

EXHIBIT #  
MMF-1000  
WUSKWIATIM GENERATION  
& TRANSMISSION PROJECT  
R.G.  
CLEAN ENVIRONMENT COMMISSION

MEMORANDUM OF UNDERSTANDING

REGARDING THE ESTABLISHMENT OF AN  
MMF-HYDRO EMPLOYMENT WORKING GROUP

BETWEEN:

MANTOBA METIS FEDERATION INC.  
(Hereinafter referred to as "MMF")

And

THE MANTOBA HYDRO-ELECTRIC BOARD  
(Hereinafter referred to as "Hydro")

1. WHEREAS Section 35 of the *Constitution Act, 1982*, recognizes and affirms the existing Aboriginal and Treaty Rights of the Aboriginal peoples of Canada, and confirms the Metis as one of Canada's Aboriginal peoples;

2. AND WHEREAS MMF is the Metis Nation's representative for the Metis within Manitoba for the purposes of Hydro to Metis Nation negotiations and agreements, service delivery, consultations and decision-making that may affect, or are intended to benefit, the Metis within Manitoba;

3. AND WHEREAS Hydro is a major Crown Corporation, employer and service provider in Manitoba;

4. AND WHEREAS Hydro has a goal to enhance Aboriginal relations, whereby it hopes to achieve workforce targets of 10% Aboriginal Corporate-wide and 33% in Northern Manitoba by 2005;

5. AND WHEREAS Hydro and MMF acknowledge the considerable contribution that can be made to Hydro, its customers, and indeed all Manitoba, by the involvement of the Metis Nation in Hydro recruitment, training, employment and business initiatives;

6. AND WHEREAS Hydro recognizes the benefits of facilitating employment opportunities for qualified Metis people and recognizes the benefits of encouraging, attracting and retaining Metis employees;

7. AND WHEREAS MMF recognizes benefits to Metis people from improved access to training and employment opportunities in Manitoba and support initiatives to increase awareness and promote participation of Metis people in the Hydro work force;

9. This Memorandum of Understanding is agreed not to be legally binding and is not intended to create, nor to be construed as creating, any rights or obligations between the MMF and Hydro;
8. Any written notice required to be given herein by either Hydro or MMF shall be effective if delivered in person, sent by registered mail, or by facsimile, addressed to the Head Office of the Party to whom it is intended;
7. This Memorandum of Understanding may be terminated upon 60 days written notice from either Hydro or MMF;
6. This Memorandum of Understanding may be amended from time to time with the consent of both Hydro and MMF; provided that such amendments shall not be effective until written and agreed to by each Party;
5. Hydro and MMF shall be responsible for the costs of their own representatives on the EWG;
4. Hydro and MMF shall each appoint representatives to the EWG up to a maximum of six (6) for each of the Parties;
3. To carry out its role and mission, the EWG shall develop such work plans and methods as it determines shall best serve the joint interests of the parties.
2. The role and mission of the EWG is:
1. Hydro and MMF will establish an Employment Working Group (EWG) intended to support, develop, and increase Metis recruitment, training, employment and business initiatives within Hydro operations;
  - a) to serve as a think tank to provide advice to MMF and Hydro relating to the training, recruitment, employment, and retention of Metis people within Hydro; and
  - b) to function as an information exchange point between MMF and Hydro with respect to information regarding services, training, recruitment and employment opportunities within Hydro, as well as training and employment program initiatives offered by other government departments; and
  - c) to develop, implement, and recommend processes and actions to eliminate systemic barriers which limit Northern and Aboriginal participation in the Hydro workforce.

The preamble forms part of this Memorandum of Understanding.

NOW THEREFORE the MMF and Hydro agree to begin discussions in accordance with a common understanding hereinafter set out:



10. Nothing in this Memorandum of Understanding shall be construed as diminishing or extinguishing existing or future rights of the MMF to pursue claims, or to seek legal or political redress, for damages incurred by past, present or future Hydro projects, operations or activities;


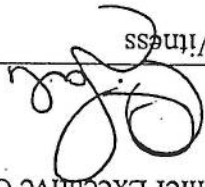
11. Nothing in this Memorandum of Understanding is intended to alter Aboriginal or Treaty Rights recognized and affirmed under Section 35 of the *Constitution Act*, 1982;

