IN THE SUPREME COURT OF NEWFOUNDLAND & LABRADOR
TRIAL DIVISION

Citation: *The Labrador Metis Nation v. Her Majesty in Right of Newfoundland and Labrador*, 2006NLTD119
Date: 20060719
Docket: 200508T0060

BETWEEN:

THE LABRADOR METIS NATION, a body Corporate under the laws of the Province of Newfoundland and Labrador and CARTER RUSSELL, OF Happy Valley-Goose Bay, Labrador

PLAINTIFF

AND:

HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR as represented by the MINISTER OF TRANSPORTATION AND WORKS and as represented by the MINISTER OF ENVIRONMENT AND CONSERVATION

RESPONDENT

Before: The Honourable Justice Robert A. Fowler

Place of Hearing: Happy Valley-Goose Bay

Held: The Government of the Province of Newfoundland and Labrador has an ongoing duty to consult with the Labrador Metis Nation in relation to the consultation of Phase III of the Trans Labrador Highway.

Appearances: Alan V. Parish, Q.C. For the Plaintiff

Cory Withrow for the Plaintiff
Donald H. Burrage, Q.C., for the Respondent
Donna Ballard for the Respondent.

Authorities Cited:

CASES CONSIDERED: R. v. Powley, (2003), 230 D.L.R. (4th) 1 (S.C.C.)(**R. v. Van Der Peet**, [1966] 2 S.C.R. 507, 137 D.L.R. (4th) 289, 109 C.C.C. (3d) 1); **Haida Nation v. British Columbia** (Minister of Forests), 2004 S.C.C. 73 (S.C.C.) paragraph 35; **Newfoundland (Minister of Government Services and Lands) v. Drew**, 2003 NLSCTD 173 (Nfld. S.C. (T.D.)); (2003) 228 Nfld & P.E.I.R. 1 (Nfld. T.D.) at paragraph 79; **R. v. Jacobs**, [199] 3 C.N.L.R. 239 9B.C.S.C.); **Anishinaabeg of Kabapikotawangag Resource Council Inc. v. Canada (Attorney General)** [1998]; **Delgamuukw v. British Columbia 153** D.L.R. (4th) 193; **Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)** [2005] 3 S.C.R. 388;

STATUTES CONSIDERED: *The Constitution Act*, 1982, Section 35

RESOURCES CONSIDERED: Black's Law Dictionary (Fifth Edition); **Royal Commission Report,** Volume 1, "Looking Forward, Looking Back"; Volume 4, Chapter 5; Dr. Marianne Stopp - "**Reconsidering Inuit Presence in Southern Labrador**"; Dr. Lisa K. Rankin - **"Porcupine Strand Project**"; Proposal by Labrador Metis Nation - "**Strategy for Long Term Research on Labrador Inuit History and Archeology"**; **Labrador Inuit Land Claims Agreement,** part 1.1.1 and 2.2.2; **Constitutional Act, 1982,** Section 35; **Proposal for Operational Funding** submitted by the Labrador Metis Association to the Secretary of State, dated August 1986; **Volume 17, Environmental Assessment Registration**; **Volume 2 of the Environmental Assessment Registration** Document at Clause 1 page 2; **Volume 2 and 18 of the Environmental Assessment Registration**;

REASONS FOR JUDGMENT

Fowler, J.:

[1] This is an application of the Labrador Metis Nation and Carter Russell asking this court to determine their right to be consulted on the construction of Phase III of the Trans Labrador Highway by the Government of the Province of Newfoundland and Labrador.

[2] At the outset it is important to state that the matter before this court is not a land claims case notwithstanding that the locus of the impugned highway construction runs through land referred to by the Plaintiff (Labrador Metis Nation) as being lands over which Aboriginal title is being asserted. It is equally important to understand that this court is not being asked to decide whether or not the Plaintiffs are Aboriginal people, that matter will require further analysis and argument at another time.

