

**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 MÉTIS NATION, CONGRESS OF ABORIGINAL PEOPLES,  
MÉTIS NATIONAL COUNCIL/MÉTIS NATION OF ONTARIO,  
B.C. FISHERIES SURVIVAL COALITION,  
ABORIGINAL 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

**Factum of the Intervener  
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Métis Nation of Ontario**

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**PART I: FACTS**

1. The Métis National Council (MNC) and Métis Nation of Ontario (MNO) intervene in support of the Respondents and accept the facts set out in the Respondents' Factum.

2. Throughout this Factum the Intervener will use the term "Métis Nation". The Métis Nation refers to the historic collective of Aboriginal people who lived and still live in what is west central North America. This territory is commonly referred to as the "Métis Nation Homeland" by the Métis people. The "Métis Nation Homeland" is based on the traditional territory upon which the Métis, as an Aboriginal people, have historically lived within and relied upon. This roughly includes the 3 Prairie provinces (Manitoba, Alberta and Saskatchewan), parts of Ontario, British Columbia and the Northwest Territories, as well as, parts of the northern United States (i.e. North Dakota, Montana).

*Royal Commission on Aboriginal Peoples* ["RCAP"], Vol. IV, *Métis Perspectives*, Exhibit #21 (Appellant's Appeal Record ["AAR"], Vol. III, Tab 41 at pp. 286, 314)

3. The MNC represents the Métis Nation within Canada nationally and internationally. It is formed by the Métis Nation of Ontario, Manitoba Métis Federation, Métis Nation - Saskatchewan, Métis Nation of Alberta and Métis Provincial Council of British Columbia [hereinafter "Governing Members"] coming together to collectively mandate a national representative body for the Métis Nation. The MNC is governed by a six member MNC Board of Governors which is comprised of the President of each Governing Member along with a National President. Each Governing Member's President is selected through a province-wide ballot box election held every 3 years. A National President is elected by a MNC assembly every 2-3 years. The MNC Secretariat has been incorporated without share capital under federal law to act as the legal and administrative arm of the MNC.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 334-335)

4. Prior to 1983, the Métis Nation had worked with non-status Indians and other Aboriginal peoples under a pan-Aboriginal umbrella political organization called the Native Council of Canada ("NCC") to advocate for the rights and title of all Aboriginal peoples living off-reserves, as well as, to lobby for desperately needed socio-economic initiatives for Aboriginal communities and initiatives throughout Canada.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 312)

5. In 1982, the NCC and other national Aboriginal representative bodies were successful in obtaining the agreement of Canada and all provinces except Quebec to include the protection of “existing aboriginal and treaty rights” within s. 35 of the *Constitution Act, 1982*. In particular, the NCC was instrumental in ensuring that s. 35 included the recognition of the Métis as one of three distinct Aboriginal peoples in Canada.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 312)

6. Section 37 of the *Constitution Act, 1982* provided that a First Ministers Conference (“FMC”) would be convened within a year of the *Constitution Act, 1982* coming into force to deal with matters “that directly affect the aboriginal peoples of Canada, including the identification of the rights of those peoples to be included in the Constitution of Canada.”

*Constitution Act, 1982*, s. 37 (Appellant’s Book of Authorities [“ABA”], Vol. II, Tab A1)

7. In 1983, prior to the s. 37 FMC, it became apparent that the Métis Nation needed to be able to once again represent itself on a national level through its own voice, a Métis voice. The pan-Aboriginal structure of the NCC did not allow for the Métis Nation to effectively represent itself. The MNC was concerned then and continues to be concerned that when the Métis are grouped into pan-Aboriginal processes with non-status Indians and other Aboriginal peoples, their distinct Aboriginal rights and title are not addressed, recognized and protected. Therefore, in March 1983, the Métis Nation’s representatives separated from the NCC to form the MNC, its own Métis-specific national representative body.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 312); *Testimony of A.E. Belcourt*, Trial Transcripts, Vol. 1 at p. 101-102

8. Since its establishment, the MNC has continuously represented the interests of the Métis Nation in Canadian constitutional discussions and sessions. The MNC represented the Métis Nation at the 1983, 1984, 1985 and 1987 FMCs which included the Aboriginal peoples of Canada. As well, the MNC represented the Métis Nation during the failed Charlottetown Accord constitutional sessions held in 1992. The MNC is recognized federally and provincially as representing the Métis Nation at a national level.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 312); *Testimony of A.E. Belcourt*, Trial Transcripts, Vol. 1 at p. 101

9. The MNO represents the interests of the Métis Nation within Ontario at a local, provincial and national level. This representation includes historic Métis communities within Ontario that are a part of the Métis Nation, as well as, Métis people from throughout the Métis Nation who now reside in urban centres within Ontario. MNO members are represented at a local level through  
5 democratically elected Community Councils which are a part of the MNO's overall governance structure. MNO members are represented regionally and provincially through a province-wide ballot box elected Provincial Council. Finally, similar to all other MNC Governing Members, the MNO represents the interests of the Métis Nation within Ontario at a national level through its participation within the MNC. The MNO Secretariat has been incorporated without share capital  
10 under the laws of Ontario to act as the legal and administrative arm of the MNO.

*Testimony of A.E. Belcourt, Trial Transcripts, Vol. 1 at pp. 89-93 and 190*

10. The Métis community at Sault Ste. Marie is a part of the Métis Nation. The RCAP Report recognized it as one of the oldest within Canada.

15 *RCAP Report, Métis Perspectives (AAR, Vol. III, Tab 41 at p. 303, 314, 340-342)*

11. The Respondents (Steve and Rod Powley) are members of the MNO.

## 20 **PART II: ISSUES ON APPEAL**

12. The Intervener submits that the issues in this appeal and the appropriate approach to answer the constitutional question at bar is: (1) whether the Métis community at Sault Ste. Marie holds a constitutionally recognized Aboriginal right to hunt protected by s. 35 of the *Constitution Act*,  
25 *1982*, (2) whether the Respondents are entitled to exercise that recognized and protected Aboriginal right, and (3) whether Ontario's *Game and Fish Act* is applicable to the Respondents by reason of their Aboriginal right to hunt qua Métis protected by s. 35.