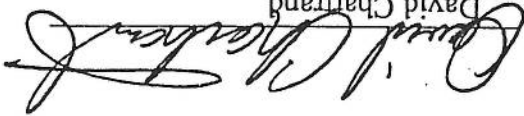
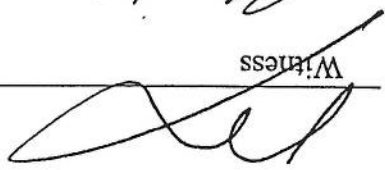
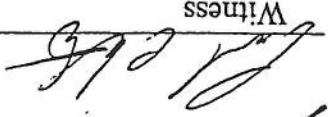
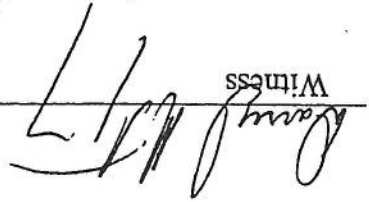
12. Nothing in the Memorandum of Understanding is intended to alter any other agreement of any nature or kind to which Hydro or MMF, or both, may be a Party;

13. All public announcements concerning this Memorandum of Understanding will be jointly coordinated and pre-approved on a timely basis by the Parties, and no reasonable request by either Party for such announcements will be denied.

IN WITNESS WHEREOF this Memorandum of Understanding has been executed by the proper officers of each of the parties on the 10<sup>th</sup> day of October, 2002.

MANTOBA HYDRO-ELECTRIC BOARD MANTOBA METIS FEDERATION

Per:   
Bob Brennan  
Chief Executive Officer  
Per:   
Witness

Per:   
David Chartrand  
President  
Per:   
Witness  
Per:   
Witness  
Per:   
Witness

Per:   
Witness



# Reports

Aboriginal Justice Implementation Commission  
Final Report

## Appendix I AJIC recommendations

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News Releases

Final Report

Final Report

2.1 The Government of Manitoba place the issue of recognition and reconciliation policies and actions on the agenda of a new Quarterly Reports

Recommendations such other implementation institution that may be agreed upon

Consultation Papers in Manitoba, including in particular the Assembly of Manitoba Chiefs and the Manitoba Metis Federation.

Report of the  
Aboriginal Justice  
Inquiry of Manitoba

2.2 The Interpretation Act of Manitoba be amended to provide that all legislation be interpreted subject to Aboriginal and treaty rights.

Terms of Reference

2.3 The Government of Manitoba formally renounce its half interest in minerals within Indian reserves.

Links

2.4 The Government of Manitoba place the issue of the establishment of an Aboriginal Justice System on the agenda of the Aboriginal Justice Commission or such other institution as may be set up to implement the recommendations of the Aboriginal Justice Inquiry.

3.1

The Government of Manitoba develop and adopt, with the full participation of the Manitoba Metis Federation, a comprehensive Metis policy on matters within its jurisdiction.

3.2

The Government of Manitoba cooperate with the federal government and other provinces, where appropriate, on the implementation of the Aboriginal Justice Inquiry and the RCAP recommendations.

3.3

Representatives of the Province enter forthwith into discussions with the MMF to begin the process of addressing matters within the jurisdiction of Manitoba that have been the subject of recommendations by the AJI and the RCAP.

**4.1**

Any future, major, natural resource developments not proceed, unless and until agreements or treaties are reached with the Aboriginal people and communities in the region, including the Manitoba Métis Federation and its locals and regions, who might be negatively affected by such projects, in order to respect their Aboriginal, treaty, or other rights in the territory concerned.

**5.1**

The Government of Manitoba commit to reducing the number of young people held in pretrial detention in Manitoba from one of the highest in Canada to at least the national average, and put in place the services to accomplish this.

**5.2**

As part of a demonstrated commitment to reducing the number of young people held in pretrial detention, the Department of Justice should, as often as possible, publish comparative statistics on its website. If statistics comparing Manitoba with other provinces are only available annually the department should publish its own statistics quarterly with comparative numbers annually.

**5.3**

The police consider alternatives to the laying of charges in all cases involving Aboriginal youth and, when appropriate, exercise their discretion to take no legal measure or to take measures other than laying a charge.

**5.4**

Police departments continue to designate youth specialists and provide specialized training to all officers involved in the administration of the Young Offenders Act.

**5.5**

When a youth court judge denies bail, the judge consider releasing the young offender into the custody of his or her parents, or another responsible person, as contemplated by section 7.1(1)(a) of the Young Offenders Act.

**5.6**

Aboriginal communities be provided with resources to develop bail supervision and other programs that will serve as alternatives to detention.

**5.7**

Young offenders be removed from their community only as a last resort and only when the youth poses a danger to some individual or to the community.

**5.8**



R. v. Powley

Her Majesty The Queen Appellant/respondent on cross-appeal

v.

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

and

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

Indexed as: R. v. Powley

Neutral citation: 2003 SCC 43.

