Date: 20071212
Docket: 06/95 & 06/105
Citation: 2007 NLCA 75

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

HER MAJESTY IN RIGHT OF
NEWFOUNDLAND AND LABRADOR,
as represented by the Minister of
Environment and Conservation and the
Minister of Transportation and Works APPELLANTS

AND:

THE LABRADOR MÉTIS NATION,
a body corporate under the laws of the
Province of Newfoundland and Labrador
and CARTER RUSSELL, of Happy Valley-
Goose Bay, Labrador RESPONDENTS

Coram: Roberts, Mercer and Barry JJ.A.
Court Appealed From: Supreme Court of Newfoundland & Labrador,
Trial Division, 200508T0060

Appeal Heard: November 14 and 15, 2007
Judgment Rendered: December 12, 2007

Reasons for Judgment by Barry J.A.
Concurred in by Roberts and Mercer JJA.

Counsel for the Appellants: Donald H. Burrage, Q.C. & Justin S.C. Mellor
Counsel for the Respondents: D. Bruce Clarke and Cory J. Withrow

Barry J.A.:

[1] The underlying issue in this case is whether individuals of aboriginal descent living in southern Labrador have a sufficiently credible claim to communal aboriginal rights to trigger an obligation on the Crown to consult with them concerning wetland and watercourse crossings affected by Phase III of the Trans-Labrador Highway ("TLH"). The applications judge concluded they did. The Crown bases its appeal primarily on the grounds that the respondents failed to produce sufficient evidence of a continuing aboriginal community and that neither the Labrador Métis Nation ("LMN") nor Carter Russell should have standing to pursue the claim.

Background Facts

[2] The LMN participated in the public environmental assessment process relating to Phases II and III of the TLH project. Phase III is now being constructed between Happy Valley-Goose Bay and Cartwright junction. In October, 2004, the LMN requested that the Minister of Transportation and Works and the Minister of Environment and Conservation provide them with applications for all wetland and watercourse crossings along with adequate time to comment on them. The Ministers denied this request on the basis that providing these applications was not required by law, nor was it standard practice for government to distribute these materials to stake holders. On May 18, 2005, the LMN filed an originating application for certiorari seeking to quash the Ministers' decisions.

[3] The applications judge concluded the Crown had an ongoing duty to engage in meaningful consultation with the LMN during construction of Phase III and quashed the decisions. The Crown appealed. The respondents cross-appealed on the basis that, while the applications judge was correct that there were sufficient Métis rights to give rise to a duty to consult, there were also sufficient Inuit rights to sustain the duty. In any event, the respondents maintain that there is no need to identify their members' aboriginal ethnicity in a duty to consult application. The respondents also submit the applications judge did not have sufficient evidence before him to determine that the effective date of European control was 1760 and suggest that, in fact, this may have been as late as the 1950s.

[4] The LMN says that approximately 6,000 individuals in 24 communities in southern and central Labrador have authorized it as their agent to pursue an aboriginal rights claim and enforce their rights to

consultation with government until the claim is resolved. Nine of its members (2 of which are honourary) have Micmac, Innu or Cree ancestry, but the remainder are of mixed Inuit and European descent.

[5] Carter Russell claims a right to act as representative plaintiff for individuals of Inuit descent in southern and central Labrador in asserting the claim.

[6] The 24 communities, where the members of the LMN reside, are (roughly from south to north):

> L'Anse-Au-Clair, Forteau, L'Anse-Amour, L'Anse-Au-Loup, Capstan Island, West St. Modeste, Pinware, Red Bay, Lodge Bay, Mary's Harbour, St. Lewis, Port Hope Simpson, Williams Harbour, Pinsent's Arm, Charlottetown, Norman Bay, Black Tickle-Domino, Paradise River, Cartwright, Happy Valley-Goose Bay, Mud Lake, North West River, Churchill Falls and Labrador City-Wabush.

Of these, the 14 from Lodge Bay to North West River are most directly affected by Phase III of the TLH project.

[7] The LMN alleges its members are beneficiaries of Inuit aboriginal rights, in that they are of Inuit descent and have continued the practices and traditions of the Inuit in their subsistence hunting, fishing and gathering. The LMN submits its members are the current manifestation of Inuit culture in southern and central Labrador.