### **PART III: ARGUMENT**

#### **A. Terminology**

13. The Intervener takes the position that the Métis Nation is an Aboriginal “nation” and an Aboriginal “people” and uses the terms “Métis Nation” and “Métis people” synonymously throughout this factum. However, in using these terms the Intervener is only referring to the Aboriginal people it represents; namely, the people and communities which make up the Métis Nation.

14. The Intervener submits that unlike the term “Indian” which was ascribed to Aboriginal peoples (i.e. Ojibway, Cree, Dogrib, Haida etc.) by outsiders, the term “Métis” was historically used by the members of the Métis Nation to describe themselves. Therefore, the term “Métis” has more than just an external meaning ascribed to the Métis people by virtue of its historic use by the Métis Nation. In contemporary times, the term “Métis” is now a legal term by virtue of its inclusion in s. 35(2) and is now subject to judicial interpretation. As well, the term “Métis” is now used by other “Aboriginal” individuals and groups, who did not historically identify as Métis or did not use the term to describe themselves, for the purposes of asserting Aboriginal rights protected by s. 35. The Intervener takes no position as to whether these other “Aboriginal” individuals and groups who are now using the term “Métis” may claim the core protections of s. 35. It is the position of the Intervener that, at the very least, s. 35 must afford protection to the Métis Nation and its members.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at pp. 286-288, 303); *Testimony of A.E. Belcourt*, Trial Transcripts, Vol I at pp. 55 - 58; *MNO Statement of Prime Purpose, Statement by Louis Riel: Where We Got Our Name*, Exhibit #4 (RAR, Vol. 3, Tab 33)

#### **B. Introduction**

15. This Court’s decision in the case at bar will have a direct impact on the Sault Ste. Marie Métis community and the Métis Nation as a whole because it will develop the test that must be met in order to establish a Métis harvesting right protected by s. 35 of the *Constitution Act, 1982*. The case is fundamentally important to all the members of the Métis Nation because the nature and scope of their constitutionally protected harvesting rights, as an Aboriginal people, are at stake.

16. It is the position of the Intervener that this is a case about the Sault Ste. Marie Métis community, which is a part of the larger Métis Nation, and the Respondents, as members of that community. It is not a case about who are the “Métis” within s. 35 for all purposes or what other Aboriginal individuals or groups may have Aboriginal rights protected within s. 35. The Intervener  
5 submits that those legal issues can only be determined through a case where a court has the benefit of evidence surrounding the history of those groups and its members.

*Respondents’ Factum* at para 145

10 **C. The Métis Nation, as a distinct Aboriginal people within Canada, is included within s. 35 of the *Constitution Act, 1982***

17. Section 35 includes the Métis, as one of the “aboriginal peoples of Canada”. The Intervener respectfully submits that this should be interpreted to: (1) recognize that, at a minimum,  
15 the Métis Nation exists as an Aboriginal people within Canada, and (2) that Métis communities, as a part of the Métis Nation, have existing Aboriginal rights based on their prior occupation of the land, as distinct Aboriginal societies, that must be reconciled with the assertion of Crown sovereignty.

20 (i) *The Métis Nation is a distinct Aboriginal people within Canada based on its members’ self-identity, common communal indicators, recognition by others and collective consciousness*

18. Although there is no universally accepted definition of a “people”, domestic and international jurisprudence has generally taken a very broad view of the term. Without being exhaustive or  
25 essential, objective elements can include: common language, history, culture, kinship, race or ethnicity, way of life and territory. In addition, a subjective element is necessary, whereby a “people” identifies itself as such.

30 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Intervener’s Book of Authorities [“IBA”], Tab 7 at pp. 281-282); Catherine Bell, “Métis Constitutional Rights in Section 35(1)” 36(1) A.L.R. 180 (IBA, Tab 9 at pp. 185-197); Ronald Lambert, “Does a Canadian People Exist”, S.C.C. File No. 25506 (3 March 1998) (QL) (IBA, Tab 10 at pp. 2-4); See also *RCAP Report*, Vol. 2, Part I, *Restructuring the Relationship* (IBA, Tab 19 at pp. 169-178, 184)

*The Birth of the Métis Nation*

35 19. The Métis Nation, as a people, evolved out of the initial relations of Indian women and European men born on the lands of what is now Canada, as well as, parts of the northern United States. While the initial offspring of these relations were individuals who possessed mixed Indian

and European ancestry, the gradual establishment of distinct Métis communities outside of Indian and European traditions, cultures and settlements, as well as, the subsequent intermarriages between Métis women and Métis men resulted in the genesis of a distinct Aboriginal people - the Métis people.

5            *RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 283); *Testimony of Dr. Ray*, Trial Transcripts, Vol. II (Respondents' Appeal Record ["RAR"], Vol. I, Tab 5, pp. 28-53, 80)

### *Common Territory*

10        20.        Métis communities arose along the routes of the fur trade. Many of these communities continue to exist today along watersheds, rivers and lakes and where once active forts and posts were hubs of fur trade activities from Ontario westward. Within the RCAP Report, Métis communities in Ontario (Sault St. Marie, Fort Frances, Thunder Bay); Manitoba (White Horse Plains, St. Laurent); Saskatchewan (Batoche, Green Lake, Ile-a-la-Crosse); Alberta (Lac St. Anne,  
15        St. Albert, Fishing Lake, St. Paul's); British Columbia (Kelly Lake) and the Northwest Territories were identified. During the mid to late 1800s, the Red River, with one of the most significant Métis populations in western Canada, acted as the Métis Nation's unofficial capital city and was a nucleus for the Métis people.

