

**IN THE SUPREME COURT OF CANADA**  
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

**HER MAJESTY THE QUEEN**

APPELLANT

- and -

**STEVE POWLEY and RODDY CHARLES POWLEY**

RESPONDENTS

- and -

**LABRADOR METIS NATION, CONGRESS OF ABORIGINAL PEOPLES,  
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**MEMORANDUM OF ARGUMENT ON BEHALF OF THE  
LABRADOR METIS NATION, INTERVENER**

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### **PART I - STATEMENT OF FACTS**

- 1 The Intervener, Labrador Metis Nation adopts the Facts set out in paragraphs 2 through 4 of the Respondent.

### **PART II - ISSUES**

- 2 The Intervenor Labrador Metis Nation adopts the Points in Issue contained in the Memorandum of Law of the Respondent.

### **PART III - ARGUMENT**

- 3 The Intervenor Labrador Metis Nation will limit its submissions to the following issues:

- a) The test for determining whether someone is Metis for the purposes of s. 35 of the Constitution Act;
- b) The relevance of exclusivity in the determination of the existence of Metis Aboriginal rights;
- c) The evidentiary standard for the proof of Metis Aboriginal rights;
- d) Cultural continuity and the content of the Metis Aboriginal right;
- e) The relevant date for the determination of Metis Aboriginal rights.

**THE TEST FOR DETERMINING WHETHER SOMEONE IS METIS**  
**FOR THE PURPOSES OF S. 35 OF THE *CONSTITUTION ACT***

4 Metis” are one of the three expressly included Aboriginal groups described in the more expansive definition contained in section 35 of the Constitution. Since 1982, there has been an increased use of this descriptor. Not all Metis communities in Canada are the same. This is no surprise, since not all Indian or Inuit communities in Canada are the same either. There are variations throughout the country. Any test set by this Honourable Court to consider the identification of and the rights of Metis must be cognizant of these variations and allow for their individual recognition and expression. Each community needs to be assessed within the context of its own cultural criteria, social structure, history and geography.

5 The Powleys are Metis from the Sault Ste. Marie area of Ontario. Judging by the various

Interveners in this appeal, there are Metis in many other places in Canada as well.

6 There are, for example, Metis-Inuit in south and central Labrador, descendants of the Thule Inuit, represented by the Intervenor, Labrador Metis Nation. The Labrador Metis Nation seeks to bring the unique perspective of this Metis-Inuit population of Labrador before this Court.

7 The people who have come to be known as the Thule Inuit spread across the Arctic and arrived in Labrador sometime around 1000 AD. The Inuit came to occupy at least coastal Labrador and the north shore of Quebec prior to any substantial European presence in Labrador.

8 Labrador may be the area of Canada where the Aboriginal people (Inuit) had the earliest encounters with Europeans. History can never tell us exactly when this occurred. European fishermen or whalers, intentionally or as a result of storms, may have landed on the coast of Labrador during early times. The Norse appear to have made landings in Newfoundland and Labrador near the beginning of the last millennium but left little written record.

9 European knowledge of the south coast of Labrador existed by the mid-1500's. As a result, the Inuit occupying this region of Labrador may be the Aboriginal people of this country with the longest period of encounter with Europeans. Conversely, however, much of Labrador was barely impacted by Euro-Canadian government until the World Wars brought outsiders to some of the communities. This dichotomy of early European encounter, but only recent Euro-Canadian presence, has influenced the evolution of the south coast Inuit society of Labrador.

10 The presence of Inuit in south and central Labrador was well known to government throughout the historic period, but was not welcomed. As a result, when the British began to establish an initial presence in southern Labrador in the 1760's, efforts were undertaken to try to 'push' the Inuit northwards, away from the north shore of Quebec, out of the Straits of Belle Isle and away from

the island of Newfoundland. These efforts were not successful. The British built Fort Pitt in the Strait of Belle Isle. They also authorized the establishment of a trading station at Cartwright, part-way up the coast of Labrador. The British also permitted the establishment of Moravian trading missions in several locations on the north coast of Labrador.

