200-09-008957-158, 200-09-008958-156, 200-09-008959-154, 200-09-008960-152, 200-09-008961-150, 200-09-008962-158, 200-09008963-156, 200-09-008964-154, 200-09-008965-151, 200-09-008966-159

Court of Appeal of Quebec

Appeal from the judgments rendered on February 10, 2015 by the honourable J. Roger Banford, judge of the Superior Court for the district of Chicoutimi.

N°: 150-05-002108-001 **GHISLAIN CORNEAU**
150-05-003511-088 **MIVILLE CORNEAU**
150-17-000584-034 **STÉPHANE CORNEAU**
150-05-003517-085 **MARTIN PELLETIER**
150-05-003514-082 **JEAN-MARIE GAGNÉ, GABRIELLE SIMARD**
150-05-003497-080 **ANDRÉ LALANCETTE**
150-05-003498-088 **CLÉMENT LALANCETTE**
150-05-003513-084 **RICHARD RIVERIN**
150-05-003508-084 **GABRIEL JEAN**
150-05-003495-084 **MARC SIMARD**

APPELLANTS - Defendants

v.

ATTORNEY GENERAL OF QUEBEC

RESPONDENT - Plaintiff

and

LA COMMUNAUTÉ MÉTISSE DU DOMAINE DU ROY ET DE LA SEIGNEURIE DE MINGAN,
LA PREMIÈRE NATION DE MASHTEUIATSH,
LA PREMIÈRE NATION DES INNUS ESSIPIT,
LA PREMIÈRE NATION DE NUTASHKUAN,

MIS EN CAUSES - Interveners

and

MRC LE FJORD-DU-SAGUENAY,
MUNICIPALITÉ DE SAINT-FULGENCE,
MUNICIPALITÉ DE RIVIÈRE-ÉTERNITÉ

MIS EN CAUSES - Mis en causes

and

MÉTIS NATIONAL COUNCIL

INTERVENER

Factum of the Intervener

Métis National Council

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(First Nations)

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I Facts

1. The intervener, the Métis National Council ("MNC"), is the governing body of the Métis Nation and consists of five (5) provincial Métis governments that have joined together to better represent the Métis Nation's interests at the national and international levels. These Métis governments include the Métis Nation of Ontario, the Manitoba Métis Federation, the Métis Nation – Saskatchewan, the Métis Nation of Alberta, and the Métis Nation British Columbia (collectively referred to as the "MNC Governing Members").

2. The MNC is the sole representative of the Métis Nation at the national level. It has represented the Métis Nation in all Canadian constitutional processes where Aboriginal peoples were involved, including the 1983, 1984, 1985, and 1987 First Ministers' Conferences. The MNC participated in the 1992 Charlottetown Accord constitutional negotiations, the 2005 First Ministers Meeting on Aboriginal Issues in Kelowna, and signed a Métis Nation Protocol with the Government of Canada in 2008.

3. On October 28, 2016, Parent JCA granted the MNC intervener status in this appeal ("MNC Intervention Order").

II Issues

4. The MNC Intervention Order specified two questions of law on which the MNC was granted leave to make submissions:

> **The Court's approach to identifying the distinctive traits and traditions of Métis Peoples; and**
>
> **The Court's approach to identifying when effective control can be said to have been exercised over a territory.**

III ARGUMENT

A. The Court's approach to identifying the distinctive traits and traditions of Métis Peoples

5. The Historic Métis Nation, a Métis people with recognized and affirmed rights under section 35 of the *Constitution Act, 1982*, came into being through a process of ethnogenesis. The Historic Métis Nation developed a distinct cultural and political identity, and distinct cultural practices and traditions as an Aboriginal people prior to Confederation.

6. In the seminal case of *R v Powley*, 2003 SCC 43, a unanimous Supreme Court of Canada held that section 35 of the *Constitution Act, 1982* recognized and affirmed: 1) the prior existence of the Métis, "which grew up in areas not yet open to colonization",[1]; and 2) the "practices that were historically important features of these distinctive communities" that continue today "as integral elements of their Métis culture".[2] Accordingly, in *Powley*, the Court held that section 35 of the *Constitution Act, 1982* is committed to enhancing the survival of the Métis as distinctive communities.