20            *RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 203 (lines 30-40), 303, 304 (line 40), 309 (lines 20-40), 310 (lines 20-30), 311, 340-342, 404, 430, 436). See also *Intervener's Factum* at para 2 re: boundaries of Métis Nation Homeland.

21.        The Intervener submits that the determination of exact boundaries of the Métis Nation  
Homeland rests with the Métis Nation itself based on its history and the principles its Aboriginal  
25        nationhood is founded on. However, the Métis Nation has identified its core traditional territory. The RCAP Report supported the recognition of the Métis Nation as a distinct Aboriginal people with a right to determine what communities constitute their nation.

30            Although there are differences of opinion about precisely how far the Métis Nation extends beyond its prairie core, there is wide agreement that it includes some portions of Ontario, the Northwest Territories and British Columbia. ... It is not for the Commission to say which Métis communities in the disputed areas form part of the Métis Nation and which do not. These are matters to be determined by the Métis Nation and the communities themselves.

35            *RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at pp. 314, 286); *RCAP Report*, Vol. 2, Part I, Restructuring the Relationship, Ch. 3, Governance at pp. 182 - 184 (IBA, Tab 19 at pp. 182-184)



*Population Movement and Kinship Connections of the Métis Nation*

22. On-going population flow between Métis communities strengthened kinship connections and common communal indicators throughout the Métis Nation. In his testimony, the Respondents' expert Dr. Arthur Ray described this population movement in relation to Sault Ste. Marie. The Intervener  
5 submits that the "larger Métis community" referred to by Dr. Ray is the emergence of the Métis Nation's identity as an entity larger than just specific communities along the routes of the fur trade.

Sault Ste. Marie was regarded, was the home base for some of these families, but members of the family could be spread across the country for years and years before they came back and in that case there's an interesting parallel to Red River which had a similar relation to the  
10 western Metis and Half-breed ... these communities get moved around with changing political boundaries and so on, but, so that there are nucleated settlements beginning to emerge, **but there's also this larger Metis community** that may or may not be present in any one of those communities at any one point in time. [emphasis added]

... there is movement back and forth in the area [Sault Ste. Marie], people coming and going. There are ties to the Red River in the West, **but it isn't all one way, it's backward movement as well**, so I don't want to leave the impression that the place was depopulated by an outward migration. [emphasis added]  
15

*Testimony of Dr. Ray*, Trial Transcripts, Vol. II (RAR, Vol. I, Tab 5 at p. 80); *Testimony of Dr. Ray*, Trial Transcripts, Vol. II at p. 265 (RAR, Vol. I, Tab 5 at p. 143 (lines 10-15));  
20 *RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at pp. 286, 303-314)

*Self-Identity of Members*

23. The Intervener submits that it is highly significant that Métis individuals and communities no longer saw themselves as Indian or European - they identified as Métis and collectively organized and asserted themselves as such. These individuals did not see themselves as "half-of-this" or "half-of-that" - they were distinctly Métis. Louis Riel, one of the Métis Nation's greatest leaders, poignantly articulated this concept in his 1885 statement on where the Métis acquired their name:  
25

The paternal ancestors of the Métis were the former employees of the Hudson Bay and Northwest Fur Companies, and their maternal ancestors were Indian women of the various tribes. The French word Métis is derived from the Latin participle mixtus, which means mixed in French melee; it expresses well the idea that is sought to be conveyed. However  
30 appropriate the corresponding English expression Half-breed might have been for the first generation of the mixture of blood, now that European blood and Indian blood are mixed in every degree, it is no longer general enough. The French word Métis expresses the idea of this mixture in the most satisfactory manner possible, and thus becomes a proper race name. Why should we care to what degree exactly of mixture we possess European blood and Indian  
35 blood? If we feel ever so little gratitude and filial love toward one or the other, do they not constrain us to say: We are Métis!  
40

*Métis Nation of Ontario Statement of Prime Purpose, Statement by Louis Riel, Where We Got Our Name*, Exhibit #4 (RAR, Vol. 3, Tab 33); *Testimony of Dr. Ray*, Trial Transcripts,

Vol. II (RAR, Vol. I, Tab 5 at p.126); *RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at pp. 303, 322-326); *Testimony of A.E. Belcourt*, Trial Transcripts, Vol. 1 at pp. 56 - 58

*Common Communal Indicators*

24. Throughout the Métis Nation, common communal indicators with respect to language, song, dance, dress, art, national symbols, community structures and way of life have been identified. The Intervener submits that the Métis Nation developed a culture that was unique its own.

The problem with the term Half-breed or mixed-blood and Half-breed is the term the English people travelling through this period are commonly using to the Metis. It implies that just half of this and half of that is what a Metis is. It overlooks the fact that the Metis 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 and I think that would be the major point that I would make.

*Testimony of Dr. Ray*, Trial Transcripts, Vol. II (RAR, Vol. I, Tab 5 at p. 126). See also *RCAP Report, Métis Perspectives* (RAR, Vol. III, Tab 41 at p. 286, 303, 322-326); *Testimony of Dr. Ray*, Trial Transcripts, Vol. II (RAR, Vol. I, Tab 5 at p. 83-84 [re: song], 121-127 [re: language, Métis home and traditional clothing]; *Lytwyn Report*, Exhibit #39 (AAR, Vol. IV, Tab 47 pp. 619 [re: community structures], 645 [re traditional clothing])

25. The RCAP Report recognized the Michif language as a feature of the Métis Nation's cultural distinctiveness. The language has been identified as having regional dialects; but, uniquely belonging to the Métis people.