[3] What this court is being asked to consider is whether or not the government of Newfoundland and Labrador in constructing the 250 kilometre, Phase III Section of the Trans Labrador Highway between Happy Valley-Goose Bay and Cartwright Junction in Labrador had and has a duty to consult those people who claim Aboriginal status as Inuit-Metis of south and central Labrador? While I will not be making a final determinative as to the Aboriginality of the people of Labrador who call themselves Metis; I will be following the reasoning of the Supreme Court of Canada and state in my analysis the relative strength or likelihood of that question succeeding at some time in the future.

[4] To analyze this question I intend to follow the ten step approach employed by the Supreme Court of Canada in **R. v. Powley**, (2003), 230 D.L.R. (4th) 1 (S.C.C.) which the court referred to as a modified Van der Peet test (**R. v. Van der Peet**, [1966] 2 S.C.R. 507, 137 D.L.R. (4th) 289, 109 C.C.C. (3d) 1) to distinguish between Metis claims and Indian claims. In **Powley** (supra) the Supreme Court of Canada began with:

1. Characterization of the right

[5] The right being claimed here is the right to have been consulted prior to the construction of the highway running through lands over which the Metis claim aboriginal rights. These alleged land claims rights have yet to be determined and up until the 2005 Labrador Inuit Land Claims Agreement there were no historical treaties between any aboriginal peoples of Labrador and the Crown. How then does a right of consultation arise in these circumstances? Counsel for the Plaintiffs states that such a duty is grounded in the honour of the Crown and relies on the Supreme Court of Canada's analysis of that principle in **Haida Nation v. British Columbia** (Minister of Forests), 2004 S.C.C. 73 (S.C.C.) wherein McLachlin C.J.C. states at paragraph 35:

> "But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation, suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. See *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C. S.C.), at p. 71, per Dorgan J."

[6] Counsel for the Defendants on the other hand while in full agreement with the principle that the duty to consult is predicated on the honour of the Crown argues that in the present case there is an obligation to provide the Crown with a clear and credible claim; an element of which is the identity of who is making the claim. He argues that aboriginal rights unlike Charter rights are not held by individuals but by the aboriginal community and that consultation must be with a community. That is, these rights are site and facts specific and have not been sufficiently made clear in the present case as to properly identify the Metis community the Crown was expected to have consulted. He argues therefore that in the present case there was no duty by the Government of Newfoundland and Labrador to consult.

2. Identification of the Historic Rights-Bearing Community

[7] In attempting to identify the Labrador Metis community it is helpful to consider first, the more recent emergence on the scene of the Labrador Metis Nation and the significant references to this aboriginal group in the discussions of Canada's Metis peoples as a whole. I will then consider the earlier historical evidence or lack of evidence as it relates to the Labrador Metis and their present circumstance.

A. Recent References:

[8] In the **Powley** case (supra) the Supreme Court of Canada at paragraph 10 in relation to the term "Metis", and relying on the reference in the 1996 Canadian Government Royal Commission on Aboriginal Peoples: [Report of the Royal Commission on Aboriginal Peoples (Ottawa, 1996)]; the Royal Commission, stated:

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

[9] And further that:

> "The French referred to the fur trade as coureurs de bois (forest runners) and bois brules (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Metis (whose culture had early roots) were originally called "livyers" or "settlers", those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland. The Cree people expressed the Metis character in term Otepayemsuak, meaning the "independent ones". [Report of the Royal Commission on Aboriginal Peoples, vol. 4 (Ottawa: the Commission, 1996), at pp. 199-200 ("RCAP Report").]

[10] What is significant by reference to the Labrador Metis is the definitive language used by the Supreme Court of Canada. It, no doubt gave great deference to the Royal Commission in relying on its references as to who identified as Metis people. The Supreme Court of Canada, if it felt uncertain; could have, but did not, use any conditional terms in its reference to Metis people in Labrador. It began by expressly using the grammatical definite article "the" to begin its reference to "The Labrador Metis."

[11] **Black's Law Dictionary** (Fifth Edition) had this to say on the use of the article "the":

> "The: An article which particularizes the subject spoken of. "Grammatical niceties should not be resorted to without necessity; but it would be extending liberality to an unwarrantable length to confound the articles 'a' and 'the'. The most unlettered persons understand that 'a' is indefinite, but 'the' refers to a certain object."