[8] While presenting their claim as beneficiaries of Inuit aboriginal rights, the respondents say it is possible that, as a matter of law, their claim may eventually be founded upon Métis rights. They submit, however, that they need not definitively take a position, at this stage, as to whether they are Inuit or Métis, saying that this will ultimately be determined by the courts, as a matter of law, once the essential facts have been established. For now, say the respondents, in order to trigger a duty on the Crown to consult with them, they need only establish a credible claim as aboriginal people.

[9] The Crown submits that no duty to consult arises until the respondents have asserted a credible claim. It argues the claim must be based upon a specific ethnic identity, since this is essential to show rights claimed flow from an aboriginal community.

[10] The Crown also submits that the LMN, as a body corporate, cannot have standing to enforce aboriginal rights because those rights cannot be

transferred from the communities holding them. In addition, the Crown challenges Carter Russell's right to act as a representative plaintiff on the basis that sufficient evidence has not been presented to establish that he is a member of an aboriginal community.

The Evidence at Trial

[11] Much of the evidence on the hearing of the application consisted of competing experts providing opinions whether the Inuit had a sufficient presence south of Hamilton Inlet between the period of Inuit and European contact and the date Europeans established effective control in the area.

[12] Evidence relating to continuity of Inuit culture may be summarized as follows:

- Each of the 14 communities most directly affected by Phase III of the TLH have inhabitants who are members of the LMN with mixed Inuit and European ancestry.

- These individuals, who call themselves Inuit–Metis, comprise the majority population in most of these 14 communities.

- These communities rely upon the lands and waters of this area for food, cultural, economical and spiritual purposes.

  [Parr affidavit, para. 34]

- The majority of the population in many of the 14 communities is the modern manifestation of the south and central Inuit culture tracing back to before European contact, which occurred in Labrador in the mid-1500s.

- The British became the only European country asserting sovereignty over Labrador after the Treaty of Paris in 1763.

- Beginning in the late 1700s, occasional European males began to remain in Labrador and enter into family relationships with Inuit. The mixed-blood descendants merged with the Inuit families of the area.

- The mixed-blood descendants lived within their ancestors' traditional Inuit-Metis lifestyle, in the summer fishing for cod, capelin, herring and salmon, hunting seals and seabirds, and gathering berries and greens. In the winter they hunted small game, such as partridge, rabbits and porcupine, gathered water and firewood, and ran trap lines.

- Over 90% of Inuit-Metis still hunt, 93% fish for food, 90% collect their own wood, almost 70% trap, and almost all harvest berries and other flora.

[Affidavit of Carter Russell, paras. 8, 9, 13, 14]

The Decision Below

[13] The applications judge made the following findings:

(i) … from the scholarly evidence presented so far, notwithstanding disagreement as to the time that the Inuit people fully occupied southern Labrador, … generally it is agreed that the period from first contact around 1550, to the period of effective European control around 1760 that there were Inuit people using the southern regions of Labrador in one capacity or another. (para. 48)

(ii) Whatever the date of full occupation by the Inuit it is the conclusion of this court that there is a very high probability that the Inuit people emerged along the southern coast of Labrador prior to and continuous with the gradual appearance and introduction of the Europeans for at least two hundred years before effective control by the British. (para. 49)

(iii) In the present case all the Labrador Metis people belong to the same aboriginal community notwithstanding that this community of people is scattered in a number of villages throughout a well defined region of Labrador and for the most part along the coastal region of southern Labrador. (para. 52)

(iv) … I am more in agreement with Counsel for the [LMN] when he argues that the law of agency applies and that the aboriginal community can be represented by an agent, in this case, the … LMN. (para. 60)

(v) [Having treated the Labrador Inuit Association as the agent for the Inuit people of Labrador for the purposes of negotiating the Labrador Inuit Land Claims Agreement] I would think that [the Crown is] now estopped from refusing the same recognition to the Labrador Metis Nation as the agent representing the Labrador people claiming Aboriginal status as Metis people. (para. 70)

(vi) … I am satisfied that there is a strong case to be made for recognizing a regional community of Labrador Metis people of mixed Inuit and European ancestry along the east and south coast of Labrador. I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration. I am satisfied as well that the modern day people who claim that they are Metis