It is a mixed language drawing its nouns from a European language and its verbs from an Amerindian language. ... No such mixture of two languages has been reported from any [other] part of the world. Michif is unusual if not unique in several respects among the languages of the world. It poses challenges for all theories of language and language contact. ... The impetus for its emergence was the fact that the bilingual Metis were no longer accepted as Indians or French and they formulated their own ethnic identity, which was mixed and where a mixed 'language of their own' was considered part of their ethnicity.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 303). For more on Michif language see (AAR, Vol. III, Tab 41 at pp. 322-325).

26. The music of the Métis Nation was a means of transmitting identity, history and culture throughout communities as well as to future generations. Dr. Ray identified that a "distinctive Métis musical tradition" evolved as a part of the people's oral tradition.

... they [the Metis] became famous for what were the voyageur songs and the important thing to understand about the songs is they weren't just songs and they weren't just mixtures of French and Indian, they were in fact mixed in a very particular way and these were songs of place, people, songs of family and it was....it was a musical oral culture, oral tradition and it was one of the things that linked these communities together and these men would travel between communities.

Testimony of Dr. Ray, Trial Transcripts, Vol. II (RAR, Vol. I, Tab 5 at p. 83-84). See also *RCAP Report, Métis Perspectives* at p. 202 (RAR, Vol. III, Tab 41 at p. 286).

27. Métis communities throughout the Métis Nation have also been recognized for their characteristic subsistence-based lifestyles rooted on the land while integrating economic opportunities available. In Dr. Ray's report he compared the parallels between the Sault Ste. Marie Métis community and Métis community of Saint-Laurent in Manitoba based on the research of Nicole St-Onge. Dr. Ray's report concludes:

It is clear from the St-Onge research, and that presented here to Sault Ste. Marie, that the Metis were a diverse people, whose specific mix of economic activities at any place and point in time depended on the nature of the local resource base and economic opportunities. What all of the Metis communities had in common over time and space was that their members earned a substantial part of their livelihood off of the land by integrating commercial and subsistence fishing, hunting, and trapping with other economic activities. [emphasis in original]

*Ray Report* (AAR, Vol. IV, Tab 42 at p. 527). See also *Ray Report* (AAR, Vol. IV, Tab 42 at p. 526 [re: comparison with Saint-Laurent])

*Recognized by Others as Distinct*

28. The Métis people have always been recognized as distinct by "outsiders" as well. In western Canada, the Cree referred to the Métis as "Otepayemsuak", the "independent ones". Europeans saw them as distinct. The Hudson Bay Company identified "Half-Breed" traders in their records. The Crown also recognized the Métis as culturally different from Indians and settler populations.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 284 (lines 10-20)); *Testimony of A.E. Belcourt*, Trial Transcripts, Vol. I at pp. 56-58; *Ray Report*, Exhibit #30 (AAR, Vol. IV, Tab 42 at pp. 473-474 [HBC Records], 529-533 [Kohl's Account] and 536-549 [Crown Recognition])

29. This recognition of the Métis Nation and its communities has continued in contemporary times. Revitalized Métis political movements began to once again assert the nation's distinct identity and rights in the early 1900's. In 1938, the Métis settlements were established by the Alberta government. In 1982, the Métis were included in s. 35. In 1992, the federal government, Northwest Territories and provincial governments from Ontario westward agreed to the *Métis Nation Accord* as a part of the failed *Charlottetown Accord*. In 2002, the province of Saskatchewan proclaimed the *Métis Act* which recognizes the Métis people's distinct culture, language and political institutions. Lower courts have also recognized the Métis people's distinct existence, identity and communities.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at pp. 311-314); *The Métis Population Betterment Act*, S.A. 1938, c. 6 (Appellant's Book of Authorities ["ABA"], Vol.

II, Tab B4); *Métis Act*, S.S. 2001, c. 14.01 (IBA, Tab 13); *Testimony of A.E. Belcourt*, Trial Transcripts, Vol. I at pp. 56-58; *Morin and Daigneault*, [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.); [1998] 1 C.N.L.R. 182 (Sask. Queen's Bench) (IBA, Tab 3)

5 *Collective Consciousness*

30. The Métis Nation's self-realization of its existence as a people is confirmed throughout the historic record. The assertion of this distinctiveness crystallized in well-known events like the Battle of Seven Oaks, the Sayer Trial, the Red River Resistance, the Mica Bay Uprising, inclusion within Treaty #3 and the Battle of Batoche. The Intervener submits that these types of collective acts distinguish the Métis people from the Appellant's analysis of the Métis as just individuals with mixed heritage. Throughout their history, the Métis people knew they had something unique to sustain; namely, their identity, communities rights, lands and way of life. At various times they acted collectively to protect these. The fact that the Métis people were willing to stand up and fight for their collective existence endures as one of the defining features of their nationhood.

15 *RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at pp. 303-308). See also *Respondent's Factum* at para 68 for additional info re Métis assertions.

31. The Intervener submits that, based on the Métis Nation's members self-identity, common communal indicators, recognition by others and collective consciousness within Canada, it constitutes an Aboriginal people in domestic and international law. This conclusion was also reached by RCAP.

Application of the recognition policy [recognition of nationhood] is not likely to cause any problems for the Métis Nation. Its long-standing existence as a nation seems to us indisputable. It is widely acknowledged that the Métis Nation is culturally distinct and that it has a demonstrated social cohesiveness as well as political determination and effectiveness throughout its eventful history.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 289 (lines 30-40))

(ii) *The Sault Ste. Marie Métis community is a part of the Métis Nation*

32. The Intervener agrees with the conclusions of the RCAP Report that the Sault Ste. Marie Métis community is one of the oldest and well-recognized Métis communities within Canada. Dr. Ray described the community as "... a strategic spot on the east/west flow of people across the Upper Lakes area and so as the fur-trade is pushing westward, Sault Ste. Marie was strategically important." Dr. Ray also testified that the community was regarded as "home base" for many families who moved throughout the Métis Nation as part of the back and forth movement of the fur trade. The flow between the Sault Ste. Marie Métis community and the west (i.e. Red River) was on-going. The

Intervener submits these factors demonstrate the Sault Ste. Marie community's connection to the territory, existence and history of the Métis Nation.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 303, 314, 340-342);  
*Testimony of Dr. Ray*, Trial Transcripts, Vol. II (RAR, Vol. I, Tab 5 at pp. 80, 143)

5

33. By the mid-nineteenth century, the Sault Ste. Marie Métis community shared many of the Métis Nation's common communal indicators. From their unique "Frenchified" dress (i.e. sash, blanket coat), "fantastic and gay embroidery", distinctive music and song that "identif[ied] places and individuals to document those who were accepted as being members of the Métis community" and peculiar "Canadian" language (Michif) - a unique Métis culture was identifiable within the Sault Ste. Marie area.