1. Application of Powley Throughout Canada

7. Given the *Powley* test's focus on the Métis' distinctive communities, it is logical that the test formulated by the Supreme Court of Canada speaks in general terms. As the Supreme Court of Canada has recognized, Métis communities, and their historical circumstances, are diverse.[3]

8. Métis Peoples with rights under section 35 of the *Constitution Act, 1982* have been recognized by Canadian courts in Ontario,[4] Manitoba,[5] Saskatchewan,[6] and Alberta.[7]

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[1] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 17, **Book of Authorities of the Intervener Métis National Council (MNC BOA), Tab 18, pp 234-235.**
[2] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 13, **MNC BOA, Tab 18, pp 232-233**.
[3] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 11, **MNC BOA, Tab 18, p 232**.
[4] *R v Powley*, [1998] OJ No 5310, 58 CRR (2d) 149 (ON Prov Ct), aff'd (2000), 47 OR (3d) 30 (SCJ), aff'd (2001), 53 OR (3d) 35 (CA), aff'd 2003 SCC 43, **MNC BOA, Tab 17, pp 195-222**.
[5] *R v Goodon*, 2008 MBPC 59, 185 (CRR) (2d) 265 at paras 42-48, **MNC BOA, Tab 10, pp 131-133**.

Canadian courts have yet to recognize Métis Peoples in Nova Scotia,[8] New Brunswick,[9] and British Columbia.[10] In Labrador, an applications judge on judicial review identified a Métis People; however on appeal the parties agreed that the applications judge had insufficient evidence to conclude that an ethnogenesis had occurred leading to the evolution of a Métis culture separate and distinct from the Inuit culture.[11]

9. At the provincial level, governments in Manitoba, Saskatchewan, and Alberta have responded to the presence of Métis Peoples by enacting legislation and policies aimed at defining mechanisms for the exercise of Métis rights pursuant to section 35 of the *Constitution Act, 1982*. Courts in those jurisdictions have noted the existence of such policies in recent years.[12]

2. The Need for a Coherent Approach

10. While the *Powley* test is highly fact-based, a consistent approach to the identification of Métis Peoples with rights under section 35 of the *Constitution Act, 1982* is essential, as it provides certainty both to rights claimants seeking to exercise rights, and to the provincial governments with which rights-claimants must negotiate when seeking to create vehicles for the exercise of those rights outside of the litigation process.

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[6] *R v Laviolette*, 2005 SKPC 70, [2005] 3 CNLR 202 at paras 21-30, **MNC BOA, Tab 16, pp 191-193**; *R v Belhumeur*, 2007 SKPC 114, 301 Sask R 292 at paras 153-168, **MNC BOA, Tab 6, pp 55-56**.
[7] *R v Hirsekorn*, 2010 ABPC 385, 42 Alta LR (5th) 346 at para 115, **MNC BOA, Tab 12, p 155**.
[8] *R v Babin*, 2013 NSSC 434, **MNC BOA, Tab 5, pp 39-51**; *R v Hatfield*, 2015 NSSC 77, **MNC BOA, Tab 11, pp 143-151.**
[9] *R v Castonguay and Faucher*, 2003 NBPC 16, 271 NBR (2d) 128, aff'd 2006 NBCA 43, **MNC BOA, Tab 9, pp 95-124**; *R v Hopper*, 2004 NBPC 7, 275 NBR (2d) 251, aff'd 2005 NBQB 399, 2008 NBCA 42, **MNC BOA, Tab 13, pp 157-173**; *R v Vautour*, 2010 NBPC 39, 368 NBR (2d) 201, aff'd 2015 NBQB 94, **MNC BOA, Tab 21, pp 287-294**; *R v Castonguay*, 2012 NBPC 19, **MNC BOA, Tab 8, pp 77-93**; *R v Caissie*, 2012 NBPC 1, 383 NBR (2d) 180, **MNC BOA, Tab 7, pp 63-75**.
[10] *R v Willison*, 2006 BCSC 985, [2006] 4 CNLR 253, **MNC BOA, Tab 22, pp 295-318**.
[11] *The Labrador Métis Nation v Newfoundland (Minister of Transportation and Works)*, 2006 NLTD 119, 2006 NLSCTD 119 at paras 48-49, **MNC BOA, Tab 23, pp 322-323**, rev'd in part 2007 NLCA 75, 288 DLR (4th) 641 (see in particular para 40), **MNC BOA, Tab 24, p 327**.
[12] *Peavine Métis Settlement v Alberta (Minister of Aboriginal Affairs and Northern Development)*, 2007 ABQB 517, 81 Alta LR (4th) 28 at paras 5-8, **MNC BOA, Tab 4, pp 36-37**; *R v Kelley*, 2007 ABQB 41, 413 AR 269 at paras 2 and 7-9, **MNC BOA, Tab 14, pp 175-179**; *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12, 542 AR 68 at para 10, **MNC BOA, Tab 2, pp 11-13**; *R v Laviolette*, 2005 SKPC 70, [2005] 3 CNLR 202 at para 13, **MNC BOA, Tab 16, p 188**.