File No.: 28533.

2003: March 17; 2003 : September 19.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

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

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

The term "Métis" in s. 35 of the Constitution Act, 1982 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a



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

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

The verification of a claimant's membership in the relevant contemporary community is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. Self-identification, ancestral connection, and community acceptance are factors which define Métis identity for the purpose of claiming Métis rights under s. 35. Absent formal identification, courts will have to ascertain Métis identity on a case-by-case basis taking into account the value of community self-definition, the need for the process of identification to be objectively verifiable and the purpose of the constitutional guarantee. Here, the trial judge correctly found that the respondents are members of the Métis community that arose and still exists in and around Sault Ste. Marie. Residence on a reserve for a period of time by the respondents' ancestors did not, in the circumstances of this case, negate their Métis identity. An individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights, absent collective adherence by the Métis community to the treaty.

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

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

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

Cases Cited

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



## Statutes and Regulations Cited

*Constitution Act, 1982*, s. 35.

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

## Authors Cited

Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4. Ottawa: The Commission, 1996.

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Morrison, James. "The Robinson Treaties of 1850: A Case Study". Study commissioned by the Royal Commission on Aboriginal Peoples.

Ontario. Ministry of Natural Resources. *Interim Enforcement Policy on Aboriginal Right to Hunt and Fish for Food*. Toronto: The Department, 1991.

Peterson, Jacqueline. "Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815". In Jacqueline Peterson and Jennifer S. H. Brown, eds., *The New Peoples: Being and Becoming Métis in North America*. Winnipeg: University of Manitoba Press, 1985, 37.

Ray, Arthur J. "An Economic History of the Robinson Treaties Area Before 1860", March 17, 1998.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (2001), 53 O.R. (3d) 35, 196 D.L.R. (4th) 221, 141 O.A.C. 121, 152 C.C.C. (3d) 97, [2001] 2 C.N.L.R. 291, 40 C.R. (5th) 221, 80 C.R.R. (2d) 1, [2001] O.J. No. 607 (Q.L.), affirming the decision of the Superior Court of Justice (2000), 47 O.R. (3d) 30, [2000] O.T.C. 49, [2000] 2 C.N.L.R. 233, which upheld the judgment of the Ontario Court (Provincial Division), [1999] 2 C.N.L.R. 153, 58 C.R.R. (2d) 149, [1998] O.J. No. 5310 (Q.L). Appeal and cross-appeal dismissed.

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Darlene A. Leavitt, for the intervenor the Attorney General of British Columbia.

Written submissions only by P. Mitch McAdam, for the intervenor the Attorney General for Saskatchewan.

Margaret Unsworth and Kurt Sandstrom, for the intervenor the Attorney General of Alberta.

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Joseph Elliot Magnet, for the intervenor Congress of Aboriginal Peoples.

Clem Chartier and Jason T. Madden, for the intervenors Métis National Council and Métis Nation of Ontario.

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

Written submissions only by Brian Eyoifson, for the intervenor Aboriginal Legal Services of Toronto Inc.

Robert MacRae, for the intervenor Ontario Métis Aboriginal Association.

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

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

Written submissions only by Janet L. Hutchison, for the intervenor North Slave Métis Alliance.

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

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

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

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

Solicitor for the intervenor North Slave Métis Alliance: Chamberlain Hutchison, Edmonton.

**CITATION**

Before publication in the S.C.R., this judgment should be cited using the neutral citation: *R. v. Powley*, 2003 SCC 43. Once the judgment is published in the S.C.R., the neutral citation should be used as a parallel citation: *R. v. Powley*, [2003] x S.C.R. xxx, 2003 SCC 43.

**THE COURT --**

**1. Introduction**

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

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

3 Moose hunting in Ontario is subject to strict regulation. The Ministry of Natural Resources ("MNR") issues Outdoor Cards and validation stickers authorizing the bearer to harvest calf moose during open season. People wishing to harvest adult moose must enter a lottery to obtain a validation tag authorizing them to hunt either a bull or a cow in a particular area, as specified on the tag. The number of tags issued for a given season depends on the calculations of MNR biologists, who estimate the current adult moose population and the replacement rate for animals removed from the population. The validation tag requirement and seasonal restrictions are not enforced against Status Indians, and the MNR does not record Status Indians' annual harvest. (See MNR Interim Enforcement Policy, May 28, 1991.)

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

5 Later that day, two conservation officers arrived at the Powleys' residence. The Powleys unlawfully hunting moose and knowingly possessing game hunted in contravention of the *Game and Fish Act*, R.S.O. 1990, c. G-1. They both entered pleas of not guilty.