- 11 The Moravians were Protestant trader-missionaries from Germany. They set up missions centered in northern Labrador. From there, they eventually managed to induce some Inuit to forego their traditional way of life and thereby anchored a portion of the Inuit population of Labrador at those trading missions. The few Europeanized Inuit who came to live at these European settlements were, however, only a portion of the Inuit population of Labrador.
- 12 Other Inuit of Labrador declined to settle into the Moravian regime and continued to live their traditional, semi-nomadic life-style of seasonal transhumance throughout their traditional territory. It is these traditional Inuit who are the ancestors of the members of the Labrador Metis Nation.
- 13 The word “metis” was a term used by Europeans in Labrador for centuries. It meant, literally, a person of mixed Inuit and European descent. In the last centuries, occasional European males trickled into Labrador from fishing stations, trading posts, etc. The offspring of their marriages to Inuit women were sometimes called "metis". It was not necessarily, in early times, a compliment. The individuals in Labrador who were called metis at that time did not live in any separate organized society, apart from the Labrador Inuit. They were Inuit people, living in Inuit communities in south and central Labrador, some of whom possessed mixed heritage. They were members of their original Aboriginal culture.
- 14 Since the late 1970's, Aboriginal people who are the descendants of these original Metis-Inuit and of other Inuit in south and central Labrador have again come to be known as “Metis”. Prior to that they were known by various names at various times, including “Eskimos”, “Anglo-Eskimos”, “half-

breed Eskimos”, “Inuit”, “Kablunangajuit”, “Settlers” or “Labradorians”, depending on who you talked to. All of these names were and are a continuing assertion of and recognition of their Aboriginality. None of these identifiers were a repudiation of their Inuit heritage. None of them lost their Inuit rights when these various labels were applied to them.

- 15 Government preferences in Labrador in the 1970's and 1980's were to segment the Aboriginal population into separate constitutional categories. As a result, the Metis-Inuit began to use the descriptor “metis” to signify their ineligibility for membership in the Labrador Inuit Association and the Innu Nation, the two other major Aboriginal organizations of Labrador. That being said, the population now called "Labrador Metis" remains a continuing manifestation of an authentic Inuit culture, impacted by centuries of Euro-Canadian encounter. The Metis-Inuit are not a society separate and distinct from other Inuit. It is an Inuit culture, which uses the constitutional descriptor of “Metis”. Its members are inextricably bound together with other Inuit of Labrador socially, culturally and genetically.
- 16 Not all communities called "Metis" are the same. Any test set by the Court to consider the identification of and the rights of Metis must be cognizant of these variations. Each such community needs to be assessed within the context of its own cultural criteria, history and geography. The Metis-Inuit of the Labrador peninsula are not the same as the Metis of Ontario.
- 17 The Metis-Inuit will hold Aboriginal rights by virtue of their continuing manifestation of the culture of their original Inuit forbears. In such a case, the word “metis” simply means a person of mixed Aboriginal and non-Aboriginal descent, the original and historic meaning of this French word. The Metis-Inuit of Labrador, although described colloquially as “metis”, are the holders of Aboriginal rights which flow from their original Inuit ancestors and from their continuing cultural connection as successors of that original Aboriginal community.

- 18 The situation in other parts of Canada may be very different from that in Labrador. Other Metis communities, including possibly that in Sault Ste. Marie, will hold Aboriginal rights (distinct from the original Aboriginal communities) by virtue of their ethnogenesis into separate and identifiable organized communities in a particular geographic area. That being said, these newly organized Metis societies originally had, and built from a foundation of, the Aboriginal rights of its members. For the balance of this factum, the word “Metis” will be used to describe such ethnogenesized societies. The phrase “Metis-Inuit” will be used to specifically describe the membership of the Intervenor in Labrador.
- 19 Metis can be identified by: a) self-identification; b) ancestral connection, including by adoption or absorption; and c) community acceptance.

#### Self-identification

- 20 Since Aboriginal rights for a Metis person may flow either (1) from their Indian or Inuit heritage or (2) from a discrete Metis heritage, self-identification by an individual as a Metis does not require a repudiation by that person of his or her ancestral connections and associations with the Indian or Inuit people from whom that Metis is a descendant. No legal test should force a modern-day Metis person to repudiate his or her grandparents or great-grandparents.
- 21 The test for identification of Metis should not assume that they have lived in a vacuum, away from the impacts of non-Aboriginal cultures. Aboriginal people are not required to live frozen in time, as if the outside world never happened. Eating pizza, wearing jeans or having wage-based employment are not indicators of Aboriginal inauthenticity
- 22 The consideration of self-identification must take into account the anthropologic concept of “passing”. There may have been periods of time when, for discrimination or other reasons, an

Aboriginal person may not have wished to manifest his or her Aboriginality. If employment prospects, for example, were improved by “passing” as a non-Aboriginal person, some Aboriginal people may have been forced to do just that. This sad reality can not now be used as a reason to deny the Aboriginality of those individuals.