11. Furthermore, a consistent approach to the identification of Métis Peoples with rights under section 35 of the *Constitution Act, 1982* is required to uphold the framers' intent to recognize and affirm the pre-existing rights of Métis Peoples, which arose before the time of effective imposition of Crown control over the lands in which these Métis Peoples lived.[13] Such an approach ensures integrity in what is necessarily a fact-driven process. As stated by Slatter JA, writing for a unanimous panel of the Court of Appeal for Alberta in *L'Hirondelle v Alberta*:

> there is nothing ironic or improper about jealously guarding entrenched constitutional rights, and ensuring that only those truly entitled are allowed to assert those rights. Those who enjoy such rights are entitled to expect that their rights will not be watered down by the recognition of unentitled claimants.[14]

3. Applicable Principles

a) The Métis Community

12. Since *Powley*, the analysis of courts has operated at the community level when seeking to identify Métis rights-holders under section 35 of the *Constitution Act, 1982*. Indeed, in *Powley*, the Supreme Court of Canada held that it was "not necessary […] to decide […] whether [the Métis community centred in and around Sault Ste. Marie] 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."[15] Further, in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, McLachlin CJ (writing for a unanimous Court) observed that "[t]he Métis were originally the descendants of eighteenth-century unions between European men – explorers, fur traders and pioneers – and Indian women, mainly on the Canadian plains, which now form part of Manitoba, Saskatchewan and Alberta."[16]

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[13] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 17, **MNC BOA, Tab 18, p 234**.
[14] *L'Hirondelle v Alberta (Sustainable Resource Development)*, 2013 ABCA 12, 542 AR 68 at para 35, **MNC BOA, Tab 2, p 16**.
[15] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 12, **MNC BOA, Tab 18, p 232**.
[16] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 at para 5, **MNC BOA, Tab 1, pp 7-8**.

13. Rather than focusing on an overarching Métis People, the Supreme Court of Canada held that "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."[17] The Supreme Court of Canada laid out three requirements that claimants must establish in order to identify a "Métis community":

> **The group of Métis must have a distinctive collective identity;**
>
> **The group of Métis must live together in the same geographic area; and**
>
> **The group of Métis must share a common way of life.**[18]

i. The Court's approach to identifying a "Métis community" must be based in the Métis Perspective

14. The Supreme Court of Canada has directed that the Court's reasons in *R v Van der Peet*, [1996] 2 SCR 507, with necessary modifications, provide the template for considering Métis rights.[19] As such, much like other Aboriginal rights protected under section 35 of the *Constitution Act, 1982*, Métis rights must be approached from the Aboriginal (Métis) perspective. Indeed, in *Van der Peet*, Lamer CJ, writing for the majority, held that:

> [t]he definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.[20]