*Ray Report* (AAR, Vol. IV, Tab 42 at pp. 527-533)

15

34. The Sault Ste. Marie Métis were also recognized as distinct. The Ojibway saw the Métis as distinct. Europeans visiting the Sault Ste. Marie area recognize the difference between the Métis and the Ojibway. In his testimony, Dr. Ray recounts the visit of a German ethnographer, Johann George Kohl to emphasize this point, "[i]t's absolutely clear in his mind that they're [the Métis family Kohl is staying with] not Ojibway. They're Métis, and when he wants to study the Ojibway, he goes across the river..." Hudson Bay records identify the Sault Ste. Marie Métis as Half-Breeds. The Crown recognized them as distinct from the Ojibway and the settler populations.

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*Ray Report*, Supporting Document: *Many Roads to the Red River* (AAR, Vol. IV, Tab 44 at p. 591-592); *Testimony of Dr. Ray*, Trial Transcripts, Vol. II (RAR, Vol. I, Tab 5 at p. 249); *Ray Report* (AAR, Vol. IV, Tab 42 at pp. 527-533 [re: Métis Identity], pp. 473-480 [re: HBC Records] and pp. 536-550 [re: Crown Relations with Métis])

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35. Similar to other collective actions by the Métis people in western Canada, the Sault Ste. Marie Métis asserted their distinct identity and rights.

30

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. **And they...and there's some parallels with the Metis of the West.** One of the questions is the Metis community here began and, again, this is more for later stories I guess, is they petitioned for their rights. Many times...both before and after the Treaty, as they petitioned for their rights in Western Canada later on, so they take...**they take political steps to assert that right** and here everybody knows about the Mica Bay Incident when the mining properties at Mica Bay were...were taken over, attacked, assaulted, whatever term, it was a physical act done to assert a right and it's often described as an Indian/Metis action. **[emphasis added]**

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*Testimony of Dr. Ray*, Trial Transcripts, Vol. II, p. 269 (RAR, Vol. I, Tab 5 at p. 147)

36. In contemporary times the Sault Ste. Marie Métis community continues to be a part of the Métis Nation. The community is represented locally and provincially through the MNO which represents the Métis Nation within Ontario at a national level through the MNC.

*Testimony of A.E. Belcourt, Trial Transcripts, Vol. 1 at pp. 89-93 and 190*

(iii) *The Métis Nation is an Aboriginal people within Canada included in s. 35*

37. The Intervener submits that based on the factors identified above, the Métis Nation, as a distinct Aboriginal people, is included in s. 35. A similar conclusion was reached by RCAP. Further, the Intervener submits that the Sault Ste. Marie Métis community is a part of the Métis Nation based on the evidence demonstrating its connection to the larger nation and its acceptance by the Métis Nation.

What we can say is that the Métis Nation is the most significant Métis collectivity in Canada. It unquestionably constitutes an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982* for the purposes of negotiations with other governments.

*RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 314 (lines 30-40))

38. The Intervener requests that this Court appreciate and explicitly recognize within its reasoning the distinction between the Métis Nation - as a distinct Aboriginal people - based on its unique history and emergence, self-identity of members, communal indicators, recognition by others and collective consciousness. The Intervener feels this distinction is important in order to respect and protect the distinct identity of the Métis Nation within Canada.

For support of the importance of this distinction see *RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at pp. 286 (lines 30-40))

**D. The underlying constitutional principle of protecting minority rights adds another source of the Crown's honourable and equitable obligations owing to Aboriginal peoples in possession**

39. The Intervener agrees with the Respondents' overall analysis with respect to the inclusion of Métis people in s. 35 and adds that the underlying constitutional principle of protecting minority rights within the federation should inform the purpose and interpretation of the Aboriginal rights of the Métis.

40. The Intervener submits that the federalism ideal of “reconciling diversity within unity” infuses another source for the Crown’s honourable and equitable obligations owing to Aboriginal peoples, in possession, as confederation was expanded westward after 1867.

5 The protection of these rights [referring to the inclusion of s. 35 within the *Constitution Act, 1982*], so recent and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at p. 262 (para 82) (IBA, Tab 7)

10 41. Further, this Court stated that “a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote those identities against the assimilative pressures of the majority.” The Intervener submits that s. 35 provides exactly that for the Métis people; namely, the rights necessary to protect, maintain and promote their distinct identity within the Canadian federation. The Intervener submits this requires positive action, on the  
15 part of the Crown, to identify and support the rights necessary in order to sustain healthy and vibrant Aboriginal peoples within Canada.

*Reference re Secession of Quebec, supra* at p. 259 (IBA, Tab 7)

20 **E. The Crown cannot use uncertainty, its own inaction or administrative inconvenience as a justification for not recognizing or negotiating the Aboriginal rights of the Métis**

42. The Intervener agrees with the submissions of the Respondents on the appropriate test for determining a s. 35 Aboriginal harvesting right claimed by the Métis and its application to this case.

