many of the Indians, particularly the Sault Chiefs Shin guakonse and Nehbai ni co ching, whose lands are situated on American Territory

Swanston, Letter to Governor Simpson dated August 24, 1850 as quoted in Ray Report (AAR, Vol. IV, Tab 42, p. 67)

57. This recognition, that the Métis were in possession, was later confirmed by Vidal, the government surveyor in 1846, and in the *Vidal/Anderson Report* of 1849. Final confirmation can be found in the treaty commissioner, William Robinson's report and in the wording of the treaty itself.

Another subject which may involve a difficulty is that of determining how far the Half breeds are to be regarded as having a claim to share in the remuneration awarded to the Indians, and (as they can scarcely be altogether excluded without injustice to some)

Vidal/Anderson Report, 1849 as quoted in *Ray Report* (AAR, Vol. IV, Tab 42, p. 67). See also *Robinson Superior Treaty*, which includes total numbers of Aboriginal peoples in the area, Exhibit 43 (RAR, Vol. III Tab 42) and *Testimony of Dr. Lytwyn* (RAR, Vol. II, Tab 18, p.293)

58. This Court has held that the Royal Proclamation "bears witness to the British policy towards aboriginal peoples", based on respect for their right to occupy their ancestral lands. It is submitted that the *Royal Proclamation* and the principles it reflects apply to the Métis. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R 1010 (RBA, Vol. I Tab A2, p. 1131-1132, para 200))
59. Whether or not this is the case, it is submitted that the fiduciary relationship with the Crown, which this Court held in *R. v. Sparrow* applies generally to Indians, also applies to Métis. *R. v. Sparrow*, [1990] 1 S.C.R 1075 (RBA, Vol. I Tab A3, p. 1108)
60. It is submitted that based on the *Royal Proclamation* and/or the fiduciary relationship, the Crown must have had - and continues to have - an obligation to deal with the Métis, and to take steps to protect their distinct rights, interests and way of life.
61. The record shows that the Crown consistently recognized that Métis were part of the Aboriginal landscape. However, with a few exceptions, government refused to deal with the Métis as a collective.
62. In Manitoba in 1869, Canada negotiated with the Métis collective with respect to their rights and land. That negotiation resulted in the *Manitoba Act, 1870*, which set aside 1.4 million acres "... towards the extinguishment of the Indian Title to the lands in the Province ...for the benefit of the families of the half-breed residents". Delays and allegations of frauds and abuses in the implementation of these promises to the Métis form the subject of Manitoba *Dumont v. Canada*, which is currently before the courts. *The Manitoba Act, 1870*, S.C. 1870, c. 3, R.S.C. 1985, App. II, No. 8, s. 31 (ABA, Vol. II Tab B2); *Métis Perspectives*, (AAR, Vol. III Tab 41, p. 305-309,403-407,413-422); *Dumont v. Canada* (1998), 52 Man. R. (2d) 291 (Man. C.A.), rev'd at [1990], 1 S.C.R 279 (ABA, Vol. I, Tab 21). For an extensive discussion of the background, negotiations and implementation of the *Manitoba Act, 1870*, not included in the authorities, see Paul Chartrand, *Manitoba Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre Press, 1991)
63. In 1875, in the *Addendum to Treaty Three by the Halfbreeds of Rainy Lake/Rainy River* the

Métis adhered to the treaty as a collective on the basis that the "Half-breeds ... by virtue of their Indian blood, claim a certain interest or title in the lands or territories in the vicinity of Rainy Lake and the Rainy River."

Treaty No. 3, Addendum by the Halfbreeds of Rainy River/Rainy Lake (ABA, Vol. III Tab C1, pp. 49-51)

64. Later in the so-called numbered treaties, government officials met with Métis and Indians at the same time with different results. Indians received treaty. Métis received scrip issued pursuant to the *Dominion Lands Act* "to satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by the half-breeds resident in the North-West Territories...".

Dominion Lands Act, S.C. 1879, c. 31, s. 125(e) (ABA, Vol. II Tab B3). For a discussion on the *Dominion Lands Act* scrip distribution system see *Métis Perspectives* (AAR, Vol. II Tab 41, pp. 407-408, 422-430). For discussions on Métis participation within treaties Métis *Perspectives* (AAR, Vol. III Tab 41, pp. 341-343). Also see map of the treaties in *Looking Forward*, Ch. 3 (RBA, Vol. II Tab A2, p. 162) and map of established Métis scrip commissions, in *Historical Atlas of Saskatchewan* (Saskatoon: University of Saskatchewan Press, 1999) at pp. 61-62 (RBA, Vol. II Tab 131)

65. In each of these circumstances the Métis sought, as a group, to have their Aboriginal claims recognized. They participated in the negotiations that dealt with the Aboriginal rights in each particular region. They are acknowledged as having Aboriginal claims, although for the most part, they are dealt with as individuals and treated differently than Indians.

Testimony of Dr. Ray (AAR, Vol. I Tab 5, p. 146)

66. The historic record shows that the Métis have always been recognized as Aboriginal with legitimate Aboriginal claims. Therefore, it is submitted that the recognition of the Métis in s.35(2) is not a new recognition. And because the recognition of the Métis is not new, their inclusion in s. 35 cannot be interpreted as merely a political compromise. The inclusion of the Métis in s. 35 is part of a continuum begun much earlier, implemented as part of the doctrine of Aboriginal rights as articulated in the *Royal Proclamation*, and affirmed by government actions and in statutes, treaties and constitutional instruments.

Today the House of Commons is affirming and recognizing the rights of aboriginal peoples as they exist It will be up to the courts to make a legal interpretation on the facts. The rights of natives, in the mind of the government are the rights which flow from the *Royal Proclamation*

19
of 1763. It will apply in Canada because in fact we are recognizing the obligation which was

vested on the Crown at the time by King George II or III. It is now recognized as such as the first time in the Canadian Constitution. It is an affirmation of the rights of natives.

Statement by Hon. Jean Chretien, Minister of Justice and Minister of State for Social Development in Commons Debate (RBA, Vol. II Tab C1 at 13202)

67. What is new about s. 35 is the solid commitment to deal with the Métis as an Aboriginal people from now on. The government's failure to consistently treat the Métis as a people was one of Canada's "old and difficult grievances" that required reconciliation with the Métis.

Statement by Senator Austin in Senate Debate (RBA, Vol. II, Tab C2 at 3317)

68. Reconciliation, of course, is the second purpose of s. 35 and the need for reconciliation with the Métis is imperative. The very survival of the Métis into the 21st century is a testament to their collective strength and aspirations. It was in 1763 with the Pontiac Uprisings that the Métis first began to assert their Aboriginal rights. These assertions continued with the Battle of Seven Oaks in 1816, the Sayer trial in 1849, Mica Bay in 1849, Red River in 1870, the *Halfbreed Addendum to Treaty #3* in 1875, at Saskatchewan (Duck Lake, Fish Creek and Batoche) in 1885, and again in the events leading up to 1982.

For Pontiac Uprisings see *Testimony of Dr. Lytwyn* (RAR, Vol. II, Tab 13, pp. 278-279). For Mica Bay see *Testimony of Dr. Ray* (RAR, Vol. I Tab 5, p. 147) and *Ray Report* (AAR, Vol. II, Tab 42, pp. 536-540). For other Métis assertions see *Métis Perspectives* (AAR, Vol. III Tab 41, pp. 303-310, 340-343)

69. As settlement moved west, and the government concluded treaties with the Indians, the Métis faced the continuing challenge of maintaining their collectivity.

... Increasing immigration and development consumed their historical lands at a distressing rate. Increasingly restrictive hunting laws, with which they were required to comply despite their Aboriginal heritage, made it more and more difficult to follow traditional pursuits. While they were never well off, Indian people at least had their reserves and benefited from various social services provided by the government of Canada. Not so the Métis ... "[g]ame was scarce, prohibitively expensive fishing licences were required, and white settlement was spreading remorselessly. The majority of the Métis were reduced to squatting on the fringes of Indian reserves and white settlements and on road allowances'. The 'independent ones,' who had been the diplomats and brokers of the entire northwest were now being referred to as the road allowance people".

Métis Perspectives at p. 227 (RAR, Vol. III Tab 38) [Note that this page of *Métis Perspectives* is missing from the Appellant's Record]

70. This excerpt above from the *RCAP Report* specifically discusses the Alberta Métis. Yet,

Alberta is the only province that has maintained some affirmative action with respect to the Métis. As noted by the trial judge, governments by and large have refused to acknowledge the existence of the Métis as a people. The Métis were intentionally ignored or displaced and became known as the "forgotten people." With no protected collective lands, the Métis culture was constantly threatened by wave after wave of settlers with an agricultural lifestyle. Yet, despite all of this, the Métis survived. They slipped from public awareness and as with all Aboriginal peoples in Canada, they lived for decades in relative obscurity, but still they survived.

Some people think that the Métis Nation 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 practise and persevere Métis culture and to do everything possible to pass it on to future generations.

Métis Perspectives (RAR, Vol. III Tab 38, p. 227); *Testimony of Dr. Lytwyn* (RAR, Vol. II, Tab 9, pp. 294-295); *Trial Judgment* (AAR, Vol. VIII Tab 59, pp. 1016 (line 20) and 1021-1023)

71. The story told by Olaf Bjornaa at trial - that he and his sister were turned away from the reserve school (because they were not Indians) and the non-Aboriginal school (because they were Indians) is indicative of the Métis place in Canadian society - "a displaced person in your own homeland."