15. Most recently in *Tsilhqot'in Nation v British Columbia*, the Supreme Court of Canada specified that "[t]he Aboriginal perspective focuses on laws, practices, customs and traditions of the group".[21] In the context of Aboriginal title (the right at issue in *Tsilhqot'in Nation*), considering the Aboriginal perspective required the Court to "take into

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[17] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 43 at para 12, **MNC BOA, Tab 18, p 232**.
[18] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 12, **MNC BOA, Tab 18, p 232**.
[19] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 18, **MNC BOA, Tab 18, p 235**.
[20] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 49, **MNC BOA, Tab 20, pp 276-277**.
[21] *Tslihqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 35, **MNC BOA, Tab 25, p 342**.

account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".[22] The Court summarized this approach as "a culturally sensitive approach […] based on the dual perspectives of the Aboriginal group in question […] and the common law".[23]

16. A culturally sensitive approach is equally important to the identification of Métis communities. Métis communities have a "special status as peoples that emerged between first contact and the effective imposition of European control."[24] Accordingly, in identifying a Métis community, the analysis must be based in the perspective of the ways of life that would have been possible in the area in question between the time of first contact and the effective imposition of Crown control.

17. The Métis perspective must also animate the Court's approach to the evidence led by Métis rights claimants. As Lamer CJ held in *Van der Peet*, courts must take an approach to the rules of evidence, and to the interpretation of the evidence provided, that is mindful of the special nature of claims for Aboriginal rights. In particular, the court's approach must pay heed to the evidentiary difficulties facing Aboriginal rights claimants.[25]

18. In *Van der Peet*, a case dealing with practices integral to the distinctive pre-contact cultures of Aboriginal peoples, the Court noted that section 35 of the *Constitution Act, 1982* does not require "that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community."[26] Rather, the court's approach to evidence "must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."[27]

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[22] *Tslihqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 35, citing B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p 758, **MNC BOA, Tab 25, p 342**.
[23] *Tslihqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at para 41, **MNC BOA, Tab 25, pp 344-345**.
[24] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 17, **MNC BOA, Tab 18, pp 234-235**.
[25] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 68, **MNC BOA, Tab 20, pp 284-285**.
[26] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 62, **MNC BOA, Tab 20, pp 281-282**.
[27] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 68, **MNC BOA, Tab 20, pp 284-285**.

19. In *Mitchell v MNR*, 2001 SCC 33, the Supreme Court of Canada provided guidance with regard to evidentiary approaches that will allow courts to take an approach to the rules of evidence, and to the interpretation of the evidence provided, that is mindful of the special nature of claims for Aboriginal rights. In that case (dealing particularly with oral history evidence), the Court held that focusing on usefulness and reasonable reliability permits courts to take a flexible approach all while affirming the continued applicability of the rules of evidence.[28]

20. Much as is the case in other Aboriginal rights cases under section 35 of the *Constitution Act, 1982*, oral history evidence will be useful in Métis rights cases, as it may offer evidence that would not otherwise be available and may provide the Métis perspective of the right claimed.[29] However, this usefulness may be tempered by an expectation that, unlike what is the case for Aboriginal rights based in the practices integral to the distinctive pre-contact cultures of Aboriginal groups, where there is an absence of a contemporaneous record, Métis communities arose after contact, such that it may be expected that some reflection of the existence of a Métis community would be found in the written records of Euro-Canadian communities. However, regardless of this different context, courts must be careful to follow the Supreme Court of Canada's caution that "[i]n determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions."[30]

ii. Distinctive collective identity

21. In *Powley*, the Supreme Court of Canada held that demographic evidence was not sufficient to demonstrate the existence of a Métis community.[31] This is in keeping with the Court's conclusion in *Powley* that mixed ancestry is not sufficient to ground Métis rights. Instead, the Court held that claimants must also prove that the community in question had

[28] *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at paras 29-34, **MNC BOA, Tab 3, pp 31-33**.
[29] *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 32, **MNC BOA, Tab 3, pp 33-34**.
[30] *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 34, **MNC BOA, Tab 3, p 33**.
[31] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 23, **MNC BOA, Tab 18, p 237**.