[12] In fully considering the **Powley** case it is necessary to consider the references in that case to the report of the Royal Commission as it relates to the Labrador Metis.

[13] The **Royal Commission Report** in its Volume 1, Looking Forward, Looking Back under the heading "*A Note About Terminology*" when referencing the term Metis stated:

> "Our use of the term *Métis* is consistent with our conception of Aboriginal people as described above. We refer to the Métis as distinct Aboriginal people whose early ancestors were of mixed heritage (First Nations, or Inuit in th case of the Labrador Métis, and European) and who associate themselves with a culture that is distinctly Métis. The more specific term Métis Nation is used to refer to Métis people who identify themselves as a nation with historical roots in the Canadian west. Our use of the terms Métis and Métis Nation is discussed in some detail in Volume 4, Chapter 5."

[14] Once again a degree of certainty attaches to the use of the designation "Labrador Metis." It must be recognized that a Royal Commission has the very broad mandate to inquire into and hear from numerous sources on the subject of its mandate before arriving at its conclusions or choosing the language it deemed appropriate to present its report. This was certainly not an unsophisticated document generated by unlettered individuals.

[15] In Volume 4 at Chapter 5 of the **Royal Commission Report** (supra) at paragraph 1.3 under the heading "The Metis Nation and the Labrador Metis" the authors state that:

> "Although we have less information about the Métis people of Labrador, we believe that they are probably also in a position to exercise the rights and powers of nationhood. Certainly, the Labrador Métis community exhibits the historical rootedness, social cohesiveness and cultural self-consciousness that are essential to nationhood, and they are developing a political organization that will allow them to engage in effective nation-to-nation negotiation and to exercise self-

> government. While the way of life of the Labrador Métis is very similar to that of Labrador Inuit and Innu, the Métis culture is sufficiently distinct to mark them as a unique people, and in our view they are likely to be accorded nation status under the recognition policy we propose."

[16] What is significant here is the certainty that the Royal Commission puts on the historical rootedness of the Labrador Metis and the Royal Commission's recognition of them as a culturally unique people.

[17] While the Royal Commission Report at paragraph 1.4 of Chapter 5 of Volume 4 makes it clear that it is ultimately the Supreme Court of Canada which decides the legal definition of Metis it is hard to ignore the fact that perhaps the Supreme Court of Canada's specific reference to the Labrador Metis was setting the stage for just that in **Powley** (supra). This is especially so since that Court referred specifically to the Royal Commission Report on Aboriginal Peoples. At the very least it was clear notice that the Labrador Metis were a people poised for such recognition and nationhood.

B. Early History:

[18] There is disagreement among the Archaeological and Anthropological scholars as to the traditional regions of the coast of Labrador occupied over the centuries by the Inuit people. The division is generally geographically defined as the northern coast being all of the coast north of Hamilton Inlet. The south coast is generally understood to mean everything south of Hamilton Inlet and extending south through the Straits of Belle Isle, and westward to what is now the Quebec, Newfoundland and Labrador border. These are general references only and when the Plaintiffs refer to the land in the south and central region of Labrador they are generally referring to land south of 54˚ North Latitude as referred to on the map of Labrador at page 38 of this decision.

[19] Dr. Marianne Stopp, a recognized scholar and Archaeologist on the Labrador Inuit, in her affidavit at paragraph 9 stated that:

> "The evidence presents a case for year-round Inuit occupation and land-use in southern Labrador and the North Shore of Quebec for the period between the mid-1500's and the mid-1700's."