Testimony of O. Bjornaa (RAR, Vol. II, Tab 20, pp. 296-297); *Trial Judgment* (AAR, Vol. VIII Tab 59, pp. 1021-1023)

72. However, while the Métis may have been "forgotten" by the public and government, they did not disappear. The Métis quietly continued to persevere and, along with Indian and Inuit organizations, began to re-emerge in the public eye in the 1960s with new political organizations to speak for their rights. In the late 1970s several bodies, such as the Pepin Robarts Task Force on Canadian Unity, were calling for constitutional reform that included protection for Aboriginal peoples. That Task Force Report specifically included Métis as one of the "native people in Canadian society".

Our next two proposals are addressed equally to the federal and provincial governments, and refer directly to the place of native people in the Canada of the future. First as both orders of government are currently involved in serious consideration of constitutional reform, we believe that it is now appropriate that specific attention be paid to the issue of the constitutional position of the first Canadians. More specifically, both provincial and federal authorities should pursue direct discussions with representatives of Canada's Indians, Inuit and Métis, with a view to

arriving at mutually acceptable constitutional provisions that would secure the rightful place of native people in Canadian society.

Pepin-Robarts Task Force on Canadian Unity, *A Future Together* (RBA, Vol. II, Tab B5, p. 5)

73. In *Sparrow*, the Chief Justice stated the reasons why it, was necessary to protect Aboriginal rights in the Constitution. He quoted MacDonald J when he stated that we "cannot recount with much pride the treatment accorded to the native people of this country." The same kind of historical reasons underlie the decision by the federal government and nine provinces to expressly include Métis and their Aboriginal and treaty rights in the *Constitution Act, 1982*. O'Neill J, perhaps stated it best when he held that,

The purposes underlying the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* relate to both prior occupation, and reconciliation. What however, are the reasons underlying the protection that s. 35(1) gives, and what is the basis for the special protection that aboriginal peoples generally, and Métis people specifically, have within Canadian society? 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*.

Ont. SC Judgment (AAR, Vol. VIII Tab 60, p 1047 (lines 10-30)); *Sparrow*, supra (RBA, Vol. I, Tab A3, p. 1103). See also Hansard cites from House of Commons and Senate re: purpose underlying inclusion of s. 35 in this Factum below at para 79.

74. It has been noted by this Court that the inclusion of s. 35 in the *Constitution Act, 1982* was the culmination of a long and arduous struggle by all the Aboriginal peoples of Canada. Indeed, the record indicates, that the three national Aboriginal organizations of the day worked together to achieve the entrenchment of Aboriginal and treaty rights in the Constitution. When the constitutional debate went into high gear in 1980, Métis (represented at that time by the Native Council of Canada) were included and funded to participate in the negotiations along with the national Inuit and Indian organizations.

Sparrow, supra (RBA, Vol. I, Tab A3, p. 1105); *Statement by Ron. John C. Munro, Minister of Indian Affairs and Northern Development* (RB A, Vol. II Tab C3)

75. By the fall of 1980 the Aboriginal organizations had been successful in obtaining public support for the idea of entrenching Aboriginal rights in the Constitution. The Canadian Bar Association, the Pepin-Robarts Task Force on Canadian Unity, a Joint Senate-House of

Commons Committee on the Constitution, and church groups all called for constitutional protection of Aboriginal rights.

Peter Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) (RBA, Vol. II, Tab B6, pp. 1-3, 69 and 81-83); Donald Purich, *The Métis* (Toronto: James Lorimer & Company, 1988) (RBA, Vol. II, Tab B7, pp. 167-169); Roy Romanow, "Aboriginal Rights in the Constitutional Process" in Menno Boldt and Anthony Long, eds, *Quest for Justice* (Toronto: University of Toronto Press, 1985) at p. 73-74 (RBA, Vol. II, B8); *Pepin-Robarts, supra* (RBA, Vol. II, Tab B5, p. 5)

76. The constitutional debates show controversies with respect to the inclusion of s. 35 in the Constitution and the introduction of the term "existing" into that provision. However, the definition of Aboriginal peoples listed in s. 35(2) appears to have reflected a consensus.

Romanow, supra (RBA, Vol. II Tab B8, pp. 73-74); *Purich, supra* (RBA, Vol. II, Tab B7, p. 172-173); Catherine Bell, "Who are the Métis People in Section 35(2)?" (1991) 24 Alta. L. Rev. 351 (RBA, Vol. II, Tab B 10); Hansard citations in this Factum below at para 79

77. It is of great significance that s. 35(2) specifically enumerates three distinct Aboriginal peoples in Canada. We also note that the text of s. 35 focuses on the recognition and affirmation of the rights of "peoples" rather than individuals. We note that the word "peoples" is used three times within s. 35. It is submitted that the inclusion of the Métis as one of the "aboriginal people of Canada" must be given substantive meaning.

Sparrow, supra (RBA, Vol. I Tab A3, p. 1105); *Partners in Confederation, supra* (RBA, Vol. II, Tab B2, pp. 29-30)

78. The Appellant urges the Court not to treat the Métis as a people but rather as individuals who, are simply the descendents of Indians, with their rights and existence determined by examining their Indian ancestors, their Indian blood quantum and their Indian lifestyle. We submit that such an approach is fundamentally wrong and would result in a basic denial that s. 35 has any substantive meaning for the Métis as a distinct people. Section 35 expressly states that the Métis are an Aboriginal people. Their rights must therefore be understood as inhering in their Métis society, with its distinct practices, customs and traditions.

79. It is submitted that there would have been no reason to include the Métis in s. 35 if they were to be treated as individuals who are part Indian. The recognition - that the Métis are a distinct people - is one of the most fundamental reasons that required the inclusion of the Métis in s. 35. Government's predominant pattern - treating Métis as individuals who were part Indian - is exactly what needed to change. In the constitutional debates leading up to

1982, there was unanimous recognition that the status quo with respect to the Aboriginal peoples of Canada - including the Métis - was in drastic need of change. The constitutional debates reflect the following:

- a. Métis, Inuit and Indians are considered to be Canada's "original residents" and are the native peoples" or "aboriginal peoples" in Canada;
- b. A recognition that all Aboriginal organizations representing Indians, Inuit and Métis fought long and hard for their rights to be included in the Constitution;
- c. A recognition of the distinct cultures of the Aboriginal peoples of Canada and their commitment to this country;
- d. That the intention of the adoption of s. 35 was "a turning point in the status of native peoples in this country", "a new starting point", "a renewal of our commitment to the native peoples", an "historic recommendation of equality of constitutional standing of the Aboriginal peoples with other communities in Canada", "a political watershed in the lives of the Aboriginal people in Canada", and that s. 35 "represents reconciliation of old and difficult grievances;" and
- e. That including s. 35 in the Constitution will mean that, "no government or individual will again be able to put aside or disregard the rights of Canada's original peoples" because Parliament has taken the "opportunity of redressing their claims in the Constitution and to provide a legal basis for it."

See Hansard of the House of Commons and Senate of Canada 1980-1982 re: inclusion of s. 35: Canada, H.C., H.C. Debates (AAR, Vol. II, Tab C6 at 7448), (AAF, Vol. III, Tab C1 at 13280) (AAP, Vol. I Tab C5 at 3889) for para A; Canada, H. C., H. C. Debates (AAR, Vol. II Tab C6 at 7519-7520), (AAR, Vol. II Tab C7 at 9403), (AAR, Vol. II Tab C1 at 7448) and Canada, Senate, Senate Debates (AAR, Vol. II Tab C4 at 1921-1922) for para B; Canada, H.C., H.C. Debates (AAF, Vol. II Tab C5 at 4044-4045), (AAR, Vol. II, Tab C1 at 13276) for para C; Canada, H.C., H.C. Debates (AAF, Vol. II Tab C6 at 7521-7521); and Canada, Senate, Senate Debates (AAR, Vol. II, Tab C2 at 3318) for para D; Canada, Senate, Senate Debate (AAR, Vol. II, Tab C2 at 3318) for para E .

Issue #2: What is the appropriate test for determining the Aboriginal rights claimed by the Métis?

80. This Court is now faced with determining the appropriate test for the Aboriginal rights of the Métis. It is submitted that the appropriate test is essentially the same as the test set out by this Court in *Van der Peet*, which we set out as follows:

- a. What is the correct characterization of the right?
- b. Is the right claimed a practice, custom or tradition which was integral to the historic Métis society at the relevant time?
- c. Does the contemporary Métis society continue to exercise the practice, custom or tradition?

- d. Has the right been extinguished?
- e. Are the claimants entitled to exercise the right?

Issue #3: Application of the s. 35 Métis Harvesting Rights Test to the facts in the case at bar

The Findings of Fact by the Trial Judge

81. Appellate courts are to treat findings of fact by the trial judge with deference. The principle of appellate court deference has been held to apply to expert witnesses.

Stein v. The "Kathy K", [1976] 2 SCR 802 (RBA, Vol. I Tab A4, p. 808); *N. V Bocimar S.A. v. Century insurance Co. of Canada*, [1987] 1 S.C.R. 1247 (RBA, Vol. I Tab A5, pp. 1249-50); *Van der Peet, supra* at (ABA, Vol. I Tab A1, pp. 564-566)

82. In the application of the test to determine Métis harvesting rights, some of the issues are issues of principle and some are issues of fact. Both types of issues will be addressed under the test. With respect to the facts, the Appellant, in its factum, states many times that there is no evidence to support the trial judge's findings of fact. It is submitted that there is evidence to support the trial judge's finding of fact in each circumstance. Both appeal courts carefully reviewed the evidence and upheld the findings of fact made by the trial judge. In each circumstance, it is submitted that the Appellant is really asking this Court to substitute evidence that was specifically rejected by the trial judge.

What is the correct characterization of the right claimed?

