Court File No. C28533

SUPREME COURT OF CANADA

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

STEVE POWLEY and RODDY CHARLES POWLEY

Respondents

FACTUM OF THE INTERVENER, CONGRESS OF ABORIGINAL PEOPLES

JOSEPH ELIOT MAGNET
57 Louis Pasteur
Suite 357
Ottawa, Ontario
K1N 6N5

Telephone: (613) 562-5800 (3315)
Facsimile: (613) 562-5124
email: jmagnet@uottawa.ca

Solicitor for the Intervener
Congress of Aboriginal Peoples

TO: **THE REGISTRAR OF THE SUPREME COURT**
Supreme Court of Canada 301 Wellington Street
Ottawa, Ontario K1A 0J1

	Counsel	**Ottawa Agent**
AND TO:	Ministry of the Attorney General Constitutional Law Branch 8th Floor, 720 Bay Street Toronto, ON M5G 2K1 Lori Sterling Tel.: (416) 326-4453 Fax: (416) 326-4015 Solicitors for the Appellant, Her Majesty the Queen	Robert E. Houston, Q.C. Burke-Robertson 70 Gloucester Street Ottawa , Ontario K2P 0A2 Telephone (w): (613) 236-9665 Fax: (613) 235-4430
AND TO:	Jean Teillet Ruby & Edwardh Barristers & Solicitors 11 Prince Arthur Avenue Toronto, Ontario M5R 1B2 Tel.: (416) 964-9664 Fax: (416) 964-8305 Solicitor for the Respondents, Steve Powley and Roddy Charles Powley	Gowling Lafleur Henderson Henry S. Brown, Q.C. 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Telephone (w): (613) 233-1781 Fax: (613) 563-9869 E-Mail: henry.brown@gowlings.com
AND TO:	Brian Eyolfson Aboriginal Legal Services of Toronto 197 Spadina Ave. Suite 600 Toronto, Ontario M5R 1B3 Tel.: (416) 408-3967 Fax: (416) 408-4268 Solicitors for the Intervener, Aboriginal Legal Services of Toronto, Inc.	

AND TO: Clem Chartier Gowling Lafleur Henderson
Barrister and Solicitor
Box 168
Saskatoon, Saskatchewan
S7K 3K4

Tel.: (306) 343-8285
Fax: (306) 343-0171
Solicitors for the Intervener,
Métis National Council

AND TO: Robert Macrae Gowling Lafleur Henderson
Barrister and Solicitor
188 Industrial Park Crescent
Sault Ste. Marie, Ontario
P6B 5P2

Tel.: (705) 945-6090
Fax: (705) 949-9431
Solicitor for the Intervener,
The Ontario Métis Aboriginal Association

AND TO: D. Bruce Clarke Gowling Lafleur Henderson
Burchell Green Hayman Parish
1801 Hollis Street, Suite 1800Halifax , Nova Scotia B3J 3N4 Telephone (w):

Solicitor for the Intervener,
Labrador Métis Nation

AND TO: J. Keith Lowes William T. Houston1800 - 1095 West
Pender Street Fraser Milner Casgrain LLPVancouver , British Columbia 420 - 99
783-9690
Solicitor for the Intervener,
B.C. Fisheries Survival Coalition

AND TO: Danson, Recht & FreedmanTimothy S.B. Danson
Gowling Lafleur Henderson2000 - 700 Bay St.Toronto , OntarioM5G
1Z6Telephone (w): (416) 929-2200 Fax: (416) 929-2192E-Mail: danson@drf-law.com

Solicitor for the Intervener,

Ontario Federation of Anglers and Hunter

AND TO: Alan Pratt3550 Torwood Dr. Gowling Lafleur HendersonR.R. #1Dunrobin , OntarioK0A 1T0Telephone (w): (613) 832-1261 Fax: (613) 832-4978

Solicitor for the Intervener,
Métis Chief Roy E. J. DeLaRonde,
on behalf of the Red Sky Métis Independent Nation

AND TO: Attorney General for New Brunswick , Gowling Lafleur Henderson
Intervener