[20] In her attached paper "**Reconsidering Inuit Presence in Southern Labrador**", Dr. Stopp makes a strong and compelling case for the presence of Inuit people in Southern Labrador and would not restrict the Inuit people to the coastal region north of Hamilton Inlet. It is her position that out of necessity the Inuit had developed a complex and sophisticated understanding of the land and its resources and followed the changing climate and animal resources all along the coast of Labrador including that coast south of Hamilton Inlet. The Inuit were not permanently settled in any paticular community or restricted region until the Moravian Missionaries arrived in the nineteenth century and required that they settle down in specified locations. She states at page 95 of her paper:

> "If we consider what we know of resource procurement and settlement among northern foragers, particularly those of the study area, it becomes apparent that terms such as "permanent" need to be qualified at best, if used at all. The hunting, fishing, and gathering way of life was not characterized by chance encounters with resources but involved a good deal of prior environmental knowledge, planning, and calculation (Tanner 1979). The hunter-gatherer way of life in Labrador, specifically among Innu and Inuit, revolved around a knowledge of the availability of resources at specific times and in specific places, and travelling t those places at the appropriate times. Several seasonal divisions were recognized by foragers living in Labrador, whether inland or along the coast, which were broadly divisible into periods of freezing temperatures and frozen water, and above-freezing temperatures and open water (Tanner 1979; Taylor 1974)."

[21] And at page 96:

> "Movement between resource locales, and at times across extensive stretches of territory, was a cardinal characteristic of foragers of the Canadian northeast. Moving by sled and/or snowshoe during freeze-over, and by water craft in seasons of open water, ensured continuous supplies of food, skins, bone, and stone in prehistoric times. With the appearance of Europeans came the addition of forays for European iron, European fabrics, and other introduced materials.
>
> The movement from resource to resource is essentially a revisiting of known areas across a familiar, and sometimes extensive, territory, with temporary residence organized around seasonal availability of resources at locations determined by prior knowledge of the environment (see Henriksen 1973; Mailhot 1993; Tanner 1979; Taylor 1977; Taylor and Taylor 1977). The Inuit did not settle "permanently" in Labrador until the nineteenth century, following the establishment of Morivian Mission stations (which ranged from Hopedale north

to Killinek). These stations anchored populations to specific places on a year-round basis. Vestiges of the forager way of life are still apparent, however, among today's Inuit, as well as among the Innu, Métis, and Settler populations, in seasonal settlement shifts between communities and the interior, or between the coast and inner bays for the purpose of obtaining resources (e.g., Armitage 1990; Brice-Bennett 1977; Jackson 1982; Kennedy 1995). (Emphasis added)

The idea that winter habitation somehow represents a stronger land use association that does the spring or summer camp is untenable. "Permanence" applies to colonialist criterion of belonging to a place. In reference to Inuit occupation, it obscures the reality of forager adaptation, of the distances covered to obtain resources, and of the seasonal flux of the forager group."

[22] In her conclusion Dr. Stopp states beginning at page 96:

"The archival and archaeological evidence presents a good case for year-round Inuit occupancy and land use in southern Labrador and the North Shore between the mid-1500s and the mid-1700s. Previously unpublished archaeological material from southern Labrador augments the existing data base of known and possible Inuit cultural remains.

These sites have effectively shown Inuit settlement across the southern region. Together with archival indicators of Inuit settlement and life ways, they present a convincing picture of nearly 200 years of Inuit land use south of Hamilton Inlet. (Emphasis added)

Admittedly, the data do not approach Hawkes' (1916: 17) extravagant descriptions of Inuit "fortified settlements, camps, and burying grounds south of Hamilton Inlet, as well as archaeological material extending as far south as the state of New York." But remains do indicate multi-season hunting and settlement, trapping, resource preparation, and cultural and spiritual activities, not to mention trading with Europeans. The presence of larger numbers of people in the summer, smaller numbers in the winter, and family social organization, resembles the settlement demographics seen in northern Labrador.

I have argued that the notion of "permanency," however defined, is an inadequate criterion for describing Inuit settlement in Labrador. Inuit sod house presence in one region does not represent a stronger link to place than would summer settlement in another region. Viewed another way, if we had only archival and archaeological evidence of Inuit summer presence in the study area, this would nevertheless constitute proof of land use and occupancy.