- 23 “Passing” for periods of time by either a community or by Metis individuals, and the subsequent external manifestation by that community or person as Metis, does not prevent cultural continuity. The causes of “passing” are rooted in socio-economic pressures and discrimination imposed by Euro-Canadian society. The Metis community or certain members of it may have been non-apparent for periods of time to the external, non-Aboriginal society but the Metis community and its members continued to exist. Any lack of full structure and expression of the Metis community should be considered to be the result of Euro-Canadian conduct and discrimination and should not be grounds for the denial of either the existence of the community or its rights.

#### Ancestral Connection

- 24 The Metis community holding the rights is the modern community, however constituted. It would be a successor of the original organized Metis society, even though perhaps all of its individual constituent members have changed. Community populations change continuously by birth, death, intermarriage, adoption, absorption or fission. In this context, “community” is a social description, not a geographic one nor one of pure genealogy. Blood quantum calculations are inappropriate to the consideration of community membership.
- 25 Similarly, governmental policies on the acceptance, or non-acceptance, of a person as Metis (or

as Indian or Inuit) are irrelevant to the core questions of self-identification and community acceptance. Provincial or federal governments may have chosen, for a variety of reasons at different periods of time, to deny the existence of Metis communities or to deny the identity of certain Metis peoples. Additionally, the federal government may have, from time to time, accorded “status” under the Indian Act to selected Metis people and assigned them to various Indian Act Band lists. None of these external processes can take away the right of a Metis person to self-identify as Metis nor prevent a Metis community from accepting that person as a member of their community.

26 The Appellant at paragraphs 101 and 107 - 119 presents the Indian Act registration system as a template for the determination of entitlement to Aboriginal rights. This assertion does not accord with that legislation nor with case law dealing with the difference between Aboriginal and Treaty rights, on the one hand, and the administration of the Indian Act, on the other. The Indian Act can not serve as an appropriate model for rights entitlement. There are many “status Indians” in Canada who are not Aboriginal at all. There are many Aboriginal people in Canada who are not “status Indians” under the Indian Act.

27 Indian Act registration deals only with specific statutory and administrative policies and procedures, any of which can be amended by Parliament, and none of which are rooted in a recognition of Aboriginal or Treaty rights entitlement. The Indian Act does not confer on an Indian Act Council the right to regulate or surrender the Aboriginal or Treaty rights of Aboriginal people. Those Aboriginal rights flow from the existence of Aboriginal societies that long pre-existed the founding of Canada as a nation and those Aboriginal rights are not subsumed in nor controlled by the Indian Act system.

### Community Acceptance

- 28 Membership in an Aboriginal organization is a strong demonstration of community acceptance. The Aboriginal organization may not itself be the “community”. However, it is most often an expression of how that Aboriginal community wishes to represent itself and interact with Canadian society.
- 29 Organizational membership is not, by itself, conclusive or determinative of community acceptance. The Court will also consider the personal circumstances of the individual and the history and credibility of the Aboriginal organization in question. This is not an issue in this case as there is no question as to the credibility of the Metis community of Sault Ste. Marie or the acceptance of the Respondents as members of that community.

#### **THE RELEVANCE OF EXCLUSIVITY OF OCCUPATION IN METIS RIGHTS**

- 30 Metis should not be required to demonstrate exclusivity of occupation of a geographic area. It would not be reasonable to require exclusivity of occupation from other First Nation peoples. To do so would pre-define Metis rights out of existence. It would usually be the case that there will be some Indian or Inuit people in the same geographic area. The Metis population exists because there was an original Aboriginal population in the area. However, this is not the case for the Labrador Metis-Inuit who do demonstrate effective exclusivity of Aboriginal occupation of south and central Labrador.
- 31 The growth of a distinct Metis community is a progression, from individuals to a distinct community. This process should not require the Metis community thus formed to then turn on the original Aboriginal community and to displace them from the area.
- 32 The presence of European people in the same geographic area as a Metis community is irrelevant. The aboriginal law concept of exclusivity operates as between Aboriginal groups.