> are descendants of this early new culture and have, since the sixteenth century, gradually migrated throughout the south coastal region of Labrador from Hamilton Inlet all the way to the present border with Quebec and Labrador. (para. 72)
>
> (vii) … there is a high degree of probability that the ancestral people of those people who call themselves Labrador Metis were of Inuit origin. (para. 74)
>
> (viii) I am satisfied that Mr. Russell's account of his cultural background satisfies the criteria to establish his Aboriginal status to a very high degree of probability … . (para. 76)
>
> (ix) … the evidence strongly supports the position that the Inuit-Metis period began between first contact with the Europeans and the time ascribed to be effective control by the British over the coast of Labrador. That is from about 1550 A.D. to 1760 A.D. (para. 87)
>
> (x) The evidence is convincing that the customs and traditions of the Metis people … included a broad use of the land and its resources and was an integral part of the lifestyle of the Metis people from earliest times and continues to be maintained to this day throughout the Metis community of Labrador. (para. 90)

[14] The parties agree that the hearing and submissions before the applications judge proceeded on the basis that the respondents were founding their right of consultation upon an Inuit rights claim. The Crown submits that the reasons of the applications judge indicate that his analysis, including following the ten step approach employed in **R. v. Powley**, [2003] 2 S.C.R. 207, a Métis claims case, proceeded on the basis of the respondents' rights being based upon a Métis claim.

[15] The respondents, while admitting that the interspersing of Métis references with Inuit ones results in some confusion, argues that the applications judge made all the findings necessary to found the respondents' claim in Inuit rights but also, in the alternative, went on to show the right of consultation could also be founded upon a Métis claim. The respondents note that, throughout his reasons, the applications judge never made a specific finding that the claimants were Métis or Inuit and employed language such as "those people who call themselves Labrador Metis" (para. 74). The Crown notes, however, language such as:

> It is helpful to consider how those who claim to be Metis come to that determination. While not all members of the Labrador Metis Nation can be identified and evaluated in this case, those whose affidavits have been entered

> into evidence are relevant to show that these individuals self-identify as Metis. (para. 26)
>
> In the case of the Labrador Metis people there is no precise time that can be attached to their cultural emergence however, it is the very fact that the Europeans had arrived that gave them their distinctive cultural status. It made little difference to the emerging culture that this was prior to actual British control over the region. (para. 46)
>
> … I am satisfied that there is a strong case to be made for recognizing a regional community of Labrador Metis people of mixed Inuit and European ancestry along the east and south coast of Labrador. I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration. I am satisfied as well that the modern day people who claim that they are Metis are descendents of this early new culture and have, since the sixteenth century, gradually migrated throughout the south coastal region of Labrador from Hamilton Inlet all the way to the present border with Quebec and Labrador. (para. 72)

[16] The Crown argues references such as “self-identify as Metis”, “their cultural emergence”, “distinctive cultural status”, “emerging culture” and “descendants of this early new culture”, show the applications judge had concluded the respondents’ claim flowed from Métis rights.

The Law

[17] Section 35 of the **Constitution Act**, **1982**, being Schedule B to the **Canada Act 1982,** (U.K.), 1982, c. 11, provides:

> (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.

[18] The Supreme Court of Canada set out the test for identifying s. 35(1) aboriginal rights in **R. v. Van der Peet**, [1996] 2 S.C.R. 507, where Lamer C.J.C. stated for the majority, at para. 44:

> In order to fulfill 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.

And further, at para. 46:

> … the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[19] The Court held in **Van der Peet** that the evidence relied upon by the applicant simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

[20] To succeed, an aboriginal group must also demonstrate that the connection with the land in its customs and laws has continued to the present day.

[21] The Court dealt with Métis rights in **Powley**. It applied the basic elements of the **Van der Peet** test but modified these to recognize that Métis communities evolved post-contact but prior to the entrenchment of European control, when the influence of European settlements and political institutions became pre-eminent. At para. 18 of **Powley**, the court referred to **Van der Peet** as the "template" for the discussion of Métis rights. It modified the pre-contact focus of the **Van der Peet** test to account for the important differences between Indian and Métis claims. The Court stated:

> 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.

[22] The Court affirmed in **Powley** that aboriginal hunting rights, including Métis rights, are contextual and site-specific. It confirmed that aboriginal rights are communal rights and a historic rights-bearing community must be identified. The claimant's membership in the relevant contemporary Métis community must be verified by considering three factors as indicia of Métis

identity: self-identification, ancestral connection, and community acceptance. (para. 30) The claimant must self-identify as a member of a Métis community and this self-identification should not be of recent vintage merely to benefit from a s. 35 right. Also, 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. A minimum "blood quantum" is not required. Finally, the claimant must demonstrate he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. 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 identify and distinguish it from other groups. Membership in a Métis political organization is relevant but not necessarily sufficient on the question of community acceptance. (paras. 31-33).