shared customs, traditions, and a collective identity. [32] As the trial judge held in *R v Vautour*, 2010 NBPC 39, this aspect of the test means that "the anthropological approach that focuses on collectivities such as ethnic groups or communities […] is therefore more helpful than a genealogical inquiry that centres on individuals and family histories."[33]

22. It is also important to note that the court should seek a distinctive group. Some courts, like the trial judge in *Vautour*, have found that, while cultural exchange occurred between the Indigenous group in a given area and European settlers from the time of contact to the establishment of effective Crown control, this cultural exchange did not lead to the emergence of a third cultural group, with its own separate identity and culture. In those cases, the descendants of inter-marriages between Europeans and Indigenous groups were absorbed into one or the other cultural group.[34] Other courts, such as the courts in *R v Laviolette*, 2005 SKPC 70, *R v Belhumeur*, 2007 SKPC 114, and *R v Goodon*, 2008 MBPC 59, have identified the emergence of distinctive groups between the time of contact and the time of effective Crown control, looking to factors such as a distinctive language, distinctive songs, distinctive storytelling, distinctive dance, distinctive foods, distinctive dress, distinctive beadwork, and distinctive governance structures.[35]

23. The analysis of a Métis community's distinctive collective identity must be holistic, such that it cannot focus on the presence or absence of any one factor that would demonstrate shared customs, traditions, and a collective identity (for instance: any one of language, forms of dress, storytelling, or foods). Further, given the *Powley* test's roots in the Supreme Court of Canada's decision in *Van der Peet*, elements of a distinctive collective identity should not include "those aspects of the aboriginal society that are true of every human society (e.g. eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society".[36]

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[32] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 23, **MNC BOA, Tab 18, p 237**.
[33] *R v Vautour*, 2010 NBPC 39, 368 NBR (2d) 201 at para 55, **MNC BOA, Tab 21, p 289**.
[34] *R v Vautour*, 2010 NBPC 39, 368 NBR (2d) 201 at para 81, **MNC BOA, Tab 21, p 292**.
[35] *R v Laviolette*, 2005 SKPC 70, [2005] 3 CNLR 202 at paras 23-30, **MNC BOA, Tab 16, pp 191-193**; *R v Belhumeur*, 2007 SKPC 114, 301 Sask R 292 at paras 155-167, **MNC BOA, Tab 6, pp 56-57**; *R v Goodon*, 2008 MBPC 59, 185 (CRR) (2d) 265 at paras 42-47, **MNC BOA, Tab 10, pp 131-132**.
[36] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 56, **MNC BOA, Tab 20, p 279**.

24. Given that the process through which Métis communities arose involved "combining European and First Nations or Inuit heritages in unique ways",[37] it should not be expected that a Métis community's distinctive collective identity will be entirely foreign to the Indigenous and European cultural groups that contributed to its unique emergence. For that reason, the court's analysis must be a holistic one that avoids focusing on the minutiae of various practices that might be similar in nature to those seen in neighbouring Indigenous and European communities prior to the time of effective Crown control.

iii. Living together in the same geographic area

25. When considering how a Métis community lived together in a given geographic area, a court must be sensitive to the unique aspects of life in the area in question, and its consequences in terms of a Métis community's ability to live together.

26. In particular, courts should not limit their consideration to the area of a given Métis settlement, absent compelling reasons based in the evidence of the particular facts of that region requiring the court to do so. Indeed, in *Belhumeur*, the trial judge cited one of the defendant's expert's explanation of the difference between a "community" and a settlement". A "community" referred "to a group of people who were interdependent, interacted socially on a regular basis and usually were close kin."[38] A "settlement", on the other hand, referred "to physical sites that are defined in terms of their built-up and cleared areas".[39]

27. A court that focuses only on a specific Métis settlement in a specific geographic area risks being unable to see the forest through the trees (or indeed, the community through the settlements). As the trial judge recognized in *Goodon*, it is possible for a wide geographic area (in that case, southwestern Manitoba, parts of Saskatchewan, and the northern Midwest United States)[40] to be one community "as the same people and their