25 43. In *R. v. Sparrow*, this Court first articulated the significance of s. 35 as a “substantive promise” to Aboriginal peoples. The Intervener submits that the language used in *Sparrow* and subsequent decisions from this Court indicate s. 35 creates a meaningful obligation which involves positive actions (at a minimum negotiations) on the part of the Crown that are consistent with a “high standard of honourable dealing.”

30 Section 35(1), at the least, provides a solid constitutional base upon which **subsequent negotiations** can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. [**emphasis added**]

*R. v. Sparrow*, [1990] 1 S.C.R. 1075 (IBA, Tab 6 at pp. 1105, 1110)

44. This Court has also suggested that there is heightened Crown responsibility with respect to regulating harvesting in light of the fundamental importance this activity has in relation to the health, well-being, way of life, identity, culture and economy of Aboriginal peoples.

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

*Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 (IBA, Tab 2 at p. 1113)

45. It is over twenty years since the *Constitution Act, 1982* came into force and effect with its  
10 “substantive promise” to Aboriginal peoples in Canada. While Canadian citizens now enjoy the recognition of numerous individual rights protected by the *Canadian Charter of Right and Freedoms* and other Aboriginal peoples (Indian and Inuit) have resolved or at least have an established negotiation process between their representatives and the Crown (federal and provincial) to address the nature and scope of their Aboriginal and Treaty rights - this is not the case for the members of the  
15 Métis people. Instead, a blanket denial of any Métis rights approach has been implemented by the Crown until a Métis right is proven in a court of law.

*R. v. Sparrow*, [1990] 1 S.C.R. 1075 (IBA, Tab 6 at pp. 1110); *RCAP Report, Métis Perspectives* (AAR, Vol. III, Tab 41 at p. 392); *Intervener’s Factum* at para 45

46. In the case at bar, the Crown justifies its inaction because there is perceived uncertainty with respect to who the Métis are, the nature and scope of Métis rights, and the representation of all Métis by one group. In 1994 the Minister of Natural Resources refused to enter into the proposed Northwest Hunt Agreement with the MNO because “[i]t is difficult to develop an allocation for Métis harvest of large game while the issue of Métis representation remains unresolved”. In 1995, the  
25 Minister wrote, “[a]t the present time the Ontario government does not recognize the Métis people as having any special access right to natural resources”.

*Letter from Howard Hampton to Tony Belcourt*, Exhibit #12 (RAR, Vol. III, Tab 35); *Letter from Chris Hodgson to Ron and Mary O’Connor*, Exhibit #17 (RAR, Vol. III, Tab 37);  
30 *Testimony of A.E. Belcourt*, Trial Transcripts, Vol. 1, at pp. 95-100, 119

47. Governments cannot use administrative inconvenience as a valid reason to deny a constitutionally protected right. Further, in *Corbière v. Canada*, McLachlin J. (as she was then) held that the Crown’s lack of any concrete and tangible evidence on why it would be difficult to allow off-reserve Band members the right to vote in Band elections was fatal to its justification submissions.

35 But they present no evidence of efforts deployed or schemes considered and costed, and no argument or authority in support of the conclusion that costs and administrative convenience could justify a complete denial of a constitutional right. Under these circumstances, we must conclude that the violation has not been shown to be demonstrably justified.



*Corbiere v. Canada*, [1999] 2 S.C.R. 203 per McLachlin and Bastarache JJ. (dissenting in part, but not on these grounds) (IBA, Tab 1 at pp. 224-225 (para 21)); *Singh v. Canada*, [1985] 1 S.C.R. 177 (IBA, Tab 8 at pp. 218 219 (para 70))

48. The Intervener submits that uncertainty or difficulty in determining the nature and scope of the Aboriginal rights of the Métis or who is Métis cannot be a sustainable rationale for the Crown's inaction when the constitutionally entrenched rights of the Métis people are at stake. Moreover, it is submitted that a blanket denial of any Métis rights undermines the substantive and honourable purpose of s. 35.

**F. The recognition of a Métis community and the traditional territory identified in relation to its Aboriginal harvesting rights must be reflective to the unique subsistence harvesting lifestyle and practices of the community in question**

49. This case is about the Métis community of the Upper Great Lakes generally and more specifically on the Sault Ste. Marie Métis community. The Intervener supports the Respondents' position that it is their history and their rights that are at issue. The Intervener submits that the rights of other Métis communities within the Métis Nation must be determined by the courts or negotiated with the Crown based on their own unique histories and existence.

*Respondents' Factum* at para 19

50. The Métis people have often been recognized for their mobile subsistence-based lifestyle in the North and on the Prairies. Consequently, the Intervener submits that the traditional harvesting territories of Métis communities must be based on their own unique subsistence-based lifestyles. For example, in *R. v. Morin and Daigneault* the trial judge found that the Métis community of Northwest Saskatchewan has an Aboriginal right to fish for food protected by s. 35 that covers a territory that is approximately one quarter of the province of Saskatchewan (roughly Treaty #10). This finding was upheld on appeal to Saskatchewan's Queen's Bench. As well, in *R. v. Laviolette*, a case scheduled to be heard before the Provincial Court of Saskatchewan, the issue of establishing an Aboriginal right to hunt based on a larger Métis community is at issue.

*Morin and Daigneault*, [1996] 3 C.N.L.R. 157 (Sask. Prov. Ct.); [1998] 1 C.N.L.R. 182 (Sask. Queen's Bench) (IBA, Tab 3)

51. The Intervener agrees with the testimony of Dr. Ray that identifies the problems associated with the using the term "community". It can be used to describe a site-specific community, a regional

identity or even a larger community like the Métis Nation. The Intervener submits that although this case is specifically about the Sault Ste. Marie Métis community, this Court should not foreclose on the possibility of establishing larger Métis communities (i.e. regional or nation-based) with Aboriginal harvesting rights in future cases or through negotiations. Some of the evidence within the case at bar highlights the larger concept of community that can be found within the Métis Nation.