[23] By analogy from **Van der Peet**, the test for Métis practices was held to focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. (para. 37)

[24] The constitutional duty to consult and accommodate was first set out by the Supreme Court of Canada in **Haida Nation v. British Columbia (Minister of Forests)**, [2004] 3 S.C.R. 511. At para. 25, the Court stated:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[25] In **Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)**, [2004] 3 S.C.R. 550, a companion case to **Haida,** McLachlin C.J.C. stated, at para. 24:

> … the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted

> Aboriginal rights and title. … The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

[26] The right of an aboriginal people to be consulted by the Crown is a procedural right, not a substantive one. See **Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)**, [2005] 3 S.C.R. 388, which dealt with consultation before construction of a winter road.

[27] In assessing whether a duty to consult exists and the extent of any such duty, the Crown is not permitted to narrowly interpret the facts. See **Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)**, [2005] 3 C.N.L.R. 74 (B.C.S.C.), at para. 94:

> The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution … . In its review, the Court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process … .

[28] Each case must be approached individually and with flexibility. The honour of the Crown does not permit sharp dealing. See **Haida**, at paras. 42 and 45.

[29] The Crown obligation to undertake an analysis of whether the Crown owes a duty to consult is triggered at a low threshold. See **Mikisew Cree**, at para. 55. To trigger that obligation, the Crown must have knowledge, real or constructive, of the "potential" existence of an aboriginal right that "might" be adversely affected by conduct contemplated by the Crown. See **Haida**, at para. 35. All that is necessary is that the Crown have "some idea" of the potential scope and nature of the aboriginal right asserted and of the alleged infringements of these rights. See **Haida**, at para. 36.

[30] There is a distinction between knowledge sufficient to trigger a duty to consult and the content or the scope of the duty to consult in a particular case. As the Court noted in **Haida**, at para. 37:

> Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances… . A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. … Difficulties associated with the

> absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

[31] In order to determine what the scope of the Crown's duty to consult may be in any given case, the Court must consider that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or the title claimed. See **Haida**, at para. 39.

[32] The kind of duties to consult are discussed in **Haida**, at paras. 43-46, where the Court stated:

> [43] Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. ''[C]onsultation' in its technical definition is talking together for mutual understanding': T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.
>
> [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> [45] Between the two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect

> Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.
>
> [46] Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. …

Issues

[33] Five issues arise:

(i) Must claimants ethnically identify themselves before the Crown can be compelled to consult and accommodate them?

(ii) Did the applications judge err in identifying the respondents as Métis when the parties had made their submissions on the basis of Inuit rights?

(iii) Did the applications judge err in concluding that the respondents had a credible but unproven claim?

(iv) Are the Labrador Métis Nation and Carter Russell proper parties to enforce the duty to consult?

(v) What may be said on the scope of the duty to consult?

The Applicable Standard of Review

[34] The appropriate standard of review was discussed by this Court in **Newfoundland v. Drew et al.** (2006), 260 Nfld. & P.E.I.R. 1 (NLCA), as follows:

> [11] The standard of appellate review to be applied is determined by whether the question being considered is one of law, of fact, or of mixed fact and law. The standard of review for pure questions of law is correctness: **Housen v. Nikolaisen et al.**, [2002] 2 S.C.R. 235 … at para. 8. This means that an appeal court is free to substitute its opinion for that of the trial judge on questions of law.
>
> [12] As to findings of fact, including the weight to be given to evidence, an appeal court can only reverse a lower court decision where the trial judge has made a palpable and overriding error: **Housen** at paras. 10 & 23, and **K.L.B. et al. v. British Columbia et al.**, [2003] 2 S.C.R. 403 … at para. 62. A palpable error is one that is plainly seen: **Housen** at para. 5. An overriding error is one that 'is sufficiently significant to vitiate the challenged finding of fact. … The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error… .' In **H.L. v. Canada (Attorney General) et al.,** [2005] 1 S.C.R. 401 … at para.