**THE EVIDENTIARY STANDARD FOR THE PROOF OF METIS RIGHTS**

33 The burden of proof of Metis Aboriginal rights can not be so high that they could not realistically be proven. The effect of this would be to render the rights nugatory. The extent of evidence required on issues such as social organization and cultural continuity must take into account the historic circumstances of the Metis. The tests must recognize that some Metis communities in Canada will have retained largely oral cultures for much of their history. Some Metis communities will have been located in remote areas, distant from regular Euro-Canadian observation or comment. A lack of significant written documentation describing these communities can not be taken as proof that the communities did not exist or did not function as organized societies.

*R. v. Van der Peet*, [1996] 2 S.C.R. 507, p. 555; *Simon v. The Queen*, [1985] 2 S.C.R. 387, p. 408

34 The evidentiary standard for the proof of Aboriginal rights for Metis communities must take into account the oral histories of the Aboriginal people of that area. Testimony from elders will often provide the most detailed information about the Metis culture itself. No better evidence can exist of Metis world view and culture than evidence from the Metis themselves.

*Delgamuukw v. British Columbia*, [1973] 3 S.C.R. 1010, p. 1011- 1012

35 The test for determining who is “Metis” should not require written genealogical evidence where the oral cultures of both the Aboriginal people from whom the Metis are descendants and of early Metis communities would not contain such documentation. The test should be based on oral histories, self-identification and community acceptance.

**CULTURAL CONTINUITY AND THE CONTENT OF THE METIS RIGHT**

36 Section 35 must be given a purposive interpretation to provide some meaning to the protection of Metis rights contained therein. Metis are one of the three expressly enumerated Aboriginal groups. It can not be supposed that this fundamental constitutional document was not intended to protect meaningful rights.

*R. v. Van der Peet*, [1996] 2 S.C.R. 507, p. 535

37 The Court should not import Aboriginal rights concepts that flow from the consideration of other Aboriginal peoples if the result would be to render Metis rights an “empty box”. As observed by L’Heureux-Dubé J. in dissent in *Van der Peet*, it must be possible for aboriginal rights to arise after British sovereignty, so that Metis people can benefit from the constitutional protection of s. 35 (1). The tests applicable to Metis communities can not be foreign to the history of the particular Metis peoples concerned. Otherwise, there is a risk that Metis rights, by failing to meet tests developed to meet other circumstances, will be deemed to have never existed or been extinguished.

*R. v. Van der Peet*, [1996] 2 S.C.R. 507, per L’Heureux-Dubé J., p. 598 (para. 169)

38 Some Metis communities, such as the Metis-Inuit of Labrador, will hold Aboriginal rights which existed at the time of “European contact” by virtue of their continuing manifestation of their original Indian or Inuit community and culture. The Aboriginal persons of these communities would have possessed Aboriginal rights and would not have lost them as they continued to evolve as communities.

39 Other Metis communities will hold Aboriginal rights by virtue of their existence as identifiable organized communities as at some particular date in a defined geographic area. The legal doctrine of “European contact” should not be applied to such distinct Metis communities where the impact

of doing so would be to pre-define such rights out of existence.

40 Metis Aboriginal rights were built on a foundation of the rights held by the original Aboriginal community but are not limited to those held by that original Aboriginal community. As a result, Metis Aboriginal rights will include:

- a) practices, customs or traditions of the original Aboriginal (Indian or Inuit) community which remain within the current Metis community;
- b) practices, customs or traditions of the original Aboriginal (Indian or Inuit) community that subsequently evolved within the Metis community;
- c) practices, customs or traditions of a discrete Metis community at the time of “effective European sovereignty” and remain within the current Metis community.

41 Metis Aboriginal rights would not include practices, customs or traditions that are wholly derivative of a European culture, unadopted by the Metis as an aspect of the Metis culture at the time of effective European sovereignty.