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

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

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

## II. Analysis

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

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

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

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

Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. Economies played a major role in this process. The special qualities and skills of the Métis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures.... As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Métis people contributed massively to European penetration of North America.

The French referred to the fur trade Métis as *coureurs de bois* (forest runners) and *bois brûlés* (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Métis (whose culture had early roots) were originally called 'livyers' or 'settlers', those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland. The Cree people expressed the Métis character in the term *Otepayemsuak*, meaning the 'independent ones'.

(Report of the Royal Commission on Aboriginal Peoples, vol. 4, at pp. 199-200 ("RCAP Report")):

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

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

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

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

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

### A. The Van der Peet Test

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

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

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



aboriginal rights for another day. He wrote at para. 67:

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

17 As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

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

(1) Characterization of the Right

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

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

(2) Identification of the Historic Rights-Bearing Community

21 The trial judge found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850. We find no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal. The record indicates the following: in the mid-17th century, the Jesuits established a mission at Sainte-Marie-du-Sault, in an area characterized by heavy competition among fur traders. In 1750, the French established a fixed trading post on the south bank of the Saint Mary's River. The Sault Ste. Marie post attracted settlement by Métis -- the children of unions between European traders and Indian women, and their descendants (A.J. Ray, "An Economic History of

the Robinson Treaty Areas Before 1860 (1998) ("Ray Report"), at p. 17. According to Dr. Ray, most important [Métis settlements] in the upper lakes area" (Ray Report, *supra*, at p. 47). The Hudson Bay Company operated the St. Mary's post primarily as a depot from 1821 onwards (Ray Report, *supra*, at p. 51). Although Dr. Ray characterized the Company's records for this post as "scanty" (Ray Report, *supra*, at p. 51), he was able to piece together a portrait of the community from existing records, including the 1824-25 and 1827-28 post journals of HBC Chief Factor Bethune, and the 1846 report of a government surveyor, Alexander Vidal (Ray Report, *supra*, at pp. 52-53).

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

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

### (3) Identification of the Contemporary Rights-Bearing Community

24 Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestral based membership in the present community. The trial judge found that a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850. While we take note of the trial judge's determination that the Sault Ste. Marie Métis community was to a large extent an "invisible entity" (para. 80) from the mid-19th century to the 1970s, we do not take this to mean that the community ceased to exist or disappeared entirely.

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

[T]he Métis continued to live in the Sault Ste. Marie region. Some drifted into the Indian Reserves which had been set apart by the 1850 Treaty. Others lived in areas outside of the town, or in back concessions. The Métis continued to live in much the same manner as they had in the past -- fishing, hunting, trapping and harvesting other resources for their livelihood.

(Lytwyn Report, p. 31 (emphasis added); see also Morrison, "The Robinson Treaties", at p. 201)

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

disinclination to be identified as Métis" in the wake of the Riel rebellions and the turning of Ontario public opinion against Métis rights through government actions and the media (Lytwyn Report, *supra*, at p. 33).

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

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

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

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

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

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

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

33 Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and



distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

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

35 In this case, there is no reason to overturn the trial judge's finding that the Powleys are members of the Métis community that arose and still exists in and around Sault Ste. Marie. We agree with the Court of Appeal that, in the circumstances of this case, the fact that the Powleys' ancestors lived on an Indian reserve for a period of time does not negate the Powleys' Métis identity. As the Court of Appeal indicated, "E. B. Borron, commissioned in 1891 by the province to report on annuity payments to the Métis, was of the view that Métis who had taken treaty benefits remained Métis and he recommended that they be removed from the treaty annuity lists" (Sharpe J.A., at para. 139). We emphasize that the individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights. It will depend, in part, on whether there was a collective adherence by the Métis community to the treaty. Based on the record, it was open to the trial judge to conclude that the rights of Powleys' ancestors did not merge into those of the Indian band.

#### (5) Identification of the Relevant Time Frame

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

37 The pre-contact test in *Van der Peet* is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land. By analogy, the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.

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

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

With the exception of Detroit, Kaskaskia and Cahokia, the French colonial administration established no farming communities in the Great Lakes region. After 1763, only partly in response to the regionwide resistance movement known as Pontiac's Rebellion, the British likewise discouraged settlement west of Lake Ontario. Desire to keep the peace and to monopolize the profits of the Great Lakes Indian trade were the overriding considerations favouring this policy. To have simultaneously encouraged an influx of white farmers would have upset both the diplomatic alliance with the native inhabitants inherited from the French and the ratio between humans and animals on the ground, straining the fur-bearing capacities of the region.