> 110, Fish J., for the majority, described the functional equivalents of palpable and overriding error as including 'clearly wrong', 'unreasonable' and 'not reasonably supported by the evidence.' Lamer C.J.C., in **Delgamuukw et al. v. British Columbia et al**, [1997] 3 S.C.R. 1010 … at para. 80 stated that interference with factual findings was warranted 'where the courts below have misapprehended or overlooked material evidence…'. The standard of palpable and overriding error is also applicable to a review of the trial judge's inference of fact: **Housen** at para. 21.
>
> [13] Questions of mixed fact and law are subject to a 'standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.'

[35] Issue (i), the necessity of ethnic identification, is a pure question of law and the standard of review is correctness. Issue (ii) concerning identification as Métis, would normally be a mixed question of law and fact; if the issue were properly before him, the applications judge would have to apply the **Powley** legal standard to the facts of this case. But whether the issue was properly before him is a question of law. Issue (iii), assessing the credibility of the respondents' claim, is also a mixed question of law and fact; the legal principles earlier discussed had to be applied to the facts. Issue (iv), the matter of standing, is another mixed question of law and fact; legal questions of agency and entitlement to be a representative plaintiff must be applied to the circumstances of the LMN and Carter Russell. Issue (v), the scope of the duty to consult, depends on (a) legal principles relating to the extent and scope of the Crown's duty to consult; (b) the potential strength of the LMN communities' claim to aboriginal rights; (c) the extent of the potential adverse effects the construction of the TLH may have; and (d) whether the Crown failed in its constitutional duties to consult and accommodate. Question (a) is a pure question of law, (b) and (d) mixed questions of law and fact, and (c) a pure question of fact.

Analysis

(i) Must claimants ethnically identify themselves before the Crown can be compelled to consult and accommodate them?

[36] I do not accept the appellants' submission that claimants always have to self-identify as either Inuit or Métis before the Crown's duty to consult and accommodate is triggered. I agree with the respondents that it was sufficient in the present case to assert a credible claim that the claimants

belong to an aboriginal people within s. 35(1) of the **Constitution Act, 1982**. The respondents have established this by the affidavit evidence of Carter Russell, Todd Russell and Trent Parr, showing they are of mixed Inuit and European ancestry whose Inuit bloodlines have originated from those Inuit ancestors that resided in south and central Labrador prior to European contact. The unrefuted evidence before the applications judge was sufficient to demonstrate a credible claim that the members of the 24 LMN communities know they have genetic, cultural and land use continuity with their Inuit forebears, have a regional consciousness of a regional community, and occupy and use, for traditional hunter/gatherer purposes, lands and waters threatened with adverse effects by construction of the TLH.

[37] Whether the present day LMN communities are the result of an ethnogenesis of a new culture of aboriginal peoples, that arose between the period of contact with Europeans and the date of the effective imposition of European control, is not yet established, although it is possible that such an ethnogenesis occurred. If so, the members of the LMN communities could be, in law, constitutional Métis.

[38] However, it is also possible that the LMN communities are simply the present-day manifestation of the historic Inuit communities of south and central Labrador that were present in the area prior to contact with the Europeans. Or they may be the manifestation of a culture which developed only after effective European control in Labrador had occurred, in which case, on the basis of **Powley**, the culture could be viewed as involving non-aboriginal customs and practices, unprotected by s. 35(1). The fact that the actual bloodlines of the present-day aboriginal persons may have a mix of European and Inuit ancestry does not detract from the argument that the LMN communities may have “Inuit” aboriginal rights. The present-day manifestation of this authentic Inuit culture may simply have been impacted by centuries of Euro-Canadian encounter and influence.

[39] The LMN communities have not refused to self-identify with a specific constitutional definition but they reasonably say they are unable, at the present time, to do so definitively. This position may change as further historical, archeological, anthropological and other information is obtained and as the law provides further guidance on these complex issues. In any event, definitive and final self-identification with a specific aboriginal people is not needed in the present circumstances before the Crown’s obligation to consult arises. All the respondents had to do was establish, as they did, certain essential facts sufficient to show a credible claim to

aboriginal rights based on either Inuit or Métis ancestry. The situation might be different if the right adversely affected only flowed from one of the Inuit or Métis cultures. But that is not the case. Here fishing rights are in issue. Those rights are not dependent upon whether the claim is Inuit or Métis-based. Fishing rights flow from both types of claims. The applications judge did not need to determine the issue of ethnicity.