TABLE OF CONTENTS

OVERVIEW.....1

PART I - FACTS.....1

PART II - POINTS IN ISSUE 2

PART III - ARGUMENT 2

Underlying Constitutional Principles 2

Specific Relevant Principles 3

(A) Aboriginal persistence 3

(B) *Self-determination*.....5

(C) Justice between societies.....6

(B) Recast of Van deer Peet 7

(i) *Van der Peet Test*.....7

(ii) *The Van der Peet Deviation*..... 9

(iii) *The Theory of Aboriginal Rights Reconsidered*.....10

(iv) *Aboriginal Rights and the Marshall Decisions*.....11

(vi) *Continuity*.....13

(vii) *Conclusion*.....15

(viii) *New Test and Consistency with Authorities*.....15

(C) APPLICATION.....16

(i) *Application of New Test*.....16

(ii) *Submission*: Court of Appeal Error.....17

PART IV - ORDER REQUESTED 19

PART V - TABLE OF AUTHORITIES

OVERVIEW

1. *R. v. Van der Peet should be reconsidered and refashioned*. The majority decision in *R. v. Van der Peet* has attracted powerful criticism from most commentators. This factum develops the principled objections to *Van der Peet*, and offers submissions as to how it may be recast before being applied here. The refashioned test conceives Aboriginal rights as the significant customs, traditions or practices of Aboriginal societies:

1. which have not been extinguished by the colonial powers;
2. are currently practised and have been practised for a reasonably continuous period;
3. do not have a major impact on non Aboriginal people or fundamental interests of the provincial and federal government; and
4. include those customs, traditions or practices which evolved after assertion of sovereignty that are necessary for the maintenance or evolution of Aboriginal societies.

PART I - FACTS

2. *This Intervener and its Perspective.* The Congress of Aboriginal Peoples brings together into one national Aboriginal organization twelve provincial and territorial affiliates which represent approximately 750,000 Métis and off-reserve Indian peoples.

3. Intervener adopts Part I of the Respondent's factum.

PART II - POINTS IN ISSUE

4. Are sections 46 and 47(1) of the *Game and Fish Act*, R.S.O. 1990, c. G.1 as the read on Oct. 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?*

Intervener's position: Yes.

PART III - ARGUMENT

5. **Underlying Constitutional Principles.** *R. v. Van der Peet* concerned status Indians. This Court recognized that the Aboriginal rights theory it developed there might not apply to Métis because "the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada".

R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 67

6. To expound Métis Aboriginal rights under s. 35, this Court must reference an incompletely manufactured constitutional doctrine where many gaps exist.

7. The *Provincial Judges* and *Secession Reference*s showed how to proceed in constitutional cases which, as here, advance legal doctrine into uncharted domains. Courts should take guidance from "certain underlying principles [that] infuse our Constitution and breathe life into it," because, as this Court said:

> The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. ... the preamble 'invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text'....
>
> These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.
>
> *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 50-4
> *Reference Re Provincial Judges*, [1997] 3 S.C.R. 3

8. Underlying constitutional principles helped the *Van der Peet* Court identify the purpose of sec. 35(1) *as relevant to status Indians*. Underlying constitutional principles can also help this Court identify the purpose of s. 35(1) *in Métis contexts*.

9. **Specific Relevant Principles.** The underlying constitutional principles relevant to this case are: Aboriginal persistence, self determination and justice between societies.

10. **(A)** ***Aboriginal persistence.*** The principle of Aboriginal persistence has deep roots in Canada's international customary and human rights obligations, and therefore informs interpretation of s. 35 of the *Constitution Act, 1982*.

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]
>
> *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70, quoting Driedger, *Construction of Statutes* (3d), p. *340*
> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3 at para. 46
> *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313, 348

11. Canada ratified the *International Covenant on Civil and Political Rights* ["ICCPR"]. Art. 27 protects the rights of minorities "to enjoy their own culture".

> *International Covenant on Civil and Political Rights (*1966), 999 U.N.T.S. 171, 1976 Can. T.S. No. 47, art 27.

12. The U.N. Human Rights Committee, which hears complaints under the ICCPR, holds that art. 27 obligates states to preserve the "identity of [Aboriginal] people" and to protect Aboriginal activities which are intimately related to the survival of Aboriginal cultures.