(J. Peterson, "Many roads to Red River", in *The New Peoples: Being and Becoming Métis in North America* (1985), at p. 400)

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

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

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

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

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

These people were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between. By the end of the last struggle for empire in 1815, their towns, which were visually, ethnically and culturally distinct from neighbouring Indian villages and "white towns" along the eastern seaboard, stretched from Detroit and Michillimackinac at the east to the Red River at the northwest.

...[R]esidents [of these trading communities] ... drew upon a local subsistence base rather than on European imports.... [S]uch towns grew as a result of and were increasingly dominated by the offspring of Canadian trade employees and Indian women who, having reached their majority, were intermarrying among themselves and rearing successive generations of métis. In both instances, these communities did not represent an extension of French, and later British colonial culture, but were rather "adaptation[s] to the Upper Great Lakes environment." [Emphasis added.]



43 Dr. Ray emphasized in his report that a key feature of Métis communities was that "their members earned a substantial part of their livelihood off of the land" (Ray Report, *supra*, at p. 56). Dr. Lytwyn concurred: "The Métis of Sault Ste. Marie lived off the resources of the land. They obtained their livelihood from hunting, fishing, gathering and cultivating" (Lytwyn Report, at p. 2). He reported that "[w]hile Métis fishing was prominent in the written accounts, hunting was also an important part of their livelihood," and that "[a] traditional winter hunting area for the Sault Métis was the Gouais Bay area" (Lytwyn Report, *supra*, at pp. 4-5). He elaborated at p. 6:

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

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

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

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

(8) Determination of Whether or not the Right was Extinguished

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

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

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

(10) Determination of Whether the Infringement is Justified

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



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

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

B. The Request for a Stay

51 With respect to the cross-appeal, we affirm that the Court of Appeal had jurisdiction to issue a stay of its decision in these circumstances. This power should continue to be used only in exceptional situations in which a court of general jurisdiction deems that giving immediate effect to an order will undermine the very purpose of that order or otherwise threaten the rule of law: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. We note that the Powleys' acquittal would have remained valid notwithstanding the stay. It was, however, within the Court of Appeal's discretion to suspend the application of its ruling to other members of the Métis community in order to foster cooperative solutions and ensure that the resource in question was not depleted in the interim, thereby negating the value of the right.

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

III. Conclusion

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

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

55 The constitutional question is answered as follows:

Are ss. 46 and 47(1) of the *Game and Fish Act*, R.S.O. 1990, c. G.1, as they read on October 22, 1993, of no force or effect with respect to the respondents, being Métis, in the circumstances of this case, by reason of their aboriginal rights under s. 35 of the *Constitution Act, 1982*?

Answer: Yes.

Appendix A

Relevant Constitutional and Statutory Provisions

The following provisions govern this appeal:

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

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

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

Section 35 of the *Constitution Act*, 1982

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

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

*Appeal dismissed with costs. Cross-appeal dismissed.*

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

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

*Solicitor for the intervenor the Attorney General of Canada: Attorney General of Canada, Ottawa.*

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

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

*Solicitor for the intervenor the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.*

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

*Solicitor for the intervenor the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.*

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

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

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

*Solicitor for the intervenor Congress of Aboriginal Peoples: Joseph Elliot Magnet, Ottawa.*

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

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

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

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

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

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

Solicitor for the intervenor North Slave Métis Alliance: Chamberlain Hutchison, Edmonton.

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Main page on: [Canadian Environmental Assessment Act](#)  
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 Source: <http://laws.justice.gc.ca/en/C-15.2/28533.html>  
 Updated to August 31, 2003

## Canadian Environmental Assessment Act

1992, c. 37

An Act to establish a federal environmental assessment process

Preamble

WHEREAS the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;

WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

WHEREAS the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality;

AND WHEREAS the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

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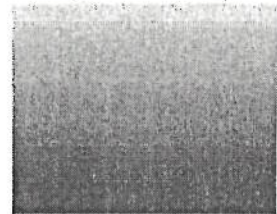
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SHORT TITLE

1. This Act may be cited as the *Canadian Environmental Assessment Act*.

INTERPRETATION

2. (1) In this Act,

"Agency" « Agence » means the Canadian Environmental Assessment Agency established by section 61;

"assessment by a review panel" means an environmental assessment that is conducted by a review panel established pursuant to section 33 and that includes a consideration of the factors required to be considered under subsections 16(1) and (2);

"comprehensive study" means an environmental assessment that is conducted pursuant to section 21 and that includes a consideration of the factors required to be considered under subsections 16(1) and (2);