83. This Court has held that the nature of the claim must be identified in order to determine whether an Aboriginal claimant has demonstrated the existence of an Aboriginal right. To characterize an applicant's claim the court should consider the nature of the activity asserted as the exercise of an Aboriginal right, the nature of the government statute being impugned and the tradition, practice or custom being relied on to establish the right.

Van der Peet, supra (ABA, Vol. I Tab A1, p. 552 (paras. 52-53))

84. The trial judge characterized the right claimed as a right to hunt for food and found as a fact that the Powleys were hunting for food. His conclusion was upheld by both appeal courts.

Agreed Statement of Facts, supra (AAR, Vol. II, Tab 38); *Trial Judge* (AAR, Vol. VIII Tab 59, p. 1025 (lines 10-40)); *Ont. SC Judgment* (AAR, Vol. VIII Tab 60, p.1051 (lines 20-30)); *Ont. CA Judgment* (AAR, Vol. VIII Tab 62, p. 1131 (lines 20-40))

85. In the courts below the Appellant argued that the right should be characterized as a species-specific right - the right to hunt moose. In this Court, the Appellant now asks that the right be characterized as a right to hunt large game for food. The Appellant also argues that the Court of Appeal erred in not adopting a narrower characterization of the right claimed because if the right were characterized as a right to hunt it would permit harvesting of resources that traditionally were not significant to an Aboriginal society, without regard to historic geographic limits on harvesting, traditional cultural preferences, historic methods of harvesting; or historic limits on the availability of resources.

Appellant's Factum at para 91

86. The evidence shows that the Métis hunting practices were not limited to large game generally or by species. They did not take a sport-hunter approach and hunt species by species or at specific dates. The evidence shows that the Métis hunting practices combined a sophisticated and efficient knowledge of the species, the seasons and their territories. All of the evidence at trial showed that the Métis had a flexible, integrated, mixed economy in which they hunted, fished and gathered whatever species was available at the time.

... the better way to think about it is that these people had a livelihood based on living off the land and they also had the attitude that you took what the land offered and it also meant ... you know, in our modern society we tend to segment everything. If we go fishing, we just go fishing, we don't if we're traveling along and a moose shows up or a caribou, we don't oh well, we'll hunt instead, which is what the Natives did. They didn't they didn't make those kinds of distinctions, so if they're out hunting and fishing turns out to be good, they fished. If they're out fishing and the hunting was good, they hunted.

Testimony of Dr. Ray, Trial Transcripts (RAR, Vol. I Tab 5, pp. 43-44,109,132-133); *Trial Judgment* (AAF, Vol. VIII Tab 59, p. 1025-1026); *Ont. SC Judgment* (AAR, Vol. VIII Tab 60, p. 1049-1052 (paras. 24-28); *Ont. CA Judgment* (AAR, Vol. VIII Tab 62, pp. 1129-1131 (paras. 110-115))

87. The second factor in determining the characterization of the right is the nature of the government regulation. The Appellant argues that the regulations are large-game specific and therefore the characterization of the right should be as well. This is not an accurate description of the regulatory regime. The Powleys are charged under s. 46 & 47(1) of the *Game & Fish Act*. Section 46 is a general prohibition against possession of any game in contravention of the *Act*. Section 47(1) prohibits hunting of large game without a licence. The IEP, which is the policy enacted following this Court's decision in *Sparrow*, deals with

Aboriginal harvesting, but does not distinguish between large and small game or between fish and game. It is generic and deals with all species and sizes of hunting and fishing.

Game & Fish Act (ABA, Vol. II, Tab B1); *IEP, supra* (RAR, Vol. III, Tab 36)

88. Indians in Ontario, pursuant to the IEP, have largely unrestricted access to all species and sizes of game and fish (with the exception of rare or endangered species) without seasonal or gear restrictions. The *IEP*, in its preamble, states that it was established in response to this Court's decision in a food fishing case about salmon - *Sparrow* - yet the policy is not restricted to species-specific or size-specific fishing.

89. It is submitted that the Court of Appeal for Ontario was correct in refusing to define the activity as species-specific when it stated that 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."

[emphasis in original]

Ont. CA Judgment (AAR, Vol. VIII Tab 62, p. 1130 (para 113))

90. It is submitted that the proper characterization of the right is the right to hunt for food. The Respondents rely on the hunting practices of the historic Métis community at Sault Ste Marie to establish the claimed right.

Hunting was Integral to the historic Métis society at Sault Ste Marie,

91. In *Van der Peet*, this Court held that in order for an activity to meet the test of being an Aboriginal right protected within the meaning of s. 35, "the claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture." In *Adams* this Court held that demonstrated reliance on a practice is sufficient to meet the "integral to their distinct society" test.

Van der Peet, supra (ABA, Vol. I Tab A1, p. 552 (para 55)); *R. v. Adams*, [1996] 3 S.C.R. 101 (RBA, Vol. I Tab A6, p. 117-118 (para 26))

92. The trial judge found as a fact that there was an historic Métis community at Sault Ste Marie. He found that the Métis evolved into a visually, culturally and ethnically distinct Aboriginal community in the Sault Ste Marie area at the relevant time. The trial judge also found as a

fact that hunting was an integral part of the Métis culture. Both appeal courts upheld these findings of fact.

Trial Judgment (AAR, Vol. VIII, Tab.59, p. 1025 (lines 10-20)) and 1026-1027); *Ont. SC Judgment* (AAF, Vol. VIII, Tab 60, p. 1051 (para 26)); *Ont. CA Judgment* (AAR, Vol. VIII Tab 62, pp. 1137-1138 (paras. 126-127))

93. The Appellant argues that because the Métis society did not exist at the relevant time, (either at contact or at the assertion of sovereignty) the Court must look to the practices of their Indian ancestors. In the alternative, the Appellant argues that hunting was not integral to the distinct Métis society because it was a marginal aspect of their economy, and that the courts below failed to distinguish between the culture and practices of the Ojibway and the Métis. *Appellant's Factum* at paras. 113 and 115

What is the relevant time for determining the existence of the right?

94. As noted above, the majority in *Van der Peet* held that the relevant time for determining the existence of the rights of Indians was at the time of contact with Europeans. The majority also noted that this part of the test would need to be re-examined in the Métis context.

Van der Peet, supra (ABA, Vol. I Tab A1 at pp. 558-559 (para 67))

95. At the courts below, both parties asserted that the contact test was inappropriate for Métis. The trial judge held, and all parties agreed, that the relevant time was 1815-1850. The Appellant argued that the relevant time was the date of 'effective sovereignty,' while the Powleys, building on the statements of this Court in *Adams*, proposed the time when 'effective control' changed in the area. The Court of Appeal declined to determine the relevant time because the evidence showed that while both parties differed as to the reasons for it, they agreed on, the time frame.

Trial Judgment (AAR, Vol. VIII Tab 59, p. 1024 (line 40)); *Ont. SC Judgment* (AAR, Vol. VIII Tab 60, p. 1046-1048 (paras. 14-20)); *Ont. CA Judgment* (AAR, Vol. VIII Tab 62, pp. 1123-1126 (paras. 95-104))

96. The Appellant now argues, for the first time in this Court, that the relevant time is first contact, which has the effect of moving the time back by 200 years. We submit that the Appellant's proposition cannot be the relevant time for the case at bar because it eliminates the possibility that any Métis (and many Indians) could claim Aboriginal rights. It is nothing

less than an argument that s. 35's stated recognition of the Aboriginal and treaty rights of the Métis is meaningless. This is not a purposive application of s. 35.

97. It is submitted that this Court has never used a strict application of the contact test and in fact in *Adams* and *Coté* has applied the test purposively and with flexibility in two respects - with respect to the date of contact and with respect to the actual people contacted. In *Adams* and *Coté* the facts show that first contact in 1535 by Cartier was with a different people. For the purposes of the *Van der Peet* test, this Court instead used 1603, with the arrival of Champlain. In *Mitchell* the trial judge used 1609 even though the Mohawks, whose rights were before the court, didn't settle in the area until over 140 years later.

Adams, supra (RBA, Vol. I Tab A6, pp. 125-128); *R v. Coté*, [1996] 3 S.C.R. 139 (RBA, Vol. I Tab A7, pp. 171-175); *Mitchell v. Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911 at 965 (RBA, Vol. I Tab A8, p. 3 1) (QL); *Delgamuukw, supra* (RBA, Vol. I, Tab A2, p. 1131 (para 147))

98. Based on this Court's decision in *Mitchell*, the Appellant argues, in the alternative, that the relevant time is the assertion of sovereignty in 1763. In support of this argument, the Appellant has submitted voluminous case law with respect to the assertion of sovereignty. It is submitted that the assertion of sovereignty has been dismissed by this Court as the relevant time for determining whether a practice meets the integral to their distinct society test. The discussion with respect to the assertion of sovereignty in *Mitchell* arose because of the nature of the right at issue, and was with respect to incompatibility, not the relevant time for determining the right. For this reason, it is submitted that, all the materials cited by the Appellant respecting requirements for proof of the assertion of sovereignty are irrelevant. *Mitchell, supra* at 987 (RBA, Vol. I Tab A8, p. 43) (QL)

99. It is submitted that both the contact test and the assertion of sovereignty test are inappropriate in the context of the Aboriginal rights claimed by the Métis. The contact test was developed to determine the Aboriginal rights of Indians. It is a test that reflects the purpose for including Indians within s. 35 - to recognize their existence as a people in possession prior to contact. The relevant time to determine whether the practice, custom or tradition is integral to the distinct Indian society is the same time - prior to contact.