> *Lovelace v. Canada* U.N. Petition R. 6/24 (1981), *Report of the Human Rights Committee,* U.N. GAOR, 36th Sess. Supp. No. 40, at 134, U.N. Doc. A/36/40 (1981), para. 35

Ominayak v. Canada, Communication No. 267/1984, Report of the Human Rights Committee, U.N. GOAR, 45th Sess., Supp No. 40, Vol. 2, at 1, U.N. Doc A/45/40, Annex 9(a) (199)

13. Art. 27 requires states "to ensure the continued development of the cultural, religious and social identity" of indigenous peoples by positive legal measures. States must secure to indigenous peoples the continuation and sustainability of their traditional forms of economy.

General Recommendation XXIII Concerning the Rights of Minorities,(1994), 50th Sess., 1314 mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.5("the rights of individuals protected [under art. 27] – for example to enjoy a particular culture ... is directed to ensure the continued development of the cultural, religious and social identity of the minorities concerned.")

Concluding Observations of the Human Rights Committee: Australia, (2000), U.N. Doc. CCPR/CO/69/AUS, paras. 10-11.

14. The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* adds detail to art. 27. Article 4(2) of the *Declaration* requires that "States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs".

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by General Assembly resolution 47/135 of 18 December 1992, <http://www.unhchr.ch/html/menu3/b/d_minori.htm>.

15. Customary international law and Canada's international human rights commitments require Canada to ensure the preservation of indigenous cultures and to enable Aboriginal peoples to persist as distinctive societies. *This is the principle of aboriginal persistence. This is the lens through which the rights protected in section 35 of the Constitution Act, 1982 must be interpreted.*

16. The principle of Aboriginal persistence requires that the relief afforded to the respondents under section 35 of the *Constitution Act, 1982* must protect not only the Powleys' individual harvesting rights, *but must also ensure that the Aboriginal community to which they belong is enabled to persist as a distinctive Aboriginal society*.

17. **(B) *Self Determination of Peoples***. "The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law".

18. The right of a people to self determination includes internal self-determination, which is a "people's pursuit of its political, economic, social and cultural development within the framework of an existing state".

> *Re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 114, 126
> *ICCPR*, art. 1

19. Canada incorporates the principle of self determination through its *Federal Policy Guide*, which recognizes for Aboriginal people an the inherent right of self government.

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982. ... Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources. The Government acknowledges that the inherent right of self-government may be enforceable through the courts.
>
> Canada, *Federal Policy Guide: Aboriginal Self Government*, (1995) <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>

20. Only communities of sufficient critical mass, communities having the size and characteristics of nationhood, can self govern and determine culture. Local municipal communities are not capable.

> RCAP, *Report* (1996), II, p. 168 ("The constitutional right of self government is vested in peoples who make up Aboriginal nations, not in local communities. Nevertheless, local communities of Aboriginal people, including communities in urban areas, have access to inherent governmental powers if they join together in their national units and draft a constitution allocating powers between national and local levels;" emphasis added.).

21. The underlying constitutional principle of self-determination is a second lens that reveals the meaning of s. 35 of the *Constitution Act, 1982*. Here, the principle requires that the Métis community to which the Powleys belong be allowed, eventually, to regulate practices, including hunting, that are critical to its cultural development. This impacts on the Court's construction of the Powley's relevant community (see *infra*. at paras. 59-66).

22. **(C) *Justice Between Societies***. Section 35(1) marks a new point of departure between the sovereignty of the Crown and Aboriginal societies. Section 35(1) intends to promote reconciliation between societies of prior Aboriginal occupants and the subsequent sovereignty of the Crown. The reconciliation s. 35(1) intends is predicated upon justice. It is inspired by a vision of a just settlement for Aboriginal societies. This principle will not allow s. 35(1) to be interpreted in a manner that simply perpetuates historical injustices visited on Aboriginal people in colonial times.

> *R. v. Coté*, [1996] 3 S.C.R. 139, at para. 53 ("the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies".)

> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at para. 54, citing Lyon, *An Essay on Constitutional Interpretation* (1988), 26 Osg. H.L.J. 95 ("Section 35

> calls for a just settlement for aboriginal peoples. It renounces the old rules of the game ...")