"comprehensive study list" « liste d'étude approfondie » means a list of all projects or classes of projects that have been prescribed pursuant to regulations made under paragraph 59(d);

"environment" « environnement » includes

(a) land, water and air, including all layers of the atmosphere,

(b) all organic and inorganic matter and living organisms, and

(c) the interacting natural systems that include components referred to in paragraphs (a) and (b);

"environmental assessment" « évaluation environnementale » means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations;

"environmental effect" « effets environnementaux » means, in respect of a project,

(a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,

(b) any effect of any change referred to in paragraph (a) on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,  
 (iii) the current use of lands and resources for traditional purposes by aboriginal persons, or  
 (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or  
 (c) any change to the project that may be caused by the environment,  
 whether any such change or effect occurs within or outside Canada;

"exclusion list" « liste d'exclusion »  
 "exclusion list" means a list of all projects or classes of projects that have been prescribed pursuant to regulations made under paragraph 59(c);

"federal authority"  
 « autorité fédérale »  
 "federal authority" means

(a) a Minister of the Crown in right of Canada,  
 (b) an agency of the Government of Canada or other body established by or pursuant to an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs,  
 (c) any department or departmental corporation set out in Schedule I or II to the *Financial Administration Act*, and  
 (d) any other body that is prescribed pursuant to regulations made under paragraph 59(e),

but does not include the Legislature or an agency or body of Yukon or Nunavut, the Commissioner in Council or an agency or body of the Northwest Territories, a council of the band within the meaning of the *Indian Act*, The Hamilton Harbour Commissioners constituted pursuant to *The Hamilton Harbour Commissioners' Act*, The Toronto Harbour Commissioners constituted pursuant to *The Toronto Harbour Commissioners' Act*, 1911, a harbour commission established pursuant to the *Harbour Commissions Act*, a Crown corporation within the meaning of the *Financial Administration Act*, a not-for-profit corporation that enters into an agreement under subsection 80(5) of the *Canada Marine Act* or a port authority established under that Act;

"federal lands"  
 « territoire domanial »  
 "federal lands" means

(a) lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands, other than lands under the administration and control of the Commissioner



of Yukon, the Northwest Territories or Nunavut and lands the management of which has been granted to a port authority under the *Canada Marine Act* or a not-for-profit corporation that has entered into an agreement under subsection 80(5) of that Act,

(b) the following lands and areas, namely,

(i) the internal waters of Canada,

(ii) the territorial sea of Canada,

(iii) the exclusive economic zone of Canada, and

(iv) the continental shelf of Canada, and

(c) reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and are subject to the *Indian Act*, and all waters on and airspace above those reserves or lands;

"follow-up program" means a program for

"programme de suivi"

(a) verifying the accuracy of the environmental assessment of a project, and

(b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project;

"interested party" means, in respect of an environmental assessment, any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious;

"partie intéressée"

"mediation" means an environmental assessment that is conducted with the assistance of a mediator appointed pursuant to section 30 and that includes a consideration of the factors required to be considered under subsections 16(1) and (2);

"médiation"

"Minister" « ministre » means the Minister of the Environment;

"mitigation" « mesures d'atténuation » means, in respect of a project, the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means;

"prescribed" « Version anglaise seulement » means prescribed by the regulations;

"project" « projet » means

(a) in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or

(b) any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b);

"proponent", in respect of a project, means the person, body, federal authority or government that proposes the project;

"record" « document » "record" includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof;

"responsible authority" "autorité responsable" "responsible authority" means a federal authority that is required pursuant to subsection 1(1) to ensure that an environmental assessment of the project is conducted;

"screening" « examen préalable » "screening" means an environmental assessment that is conducted pursuant to section 18 and that includes a consideration of the factors set out in subsection 16(1);

"screening report" « rapport d'examen préalable » "screening report" means a report that summarizes the results of a screening;

"sustainable development" « développement durable » "sustainable development" means development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.

Control (2) For the purposes of this Act, a corporation is controlled by another corporation if

(a) securities of the corporation to which are attached more than fifty per cent of the votes that may be cast to elect directors of the corporation are held, other than by way of security only, by or for the benefit of that other corporation; and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation.

1992, c. 37, s. 2; 1993, c. 28, s. 78, c. 34, s. 18(F); 1996, c. 31, s. 61; 1998, c. 10, s. 164, c. 15, s. 50; 2002, c. 7, s. 122, c. 29, s. 137.

HER MAJESTY

Binding on Her Majesty 3. This Act is binding on Her Majesty in right of Canada or a province.