100. Powleys submit that the relevant time to determine the rights of the Sault Ste Marie Métis community is the time just prior to 1850. This time reflects the purpose for including Métis

within s. 35 - to recognize their existence, as a people in possession, when the Crown's obligations arose pursuant to the *Royal Proclamation*. This is the same date that was referred to by the parties and the courts below. The historical record shows that the Crown had authorized non-Aboriginal third party activities just prior to 1850 when control was shifting away from the Aboriginal peoples in possession. This was the time when, with respect to the Sault Ste Marie Métis community, the Crown's fiduciary obligations arose and when its obligations to implement the equitable principles in: the *Royal Proclamation* crystalized.

For a discussion of the equitable principles in the *1870 Order* and their application throughout western Canada see *Métis Perspectives* (AAR, Vol III, Tab.41, pp. 399-403)

101. This suggested approach mirrors the practices of the Crown in making treaties to implement the equitable principles of the *Royal Proclamation*. Historically, treaty making involved no exhaustive analysis to determine the practices, customs or traditions of the Aboriginal people at contact, nor was there any attempt to determine eligibility based on length of occupation. By way of example, if length of occupation had been determinative, the Crown would not have entered into treaty with the Ojibway in Treaty 3, since the Ojibway did not arrive in what was previously Cree territory, until after 1821. It should be understood that we are not, in any way, saying that the Crown was incorrect in entering into treaty with Indians who had relocated. On the contrary, we submit that the Crown properly entered into treaty with the Indians who were in possession at the time.

Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1992-93), 8 *Queen's LJ* 232 (RBA, Vol. II Tab B9, p. 268); *Looking Forward* (RBA, Vol. II, Tab D3, pp. 128-132)

102. The Appellant argues that if the time for determining what is integral to the Métis is later than the time of contact, then it will be unfair to Indians. We say this is not an issue. Each time the Crown implemented the equitable principles from the *Royal Proclamation* - beginning in the Upper Great Lakes with the *Robinson Treaties* and continuing west with the numbered treaties - it negotiated with the Aboriginal peoples in possession, including the Métis. Therefore, the rights of all of the Aboriginal peoples who participated were determined at the same time. For the Indians, their rights are articulated in the treaties. They 'will not have to meet a contact test standard should they litigate their rights. Instead, they will be held to the standard set out by this Court in *R. v. Badger*: what activity does their treaty protect? Contrary to the assertions of the Appellant, we say that not only is there no

earlier in time than the treaties.

R. v. Badger, [1996] 3 S.C.R. 771 at para 52 (RBA, Vol. I Tab A9, p. 17) (QL)

Integral to which society - the Métis or their Indian Ancestors?

103. As stated above, the Appellant argues that the Métis did not exist at the time of contact or at the time of the assertion of sovereignty. Therefore, the practices at issue are those of their Indian ancestors. This is an argument that the "integral to their distinct society" test does not apply to the Métis. It is submitted that the Appellant's submission is not supported by the text of s. 35 and would result in a denial that the Métis are a distinct people.

104. There was no evidence or argument at trial with respect to the original source of the Métis hunting practices. The evidence shows that the first Métis who arrived in the Upper Great Lakes were of Iroquois descent. These Métis then intermarried with the Ojibway. In a quest such as the Appellant would have us pursue, do we look for the Ojibway ancestors practices or the Iroquois ancestors practices? What if the Ojibway and Iroquois practices are different? It is submitted that a search for the original source of the practice is not relevant to an inquiry as to whether or not a practice was integral to an Aboriginal society at the relevant time.

For evidence that initial Métis traders had Iroquois ancestry and subsequent intermarriages with Ojibway see citations in this Factum. above at para 26

105. The Court of Appeal declined to determine this issue because the evidence in this case shows that hunting was important to both the Métis and the Ojibway and that both peoples relied on hunting. The Respondents ask this Court to address this issue. The question as to whether Métis rights are dependent on, or must find their source in Indian ancestors, is of fundamental importance to the Métis. Further, there is a complete record in the case at bar to determine the matter.

Hunting was integral to the Métis Society

106. The trial judge found as a fact that the Métis society at Sault Ste Marie relied on hunting, that it was an important and significant aspect of their subsistence economy and culture and concluded that it was an integral part of the distinct Métis society. Both appeal courts upheld this finding of fact and the conclusion.

Judgment (AAR, Vol. VIII Tab 60, p. 1051 (para 26)); *Ont. CA Judgment* (AAR, Vol. VIII Tab 62, pp. 1137-1138 (paras. 126-127))

107. Dr. Ray testified that the historic economy of the Métis people in Sault Ste. Marie was similar to the Ojibway economy. Both societies had a flexible, integrated, mixed economy that included fishing, hunting, gathering and trading with a shifting emphasis on each activity according to the circumstances.

... by the mid-nineteenth century the Métis and their Indian cousins who lived in the area within the boundaries of the present-day Robison [sic] Treaties had a well established mixed economy that integrated making a livelihood off of the land through fishing, hunting, and trapping for subsistence and commercial purposes, as well as small-scale farming with wage labour, and entrepreneurial activities (mostly fur trading).

Ray Report (AAR, Vol. IV, Tab 42, p. 533)

Q. 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...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.

Testimony of Dr. Ray (RAR, Vol. I, Tab 5, p. 148). See also diagram showing Métis economy (circa 1850) in Ray Report (AAR, Vol. IV, Tab 42, p. 534). For diversity of economies of Métis communities across the Métis Nation see Ray Report (AAR, Vol. IV, Tab 42, pp. 526-527).

108. In seeking to diminish the importance of hunting to the Métis economy, the Appellant says that the Métis relied on small-scale farming. However, Dr. Ray's evidence, which the trial judge accepted, shows that although there was some farming, the society cannot be described as an agricultural society.

... this was true of the Ojibway agriculture, it's true of the Métis agriculture. You plant the crops and then you go off and do your fishing and trading and voyageuring and whatever it is that you're doing and then you come back in the fall and ... if you got a crop, that was great. If you didn't you didn't starve over the winter having putting all your eggs in one very precarious basket

... The farm was ... sort of a base, an anchor as it were on the land. They'd comb back to it

sometimes annually, regularly or sometimes over long periods of time and they engaged in ... they had to engage and did engage in a whole variety of other, activities ... they had too many other things to do than to sit around and worry about spending all their time on farms. It was too risky.

Testimony of Dr. Ray (RAR, Vol. I, Tab 5, pp. 116-118, 132-133)

109. The Appellant also asserts that the Métis relied on other economic activities - fishing, maple sugar and trading - to such an extent that hunting was a marginal activity. The evidence shows that the Métis were resourceful - they traded, produced maple sugar and fished. However, hunting remained of significant importance to their economy.

Some people were able to stay year round by the water but that was difficult ... so that aspect of Métis life although ... they were periodically employed or ran. their own trading businesses, was a precarious one. So, hunting for most of the community was definitely a way of life year in and year out, but even for those who were seasonally engaged in the fur-trade and later on in the lumber and in the mining activities, hunting was important to put food on the table and to preserve meat for later consumption, so it was part of their way of life.

Testimony of Dr. Lytwyn (RAR, Vol. II Tab 21, p. 298); *Testimony of Dr. Ray* (RAR, Vol. I Tab 5, p. 145); *Ray Report* (AAR, Vol. IV, Tab 42, p. 534)

110. Dr. Ray testified that for most of the 19th century large game was scarce and both Métis and Ojibway were forced far into the interior lands north of the Great Lakes to hunt. In the period just before 1850 obtaining game was difficult for both the Métis and Ojibway and they were facing starvation. As a result both peoples began to rely more on the fisheries. The Appellant says that Dr. Ray himself stated that, hunting was marginal, by citing a portion of his evidence out of context. Dr. Ray's statement was a simple acknowledgment that the people relied more on fishing during the time of scarcity of big game - not because they were not interested or because it was not an important part of their economy and culture - but as a matter of survival. As he put it "you can't hunt what's not there..."

It's clearly a low point in the fur and game cycle. It also points out again a point I was trying to make yesterday, I'll go back and highlight what he says here, the scarcity makes it "out of the power of the best hunter to provide a sufficiency to maintain himself & a family". That is out of hunting and trapping alone, so again, it's the diversified economy of the Indian and Métis, here which was 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 in response to game population cycles.

Testimony of Dr. Ray (RAR, Vol. I Tab 5, pp. 109,112-113,132-133,142,145) and (RAR, Vol. II Tab 6, pp. 209, 231)

111. The evidence also shows that when moose were scarce the Métis turned more to bear hunting. The Métis hunted moose prior to the time of scarcity, and when it was over, immediately returned to their moose hunting practices. At trial, Dr. Ray emphasized that the importance of hunting never waned in the Métis society, even throughout the time of scarcity, and that not one generation would have gone by without hunting large game.

Q. ... I take it from that, Sir, that there was at least one generation who grew up without hunting big game except bears.

A. Well, I think if you'll excuse me, it's a .. to my mind it's a nonsense question ...

... in terms of native economies, the question doesn't make a lot of sense because today we tend to think of fishing, hunting, and not just hunting, you know game hunting versus goose hunting ... we break up all these economic activities into separate activities, but ... the Métis didn't look at it that way. Hunting was part of living off the land as was fishing, collecting and various other things and the relative importance, of these activities would shift over time, but it's ... a livelihood off the land issue ...

Q. ...and the scarcity of large game, that there was at least a generation who grew up without hunting big game.

A. No ... I don't think that's true there's a whole generation. As I said, ... clearly bear hunting is going on, so to me the operative point is this is game hunting. I don't ... to be species specific I think is to put an unrealistic limit on our understanding of the Native economy, the way it worked.

... No, but you said a generation had passed without game hunting and I'm saying it did not.

... you're equating they don't have moose, therefore game hunting doesn't occur and what I'm resisting is that implication. That is not what I said. Game hunting occurs but by the nature of the cycle at this time it seems to be more focused on bear, but I will not accept the proposition that a whole generation went by without game hunting.