> In response to the historic supposition that Inuit travelled south solely for the purpose of obtaining European goods, it should be emphasized that the acquisition of trade goods, whether through exchange or scavenging, does not discount the long-term presence of Inuit in the southern region. European goods, especially iron, were adopted by Thule/Inuit material culture at an early date, having been introduced as early as the twelfth or thirteenth century in the eastern Arctic probably through direct or indirect trade with the Norse in Greenland (McCullough 1989; Schledermann 1996, 2000). Sutherland (2000) has compiled a comprehensive listing of evidence for even earlier Norse-Dorset contact in the eastern Arctic. Indeed, Inuit in Labrador experienced some of the earliest and most prolonged European contact of any native North American group (Kaplan 1983). Early expeditions in search of the Northwest Passage brought European explorers in contact with Inuit along Labrador's shores, encouraged by the gains of a burgeoning French, Basque, and eventually English and Dutch whale and cod fishery that began in the early 1500s (Barkham 1978, 1980, 1984; Turgeon 1994; Turgeon *et al*. 1992). The familiarity of Inuit with items of European material culture, and their acquisition of these items, are expressions of historical conditions in the western North Atlantic. Obtaining European goods had to have fitted in with subsistence-related activities such as obtaining food, skins for clothing and shelter, and manufacturing tools. Inuit interest in items of European manufacture is best understood as exploitation of yet another resource along with seals and caribou skins, all necessary to sub-arctic forager adaptation of the early post-contact period. The execution of the Inuit subsistence cycle in southern Labrador certainly accommodated trade prior to 1760 but was never supplanted by it, nor was trade the sole explanation for Inuit presence in the south.
>
> The long-term presence of Inuit in the study area attests to remarkable cultural strength and resilience between the sixteenth and eighteenth centuries. Despite regular contact with Europeans, they maintained traditional ways and resisted a variety of European pressures. That Inuit continued to met Europeans well into the 1700s and greet them with patois renditions of *"Ahé, ahé, troquer. Tous camarades!"* certainly reflects an interest in trade, but also illustrates their strong association with the southern region. The archaeological and archival evidence makes a strong case for primary use and occupation in the southern region - certainly no less than for areas north of Hamilton Inlet."

[23] Dr. Lisa K. Rankin, an Archaeologist and Associate Professor at Memorial University of Newfoundland and also a strong proponent of early Inuit occupancy in southern Labrador in her affidavit states that since 2002 she was involved in a research initiative to reconstruct the sequence of cultural occupation in a region of south-central Labrador stretching south between Hamilton Inlet and Sandwich Bay

on the Labrador Coast. (the "**Porcupine Strand Project**"). She states at paragraph 10 of her affidavit that:

> "In my opinion, archaeological evidence that has been collected over the past ten years or so, is at odds with the above statements of Dr. Taylor. Given the findings and research conducted during the Porcupine Strand Project, I am of the opinion that the Inuit were permanent residents of southern Labrador in the 16th century and prior to European settlement in the region. Moreover, archaeological information resulting from the Porcupine Strand Project has provided evidence that the presence of Inuit in southern Labrador was not a response to European exploration and the facility of trade, but was a continuation of southerly Inuit movement along the coast of Labrador that had begun centuries before."

[24] At paragraph 12 of her affidavit Dr. Rankin refers to a Proposal sent to the Research Council of Canada by the Labrador Metis Nation for funding a **"Strategy for long term research on Labrador Inuit History and archaeology"**. She states at paragraph 13 in relation to that proposal:

> "A summary of my opinion upon the issue of Inuit occupation and land-use in southern Labrador is outlined at page 14 of the Proposal, which information is consistent with my understanding of the historical and archaeological information:
>
> > Until very recently archeology has contributed little to our understanding of the Inuit in southern Labrador and this lack of research has resulted in the suggestion that the Inuit played only a small role in the early history of southern Labrador. This archaeological void has led many scholars to suggest that the ancestors of the Inuit, the Thule people, colonized territory only as far south as Groswater Bay between the 13th and 15th century. Upon reaching Groswater Bay they halted their advancement when they learnt of European Whalers in southern Labrador (Auger 1991; Jordan 1977). As a result, it is suggested that the Inuit never really occupied southern Labrador, but sent frequent trading parties south to meet with the Europeans, and scavenge their abandoned settlements.
> >
> > Nevertheless, recent research in various fields has challenged this interpretation. Work by Brewster 2005; Hanrahan 2002a, 2002b, 2002c; Kennedy 2002; McDonnell 1995, 2002; Miller 2002; Rankin 2004, 2005; Stopp 2002a, 2002b, Webb 2005 all points to a long-term presence of the Inuit in southern Labrador from at least the 16th century and suggests that the Inuit were present in family groups which lived in traditional