23. The principle of justice between societies requires that the doctrine of Aboriginal rights be developed in full recognition that Métis societies have been run down by colonial oppression. As a result of oppression, discrimination and exclusion they are not now communities having fully formed national characteristics. The Royal Commission noted:

> Other Métis [including the Ontario Métis before this Court] have been as much the victims of government discrimination as members of the Métis Nation, with the result that they too are in grave need of catch-up measures.... their level of organization is not as mature as that of the Métis Nation...(IV, p. 264).
>
> The Métis of Labrador may well have reached nationhood status, and other Métis soon will follow suit; (IV, p. 262) .

24. The underlying constitutional principle of *justice between societies* is a third lens that reveals the meaning of the rights protected in s. 35 of the *Constitution Act, 1982*. As relevant here the principle requires that the rebuilding of Ontario Métis nationhood should not be frustrated by legal precepts, including the ruling of this Court here. This Court should foresee that an Ontario Métis national entity will eventually control Métis cultural development by, *inter alia*, allocating and administering Métis hunting rights.

Recast of *R. v.Van der Peet*

25. ***The Van der Peet test.*** *Van der Peet* defined Aboriginal rights as Aboriginal practices, customs and traditions that are:

1. not extinguished by the colonial powers
2. integral to the distinctive cultures of the Aboriginal group claiming the right
3. continuous with the practices, customs and traditions that existed
4. prior to European contact.

26. The majority opinion explained that European contact is the relevant time for determining Aboriginal rights "because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1)".

R. v. Van der Peet, [1996] 2 S.C.R. 507 at paras. 44, 60

27. This test is singular in the constitutional jurisprudence of Canada, the United States and Australia. Its construction relied on the 19th century opinions of the United States Supreme Court in *Johnson v. M'Intosh* and *Worcester v. Georgia*; the 20th century opinion of the Australian High Court in *Mabo v. Queensland (No.2*); and this Court's opinions in *Sparrow*, *Guerin*, and *Calder*.

R. v. Van der Peet, [1996] 2 S.C.R. 507, at para. 34-45

28. Refinements to the *Van der Peet* test would be useful at this stage because:

i) Most commentators have noticed that the majority opinion inaccurately interpreted the principal sources relied on;

ii) Refinements would allow a single, principled test for all Aboriginal rights, including Métis rights;

iii) Refinements would allow for inclusion of the useful perspectives advanced by other members of th Court in *Van der Peet*.

29. ***The Van der Peet Deviation***. The majority opinion explained *Johnson v. M'Intosh* as deciding that:

> Aboriginal title is the right of Aboriginal people to land arising from the intersection of the pre-existing occupation of the land with the **assertion of sovereignty** over that land by various European nations. The substance and nature of Aboriginal rights to land are determined by this intersection; (para. 36). [emphasis added]

30. Chief Justice Lamer deviated from the concept of sovereignty (and its implications), and adopted instead the concept of contact.

> In order to fulfil the purpose underlying s. 35(1) -- i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions -- the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans; (para. 44, see also para. 60).

31. Deviating from the assertion of sovereignty and focussing on the moment of European contact drew criticism from the commentators.

> John Borrows, *The Trickster: Integral to a Distinctive Culture*, (1997), 8:2 Constitutional Forum 27, 31-32 ("the idea that this reconciliation should take place upon contact finds no support in either Aboriginal or non-aboriginal law. It is the Chief Justice's invention….The Court's new test threatens aboriginal cultures precisely on this point, since in adapting to new situations they do not have protection for the practices devised in meeting challenges solely as a result of European influence;")

> Barsh and Henderson, *The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand* (1997), 42 McG. L.J. 993, 1007-8 ("Chief Justice Lamer quoted ... from *Mabo* with approval but completely misconstrued its significance. He advanced it as support for the proposition that rights should be regarded as 'aboriginal' only if they are rooted in antiquity...")