*R. v. Van der Peet*, 2 [1996] 2 S.C.R. 507, p. 562

42 Basic Metis customs and practices should not be disentitled to constitutional protection just because they are or were similar to European practices. It is not necessary for an Aboriginal tradition, custom or practice to be exotic for it to be integral. The *Van der Peet* focus on ‘integralness’ and ‘distinctiveness’ seem to place a Euro-centric emphasis on practices and traditions which are unusual and exotic. This trivializes other true core Aboriginal values (such as fairness, environmental awareness, consensus-building, marriage, adoption, child-rearing practices and numerous others) which, despite their lack of apparent “oddness”, still warrant constitutional protection. It can not have been the intent of this Court to require trial judges to parse Aboriginal

cultures into artificial slices in pursuit of the unfamiliar.

43 Metis rights are not subordinate to the rights of the original (Indian or Inuit) Aboriginal communities and are protected by section 35 of the Constitution Act to the same extent. They will not be lost, for example, if the First Nation community surrendered them or entered into Treaty after the Metis community came into existence or splintered off from it. Similarly, if some members of the Metis community chose for a period of time to participate in a First Nation community, this does not “cut off” their descendants from re-identifying with their Metis heritage.

44 Continuity of possession by Metis people would not be lost if the cause of the change in utilization pattern is the result of sources imposed upon and external to the Metis communities or their antecedent Aboriginal communities, including such influences as harassment, discrimination, government relocation policies or economic or social necessity. There is no need for the Metis community to be visible to government nor for their conduct of Metis culture to be known to government for the community and its culture to continue in fact.

45 The Aboriginal cultural attribute of importance in this appeal is that of subsistence hunting. Subsistence hunting would have been, and remains, a key cultural component of any Aboriginal society. There is no need to prove that moose hunting itself was integral to the Metis culture at any particular point in time prior to the present day. Subsistence hunting needed not be proven in an exhaustive species-by-species analysis, each involving lengthy litigation. It is the act of subsistence hunting that is the cultural attribute. The type of wildlife harvested will naturally evolve over time as species become or cease to be harvestable due to their availability or the technology accessible to the harvester.

46 In the present case, the original forbears of the Metis in the Sault Ste. Marie area would have engaged in subsistence hunting as an integral part of its culture. This cultural attribute was passed

into the Metis society and remains and evolved within that society up until the present date. This demonstrates both the 'integralness' of the activity and cultural continuity associated with that activity.

### **THE RELEVANT DATE FOR THE DETERMINATION OF METIS RIGHTS**

47 The notion that a magic moment of "first contact" between Europeans and Aboriginal people could have the effect of freezing immediately the rights of the Aboriginal people is a peculiarly Eurocentric one. It is a concept which emanates from a time in history when Europeans thought of themselves as the pinnacle of human society, with a divine right to claim the lands of other peoples. Centuries ago, Europeans thought that on the day that one of them first pulled into shore from their vessel and announced that they were claiming lands for their country, that something legal had happened. Some change in "sovereignty" was believed to have occurred.

*R. v. Van der Peet*, [1996] 2 S.C.R. 507, per McLachlin, J., p. 634 (para. 247)

48 Seen through the eyes and culture of the Aboriginal people, this notion of "first contact" would have been quite astounding. To the Aboriginal people, all that had happened was that a foreigner stopped in for a visit and then left. How would any Aboriginal culture think that some *de jure* event had just occurred? Nothing changed in the lives of the Aboriginal people, who continued to live within and evolve their internal customs, culture, laws and traditions. These encounters did nothing to give that European nation the ability to control the Aboriginal society.

49 The concept that an encounter at some single location between a few Europeans and a few Aboriginal individuals could freeze the rights of a whole nation or community at that moment in time is also an unusual one. If an explorer landed in southern Ontario and met a few Aboriginal people, did that "freeze" the rights of all other Aboriginal people of that nation in other parts of Ontario?

If so, it must have been quite invisible to them and would have likely astonished them if that explorer could have told them of this consequence at the time.

50 The notions of “contact” and “first contact” have always been decidedly Eurocentric in nature. In the fact patterns of many court cases, it would have made little difference what date was selected. For example, subsistence hunting in Nova Scotia, which was the background context in *R. v. Simon*, varied little between the dates of “first contact” and the date of “European sovereignty”. As a result, the context of those Aboriginal cases did not require a detailed consideration of the rationale for and the consequence of the application of those concepts. However, their application in the context of Metis Aboriginal rights highlights the incongruities created by the concepts of “contact” and “European sovereignty” and allows the Court to re-consider their appropriateness, at least in the Metis context.