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[37] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 10, citing *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4, at pp 199-200, **MNC BOA, Tab 18, pp 231-232**.
[38] *R v Belhumeur*, 2007 SKPC 114, 301 Sask R 292 at para 152, **MNC BOA, Tab 6, p 55**.
[39] *R v Belhumeur*, 2007 SKPC 114, 301 Sask R 292 at para 152, **MNC BOA, Tab 6, p 55**.
[40] *R v Goodon*, 2008 MBPC 59, 185 (CRR) (2d) 265 at para 46, **MNC BOA, Tab 10, p 132**.

families used this entire territory as their homes, living off the land, and only periodically settling at a distinct location when it met their purposes."[41]

28. As such, when identifying the geographic area in which the Métis community in question lived together, the court and the parties should cast their minds not only to a specific settlement site but also to the broader territory over which the community operated.

iv. Common way of life

29. The requirement under the *Powley* test to demonstrate a common way of life requires some degree of unity at the group level. As the summary convictions appeal judge held in *R v Willison*, 2006 BCSC 985, "a geographically wide, loosely affiliated group of people of mixed ancestry" cannot be said to share a common way of life.[42]

30. Instead, courts should look to some sense of organization or common purpose within a Métis community. In *Laviolette*, the trial judge noted institutions of trade and class such as the northern boat brigades, the Red River cart trails, and the buffalo hunts.[43] Some of these same institutions were noted by the trial judge in *Belhumeur*,[44] while the trial judge in *Goodon* identified the Métis' "clear identity within the work force as they became diversified economically; living off the land in Aboriginal fashion combined with other economic pursuits such as labourers, entrepreneurs and also as small scale farmers."[45]

B. <u>The Court's approach to identifying when effective control can be said to have been exercised over a territory</u>

31. In *Powley*, the Supreme Court of Canada held that the test for Métis rights under section 35 of the *Constitution Act, 1982* should focus on identifying those practices, customs and traditions that were integral to the Métis community's distinctive existence

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[41] *R v Goodon*, 2008 MBPC 59, 185 (CRR) (2d) 265 at para 47, **MNC BOA, Tab 10, p 132**.
[42] *R v Willison*, 2006 BCSC 985, [2006] 4 CNLR 253 at para 48, **MNC BOA, Tab 22, p 312**.
[43] *R v Laviolette*, 2005 SKPC 70, [2005] 3 CNLR 202 at para 24, **MNC BOA, Tab 16, p 191**.
[44] *R v Belhumeur*, 2007 SKPC 114, 301 Sask R 292 at para 156, **MNC BOA, Tab 6, p 56**.
[45] *R v Goodon*, 2008 MBPC 59, 185 (CRR) (2d) 265 at para 29, **MNC BOA, Tab 10, pp 127-128**.

and relationship to the land at the time when effective control is established in a particular region. The Supreme Court of Canada elaborated on the purpose of this test further in *R v Sappier*; *R v Gray*, [2006] 2 SCR 686:

> … **the purpose of this exercise is to understand the way of life of the particular aboriginal society,** pre-contact, **and to determine how the claimed right relates to it**. **This is achieved by founding the claim on a pre-contact practice, and determining whether that practice was integral to the distinctive culture of the aboriginal people in question,** pre-contact. Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival.[46] [emphasis added]

32. Given that the "integral practice" test focuses on "historic" Aboriginal communities, courts must identify a relevant time frame. The "relevant time test" must uphold section 35 of the *Constitution Act, 1982*'s purpose of protecting the practices that were historically important features of the distinctive Aboriginal communities whose pre-existence must be reconciled with the sovereignty of the Crown.