Testimony of Dr. Ray (RAR, Vol. II, Tab 6, pp. 205-209)

112. There is no evidence to contradict Dr. Ray's evidence. It is submitted that there is no basis for this Court to overturn a finding of fact by the trial judge that is based on uncontradicted evidence at trial.

113. The Appellant asserts that the Court of Appeal erred in failing to distinguish between the Métis and Ojibway economies. In fact, the trial judge did distinguish between the two cultures and their respective economies and still found that hunting was an important practice of the Métis. Here again, the Appellant is really asking this court to overturn the findings of fact by the trial judge.

Does the contemporary Métis society continue to hunt?

114. This Court has held that Aboriginal peoples who assert Aboriginal rights must demonstrate that the claimed practice is integral to their distinctive culture today and is in continuity with their practices at the relevant time. With respect to this requirement the trial judge found two facts. First, the contemporary Métis society was in continuity with the historic one. Second, hunting was an important practice of continuing significance for the contemporary Métis community at Sault Ste Marie. These findings of fact were upheld by both appeal courts. The trial judge further found that it was not reasonable to limit the Métis community to the town-site of Sault Ste Marie proper, and that a more realistic interpretation for the purposes of considering the Métis identity and existence should encompass the surrounding environs. This finding was also upheld by both appeal courts.

Trial Judgment (AAR , Vol. VIII Tab 59, p. 1018 (lines 10-40)); *Ont. SC Judgment* (AAR, Vol. VIII Tab 60, 1051-1052, and 1057 (line 20)); *Ont. CA Judgment* (AAR, Vol. VIII, Tab 62, pp. 1138-1139 (paras. 128-129) and 1141 (para 137))

115. The Appellant disputed the findings of fact by the trial judge that the Métis community continued. They say there is insufficient evidence to show the continuity of the community. The Appellant also argues, as a matter of law that the Métis community ceased to exist.

116. The trial judge considered these arguments at trial and concluded that the Métis society at Sault Ste Marie was in continuity with its historic predecessor, although after the treaty in 1850, it was largely an invisible entity to outsiders, as a result of shame, ostracization, and prejudice. The Métis quietly became the "forgotten people". The trial judge found that this characterization was an apt one. These findings of fact were carefully considered by, both appeal courts and upheld.

See citations in this Factum above at para 114

Continuity of the Métis Society at Sault Ste Marie - The Facts

117. The evidence shows that while the Métis may have dispersed from the actual town-site of Sault Ste Marie, they merely moved to the surrounding areas where they quietly continued their culture, society and lifestyle. The evidence shows why they moved to the peripheries of town and why they became invisible socially and politically for such a long period of time.

47, pp. 1844-1845); *Testimony of O. Bjornaa* (RAR, Vol. II Tab 23, p. 305); *Testimony of A. Bennett* (RAP, Vol. II Tab 8, p. VI)

118. In 1850 Robinson promised the Métis their lands would be protected. Instead they had to pay for them and as a result lost their lands, which now form downtown Sault Ste Marie. The Appellant states that the Métis simply sold their lands. The implication is that the sales were willing seller/willing buyer exchanges. On the contrary, the evidence shows that heavy land speculation was going on after the treaty and that Robinson and his friends were trading and profiting from the Métis sales. Following the events at Red River in 1870 and in Saskatchewan in 1885 it became dangerous for Métis to self-identify publicly. In 1872 the Ontario legislature passed a \$5,000 bounty on the head of Louis Riel. From this point until the 1960s, the evidence shows that the Métis community continued to exist at Sault Ste Marie but remained hidden from public view.

Testimony of Dr. Lytwyn (RAF, Vol. II Tab 19, pp. 294-295); *Lytwyn Report* (AAR, Vol. IV, Tab 47, p. 643); *Testimony of A. Belcourt* (RAR, Vol. II, Tab 22, p. 300); *Métis Perspectives* (Vol. III, Tab 41, pp. 309-310); *Trial Judgment* (AAR, Vol. VIII Tab 59, pp. 1021 (lines 10-20)). See also *Ont. CA Judgment* (AAR, Vol. VIII p. 1141 (lines 20-40)).

119. The evidence of both experts who testified about the post- 1850 period, one of whom is the Crown's own expert, is consistent - the Métis community changed but was sustained.

Although 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. This can be seen by examining the census rolls beginning with the first census for Algoma District in 1861. The census data from 1861, 1871, 1881 and 1891 indicate that the Métis continued to live in much the same way as they had before 1850 ... Outside of the census data, few historical records provide information about the Métis in the Sault Ste Marie area., One reason for the lack of information about the Métis is their removal to the peripheries of the town. *Lytwyn Report* (AAR, Vol. IV, Tab 47, p. 643-645). See also *Testimony of Dr. Lytwyn* (AAR, Vol. I, Tab 14, pp. 280-286).

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. A few of them we know went to the States and there are some that we just don't have enough information about to be sure. And when I say the States I mean, because of the study area that we conducted, Chippewa County, very close or Sugar Island. *Testimony of G. Jones* (RAR, Vol. II Tab 7, pp. 269-270)

...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

of a separate community of Métis families persisting in the vicinity of Sault Ste Marie at least into the twentieth century. *Jones Report* (AAR, Vol. VI Tab 54, p. 765)

120. Traditional knowledge evidence at trial also shows that the Métis people continued to live at Sault Ste Marie. Mr. Olaf Bjornaa testified that both his mother, born in 1917, and his grandmother identified as Métis and lived in the surrounding environs of Sault Ste Marie. Mr. Bjornaa and Mr. Bennett testified that there have always been Métis at Sault Ste Marie. The evidence at trial also showed that some names of the original Métis society at Sault Ste Marie are continued in the present day membership lists of the Métis Nation of Ontario.

Testimony of O. Bjornaa (RAR, Vol. II, Tab 23, pp. 301-305); *Testimony of A. Bennett* (RAR, Vol. II Tab 8, p. 271); *Jones Report*, Supporting Documents: *Sketch of the Claims to Land on the River St. Mary's at Pauwa Teeg*, Exhibit 51 (RAR, Vol. III, Tab 44) and *Jones Report*, Supporting Documents: *List of Settlers of Sault Ste. Marie (May, 1846)*, Exhibit 51 (RAR, Vol. III, Tab 45). See also *List of Names from Métis Nation of Ontario Registry for Region 4 (1998)* (RAR, Vol. III, Tab 34)

121. The Appellant challenges the findings of fact of the trial judge, which were upheld on both appeals, with respect to the continued existence of the Métis community and the Powley's membership in that community. They dispute these findings by suggesting that those facts could only be proved by witnesses who themselves meet the genealogical and cultural means test the Appellant has argued for. It is submitted that there is no such evidentiary principle in our law. The trial judge saw the witnesses and heard the traditional knowledge they offered and concluded that the Métis community continued. Both appeal courts upheld this conclusion. The Appellant did not undermine the credibility of this evidence on cross-examination and did not lead any contradictory evidence on this issue.

Continuity of the Métis Community - the Law

122. The Appellant asserts that the historic Métis society and the Ojibway society merged and therefore the Métis community does not exist as a matter of law. It is submitted that what the Appellant is really asserting is that the *Indian Act* extinguished the Métis community and their collective rights as well as the Aboriginal and/or treaty rights of the Powleys as individuals.
123. The evidence shows that the societies did not merge and that as a matter of fact the Métis community continues to exist. The evidence shows that some Métis moved onto the

reserves. The evidence also shows that the individual Métis who moved onto the reserves

maintained a distinct Métis identity and that Ojibway band members always viewed the Métis individuals who moved onto the reserve as Métis. The evidence shows that government officials took the same view. It is notable that this evidence was introduced by the Crown's expert witness at trial.

Jones Report (AAR, Vol. VI, Tab 54, p. 762-763)

124. The evidence shows that the Métis approached Robinson, the treaty commissioner, as a group and asked to take treaty as a Métis group or to have a clause inserted in the treaty that protected their rights. Robinson never suggested that a consequence of some individuals taking treaty would be the extinguishment of the Métis community's collective rights or those individual's Métis identity. There is no evidence that Métis individuals were advised to make an election either to stay Métis or take treaty. In fact the evidence shows that the government's own view was that individuals continued to be Métis after taking treaty. Indeed, that was the basis on which Magistrate Borron later recommended that "French Half breeds or other breeds of like fecundity and longevity" be removed from the treaty lists - because they were readily identifiable as Métis, had not merged as a culture into the reserve community, and should never have been allowed to move onto the reserves in the first place.

Lytwyn Report (AAR, Vol. IV, Tab 47, p. 646); *Testimony of Dr. Lytwyn* (RAR, Vol. III, Tab 24, pp. 306-312); *Jones Report* (AAR, Vol. VI, Tab 54, pp. 765, 757-759) For full copies of *Borron Reports* attached to *Jones Report* see Exhibit 54A and 54B (not in RAR). See also *Looking Forward* (RBA, Vol. II, Tab D3, pp. 268-269) for discussion on government policy re: treaty lists in Upper Canada post 1850.

125. It is submitted that legally none of these events had the effect of extinguishing the collective existence or harvesting rights of the Sault Ste Marie Métis. There is no evidence that the Métis community ever surrendered its Aboriginal rights. It is submitted that the trial judge was correct when he found that, as a result of Robinson's refusal to treat with the Métis as a collective their Aboriginal rights, as a Métis people were not converted into treaty rights. Therefore, since the evidence shows that the Métis community continues to exist, and there is no evidence of extinguishment, the collective rights continue to exist. The personal histories of individual Métis could not have extinguished the rights of the Métis collective.