PURPOSES

Purposes 4. The purposes of this Act are

(a) to ensure that the environmental effects of projects receive careful consideration before responsible

(b) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

may determine that the projects are so closely related that they can be considered to form a single project.

(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of

All proposed undertakings to be considered

(b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,

likely to be carried out in relation to that physical work.

1992, c. 37, s. 15; 1993, c. 34, s. 21(F).

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

Factors to be considered

(a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public that are received in accordance with this Act and the regulations;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

Additional factors

(a) the purpose of the project;



(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

Determination of factors

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a), (b) and (d) and (2)(b), (c) and (d) shall be determined

(a) by the responsible authority; or

(b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.

Factors not included

(4) An environmental assessment of a project is not required to include a consideration of the environmental effects that could result from carrying out the project in response to a national emergency for which special temporary measures are taken under the *Emergencies Act*.

1992, c. 37, s. 16; 1993, c. 34, s. 22(F).

Delegation

17. (1) A responsible authority may delegate to any person, body or jurisdiction within the meaning of subsection 12(5) any part of the screening or comprehensive study of a project or the preparation of a screening report or comprehensive study report, and may delegate any part of the design and implementation of a follow-up program, but shall not delegate the duty to take a course of action pursuant to subsection 20(1) or 37(1).

Idem

(2) For greater certainty, a responsible authority shall not take a course of action pursuant to subsection 20(1) or 37(1) unless it is satisfied that any duty or function delegated pursuant to subsection (1) has been carried out in accordance with this Act and the regulations.

Screening

Screening

18. (1) Where a project is not described in the comprehensive study list or the exclusion list, the responsible authority shall ensure that

(a) a screening of the project is conducted; and

(b) a screening report is prepared.

Source of information

(2) Any available information may be used in conducting the screening of a project, but where a responsible authority is of the opinion that the information

File 3600-A000-16  
4 March 2002

To: Companies Subject to the Jurisdiction of the National Energy Board, Federal and Provincial  
Government Departments and Agencies and Representatives of Aboriginal Peoples

Consultation with Aboriginal Peoples : National Energy Board Memorandum of Guidance

The National Energy Board (the Board) has observed an increase in interest with respect to the issue of the potential effects of applied-for projects on aboriginal and treaty rights. The Board recognizes the complexity of this issue in the context of its role as a quasi-judicial tribunal and the Crown's fiduciary obligation to Aboriginal peoples.

It is therefore important that regulated companies, Aboriginal peoples, government departments and agencies, and stakeholders understand how the Board intends to approach the issue of Crown consultation with respect to applications for projects that have the potential to interfere with aboriginal or treaty rights. To that end, the Board has prepared a Memorandum of Guidance which outlines how the Board, in its decision-making processes, will approach the issue of the Crown's fiduciary obligation to consult with Aboriginal peoples. A copy of the Memorandum of Guidance is attached for your information.

Should you have any questions on this matter, please contact Ms. Claire McKinnon, Legal Counsel to the Board, at (403) 299-2727 or 1-800-899-1265.

Yours truly,



Michel L. Mantha  
Secretary

Attachment

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National Energy  
Board



Office national  
de l'énergie

File 230-A000-16  
4 March 2002

To: Companies subject to the Jurisdiction of the National Energy Board, Federal and Provincial Government Departments and Agencies and Representatives of Aboriginal Peoples

### Consultation with Aboriginal Peoples

The National Energy Board (the NEB) is aware of the developing jurisprudence on the issue of the Crown's obligation to consult with Aboriginal peoples prior to decisions being taken that may have the effect of interfering with Aboriginal or treaty rights. This issue has arisen in recent applications before the Board. Accordingly, the Board has decided to provide guidance to NEB regulated companies, representatives of Aboriginal peoples and federal and provincial government departments and agencies regarding the approach the Board intends to take with respect to the obligation of the Crown to consult with Aboriginal peoples, arising under section 35 of the *Constitution Act, 1982*.

The cases of *Sparrow*<sup>1</sup> and *Delgamuukw*<sup>2</sup> and subsequent jurisprudence have established that the Crown has a fiduciary obligation to Aboriginal peoples when a government decision or action has the effect of interfering with Aboriginal or treaty rights, which obligation typically requires Crown consultation with the affected Aboriginal peoples. Decisions of the Board in respect of facilities applications may in some cases have such an effect on Aboriginal or treaty rights, and thus engage the Crown's fiduciary obligation to consult.