33. In determining the relevant date of assessment, the Supreme Court of Canada found that neither a time-frame relying on first contact with Europeans, nor one relying on assertion of Crown sovereignty would uphold the purpose of protecting the practices that were historically important features of Métis communities. Instead, the Supreme Court of Canada determined that the relevant date of assessment for the emergence of a Métis right is "effective control".[47]

1. Relevant Time Frame

a) Post-Contact; Pre-Control

34. As noted above, in *Powley*, the Supreme Court of Canada confirmed that the same legal principles that had been developed with respect to the adjudication of other Aboriginal rights claims apply equally to adjudicating Métis rights. However, consistent with a purposive analysis of section 35 of the *Constitution Act, 1982*, the Court explicitly modified the *Van der Peet* test as it applies to Métis rights in recognition of Métis Peoples'

[46] *R v Sappier*; *R v Gray*, 2006 SCC 54, [2006] 2 SCR 686 at para 40, **MNC BOA, Tab 19, pp 251-252**.

post-contact emergence as Aboriginal Peoples. As Métis law professor Larry Chartrand observed, such modifications were required, as a "strict application of the Aboriginal rights test [in Van der Peet] would have meant that no Métis group could ever claim an Aboriginal right."[48] Indeed, reliance on a pre-contact time period for identifying Métis rights would have made the identification of such rights impossible, given that Métis Peoples, by definition, arose after contact. Consequently, the Supreme Court applied a post-contact, pre-control test.

b) Indicia of Crown Sovereignty are not Indicia of Effective Control

35. In *Powley*, the Supreme Court specifically avoided using any of the traditional indicia of Crown sovereignty of title as a relevant benchmark, stating instead that the "pre-control test enables us to identify those practices, customs and traditions that predate the imposition of **European laws and customs** on the Métis."[49] [emphasis added] In "R. v. Powley: Dodging Van der Peet to Recognize Métis Rights" authors Andrea Horton and Christine Mohr state that:

> By opting for pre-European control, rather than the assertion of British sovereignty as the relevant date by which to assess Métis claims under section 35, the Court has modified the *Van der Peet* test in a way which is more likely to enable members of Métis communities to establish aboriginal rights under section 35. [50]

36. The *Powley* test is careful to state that courts must consider the practices, customs and traditions predating the imposition of **European laws and customs** on the Métis. The Supreme Court of Canada's use of the word "custom" implies that courts must look beyond the Crown's assertion of sovereignty to the time when Crown control was established by political and legal means, focusing on the time at which the imposition of European socio-cultural norms changed the way of life in a particular area.

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[47] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 37, **MNC BOA, Tab 18, pp 240-241**.
[48] Darren O'Toole, "*Manitoba Metis Federation Inc. v. Canada (Attorney General): Breathing New Life into the 'Empty Box' Doctrine of 'Indian Title'"* (2015) 52:3 Alta L Rev 669-688 at 683-684, citing Larry N Chartrand, "Métis Aboriginal Title in Canada: Achieving Equality in Aboriginal Rights Doctrine" in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon: Purich, 2004) 151 at 155, **MNC BOA, Tab 27, pp 415-416**.
[49] *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 at para 37, **MNC BOA, Tab 18, pp 240-241**.

c) Effective Control

37. Courts have repeatedly held that effective control arises when the Crown's activity had the effect of changing the land tenure, lifestyle and economy of the Métis in a given region.[51] For example, in *Laviolette*, the Crown argued that the date of effective control was 1870, being the date when Rupert's Land became part of Canada. The trial judge rejected that argument, stating that "effective control takes place when the Crown's activity has the effect of changing the traditional lifestyle and the economy of the Metis in a given area."[52] The trial judge concluded that there was no real change in the Métis' lifestyle in the area until 1912, when the Department of the Interior established townships and the Métis registered their land claims under the new land system.

38. In giving effect to the "relevant time test", courts should therefore look for on-the-ground indicators that the Crown had effective control in the given region. The mere presence of Europeans or Canadians does not give rise to effective control. Nor did the presence of missionaries, the Hudson's Bay Company, or even the presence of military representatives. Instead, the Supreme Court of Canada in *Powley* looked to when the Crown itself began to actively undertake development or sanctioned settlement in the region.

39. Effective control takes place only when the Crown's activity has the effect of changing the land tenure, lifestyle and economy of the Métis in a given region. Events or actions that do not change the Métis community's on-the-ground reality do not equate to "effective control" for the purposes of the *Powley* test. Likewise, events or actions that do change these on-the-ground realities, but that are not Crown activity, do not equate to "effective control" for the purposes of the *Powley* test.