Trial Judgment (AAR, Vol. VIII, Tab 59, pp. 1015 (lines 30-40) and 1028 (lines 10-30))

126. The Appellant also argues that the Lesage family (the Powleys' ancestors) became

"Indians" by virtue of their move to the reserve, and that when they later lost their *Indian Act* status they lost their treaty and Aboriginal rights

127. It is submitted that the *Indian Act* does not determine who can claim an Aboriginal right. As noted above such an argument is fundamentally unfair in view of the fact that there is no evidence that the Métis were advised to make an election with respect to their identity.

128. Further, it is submitted that although the Powleys rely on their Aboriginal rights *qua* Métis, rather than their treaty right as descendants of treaty beneficiaries, it is nonetheless submitted that Ontario's argument that the Powleys cannot claim a treaty right is wrong for two reasons. First, treaty rights are inherited and status under the *Indian Act* is not relevant or determinative of whether an individual has a treaty right.

R. v. Fowler, (1993), 134 N.B.R. (2d) 361 (N.B. Prov. Ct.) (ABA, Vol. I, Tab 33); *R v. Cheyfier*, [1989] 1 C.N.L.R. 128 (Ont. Dist. Ct.) (ABA, Vol. I Tab 34)

129. Second, there is no reason why the Powleys may not have two constitutional protections for their existing right to hunt for food - as an Aboriginal right and as a treaty right. It is submitted that these two protections for the right are not contradictory and that the possibility of a right having two sources of protection is not unique. There are rights that can be protected under more than one section of the *Charter of Rights and Freedoms*. It is further submitted that the content of the right to hunt is the same regardless of the source of the constitutional protection and there is no conflict in claiming alternative sources as between treaty or Aboriginal rights. The theory that the protection of one right must be mutually exclusive of another right is incompatible with the interpretation of the nature and scope of rights protected within the Canadian Constitution.

R. v. Rose, [1998] 3 S.C.R. 262 (RBA, Vol. I Tab A10, pp. 314-316); *R v. Crawford*, [1995] 1 S.C.R. 858 (RBA, Vol. I, Tab A11, p. 882)

Continuity of the Hunting Practice

130. The trial judge found as a fact that hunting was carried on through the years by the Métis community and continues to be an important aspect of the Métis community today. These findings were not disturbed on appeal.

Trial Judgment (AAR, Vol. VIII, Tab 59, pp. 1027-1028); *Ont. SC Judgment* (AAR, Vol. III Tab 60, 1057-1058 (para- 38-40)); *Ont. CA Judgment* (AAR, Vol. VIII, Tab 62, pp. 1141 (para 137))

131. The evidence at trial shows that hunting continued to be an important activity for the Métis after 1850. In the census lists of the late 1800s several Métis list their occupations as hunters, and ironically, according to the Crown expert, when moose begin to reappear in the area, one of the first moose hunting charges is against a Métis.

Lytwyn Report (AAP, Vol. IV, Tab 47, p. 644-645); *Testimony of Dr. Lytwyn* (RAR, Vol. III, Tab 25, p. 313); *Jones Report* (AAR, Vol. VI Tab 54, p. 759); *Testimony of G. Jones* (RAR, Vol. III, Tab 26, p. 314)

132. Traditional knowledge was adduced at trial about Métis hunting practices. Mr. Bjornaa, who was approximately 57 years old at the time of trial, testified about the importance to the Métis, of the harvesting activities including the food hunt when he was a child.

.... They built their homes and stuff and worked ... the land... Like, Lizard Island, you take people from Gros Cap, Goulais Bay, Batchewana, all moved up to those Islands, spent the summers there, took their families. They were all Métis families. I mean the foundations and the building are still there. When they went up there, they took their families up, they spent the summer, they commercial fished, they harvested their meat and stuff off the mainland, they went over to Blueberry Island and picked berries for the year to put away and these people migrated back and forth. When I was a kid I remember. I remember being up to those islands and places.

I know at one time, people going hunting, if they shot a moose it was shared. There was a gathering, like there was people as a group. One family didn't take all the moose. The moose went to numbers of families there. The elders were looked after and stuff, so I really felt there was in a way there was a political bond there.

Testimony of O. Bjornaa (RAR, Vol. Vol. III, Tab 27, pp. 315, 317)

133. The evidence shows that Métis food hunting practices are substantial and have been continuous and that contemporary Métis families prefer the food they get from the hunt and rely to a large degree upon their hunting for food. The evidence shows that they share the product of the harvest within the Métis community and that the meat they harvest forms a substantial proportion of their diets.

Testimony of W. Bouchard (RAR, Vol. III Tab 28, pp. 318, 319); *Testimony of A. Bennett* (RAR, Vol. III, Tab 29, pp. 320-321)

134. The evidence also shows that the Métis historically exercised their harvesting rights on the islands in the Great Lakes, far into the interior, and on the lakeside. In the case at bar it

was not necessary to determine the full extent of the Métis harvesting territory because it was clear on the facts that the Powleys were hunting well within their traditional territory.

For historic hunting into the interior see *Testimony of Dr. Ray* (RAR Vol. I, Tab 5, pp. 81, 105-109, 112-113, 116) and (RAR, Vol. III, Tab 6, pp. 192-193). See *Peterson Article* (AAR, Vol. IV, Tab 44, p 603) for Métis seasonal round. For harvesting on the islands see *Testimony of O. Bjornaa* (RAR, Vol. III Tab 27, pp. 315-317). For where the Powleys hunted see *Agreed Statement of Facts* (AAR, Vol. II Tab 38 (lines 10-20)).

Are the Claimants entitled to exercise the right claimed?

135. The trial judge set out a test for determining whether a Métis claimant can exercise an Aboriginal right to hunt that is protected within the meaning of s. 35 of the *Constitution Act*, 1982. It is submitted that his test was correct. The process has three parts. The claimants presented evidence to show that they self-identified as Métis; had a genealogical connection to the historic Métis community; and were accepted by the contemporary Métis community. After applying the test, the trial judge found that the Powleys had met their burden of proof with respect to all three parts and were entitled to exercise the Sault Ste Marie Métis community's right to hunt,

Trial Judgment (AAR, Vol. VIII Tab 59, p. 10 14 (lines 20-30) and 1017-1018)

136. The Superior Court judge on appeal varied this with respect to the genealogical connection. O'Neill J held that the necessary connection did not, have to be a genealogical one. The Court of Appeal declined to uphold the variation and held that since the evidence showed that the Powleys were genealogically connected to the historic Métis community at Sault Ste Marie and therefore met the strict test, there Was no need to determine whether, on another set of facts, a genealogical connection might not be necessary.

Ont. SC Judgment (AAR, Vol. VIII Tab 60, p. 1066 (para 64)); *Ont. CA Judgment* (AAR, Vol. VIII Tab 62, p. 1148 (para 55))

137. The Appellant raises three basic objections to the trial judge's finding that, the Powleys are entitled to exercise the right claimed. First, they argue that the Powleys' have only a "trivial" genealogical connection to the historic Métis community at Sault Ste Marie. Second, the Powleys have not demonstrated a sufficient attachment to the modern-day Métis community. Finally, the Appellant asserts that the Powleys' acceptance by the Métis community cannot be effected by a political organization.

Sufficiency of Genealogical Connection

138. The uncontradicted evidence at trial shows that the Powleys self-identify as Métis. In his application to the Ontario Métis Aboriginal Association [“OMAA”] in 1989, Steve Powley self-identified as Métis and identified his then teen-aged son, Roddy, as Métis. In 1993 when Steve and Roddy Powley were hunting, the outcome of which is the subject of the case at bar, they again identified as Métis and claimed their Métis harvesting rights in the tag they affixed to the moose ear. In 1994 when the Métis Nation of Ontario [“NINO”] was established, Steve and Roddy again self-identified as Métis in their applications.

Steve Powley's OMAA Membership Application and Membership Card, Exhibit I (AAR, Vol. II, Tab 38, p. 274); *Tag Affixed to Bull Moose's Ear by Steve Powley*, Exhibit I (AAR, Vol. II Tab 38, p. 275); *List of Names from Métis Nation of Ontario Registry for Region 4 (1998)*, Exhibit 11 (RAR, Vol. III Tab 34); *Trial Judgment* (AAR, Vol. VIII Tab 59, p. 1017-1018)

139. The Powleys submitted evidence to prove that they are genealogically connected to the historic Métis community at Sault Ste. Marie. The uncontradicted evidence at trial is that the Powleys are members of the LeSage family who were recognized members of the historic Métis community at Sault Ste. Marie. As the trial judge noted, this genealogical connection was confirmed by the Appellant's historical expert.

Armstrong Genealogy Report, Exhibit 48 at p. 3 (RAR, Vol. III Tab 43, p. 375). For confirmation of genealogical connection by Appellant's witness see *Testimony of G. Jones* (RAR, Vol. II Tab 7, p. 269) and see *Trial Judgment* (AAR, Vol. VIII Tab 59, p. 1018 (lines 5 - 20)).

140. The Appellant argues that the genealogical connection is insufficient. This is in fact an argument for a minimum blood quantum requirement.

141. It is submitted that s.35 embodies the fundamental principle that the Aboriginal peoples recognized and affirmed in the Constitution are polities - political and cultural entities – not racial groups. This fundamental principle also governs the individual membership in such polities and rules with respect to who can exercise the polities' rights. It prevents the imposition of arbitrary standards on membership rules.

See *Looking Forward* (RBA, Vol. II, Tab D4, pp. 305-307) for an example of how arbitrary blood quantum rules may affect membership in an Aboriginal community.

142. Like all societies in the world today, the Métis society is a mixture of genetic

backgrounds. Métis identity lies in a collective life that is comprised of their history, ancestry, culture, values, traditions and ties to the land. The Métis identity cannot be reduced to blood quantum. We submit that any blood quantum test - whether it is quantum of Indian blood or quantum of Métis blood - is not a purposive analysis of the recognition and affirmation of the Métis as one of the “aboriginal peoples of Canada” in s. 35.