(ii) Did the applications judge err in identifying the respondents as Métis, when the parties had made their submissions on the basis of Inuit rights?

[40] The respondents concede and the Crown agrees that the applications judge had insufficient evidence before him to conclude that an ethnogenesis in law occurred so as to result in the evolution of a Métis culture separate and distinct from the pre-existing Inuit culture. I agree with the respondents that the Crown in this case had sufficient information to know the respondents had a credible claim based on aboriginal rights, whether they be of Inuit or Métis origin. All the respondents had to do was set out, as they did, the essential facts underlying and supporting their aboriginal community's claim to aboriginal rights and the facts supporting their submission that the Crown's actions could adversely affect those aboriginal rights. The known facts had to be considered by the Crown in accordance with the applicable legal tests and doctrines for each such type of aboriginal claim. If the Crown was uncertain as to the type of aboriginal rights asserted, be they Indian, Inuit or Métis, the Crown had an obligation to analyze them in the alternative. If the facts as presented by the aboriginal community could reasonably support the conclusion that the aboriginal rights asserted are potentially Métis rights, then a legal analysis used in the case law applicable to Métis rights should be undertaken by the Crown. However, if the same rights could lead to the possibility that the aboriginal rights asserted could be Inuit rights instead, then the Crown should do an analysis on that basis as well.

[41] In the present case, the Crown had a responsibility to carry out a dual-analysis of the potential strength of the aboriginal rights using both the Métis and the Inuit legal tests, in order to determine whether a duty to consult arose. In effect, the Crown carried out this dual-analysis case by initially preparing its submissions on the understanding that the respondents were basing their claim upon Métis rights. Subsequently, both the appellants and the respondents proceeded on the basis that the claim was founded on Inuit rights.

[42] In their factum, the respondents submit that the applications judge followed the dual-analysis approach and first applied the facts to the tests for Métis aboriginal rights. At the appeal hearing, the respondents acknowledged that both parties made their submissions on the basis of an Inuit claim. They also concede there is some confusion in the language employed by the applications judge. That language does, however, particularly in paras. 26 and 46, where he refers to the emergence of a new culture, on balance indicate an analysis based upon Métis aboriginal rights. This conclusion is supported by the applications judge's utilization of the ten step **Powley** approach. I agree, therefore, with the Crown that the applications judge clearly erred in employing a Métis analysis, when the case was argued on the basis of an Inuit-based claim.

(***iii) Did the applications judge err in concluding that the respondents had a credible but unproven claim?***

[43] But what was the effect of this error by the applications judge? Accepting that the evidence before him was insufficient to establish an ethnogenesis or the actual date of effective control, his other findings were sufficient to satisfy the **Van der Peet** test and establish a credible claim based upon Inuit ancestry.

[44] As previously noted, the Supreme Court in **Van der Peet** held that, in order to establish an aboriginal right protected by s. 35(1), an applicant must prove the continuing activity for which protection is sought was an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. The applications judge found this to be established, particularly where he stated, at para. 72:

> I am also satisfied that these people continued the ways and customs of making a living which incorporated both Inuit knowledge of the land and its resources with the European technology and sense of exploration.

And further, at para. 90:

> The evidence is convincing that the customs and traditions of the Metis people … included a broad use of the land and its resources and was an integral part of the lifestyle of the Metis people from earliest times and continues to be maintained to this day throughout the Metis community of Labrador.

[45] The Crown's analysis should have arrived at the same result, namely, that the respondents have a credible claim which triggers a duty to consult.

(iv) Are the LMN and Carter Russell proper parties to enforce the duty to consult?

[46] I reject the Crown's submission that a corporate plaintiff may not be the vehicle for enforcement of an aboriginal right to consultation. The Crown provided no authority for its submission that s. 35 rights could not be asserted and protected by an agent. Also, the Crown provided no authority for its proposition that, in order for an agent to so assert and protect, the rights would have to be transferred, which is impossible with s. 35 rights. I know of no proposition in the law of principle and agent which requires that rights be transferred to an agent before the agent can act to protect them. In the present case, the LMN has established through its memorandum and articles of association, including the preamble to its articles, that it has the authority of its 6,000 members in 24 communities to take measures to protect aboriginal rights. The preamble states in part (after describing the basis of the aboriginal rights claim of LMN members):

> We are entitled to consultation from government when any action they may take could impair or interfere with our rights. We have a right to involvement in the management, as an equal and full participant, of the natural resources of our lands.