40. Further, in *Powley* and in cases following, courts have tended to look to a range of time to determine when effective control arose, rather than a specific date or event.

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[50] Andrea Horton and Christine Mohr, "R. v. Powley: Dodging Van der Peet to Recognize Métis Rights" (2005) 30 Queen's LJ 772-824 at 796, **MNC BOA, Tab 26, p 371**.
[51] *R v Langan*, 2013 SKQB 256 at para 53, **MNC BOA, Tab 15, p 183**; *R v Belhumeur*, 2007 SKPC 114, 301 Sask R 292 at para 183, **MNC BOA, Tab 6, p 59**; *R v Goodon*, 2008 MBPC 59, 185 (CRR) (2d) 265 at para 69i, **MNC BOA, Tab 10, p 140**.
[52] *R v Laviolette*, 2005 SKPC 70, [2005] 3 CNLR 202 at para 30, **MNC BOA, Tab 16, p 193**.

Based on the evidence in *Powley* effective control was described as a period that began in 1815 when effective control in the northern Great Lakes was shifting from Aboriginal peoples to the Crown. This process culminated in 1850 when the Crown issued mining leases on the North shores of Lake Huron and entered into the Robinson Huron treaty. As such, it is to the end of this transitional period to which courts should look when determining the time period at which the "integral practice" test will focus.

IV CONCLUSION

41. The MNC respectfully requests that the Court consider the submissions above in evaluating the trial judge's approach to identifying the distinctive traits and traditions of Métis people in the Saguenay region, and to identifying when effective control can be said to have been exercised over the Saguenay region. The MNC does not take a position on the disposition of this appeal.

Ottawa, November 11, 2016

for: Woods LLP
Olivier Archambault-Lafond
Counsel for the Intervener Métis National Council

V AUTHORITIES

Paragraph

Case law

Secondary sources

ATTESTATION

I, the undersigned, Olivier Archambault-Lafond, hereby attest that this factum and its schedules are in compliance with the Rules of the Court of Appeal of Quebec in Civil Matters and that the originals or paper copies of all the depositions that I have had transcribed from recordings or stenographer's notes are at the disposal of the adverse party, free of charge.

The time requested for the presentation of my oral argument is 20 minutes.

Signed at Ottawa, Ontario, on this 11th day of November, 2016

for: **Woods LLP**
Olivier Archambault-Lafond
Counsel for the Intervener Métis National Council

PROVINCE DE QUÉBEC
COUR D'APPEL
GREFFE DE QUÉBEC

No. : 200-09-008957-158, 200-09-008958-156, 200-09-008959-154, 200-09-008960-152, 200-09-008961-150, 200-09-008962-158, 200-09008963-156, 200-09-008964-154, 200-09-008965-151, 200-09-008966-159

GHISLAIN CORNEAU, MIVILLE CORNEAU, STÉPHANE CORNEAU, MARTIN PELLETIER, JEAN-MARIE GAGNÉ, GABRIELLE SIMARD, ANDRÉ LALANCETTE, CLÉMENT LALANCETTE, RICHARD RIVERIN, GABRIEL JEAN, MARC SIMARD

APPELLANTS Defendants

v.

ATTORNEY GENERAL OF QUEBEC

RESPONDENT Plaintiff

and

LA COMMUNAUTÉ MÉTISSE DU DOMAINE DU ROY ET DE LA SEIGNEURIE DE MINGAN, LA PREMIÈRE NATION DE MASHTEUIATSH, LA PREMIÈRE NATION DES INNUS ESSIPIT, LA PREMIÈRE NATION DE NUTASHKUAN,

MIS EN CAUSES
Interveners

and

MRC LE FJORD-DU-SAGUENAY, MUNICIPALITÉ DE SAINT-FULGENCE, MUNICIPALITÉ DE RIVIÈRE-ÉTERNITÉ

MIS EN CAUSES
Mis en causes

and

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INTERVENER

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