143. It is exactly because determining Aboriginal status by blood quantum is a race-based concept rather than a societal and historical concept, that it has never been accepted in law or Canadian society as a meaningful way of determining Aboriginality. Blood quantum is not used to determine who is an Indian in Canada. It should not be used to determine who is Métis.

144. It is further submitted that this Court should not determine whether a genealogical connection is necessary to exercise an Aboriginal right. We do not submit that those without a genealogical connection cannot exercise an Aboriginal right. However, there is no evidence in the case at bar with respect to this issue. Further, it is a matter of great importance to the Aboriginal community and is not easily determined without a factual basis. Many people who have "Indian" status and are members of bands have no genealogical connection to the communities they now live in. Some marry in from other bands and some are not genealogically Indians at all. Whether these individuals can exercise the community's Aboriginal or treaty right to harvest has not been determined by this Court. It is submitted that this important issue should not be determined in this case because the issue does not arise on the facts.

145. This Court has said that a constitutional question before an appellate court should not be turned into a reference. This is especially so where the court does not have the requisite information and evidence it would need to determine such a question.

Northern Telecom Limited v. Communication Workers of Canada, [1980] 1 SCR 115 (RBA, Vol. 1, Tab A12, pp. 139-140); *Vadeboncoeur v. Landry*, [1977] 2 SCR 179 (RBA, Vol. I Tab A13, pp.); *Bisailon v. Keable*, [1983] 2 SCR 60 (RBA, Vol. I Tab A14, p. 71)

Sufficiency of Community Attachment

146. The Appellant asserts that there is no direct evidence from the Powleys concerning their "attachment to the modern day community" and that community acceptance by a Métis

political organization is not acceptance by the Métis society. It is submitted that

the Appellant has converted the concept of community acceptance into a requirement to prove "ties to the modern-day Métis community" and in so doing is asking that this Court set a cultural means test - a standard that does not exist for Indians.

Appellant's Factum at para 104

147. There has never been a requirement to prove ties to an Indian community in order for a member to exercise that community's right. Quite correctly, courts have not embarked on these individual rights inquiries because they have properly focused on the collective rights at issue. The rights of Indians are not dependent on proof of ties to the community. It is a fact that more band members live off-reserve than on. Many members may be spread across the country and have no day-to-day connection with their bands. These members can exercise the Aboriginal rights of their community. The theory advanced by the Appellant with respect to Métis has never formed any part of Canadian law of Aboriginal or treaty rights for Indians.
148. The Appellant asserts that the Powleys must prove that they are, not just genealogically part of the Métis community, and community accepted. They must also be well-known and highly visible members of the Métis community.
149. Aboriginal rights are collective rights although each member of the collectivity has a personal right to exercise them. The Aboriginal rights claimant must be a member of that Aboriginal community, but each individual within that community does not have to meet an arbitrary and highly subjective recognition test. It is submitted that any such test would be inconsistent with a purposive analysis of an Aboriginal right protected within the meaning of s. 35. It is submitted that an individual recognition test denies the collective aspect of Aboriginal rights. The rights belong to the Aboriginal society and are exercised by the individual members of that society regardless of their public visibility. The Aboriginal members of that society can exercise these rights whether or not they actively participate in the Aboriginal community, have a job, are able-bodied, speak a particular language, are male/female, old/young, literate, like to dance, play the fiddle or simply like to sit at home and watch television. Such tests have no part in the test for Aboriginal harvesting rights.

150. In Aboriginal rights cases regarding the claims of Indians, this Court has not had to wrestle with the problems of community acceptance. To date, because Aboriginal rights cases have been about status Indians, the courts have relied on membership in Indian bands instead of determining either genealogical connection or community acceptance.
151. The Appellant says that the *Indian Act* has set out the rules to determine membership in Indian communities, and therefore it is incumbent on this Court to set out the rules to determine who is a member of a Métis community.
152. It is submitted that the Appellant's submission is wrong. The correct focus is the collective rights of the community not the individual characteristics of members of that community. As noted above, the Aboriginal landscape is complex and dynamic with movement between the peoples. There are no simple membership rules. While it is a fact that the Indian Act has had a major effect on the membership of Aboriginal communities, it is inaccurate to argue, as the Appellant does, that the *Indian Act* determines the membership rules in Indian communities for purposes of s. 35 rights.
- See citations in this Factum above at para 128.
153. It is submitted that this Court should refrain from creating an elaborate test for community acceptance. Once it is clear that the community has Aboriginal rights, detailed criteria are best left to the Aboriginal people themselves and may be reflected in political agreements with government. It is further submitted that the Appellant's argument will lead to dozens, if not hundreds, of individual entitlement cases. This would be a needless exercise when the focus should be on the collective rights.
154. There is direct evidence respecting the Powleys' acceptance by the Sault Ste Marie Métis community. There was uncontradicted documentary evidence and uncontradicted viva voce evidence. This is not shown simply by the mere fact of being accepted by an Aboriginal organization (OMAA). It is also shown by the evidence cited by the Court of Appeal - that another member of the Sault Ste Marie Métis community, Art Bennett - affirmed the Powley's Métis ancestry, acknowledged kinship, and accepted them as registered members of that organization. The evidence also shows that the Powleys subsequently chose to register with another organization (the NINO), which has strict documentation requirements

Indian Affairs for registration as a status Indian under the *Indian Act*. The evidence shows that the Powleys provided such evidence and were accepted by MNO as Métis and as being descendants of the Sault Ste Marie Métis community.

See citations in this Factum above at para 138; Testimony of Art Bennett (RAR, Vol. III Tab 30, p. 322) and Ont. CA Judgment (AAR, Vol. VII Tab 62, p. 1145-1146 (paras. 146-147))

155. The Appellant asserts that neither OMAA nor the MNO constitute the sort of discrete, historic community that is capable of holding a constitutional right. The Respondents do not dispute this. Aboriginal political organizations, such as MNO do not purport to be the Métis community in Sault Ste Marie. However, they do represent the Métis community. Certainly neither the government of Ontario nor the government of Canada functions in this role.

See *Testimony of A. Belcourt* (RAP, Vol. III, Tab 31, pp. 323-324), AMO Statement of Prime Purpose, Exhibit 4 (RAR, Vol. III, Tab 33) and A4NO By-Laws (1997), Exhibit 7 (AAR, Vol. II, Tab 39) for representative role of OMAA and MNO for Métis communities.

156. Further, the governments of Ontario and Canada have made it virtually impossible, for Métis to have any other means of performing community' acceptance. Métis are not recognized under the *Indian Act*, or any other statute, and have no bodies analogous to band councils that are recognized by government. They are not funded for any social or cultural organizing. They receive funds only to administer the few programs and services which the government wants them to deliver to Métis. It is perverse now for the Appellant to assert that the only representative organizations the Métis have cannot perform community acceptance.
- Testimony of A. Belcourt* (RAR, Vol. III Tab 32, pp. 325-327)

157. It is submitted that the trial judge was correct in finding as a fact that acceptance by the Métis political organizations may constitute community acceptance for the purposes of establishing membership in a Métis society. The Court of Appeal held that mere formal membership in a provincial Métis organization would not be sufficient evidence to establish community acceptance. However, the Court went on to find that the evidence showed that the community acceptance in the case at bar went beyond mere formal acceptance. The Court of Appeal held that this was sufficient evidence of community acceptance.
- Ont. CA Judgment* (AAR, Vol. VIII, Tab 62, p. 1144-1147 (paras. 142-149))

158. The trial judge found that Ontario has not recognized or affirmed the Aboriginal hunting rights of the Métis in Ontario, that the regulatory scheme constitutes a *prima facie* infringement of the Aboriginal harvesting rights of the Powleys, and that the infringement was not minimal. This finding was upheld by the Superior Court on appeal. The Court of Appeal determined that the regulatory scheme infringed on the Powley's Métis right to hunt and that the right was not limited in a manner in keeping with the Crown's fiduciary duty.
- Trial Judgment* (AAR, Vol. VII Tab 59, pp. 1028-1033). *Ont. SC Judgment* (AAR, Vol. VIII, Tab 60,1066-1069); *Ont. CA Judgment* (AAR, Vol. VIA Tab 62, p. 1152 (para. 163-164))
159. At the courts below, the Appellants vigorously argued that the regulatory scheme was justified. At this Court, the Appellant declines to appeal on justification, and says it is not necessary for this Court to "comment on the precise ambit of the justification required in the Métis context. The Appellant further argues that there are complex legal issues that "will have to be raised before the lower courts" including the nature of the priority that should be afforded to Métis rights; the possibility that the Aboriginal demand alone may exceed the resource available; and the nature of the consultation required in the Métis context.
160. The Appellant raises the serious question as to whether the Métis priority is equal to that of Indians and implies, by setting the question in the context of the Métis right in relation to the Indian right, that Métis hunting is not included within the Aboriginal priority principle set out by this Court in *Sparrow*. The Appellant also implies that the Métis may be consulted less than First Nations, and that the fact that there may be more than one representative Métis organization may be an excuse that justifies a lesser level of consultation. The Appellant also raises the issue of justification when the demand may outstrip the available resource.
161. It is submitted that each of these issues was indeed fully argued at the lower courts and that there was an abundance of evidence with respect to the regulatory scheme and justification before the lower courts. The fact that the Appellant has declined in its factum to appeal on the issue of justification does not preclude this Court from addressing the issue.
162. The Respondents ask this Court to make a finding that there is no hierarchy of rights in s. 35 - and that this principle must be applied to all of the obligations of the Crown including consultation and the justification of any infringement of the right. In *R. v. Edwards Books* this Court indicated that unequal or discriminatory treatment might run afoul of justification

similar principle would apply to the case at bar and that the denial of Métis rights in this regulatory scheme is unequal or discriminatory treatment which runs afoul of justification under the *Sparrow* test.