The Board is of the view that imposing on the Board a fiduciary duty towards Aboriginal peoples as part of its decision making process is inconsistent with its function as an independent quasi-judicial tribunal. The Board finds support for this view in the judgment of the Supreme Court of Canada in the *Hydro-Quebec*<sup>3</sup> case in which Iacobucci J., speaking for the Court, stated:

The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

..12

<sup>1</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

<sup>2</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

<sup>3</sup> *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183

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In finding that the function of the Board in granting a licence for export was quasi-judicial, Iacobucci J. further stated:

While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of utmost good faith between the [NEB] and a party before it.<sup>4</sup>

The court concluded that:

... the fiduciary relationship between the Crown and the appellants does not impose a duty on the [NEB] to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.<sup>5</sup>

Nevertheless, the court in *Hydro-Québec* made it clear that the Board has a responsibility to render decisions that do not offend the *Constitution Act 1982*. The court stated:

It is obvious that the [NEB] must exercise its decision-making function, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act 1982*.<sup>6</sup>

The Board is of the view that, in accordance with this obligation, it has a responsibility to determine whether there has been adequate Crown consultation before rendering its decision in cases where the effect of the decision may interfere with an aboriginal or treaty right.

Therefore, in considering applications before it, the Board will require applicants to clearly identify the Aboriginal peoples that have an interest in the area of the proposed project and to provide evidence that there has been adequate Crown consultation where rights pursuant to section 35 of the *Constitution Act, 1982* may be infringed if the Board approves the applied-for facilities.

In such cases, applicants will be expected to contact the appropriate Crown department or agency to ensure that the requisite Crown consultations are carried out and to arrange for the information pertaining to those consultations to be filed with the Board. In the absence of such evidence, an application may be considered deficient by the Board or questions may be posed to the applicant to elicit the necessary information.

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<sup>4</sup> *Ibid.* at 184.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.* at 185.

Notwithstanding such Crown consultation activities, the Board will continue to examine the efforts made directly by applicants to contact potentially affected Aboriginal peoples to advise them of the project and to involve them in meaningful discussions regarding potential project impacts and appropriate mitigation as set out in the Board's Guidelines for Filing Requirements.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'M. Mantha', written over a horizontal line.

Michel L. Mantha  
Secretary

Attachment

Secretary  
Michel L. Mantha



Yours truly,

In order to assist applicants to determine what type of information to file with their applications, the Board has prepared a listing of information that it considers may be relevant in an application where aboriginal interests may be affected. The Board notes that this information will not be necessary if, due to the location or the nature of the project, it has no potential to interfere with any aboriginal rights or interests.

Further to the letter of the National Energy Board (the Board or the NEB) issued on 4 March 2002 on Consultation with Aboriginal Peoples, the Board wishes to provide further guidance to companies as to the information that it expects to receive for facilities applications filed pursuant to the *National Energy Board Act*. Where aboriginal peoples may have an interest in the project area, and that interest may be affected by the project, applicants should provide details as to the efforts undertaken by the applicant to contact aboriginal peoples with respect to the proposed project and information about any concerns that have been raised.

**Consultation with Aboriginal Peoples**

To: Companies subject to the Jurisdiction of the National Energy Board

File 230-A000-16  
3 April 2002

National Energy Board



Office national  
de l'énergie



Information to be Filed with Applications Where there May be an Aboriginal Interest

a) Identify all of the aboriginal groups that have been contacted by [Company Name] in respect of this application.

b) Indicate:

i) how [Company Name] identified which aboriginal groups to contact;

ii) when contact was first initiated;

iii) the individuals within the aboriginal group who were contacted, and their position in or representative role for the group;

iv) a listing, including the dates, of any phone calls, meetings and other means that may have been used by [Company Name] to provide information about the project and hear any interests or concerns of aboriginal groups with respect to the project.

c) Provide any relevant, non-confidential, written documentation regarding consultations, such as notes or minutes that may have been taken at meetings or from phone calls or letters received from aboriginal persons or groups or sent by [Company Name] to aboriginal persons or groups.

d) Identify any specific issues or concerns that have been raised by aboriginals in respect of the project and, if applicable, how [Company Name] intends to address those issues or concerns.

e) If any of the aboriginal groups who were contacted either support the application or have no objection to the project proceeding, please identify those groups and provide any available written documentation of their position with regard to the project. Also, please indicate if their positions are final or preliminary or conditional in nature.

f) Has [Company Name] discussed any concerns raised by aboriginal groups with any government department or agencies with respect to the applied-for project? If so, please identify when contacts were made and who was contacted.

g) If [Company Name] is aware of any involvement of the Crown in consultation with aboriginal groups in respect of the applied-for project, please provide details of the Crown involvement.