32. ***The Theory of Aboriginal Rights Reconsidered***. Prior to the assertion of sovereignty by Europeans, Aboriginal people were living on the land in organised societies. Aboriginal social organisation was held together by Aboriginal law – sometimes referred to as Aboriginal customs, practices or traditions. Aboriginal law held Aboriginal societies together, just as European law holds European societies together.

33. Contact gave European nations no power to control Aboriginal societies or prevent them from use or occupation of their land (contact may have given power to exclude other European nations from dealing with Aboriginal peoples).

> *Worcester v. Georgia*, 31 U.S. 515 (1832)
> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)
> *Johnson v. M'Intosh*, 21 U.S. 543 (1823)

34. Only when a European nation asserted sovereignty over an Aboriginal society, did the European nation gain power to alter Aboriginal customs, practices or traditions – that is, to alter Aboriginal law.

35. The doctrine of Aboriginal rights was the common law's way of explaining that British policy was to leave Aboriginal societies undisturbed with regard to their ancient practices, customs and traditions. Aboriginal rights continued until Britain decided to impose its will to change Aboriginal societies.

36. In this condition, Aboriginal societies continued to evolve as organised entities. So did their customs, practices and traditions. So did their laws.

37. Britain recognised and accepted this as a natural consequence of its decision to leave Aboriginal societies undisturbed. Britain stated this policy in various documents, including the Royal Proclamation of 1763, and its instructions to colonial Governors.

> *Instructions to Governor Murray*, art. 61, in Kennedy, "Statutes, Treaties and Documents of the Canadian Constitution" (1930), at p. 49 ("And you are on no account to molest or disturb them [the Indians] in the Possession of such Parts of the said Province as they at present occupy or possess"); see also *Instructions to Governor Carleton*, art. 31, *Id*., p. 153

38. The doctrine of Aboriginal rights allowed for evolution of Aboriginal societies and Aboriginal law except where the superior power expressly or by necessary implication countermanded it.

39. **Aboriginal Rights and the Marshall Decisions.** Chief Justice Marshall never decided that Aboriginal rights crystallize at the moment of European contact.

40. Chief Justice Marshall ruled that Aboriginal people had an original and natural right to use and occupation of their traditional lands, which they retained upon contact with, and the assertion of sovereignty by European powers.

> *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823)("In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion...")
>
> *Worcester v. Georgia*, 31 U.S. 515, 517-519 (1832)("This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil [from the Indigenous peoples] and of making settlements on it... It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man...The Indian nations had always been considered as distinct, independent political communities retaining their original natural rights as undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate.")

41. In Chief Justice Marshall's opinions, contact with Europeans did not create or define Aboriginal rights. Chief Justice Marshall referred to contact only to negate any suggestion that contact extinguished Aboriginal rights.

Worcester v. Georgia, 31 U.S. 515, 519 (1832).
Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831)
Johnson v. M'Intosh, 21 U.S. 543, 574 (1823)

42. In *Gurein v. The Queen* this Court upheld Justice Hall's opinion in *Calder.* Justice Hall conceived of Aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. It did not derive from, or depend on contact.

Guerin v. The Queen, [1984] 2 S.C.R. 335, at p. 376

43. No pre-*Van der Peet* Canadian decision conceived that Aboriginal rights crystallize at the "magic moment of European contact".

44. *Mabo* added an innovation to this theory. *Mabo* recognized that at the assertion of sovereignty by Britain, Aboriginal customs, traditions or practices were absorbed into the British legal system as Aboriginal rights.

Mabo v. Queensland (No.2) (1992), 175 CLR 1 (*per* Brennan J:
"The preferable rule... is that a mere change in sovereignty does not extinguish native title to land. (The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants;"(para. 61). "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory;" para 64)

Barsh and Henderson, *The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand* (1997), 42 McG. L.J. 993, at p. 1007 ("the common law absorbs (or 'receives') the lex loci [Aboriginal laws] of a territory at the moment of its conquest or annexation to the Crown. Local law remains intact unless and until it is clearly altered by the Crown".)

45. Justice McLachlin's minority opinion in *Van der Peet* supported the view that Aboriginal rights are not crystallized at contact:

> Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question.