51 It seems more reasonable to approach this issue of contact by centering on the impact to the Aboriginal culture itself. If some event is to be considered to have the effect of “fixing” an Aboriginal culture at a point in time, it should be a point in time when that community’s culture, as a whole, is materially impacted. This would be when the European culture began to dictate to the Aboriginal culture some form of limitation or restriction on the free continuance or evolution of the Aboriginal culture.

52 This event can not be simply the existence of Euro-Canadian laws which apply generically to the geographic area but about which the Aboriginal people are largely unaware. The Euro-Canadian society must be in a position to enforce those laws and have actually done so on an Aboriginal community before that Aboriginal community can be considered to have been impacted by them. As described by McLachlin, J. in dissent in *Van der Peet*, the relevant moment in time is not that of “contact” but rather the date when European laws and customs can be shown to have been imposed upon the Aboriginal culture. In both *Adams* and *Cote*, the relevant date was described

as the date of “effective control” by France, rather than the actual date of contact with the earliest French explorers.

*R. v. Van der Peet*, [1996] 2 S.C.R. 507, per McLachlin, J., p. 634, (para. 247); *R. v. Adams*, [1996] 3 S.C.R. 101, p. 128, at para. 46; *R. v. Côté*, [1996] 3 S.C.R. 139, p. 177, (para. 58).

53 If the Euro-Canadian culture is in a position of dominance so as to actually impair or coerce the Aboriginal community, it may then make some sense to talk about Aboriginal culture and rights becoming “fixed” in some manner. Until that time, the Aboriginal culture should be considered elastic and organic in its traditional way.

54 Another potential date for the consideration of Metis rights is the date of “European sovereignty”. This concept is similar to that of “European contact” in that Europeans assumed that they had the right to divide the rest of the world up between themselves, even if it was already occupied by someone else. European nations often asserted sovereignty over wide geographic areas, often times conflicting with each other. As described by Brian Slattery:

*It is not enough to found the acquisition of the continent on some bit of puffery in an ancient Charter. Claims advanced in one era were quietly retracted or modified in another. What was convenient to assert in dealings with European powers was often prudent to deny in negotiations with Indian groups, and vice versa. To determine the date, then, when the Crown unequivocally asserted sovereignty over a given sector of Canada requires a detailed analysis of the evidence pertinent to that area.*

Brian Slattery, “Understanding Aboriginal Rights”, (1983), 66 Can. Bar Rev. 727, at p. 736.

55      Assertions of sovereignty made by rulers from the comfort of their European castles should not be taken to have had any meaningful legal impact on the rights of the Aboriginal people of Canada. An assertion of sovereignty “from a distance” which had little impact on the Aboriginal people should not be the relevant date for the determination of the existence and scope of Aboriginal rights. As this Court recognized in *Delgamuukw*, when considering Aboriginal use and occupation of traditional lands, the date of sovereignty may not be the only relevant time to consider.

*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, p. 1020.

56      The common law is an evolving body of law and as such can be altered where the circumstances and justice may require it. Metis Aboriginal rights should remain manifest, despite any deficiencies which may appear in a classical analysis of Aboriginal rights issues.

*R. v. MacPherson and Christie* (1992), 82 Man. R. (2d) 86 (Man. Prov. Ct.), var’d (1994), 111 D.L.R. (4<sup>th</sup>) 278 (Man. Q.B.)

57      A more appropriate date would be that of “effective European sovereignty”, defined as the date at which a non-Aboriginal government has actually exerted effective control over the Aboriginal people in the relevant geographic area. In the circumstances of this appeal, this would be a date when Europeans or Euro-Canadians were actually exercising some degree of control over the day-to-day lives of the Metis people in the Sault Ste. Marie area. The proof of the date for effective control of an area would lie on the Crown. Effective control would require that the Aboriginal community being impacted become aware that an outside government has acquired the physical (de facto) ability to direct, restrict or control their lives.