[47] Anyone becoming a member of the LMN should be deemed to know they were authorizing the LMN to deal on their behalf to pursue the objects of the LMN, including those set out in the preamble to its articles of association. This is sufficient authorization to entitle the LMN to bring the suit to enforce the duty to consult in the present case. This well-publicized case has been proceeding since May, 2005. No evidence was presented that any of the 6,000 LMN members or any other aboriginal person questioned the authority of the LMN to act on their behalf.

[48] The trial judge concluded the Crown should be estopped from questioning the authority of a corporation to deal with aboriginal rights because the Crown had signed a treaty with the Labrador Inuit Association, which is also a corporation, dealing with Inuit rights in Northern Labrador. I agree with the Crown that this was an error. The Crown has the authority to create new constitutionally protected rights through the treaty process. See **R. v. Sioui**, [1990] 1 S.C.R. 1025, at pp. 1042-43. The legitimacy of the LMN's involvement comes not from the LIA land claims process but from the authority granted the LMN by its members.

[49] With respect to Carter Russell, as a representative plaintiff he had no obligation to show any authorization from other potential plaintiffs. It was sufficient for him to establish, as he has, that he has a credible claim, as a member of an aboriginal community situated at Williams Harbour where he resided and elsewhere, to aboriginal rights, which trigger a duty to consult on the part of the Crown. It is his assertion of the same interest as other members of his community which entitled him to act as a representative plaintiff.

(v) What may be said on the scope of the duty to consult?

[50] As noted in **Haida**, at paras. 37 and 39, the scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The second aspect, seriousness of the potentially adverse effect of highway water crossings interfering with fish habitats, is not in dispute. On the first aspect, with the admitted paucity of the evidence on the process of ethnogenesis, which may or may not have occurred before effective European control, and on the date of effective European control in Labrador, it is difficult to see how the references of the applications judge to a "strong" case may be supported at this stage. A conclusion not reasonably supported by the evidence constitutes a palpable error. See **Drew**, at para. 12. But the error is not overriding here since the respondents did not need to show a strong case in order to trigger the low level of consultation here requested.

[51] A "preliminary evidence-based assessment" of the strength of the respondents' claim, such as discussed in **Haida**, at paras. 37 and 39, supports the view in the present case that the claim is more than a "dubious" or "peripheral" or "tenuous" one, which would attract merely a duty of notice. The respondents have established a prima facie connection with pre-contact Inuit culture and a continuing involvement with the traditional Inuit lifestyle. They have presented sufficient evidence to establish that any aboriginal rights upheld will include subsistence hunting and fishing.

[52] The scope of consultation requested by the respondents was set out in a letter to the Minister of Environment and Conservation on October 26, 2004:

> We now request that your office forward to us any and all applications for water crossings and other relevant permit requirements under your legislated mandate

> during the construction phase of the Trans Labrador Highway – Phase III. We also request adequate time to review and comment on the various permit applications.

An obligation to consult at this relatively low level would be triggered by a claim of less prima facie strength than that of the respondents. While it would be helpful to provide more guidance to the parties as to the scope of future duties to consult, this is not possible without knowing the future evidence which may be presented regarding the strength of the respondents' claim and regarding the types of adverse effects on the potential aboriginal claim from future Crown activity. Any unsatisfactory consequences for the parties, from the Court's inability to provide greater guidance, may be alleviated by their implementing a process for reasonable ongoing dialogue.

Summary and Disposition

[53] In summary:

(i) The respondents need not ethnically identify themselves definitively as Inuit or Métis, before the Crown's duty to consult and accommodate arises.

(ii) The applications judge erred in identifying the respondents as Métis, when the parties had made their submissions on the basis of Inuit rights, but this error does not invalidate his ultimate conclusion.

(iii) The applications judge did not err in concluding that the respondents had a credible but unproven claim, giving rise to the Crown's duty to consult.

(iv) The LMN and Carter Russell are proper parties to enforce the duty to consult.

(v) The respondents' claim is at least strong enough to trigger a duty to consult at the low level requested.

(vi) The appeal is dismissed and the cross-appeal is allowed with party and party costs to the respondents.

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L. Barry, J.A.

I concur: _____
D. Roberts, J.A.

I concur: _____
K. Mercer, J.A.