46. Justice L'Heureux-Dubé agreed, and focussed on the continuous exercise of Aboriginal rights for a substantial continuous period:

> Consequently, in order for an aboriginal right to be recognized and affirmed under s. 35(1), it is not imperative for the practices, traditions and customs to have existed prior to British sovereignty and, a fortiori, prior to European contact ... the determining factor should only be that the aboriginal activity has formed an integral part of a distinctive aboriginal culture - i.e., to have been sufficiently significant and fundamental to the culture and social organization of the aboriginal group - for a substantial continuous period of time...
>
> *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at paras. 247,175

47. Nothing essential in any of these authorities requires that a date be specified as the moment when Aboriginal rights crystallize.

48. Nor is there anything in these authorities that necessarily forbids Aboriginal societies – after contact, settlement, or the assertion of sovereignty – from continuing to evolve their customs, traditions, practices, laws or legal systems.

49. **Continuity**. The doctrine of Aboriginal rights explains how Britain decided to deal with the phenomenon of settling a territory that contained wholly formed Aboriginal societies that continued parallel existence. Aboriginal rights require continuous exercise because they require the existence of a parallel Aboriginal society.

> ... when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and

> customs based on tradition cannot be revived for contemporary recognition.
>
> *Mabo v. Queensland (No.2)*, (1992) 175 CLR 1, at para. 66

50. To restate and summarize: Aboriginal rights find their source not in a "magic moment of European contact", but in the customs, tradition, practices, laws or legal systems of the Aboriginal people in question. Insofar as these customs, traditions, and laws were unaltered by Britain, they became absorbed into British common law as Aboriginal rights (always premising British sovereign power to alter or extinguish any part of them).

51. The *Van der Peet* test is objectionable because it requires a modern court to focus on ancient practices and speculate how antiquity might evolve into modern forms. It ignores the actual development of Aboriginal societies. It freezes Aboriginal practices at the date of European contact and only protects modern forms of those practices – again ignoring as legal subjects the real, living Aboriginal societies. It does not protect practices which evolved after contact which are necessary for the maintenance or evolution of Aboriginal societies. This diverts attention from the critical inquiry which should be: how did the Aboriginal society actually evolve and how did the superior power react to it?

> John Borrows, *The Trickster: Integral to a Distinctive Culture*, 1997 8:2 Constitutional Forum 27, 31-32
>
> Barsh and Henderson, *The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand* (1997), 42 McG. L.J. 993, 998 - 999 ("The Dickson court used 'reconciliation' to refer to a limitation on federal power, while the Lamer court uses the same term to limit further the scope of aboriginal rights... [this is] a doctrine plucked from thin air.")

52. ***Conclusion***. This review of the authorities displays an array of possible tests. Aboriginal rights could be:

A) Unextinguished laws (customs, traditions or practices) continuous with those at the time European powers asserted sovereignty over Aboriginal peoples; or

B) Unextinguished laws continuous with those earlier or later than sovereignty determined either by

i) analogy to ancestral tradition (McLachlin, C.J.C.), or

ii) assertion of the right for some significant period of time (L'Heureux-Dubé J, in *Van der Peet*).

53. ***New Test and Consistency with the Authorities***. The underlying constitutional principles of Aboriginal persistence, self-determination and justice between societies reinforce a test modelled on paragraph 52(B)(ii). The elements of the test may be restated for consistency with the underlying constitutional principles as follows:

Aboriginal rights are the significant customs, traditions or practices of Aboriginal societies

1. which have not been extinguished by the colonial powers;
2. are currently practised and have been practised for a reasonably continuous period;
3. do not have a major impact on non Aboriginal people or fundamental interests of the provincial and federal governments; and
4. include those customs, traditions or practices which evolved after assertion of sovereignty that are necessary for the maintenance or evolution of Aboriginal societies.

54. The suggested test eliminates contact as the date when Aboriginal rights are assessed. It does not replace contact with sovereignty or effective control because there is no magical significance to these dates, or to any other date. The key concept is not the time of crystallization of Aboriginal rights. The critical point is that Britain left Aboriginal societies undisturbed, and free to evolve their laws and societies. This freedom was always subject to Britain's power to extinguish Aboriginal rights or modify Aboriginal societies. After 1982, this power requires justification.