- 58 A mere assertion of European sovereignty or the existence as a matter of international law of a legal (de jure) claim to have the right to legislate over an area should not constitute “effective sovereignty” or control for the purpose of limiting Aboriginal rights. The agreement between France and Britain in the Treaty of Paris in 1763 that Britain had the rights at international law to parts of North America did not, without more, immediately constitute effective (de facto) control of all of those parts of North America. In the Sault Ste. Marie area, although sovereignty for international purposes was acquired by Britain in 1763, the Respondent’s factum at paragraph 55 notes that there was no significant impact on the Aboriginal people of that area for some 80 years or three generations.
- 59 The test for determining sovereignty for international purposes need not be the same test imported into a determination for domestic Aboriginal law purposes. For example, the Appellant at paragraph 73 of its factum imports a test of ‘effective control in relation to sparsely inhabited areas’. The citation by the Appellant refers to competing claims of sovereignty as against another international State. The Appellant also relies upon such international law concepts of the drawing of state boundaries (paragraph 45) and the act of state doctrine (paragraph 47). However, such analyses are not necessarily the same as should be applied to the domestic law issues involved in Aboriginal law.
- 60 In the case of domestic Aboriginal law, the purpose of section 35 is to recognize the prior Aboriginal right and to reconcile those prior rights within the Constitution of Canada. For the purposes of this reconciliation, the Aboriginal culture involved should be permitted to evolve naturally and organically within its own parameters until such time as the Aboriginal community becomes aware, as a culture, of some impediment on that natural growth imposed by the Euro-Canadian society around it. Agreements reached between international Sovereign States or decisions made internal to a European nation but not imposed on an Aboriginal community should not be considered to impact negatively on the organic nature of the Aboriginal culture.

61 Proof of effective sovereignty would involve evidence on such matters as:

- a) a military or police presence;
- b) the functioning of civil and criminal courts;
- c) the provision of government services (i.e., education, postal, medical);
- d) the organization of local/civic government as a constituent and subordinate part of the non-Aboriginal governing structure;
- e) the location of government officials and offices.

62 A religious or missionary presence in the New World would not, by itself, be considered to be effective governmental control. Missionaries came very early to many parts of the New World with the goal of spreading Christianity. This had necessary impacts on Aboriginal cultures and traditions. However, these missions were not an exercise of government. They were an exercise in religious expansion. The date of conversion to Christianity or the establishment of missions to Indians or Inuit should not be considered to be, by itself, the date of effective European sovereignty. As a result, the establishment of Jesuit missions in the Sault Ste. Marie area in 1615 and again in 1668 would not be proof of effective European sovereignty of that area.

63 As indicated by Brian Slattery, in the quotation at paragraph 54, the analysis of “effective sovereignty” should be conducted on a factual basis for each geographic area. The Euro-Canadian or international boundaries of a province or colony need not be controlling. For example, the construction of a British fort in the Straits of Belle Isle in 1767 would not constitute effective sovereignty over all of what is now known as Labrador. The founding of Halifax in 1749 would not have constituted effective sovereignty over all of what is now known as Nova Scotia. The first fort built somewhere in Ontario did not create effective sovereignty over the Sault Ste. Marie area. Aboriginal communities reside in different locales within their nation’s traditional territory. A

consideration of effective European sovereignty should be conducted on a community-by-community basis.

### CONCLUSION

64 Aboriginal societies were, prior to European arrival in this country, self-governing, elastic and organic. They changed in response to any number of factors. This tradition of cultural evolution is itself part of the rights, customs and traditions of the Aboriginal people. This right became part of the constitutional fabric of Canada. The culture of the Aboriginal society remained free to evolve until such time as the dominant Euro-Canadian culture:

- a) created laws to restrict such evolution;
- b) was in a position to enforce such laws on that Aboriginal culture; and
- c) did apply and enforce those laws on that Aboriginal culture.

65 As a result, no particular date of “contact” or “sovereignty” will, by itself, be determinative as an indication that the rights, customs and traditions of that Aboriginal society had become “frozen” as at that date. The relevant date will be the time at which the dominant Euro-Canadian society actually exercised sovereignty to restrict that natural evolution.

66 In the context of this appeal, it would appear that the relevant time frame during which Canada may be said to have begun to restrict, in fact, the culture of the Metis would not have been earlier than the mid-1800's, by which time the Metis of Sault Ste. Marie were an organized society.

67 The Metis exercised subsistence hunting as an integral part of their culture historically, and continue to do so today. The Metis continue as an identifiable cultural group today. The Respondents are members of that group, accepted as such by other local Metis and by the representative

organizations put forward by the Metis themselves.

**PART IV - ORDER REQUESTED**

68 The Intervenor Labrador Metis Nation requests that the Crown's appeal be dismissed and the constitutional question be answered 'yes'.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this            day of January, 2003.

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