> settlements. Such behaviour would not be expected from trading parties (Stopp 2002, Brewster 2005).
>
> Recent archaeological research by Rankin and others has shown that the Labrador Inuit were definitely residing in southern Labrador by the late 16th century, much earlier than had been previously thought (Rankin 2005; Brewster 2005). Moreover, it is now evident that their presence in the region was not simply a response to European exploration and settlement, but a continuation of a southerly Inuit movement along the coast of Labrador that had begun centuries before. This new evidence has forced a complete re-interpretation of the history of Inuit settlement in the region, as well as the nature of that settlement and the reasons for it.
>
> Kennedy (2002) and Stopp (2002) have both conducted reviews of the archaeological site inventories housed at the Newfoundland and Labrador Provincial Archaeology Office and discovered over 700 Inuit sites have been recorded in southern Labrador, but less than 10 have been evaluated for content or period of occupation. Clearly, the Inuit were part of the cultural landscape of southern Labrador during the early contact period, but we are not going to understand their history in this region until further archaeological work is undertaken."

[25] At paragraph 14 of her affidavit Dr. Rankin refers to a paper she presented at the Annual Canadian Archaeology Association in British Columbia in May of 2005. That paper is attached to her affidavit as Exhibit "5." In that paper she summarizes by way of discussion her findings as to the occupancy of Inuit people in the southern region of Labrador as follows:

> "The numerous Inuit domestic sites along Porcupine Strand and associated islands indicate that the Labrador Inuit had at least a 200 year association with this region. Furthermore, the changes to their domestic dwellings in this region follow a similar pattern to changes witnessed in central and northern Labrador. Similar house structures are found over large expanses and persist for many decades and the visible changes to house form occur in the north and south at similar time periods suggesting that the Inuit are reacting to similar experiences. As a result, chronological typologies based on domestic architecture such as those developed by Richard Jordan and Susan Kaplan are equally viable on the Porcupine Strand as they are in the north.
>
> The Inuit seem to have arrived on the Porcupine Strand in the late 16th to early 17th century as a result of a southward expansion. This expansion may well have been linked to the desire to access European goods from the Strait of Belle Isle,

> but the earliest settlements in the region contain limited European goods. Furthermore, traditional house forms continue to dominate, as does a traditional economy that exploits seasonally available resources from different locations. There is no reason to believe that these early Inuit had much face to face contact with Europeans at this time. The initial Inuit use of the Strand appears to be an extension of a southern migration by a highly mobile population rather than a purposeful venture to southern Labrador to scavenge European material to redistribute to the north. The European goods found at Snack Cove 3, for example, are not stockpiled. The limited number of European items are largely modified to resemble traditional Inuit utilitarian tools which appear to be objects of daily use for the occupants of the households. Nevertheless, the domestic architecture appears to be somewhat more conservative than the material culture, and traditional dwelling structures are in use long after the incorporation of new material culture.
>
> The domestic dwellings do change over time, however. By the 18th century fall and winter sod houses are constructed on the mainland rather than the islands, and the shape and size of the dwellings shift, first to large communal houses and then to large rectangular structures which we see throughout the Labrador coast. No doubt these transformations can be linked to the shared experiences of the Inuit in the north and the south such as increasing European settlement of the Labrador coast, increased access to European materials, internal political and economic concerns and missionization. None of these things are new ideas and I didn't set out to do much more than provide a description of the sites we are finding on the Porcupine Strand. The project has barely scratched the surface of Inuit settlement in the region and future excavations will hopefully tell us much more. What is new, however, is the concept that the Inuit expansion and consistent occupation occurred so far south beyond Hamilton Inlet. Twenty years ago Hamilton Inlet was thought to be the southernmost edge of Inuit colonization and clearly it extends beyond this point. How much further is yet to be revealed." (Emphasis added)

[26] 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.