Such intraregional mobility seems to have fostered, by the early decades of the nineteenth century, a personal and group identity which was less place-specific than regionally and occupationally defined.

*Ray Report*, Supporting Documents: Jacqueline Peterson, *Many Roads to Red River* (AAR, Vol. IV, Tab 44 at p. 603); Also see cites in *Respondents' Factum* at paras. 27-29 re Problem with Using Term "Community" and Métis Regional Identity

**H. The right to determine who is Métis or a member of the Métis Nation rests with the people themselves**

52. The Intervener submits that the Sault Ste. Marie Métis community's constitutionally protected Aboriginal right to hunt inheres within the collective itself. The collective's harvesting right is exercised personally by members of the community but it cannot be sold, transferred, surrendered or exercised unilaterally by a member. The right is held by the community and is maintained through the community's continued existence and the exercise of the right by its members.

53. Within past Aboriginal rights qua Indians cases, this Court has assumed a claimant's entitlement to exercise an Indian community's right by the inclusion of the claimant on a Band's membership list maintained by the federal Department of Indian Affairs and Northern Development (DIAND). These DIAND lists were initially based on Treaty lists; however, the Indian registration criteria and provisions in the *Indian Act* and Band control over membership lists have contracted and expanded these lists over the years. Similar lists were initially created by the Sault Ste. Marie Métis community. In evidence is the 1850 petition signed by 55 members of the Sault Ste. Marie Métis community and sent to the Governor General explaining their Aboriginal claim to land in the area. However, unlike in the situation of Indian people, these Métis lists were never recognized or maintained by the Crown.

*Lytwyn Report* (AAR, Vol. IV, Tab 47 at p. 641 (lines 30-40))

54. The evidence and testimony of Tony Belcourt, President of the MNO explains that a membership list of the contemporary Sault Ste. Marie Métis community and other Métis communities

within Ontario have been developed and maintained through a MNO registry system. The issue is that the Crown still refuses to recognize these lists in any formal way in order to determine membership within Métis communities or entitlement to exercise a Métis community's Aboriginal right.

Q. Do...do they [Government of Ontario] accept your list of Métis people?

A. No. They've never...well, they accept it in the sense that if I give it to them, they accept the fact that I'm giving them a list, but they don't accept our Registry as being the Registry of the Métis in the Province. They don't recognize our list.

*Testimony of A.E. Belcourt*, Trial Transcripts, Vol. 1, at p. 94. See also *Testimony of A.E. Belcourt*, Trial Transcripts, Vol. 1 at pp. 86, 95-100, 119 and *List of Names from Métis Nation of Ontario Registry for Region 4* (1998) (RAR, Vol. III, Tab 34)

55. The Intervener submits that the development and maintenance of Métis community membership lists would not be a difficult. Prior lists of the historic Sault Ste. Marie Métis community exist and contemporary lists, which demonstrate continuity with the historic Métis community, have been developed by the MNO. These types of Métis community membership lists developed on sound and fair principles, natural justice and the customs, traditions, and practises of the Métis people should be recognized and supported by the Crown in order to determine who are entitled to exercise a Métis community's Aboriginal right.

56. These types of membership processes for other Aboriginal peoples are already supported by the Crown through Indian and Inuit self-government agreements. In Ontario, enrolment committees for the Algonquin claim have been established. The *Gwich'in Land Claim Settlement*, the *Nisga'a Treaty* and other modern day Indian and Inuit self-government agreements provide for extensive processes and codes for the determination of membership. As well, Indian Bands under the *Indian Act* are allowed to develop and administer their own community membership codes.

See *Testimony of A.E. Belcourt*, Trial Transcripts, Vol. I, p. 119 re Algonquin Claim. Also see *Gwich'in Land Claim Settlement Act*, R.S.C. 1992, c. 53, ch. 3 (IBA, Tab 12), *Nisga'a Final Agreement Act*, R.S.C. 2000, c. 7, ch. 20 (IBA, Tab 14) and *Indian Act*, R.S.C. 1985, c. I-5, s. 10 (ABA, Vol. II, Tab B23, s. 10)

57. The Intervener submits that the Métis, as an Aboriginal people, should be afforded the same opportunity provided to other Aboriginal people in order to determine their membership and who is entitled to exercise a Métis community's Aboriginal harvesting right.

58. However, since at the time of trial the Government of Ontario did not recognize the established membership list of the Sault Ste. Marie Métis community in order to presume entitlement,

the trial judge in this case needed to determine whether the Powleys were entitled to exercise the Sault Ste. Marie Métis community's right to hunt based on the evidence provided. The Intervener submits that Vaillancourt J.'s finding that the Respondents were entitled to exercise the Sault Ste. Marie Métis community's right to hunt based on evidence that: (1) they self-identified as Métis; (2) they are  
5 genealogically connected to the historic Métis community at Sault Ste. Marie; and (3) they are accepted by the contemporary Métis community at Sault Ste. Marie is correct.

59. The Intervener respectfully submits that the legal question of whether the Powleys are entitled to exercise the Sault Ste. Marie Métis community's right to hunt does not and should not define who  
10 are members of the Sault Ste. Métis community, who are members of the Métis Nation or who the Métis people are. Only the Métis people themselves possess the right to determine who the members of their communities are. This is one of the fundamental rights that inheres within a people. This right is an internal right, to be exercised based on sound and fair principles, natural justice and the customs, traditions, and practises of the Aboriginal people themselves.

60. International human rights instruments recognize the right of self-determination of all peoples. The right of a peoples to determine its own membership is recognized as a part of the right of self-determination.