55. The addition of a date to the theory of Aboriginal rights is surplusage and distracting.

56. Any test that fashions a date requirement will undermine the generous and liberal interpretation applied to s. 35. Addition of contact, sovereignty or effective control will exclude those Métis societies that evolved after that date from having rights (a policy Canadians rejected in 1982).

57. This refashioned test dispenses with the need to debate whether the rights of Sault Ste. Marie Métis are original or derivative of their Ojibway ancestors. The critical inquiries are: the extent to which the colonial powers left Métis societies unaltered, and how Métis societies evolved.

Application

58. To apply the refashioned test, this Court must ask whether the rights at issue here are:

1. significant customs, traditions, practices, laws or part of the legal systems of Métis societies. (*There are concurrent findings of all courts below in the affirmative. No overriding error in these findings has been shown*: *Vaillancourt J. para.104; O'Neil J. paras. 24-26*; *Sharpe J.A. paras. 126-127*);
2. unextinguished by the colonial powers; (*The Crown concedes that no extinguishment took place: Appellant's Factum, para. 13*);
3. are currently practised and have been practised for a reasonably continuous period (*There are concurrent findings of all courts below in the affirmative. No overriding error in these findings has been shown*: *Vaillancourt J. paras. 105-107, O'Neil J. para.38 , Sharpe J.A. paras. 136-137*); and
4. do not have a major impact on non Aboriginal people or fundamental interests of the provincial and federal government. (*There are concurrent findings of all courts*

below. No overriding error in these findings has been shown: *Vaillancourt J., paras. 128-132, O'Neil J paras. 71-72 , Sharpe J.A. paras. 162-170*).

59. **Submission**. The Court below erred by saying, at para 144:

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

60. The Courts below found that Métis communities were fragmented by official and unofficial discrimination. (In *Lovelace* this Court also underlined that Ontario's Métis communities suffered "layer upon layer of discrimination and exclusion".) Judge Vaillancourt found direct fragmentation of Métis communities by the *Indian Act*. Judge Vaillancourt also found fragmentation of Métis communities by discriminatory attitudes, which drove Métis communities underground.

61. Justice O'Neill upheld these findings. He then quoted from the Federal Government's Statement of Reconciliation.

> '...As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples.... We must recognize the impact of these actions on the once self-sustaining nations that were disaggregated, disrupted, limited or even destroyed ... We must acknowledge that the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.'

Justice O'Neill then added:

> To deny people access to their constitutional rights because a community may now only be beginning to put together aspects of

> its identity and culture is to reward the very practices that the Statement of Reconciliation admits were wrong.
>
> Reasons of Vaillancourt, Prov. J., paras. 43, 79-83
> Reasons of O'Neill, J., paras. 29-30, 40
> *Lovelace v. Ontario*, [2000] S.C.C. 37, para 90
> RCAP, *Report*, IV, 219 ("The experience of discrimination is common to all Métis people.... the worst and least excusable form it has taken has been discriminatory governmental policies, especially on the part of the government of Canada....")

62. Métis national entities, with government encouragement (see para 20 *supra*.), are now rebuilding Métis nationhood. This Court's opinion should foresee that in subsequent cases Métis national entities will claim entitlement to allocate and administer s. 35 harvesting rights as part of the bundle of rights associated with culture, self -determination and self government. This Court's opinion should not foreclose the Court from fully considering those claims when presented in a subsequent case.

> *R. v. Pamajewon*, [1996], 2 S.C.R 821, para 24 ("Assuming without deciding that s. 35(1) includes self-government claims...")

63. The Court of Appeal erred by failing to consider the principle of Aboriginal persistence when fashioning a concept of "community" relevant to analysis of Métis Aboriginal rights. This error resulted in a concept of "community" that excluded the Ontario Métis Aboriginal Association, or other Métis national, or proto-national entities from being a community as relevant in the analysis of Métis Aboriginal rights.

64. A doctrine of site specific Métis rights which assumes that only small, municipal communities like Sault Ste. Marie and environs can enjoy harvesting rights will frustrate the rebuilding of Métis nationhood. Such a doctrine *will violate the underlying principles of self determination and justice between societies*.