[27] In his affidavit submitted to the Supreme Court of Canada in the **Powley** case (supra) Todd Russell, then President of the Labrador Metis Nation stated at paragraph 3 that:

> "The Labrador Metis Nation is Labrador's largest Aboriginal organization, numbering approximately six thousand individuals, the majority of which are ordinarily resident in fourteen communities. We are predominately Inuit-Metis, people of mixed European and Aboriginal descent. The majority of our people are of Inuit descent although certain members also have Micmac, Innu and Cree ancestry."

[28] And at paragraph 7:

> "That the Aboriginal rights and title of the members and constituents of the Labrador Metis Nation have not yet been recognized by government in our traditional lands of Labrador, although we have traditionally and for hundreds of years continuously exercised those rights. The vast majority of Labrador Metis continue to exercise their Aboriginal rights by hunting, fishing, trapping; gathering and other similar harvest activities."

[29] In his October 25, 2005 affidavit, filed with the court in the present matter Mr. Russell states among other things that:

> "I am the former Persident of the Labrador Metis Nation ("LMN") and as such have personal knowledge of matters referred herein except where stated to be by the way of information and belief and when so stated I believe it to be true.
>
> I am an Inuit descendant person from the Inuit descendant community of Williams Harbour, Labrador.
>
> I have been a member of the LMN since about 1991. I became a member of the Board of Directors of the LMN in 1992. I was the President of the LMN from 1994 to 2005. I am currently the Member of Parliament for Labrador.
>
> The communities of Aboriginal People in Labrador have lived here from time immemorial.
>
> Over time, outsiders came to live among and around us. When this occurred, we often times felt the effects of discrimination.
>
> The members of the LMN, their parents and grandparents were sometimes called quite negative things by the non-Aboriginal population of Labrador. These included the terms "breeds", "half-breeds", "skimos", "bloods", "huskies" and others. This did not happen all the time or from everyone. However, it happened often enough to leave very deep feelings in our communities against discrimination.

> One phrase that some of the LMN's members commonly used to describe themselves was "Labradorian". This sought to capture our self-identification as the people who can truly claim that they are of, from and part of south and central Labrador, its original and aboriginal inhabitants. However, this was perceived as a potential problem as a name for the organization since the term "Labradorian" was starting to be used by other people in Labrador that were not aboriginal but who had lived here for a long time.
>
> After discussion, it was decided to use the term "metis" in the title of the organization since this literally meant "person of mixed Aboriginal ancestry". It is my belief that this is the dictionary and ordinary meaning of the word. To us, it signified our continuing existence as the Inuit descendant people of south and central Labrador, inclusive of our mixed-ancestry members.
>
> Our position has been, as expressed in our submissions to the Supreme Court in *Powley*, (extracted in para 29 of the Respondent factum), that the individuals in Labrador called metis "*did not live in any separate organized society, apart from the Labrador Inuit. They were Inuit people, living in Inuit communities in south and central Labrador, some of whom possessed mixed heritage.* They were members of their original Aboriginal culture."
>
> To the best of my knowledge, this continues to be the position of the LMN, as confirmed in the affidavit of Carter Russell and as stated in the Respondent's factum at paragraphs 37 and 38. Although with respect to the latter, to my knowledge, the LMN has never described its members as "disenfranchised" Inuit. I am not aware of LMN having put forward that description and do not know what an "enfranchised Inuit" might be."

[30] Carter Russell in his extensive affidavit of May 18, 2005 identifies his heritage as Metis. He identifies the Metis community and his association to it from paragraph 4 to 6 inclusive as follows:

> "THAT individuals of mixed Inuit and European ancestry residing in communities in south and central Labrador formed the Labrador Metis Association in the early 1980s under the *Societies Act* of Newfoundland and Labrador in 1986 as a not-for-profit organization. In or about 1998, the name of the Labrador Metis Association was changed to the LMN.
>
> THAT the LMN is Labrador's largest Aboriginal organization, numbering approximately six thousand individuals in twenty-four communities. We are predominately Inuit-Metis, people of mixed European and Aboriginal descent.