*International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 1, entered into force Mar. 23, 1976 (IBA, Tab 15); *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, art. 1, entered into force Jan. 3, 1976 (IBA, Tab 16); *Declaration on the Granting of Independence to Colonial Countries and People*, U.N.G.A. Resolution 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684, adopted on December 14, 1960 (IBA, Tab 17 at para 2); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (IBA, Tab 7 at pp. 278 - 281)

61. The Intervener submits that this right of self-determination applies equally to Indigenous  
30 peoples. This principle is gaining increased recognition within the international community. This right would include the right of an Indigenous peoples to determine its own membership.

*United Nations Draft Declaration of the Rights of Indigenous Peoples*, (1994) 1 C.N.L.R. 40 at Part VII (IBA, Tab 18 at arts. 31, 32, 34). See also *RCAP Report*, Vol. 2, Part I, *Restructuring the Relationship* (IBA, Tab 19 at pp. 169-174)

62. Human rights obligations under international law serve to inform the interpretation by Canadian courts as to the objectives and scope of human rights obligations under the Constitution of Canada.

This is particularly the case where the human rights obligations pertain to those rights which Canada and other members of the international community have made a commitment to implement.

*R. v. Keegstra*, [1990] 3 S.C.R. 697 at pp. 754, 838 (IBA, Tab 5)

63. The principle that Aboriginal peoples themselves have the right to determine their membership has also been recognized by Canadian courts. In *R. v. Alphonse*, the British Columbia Court of Appeal affirmed that membership within an Aboriginal community must be driven by the Aboriginal peoples themselves:

But there remain many non-status Indians and Métis who are not Indians for the purposes of the Indian Act and to whom s. 88 does not apply. Yet those very people may well belong to a community of people which holds aboriginal title or aboriginal rights. **It must be remembered that membership of such a community must be determined in accordance with the customs, traditions and practices of the aboriginal people in question, and not in accordance with the Indian Act or with non-Indian common law principles.** [emphasis added]

*R. v. Alphonse*, [1993] 4 C.N.L.R. 19 (IBA, Tab 4 at p. 61)

64. The RCAP Report also supported the recognition of this right in its recommendation on Métis identity.

Every person who

- (i) identifies himself or herself as Métis and
- (ii) is accepted as such by the nation of Métis people with which that person wishes to be associated, **on the basis the criteria and procedures determined by that nation** be recognized as a member of that nation for the purposes of a nation - to - nation negotiations and as Métis for that purpose. [emphasis added]

*RCAP Report, Métis Perspectives* at p. 203 (AAR, Vol III, Tab 41, p. 286); See also *RCAP Report*, Vol. 2, Part I, *Restructuring the Relationship* (IBA, Tab 19 at pp. 179-181)

65. Although not available at the time of trial, the Intervener feels it is extremely important to bring to this Court's attention that the Métis Nation, through its representative structures, have adopted a national definition for citizenship after years of consultation, discussion and debate. The MNC and its Governing Members are now in process of uniformly implementing this definition throughout the Métis Nation based on sound and fair principles, natural justice and the customs, traditions, and practises of the Métis people.

Métis National Council, *National Definition of "Métis" for Citizenship within the Métis Nation*, 60 O.R. (3d) Part 10 at p. xxxvii (IBA, Tab 11)

66. The Intervener submits that any court-imposed definition of "Métis" would frustrate the Métis Nation's inherent right to determine its own membership and implement its own membership criteria and procedures based on sound and fair principles, natural justice and their customs, traditions, and practises. The Intervener respectfully restates that this Court only needs to determine the legal question of whether there is enough evidence, based on the three factors identified by the trial judge, for the Respondents to be entitled to exercise the Sault Ste. Marie Métis community's right to hunt.

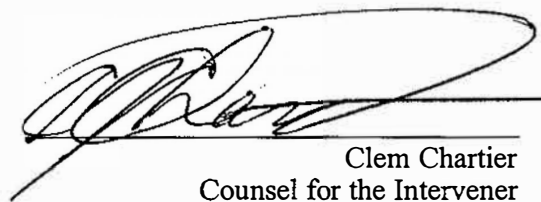
See *RCAP Report, Métis Perspectives* where Commission concludes at p. 202 "[i]t would be inappropriate for anyone outside the nation to intervene" re: determining Metis identity and membership (AAR, Vol. III, Tab 41 at p. 286)

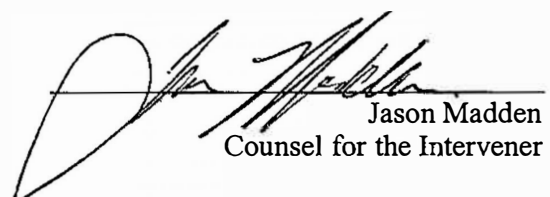
67. It is also respectfully submitted that the issue of whether a claimant, who is not genealogically connected to the historic Sault Ste. Marie Métis community, can exercise that community's Aboriginal right to hunt is not before this Court and that question is best left for another case where that specific fact situation arises. The Intervener is very aware of how important that question is, but submits it should not be dealt with without a specific factual context to address that type of claim.

**PART IV: ORDER REQUESTED**

68. The Intervener support the Respondents' request that this appeal be dismissed and that the Court deny the Appellant's request for a further one-year stay.

All of which is respectfully submitted this 3<sup>rd</sup> day of February, 2003.

  
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Counsel for the Intervener

  
Jason Madden  
Counsel for the Intervener

**PART V: TABLE OF AUTHORITIES**

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15 <i>Declaration on the Granting of Independence to Colonial Countries and People, U.N. G.A. Resolution 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684, adopted on December 14, 1960</i>	60
15 <i>United Nations Draft Declaration of the Rights of Indigenous Peoples, (1994) 1 C.N.L.R. 40</i>	61

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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

-and-

**STEVE POWLEY  
and  
RODDY CHARLES POWLEY**

Respondents

-and-

**LABRADOR MÉTIS NATION, ET AL.**

Interveners

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**FACTUM OF THE INTERVENER**

**MÉTIS NATIONAL COUNCIL  
MÉTIS NATION OF ONTARIO**

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