65. Sault Ste. Marie and environs is not a community of sufficient critical mass, of the size or with the characteristics of nationhood, as can determine culture. The constitutional principle of

self determination requires that the s. 35 remedy ordered in this case must not disable a Métis community having national characteristics from determining Métis culture, even if this occurs progressively and in stages.

> RCAP, *Report* (1996), II, p. 168 ("The constitutional right of self government is vested in peoples who make up Aboriginal nations, not in local communities;" emphasis added.)

66. This Court should disapprove the approach of the Court of Appeal in its reasons. If allocation of s. 35 rights by Aboriginal entities having national characteristics eventually occurs, this will relieve Aboriginal people, and the courts, from the pressure, inconvenience and dysfunction of having to litigate thousands of Aboriginal harvesting claims involving hundreds of small municipalities each of which enjoys Aboriginal rights.

PART IV - ORDER REQUESTED

67. Intervener requests that the Crown's appeal be dismissed and the constitutional question be answered 'yes'.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2002.

Joseph Eliot Magnet
Counsel for the Intervener,
Congress of Aboriginal People

PART V - TABLE OF AUTHORITIES

CASES

Cases and Cite	**Pages**
R. v. Van der Peet, [1996] 2 S.C.R. 507	2,8,9,13
Reference Re Secession of Quebec, [1998] 2 S.C.R. 217	2,5
Reference Re Provincial Judges, [1997] 3 S.C.R. 3	2
Baker v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70, quoting Driedger, *Construction of Statutes* (3d), p. *340*	4
Suresh v. Canada (Minister of Citizenship and Immigration), [2002] S.C.J. No. 3 at para. 46	4
Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313, 348	4
R. v. Coté, [1996] 3 S.C.R. 139	7
R. v. Sparrow, [1990] 1 S.C.R. 1075	7
Worcester v. Georgia, 31 U.S. 515, (1832)	10,11,12
Cherokee Nation v. Georgia, 30 U.S. 1, (1831)	10,12
Johnson v. M'Intosh, 21 U.S. 543, (1823)	10,11,12
Guerin v. The Queen, [1984] 2 S.C.R. 335	12

Mabo v. Queensland (No.2), (1992) 175 CLR 1	12,13
Lovelace v. Ontario, [2000] S.C.C. 37	17
R. v. Pamajewon, [1996], 2 S.C.R 821	18
Lovelace v. Canada U.N. Petition R. 6/24 (1981), *Report of the Human Rights Committee,* U.N. GAOR, 36th Sess. Supp. No. 40, at 134, U.N. Doc. A/36/40 (1981), para. 35	13
Ominayak v. Canada, Communication No. 267/1984, Report of the Human Rights Committee, U.N. GOAR, 45th Sess., Supp No. 40, Vol. 2, at 1, U.N. Doc A/45/40, Annex 9(a) (199)	13

ARTICLES

29. John Borrows, *The Trickster: Integral to a Distinctive Culture*, (1997), 8:2 Constitutional Forum 27

30. Barsh and Henderson, *The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand*, (1997), 42 McG. L.J. 993

INTERNATIONAL DOCUMENTS

31. *International Covenant on Civil and Political Rights (*1966), 999 U.N.T.S. 171, 1976 Can. T.S. No. 47

32. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Adopted by General Assembly resolution 47/135 of 18 December 1992, <http://www.unhchr.ch/html/menu3/b/d_minori.htm>

33. *General Recommendation XXIII Concerning the Rights of Minorities,*(1994), 50th Sess., 1314 mtg., U.N. Doc. CCPR/C/21/Rev.1/Add.5

34. *Concluding Observations of the Human Rights Committee: Australia,* (2000), U.N. Doc. CCPR/CO/69/AUS, paras. 10-11.

<http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40.paras.495-528.En?Opendocument>

OTHER SOURCES

35. Canada, *Federal Policy Guide: Aboriginal Self Government*, (1995) <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>

36. Royal Commission on Aboriginal Peoples, *Report* (1996)

37. *Instructions to Governor Murray*, art. 61, in Kennedy, "Statutes, Treaties and Documents of the Canadian Constitution" (1930)

SCHEDULE B

STATUTES

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