R. v. Edwards Books and Art Ltd. [1986] 2 S.C.R. 713 (RBA, Vol. I Tab A15, pp. 807-808)

163. The Respondents also ask this Court to determine the justification issue. All of these issues were addressed and thoroughly argued in the courts below. There was a full factual foundation on the regulatory scheme set out by the Appellant at trial. This is an appeal of the judgment of the Court of Appeal and that judgment included extensive reasons with respect to justification. It would be inappropriate for this Court, when it is faced with its firsts Métis rights case, with the benefit of a full record from trial, to fail to address the justification issue, which is an important aspect of the test to determine Métis rights.

164. Aboriginal rights recognized and affirmed by s. 35(1) are not absolute. These rights may be regulated. Section 35(1) requires that those regulations satisfy the test of justification. The first step in this analysis is that the government, in its law and policy must recognize and affirm the existing Aboriginal right. Government must acknowledge the right. Once it has acknowledged the right, government may regulate the exercise of that right within the justification scheme set out by this Court. Any such regulation must minimally infringe the rights and that infringement must be consistent with the honour of the Crown.

Delgamuukw, supra (RBA, Vol. II Tab A2, p. 1099); *R. v. Alphonse*, [1993] 4 C.N.L.R. 19 (RBA, Vol. I Tab A16, p. 60)

165. It is submitted that the government of Ontario has a very clear position on Métis rights - it denies their existence. The regulatory scheme does not recognize Métis as having any Aboriginal or treaty rights to hunt. The policy of denial was confirmed by the former Minister of Natural Resources, Mr. Chris Hodgson. At trial the policy was re-confirmed by the Crown expert, when he testified that there was no allocation or accommodation for Métis in the regulatory scheme.

See citations in this Factum above at para 10; See also *Trial Judgment* (AAR, Vol. VIII Tab 59, pp. 1028-1029).

166. It is submitted that the regulatory scheme in the case at bar is a *prima facie* infringement

of the Aboriginal rights of the Métis and that the infringement is not minimal. The regulatory scheme in the case at bar places the exercise of Métis hunting rights within the absolute discretion of the Minister and does not reflect 'recognition or affirmation of the right. The regulatory scheme discriminates between Indians and Métis.

167. It is submitted that it is not justifiable for the Crown to prefer Indian hunting, especially when hunting was integral to both societies. It is submitted that if any limitations are necessary for conservation of the species (the need for which was not shown at trial) any such limitation must be equally distributed as between all the Aboriginal rights holders. It would be unjust for limitations to fall exclusively or more heavily on the Métis.
168. Further, the *IEP* gives the Minister the discretion to enter into negotiations with Métis communities and states that, without a negotiated agreement Métis are precluded from exercising their Aboriginal rights. There is nothing in the scheme that gives direction to the Minister to explain how she or he should exercise this discretionary authority in a manner that would respect Métis rights. This Court has reviewed the effect of discretionary licensing schemes on Aboriginal and treaty rights. This Court, in *Adams*, applied this test to licensing schemes, and later reiterated the test in *R. v. Marshall*.

R. v. Adams, supra at paras 54, 62-66 (RBA, Vol. I Tab A6); *R. v. Marshall*, [1999] 3 S.C.R. 456 (RBA, Vol. I Tab 17, pp. 504-505) (QL)

169. It is submitted that this Court's findings with respect to justification, in *Marshall*, *Adams* and *Sparrow* set the standard for the fiduciary obligation of the Crown for all Aboriginal peoples.

Lloyds Bank v. Bundy [1974] 3 All ER 757 (C.A.) (RBA, Vol. I, Tab A18); *R. v. Marshall*, supra (RBA, Vol. I, Tab 17, pp. 504-505) (QL)

170. It is submitted that for the reasons found by the Court of Appeal, the regulatory scheme reflects denial, not recognition and affirmation of Métis hunting rights. It is not justifiable and therefore violates s. 35(1) of the *Constitution Act, 1982*.

171. The Appellant has asked this Court to suspend the effect of its order for one year if the appeal is dismissed, in order to provide time for Ontario to implement a new moose hunting regime that is consistent with s.35.
172. The Respondents rely on the submissions in their Cross-Appellants' Factum. Based on the legal principles in those submissions, it is submitted that this Court should not grant the request for a suspension or stay of its order, for the following alternative reasons:
- a. The remedy requested would have no legal effect;
 - b. This Court does not have jurisdiction to grant such a remedy, either in this proceeding or generally; and
 - c. This Court should not grant the remedy requested because, in the circumstances of this case: (1) it would be wrong to order a transition period without ensuring that Métis hunting rights could be exercised during that period; (2) it would be wrong to relieve the Appellant of its constitutionally recognized fiduciary obligations to exercise regulatory authority consistent with s. 35 rights; (3) there is no evidence that it is reasonably necessary to grant a stay or suspension remedy in order to avert a conservation problem; and (4) such a remedy should not be granted, but if negotiations are needed for a new regulatory regime for an area of the province, the Court should encourage or order such negotiations with all Aboriginal peoples with hunting rights in that area, on appropriate terms.

Part Four Order Requested

173. It is respectfully submitted that the Appeal should be dismissed and the Appellant's application for a stay or suspension should be denied, with costs to the Respondents.

All of which is respectfully submitted this 17th day of December, 2002

Jean Teillet
Counsel for the Respondents

Arthur Pape
Counsel for the Respondents

<i>Bisaillon v. Keable</i> , [1983] 2 SCR 60	145
<i>Calder v. Attorney General of B.C.</i> , [1973] S.C.R. 316	50
<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010	58,97,164
<i>Lloyds Bank v. Bundy</i> [1974] 3 All ER 757 (C.A.)	169
<i>Mitchell v. Canada (Minister of National Revenue)</i> , [2001] 1 S.C.R. 911	97,98
<i>N.V. Bocimar SA. v. Century Insurance Co. of Canada</i> , [1987] 1 S.C.R. 1247	81
<i>Northern Telecom Limited v. Communication Workers of Canada</i> , [1980] 1 SCR 115	145
<i>R. v. Crawford</i> , [1995] 1 S.C.R. 858	129
<i>R. v. Adams</i> , [1996] 3 S.C.R. 101	91, 97,168
<i>R. v. Alphonse</i> , [1993] 4 C.N.L.R. 19	164
<i>R. v. Badger</i> , [1996] 3 S.C.R. 771	102
<i>R. v. Chevrier</i> , [1989] 1 C.N.L.R. 128	128
<i>R. v. Coté</i> , [1996] 3 S.C.R. 139	97
<i>R. v. Edwards Books and Art Ltd.</i> [1986] 2 S.C.R. 713	162
<i>R. v. Fowler</i> , (1993),134 N.B.R. (2d) 361 (N.B. Prov. Ct.)	128
<i>R. v. Marshall</i> , [1999] 3 S.C.R.456	168,169
<i>R. v. Rose</i> , [1998] 3 S.C.R. 262	129
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075	59,73,74,77
<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507	15,16,17,41,81, 83,91,94
<i>Stein v. The "Kathy K"</i> , [1976] 2 SCR 802	81
<i>Vadeboncoeur v. Landry</i> , [1977] 2 SCR 179	145
Statutory Materials	
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<i>Interim Enforcement Policy</i>	9, 10, 87
<i>Royal Proclamation</i>	43
<i>Game & Fish Act</i> , R.S.O. 1990, c. G-1, ss. 46 & 47(l)	2, 10, 87
Treaties	
Treaty No. 3, Addendum by the Halfbreeds of Rainy River/Rainy Lake	63

Senate Debates	67,73,76,79
House of Commons Debates	66,73,74,76,79

Legal Journals, Articles and Books

Brian Slattery, "Hidden Constitution" in Menno Boldt and Anthony Long, eds., <i>Quest for Justice: Aboriginal Peoples and Aboriginal Rights</i> (Toronto: U of T Press, 1995)	47
Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1992-93), 8 <i>Queen's L.J.</i> 232	101
Brian Slattery, "Understanding Aboriginal Rights" (1983) 66 C.B.R. 727	49,50
Catherine Bell, "Who are the Métis People in Section 35(2)?" (1991) 24 Alta. L. Rev. 351	76
Donald Purich, <i>The Métis</i> (Toronto: James Lorimer & Company, 1988)	75,76
John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self Government", in Michael Asch, ed., <i>Aboriginal and Treaty Rights in Canada</i> (Vancouver: UBC Press, 1997)	49,52
Peter Hogg and Mary Ellen Turpel, <i>Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution</i> (Ottawa: Minister of Supply and Service Canada, 1993)	48, 50, 51, 52, 77
Peter Hogg, <i>Canada Act 1982 Annotated</i> (Toronto: Carswell, 1982)	75
Roy Romanow, "Aboriginal, Rights in the Constitutional Process" in Menno Boldt and Anthony Long, eds, <i>Quest for Justice</i> (Toronto: University of Toronto Press, 1985) at p. 73-74	75,76

Reference Materials

<i>Historical Atlas of Canada</i>	23
<i>Historical Atlas of Saskatchewan</i> (Saskatoon: University of Saskatchewan Press, 1999)	64
Pepin-Robarts Task Force on Canadian Unity, <i>A Future Together</i>	72,75
RCAP Report - <i>Looking Forward, Looking Back</i>	46,47,48, 64,101,124,141
RCAP Report - <i>Métis Perspectives</i>	20, 28,34,38, 39, 64, 68, 69,70, 100, 118