The majority of our people are of Inuit descent although a few members have Micmac, Innu and Cree ancestry.

THAT the LMN is a representative organization of the Aboriginal people of South and Central Labrador and is a member of the Congress of Aboriginal Peoples. The LMN and other similar organizations across Canada have been accorded standing in numerous cases before the Courts and have also been acknowledged as having standing on constitutional and self-government issues."

[31] And further at paragraphs 8 to 17 inclusive:

"THAT over 90% of Inuit-Metis hunt, 93% fish for food, 90% collect their own wood, almost 70% trap, and almost all Inuit-Metis harvest berries and other flora in the lands of south and central Labrador in which they live.

THAT based on information in the land claim files of the LMN, which information is notorious and well-known and which I do verily believe to be true, the following are some facts of the history of south and central Labrador, the lands in which the members and constituents of the LMN reside:

a. The first Europeans (leaving aside the Norse near the turn of the millennium arrived in Labrador in the mid-1500's;

b. At the time of European contact in Labrador, Inuit resided on the Quebec North Shore and all the way throughout what is now known as Labrador to Cape Chidley;

c. The British became the only European country asserting sovereignty to Labrador after the Treaty of Paris in 1763. However, no effective exertion of sovereignty occurred until at least the mid-1900's in many parts of Labrador;

d. After the assertion of British sovereignty as a matter of international law in 1763, Governor Palliser entered into a Treaty relationship with the Inuit of south and central Labrador in 1765;

e. Beginning in the late 1700's, 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 and were the manifestation of the Inuit culture of the south/central Inuit of Labrador;

f. The modern manifestation of the south/central Inuit culture was, and in many places remains, the majority of the population in certain areas of Labrador. They now identify themselves as Inuit-Metis;

g. The Inuit-Metis community in Labrador was acknowledged in the Royal Commission Report on Aboriginal Peoples and was referred to by the Supreme Court of Canada in its decision in *R. v. Powley*.

THAT I am an individual of Inuit descent, currently residing in the community of Happy Valley-Goose Bay, which is located in central Labrador on Lake Melville.

THAT I am a member of the LMN. A photocopy of my membership card, issued by the LMN, is attached as Exhibit "A" to this affidavit.

THAT I am originally from the small fishing village of William's Harbour which is located in south/central Labrador.

THAT my parents were Leonard and Greta Russell. They both lived a traditional Aboriginal lifestyle. During the summers my family moved to the headlands of their summer place in William's Harbour where my father fished salmon and cod commercially. He also hunted seals, seabirds, fished salmon, cod, capelin and herring, and gathered wild berries and greens for food.

THAT in the autumn, usually in late September, my father moved further Northwest up Gilbert's Bay to Rexon Cove, closer to the St. Lewis River. There my family hunted small game such as partridge, rabbits, and porcupine and gathered water and firewood. Normally in November my father travelled inland to the Gilberts River and Blue Hills where he maintained a trap line.

THAT my paternal Great Grandmother was Mary Tuccolk, a full blooded Inuk. She married my Great Grandfather, William Russell, a fisherman who was originally from Wales in approximately 1865. My ancestry is therefore of mixed Inuit and European, similar to the other members of the LMN.

THAT I have lived within my ancestors' traditional Inuit-Metis lifestyle. From the age of 8 onwards, I fished with my father and uncle during the summers. In the Fall and Winter, after school, I hunted partridge and rabbit, trapped fox and mink and cut firewood. At 15, I left William's Harbour to finish High School in Port Hope Simpson. After High School I attended University.

> THAT I have kept closely involved in Metis issues throughout my life. I participated in the original aboriginal food fishery protests during July 1996 at Wilburn Bay in Lake Melville near Happy Valley. Since then, I have also been involved in a variety of Aboriginal rights direct actions relating the Labrador Metis and I am presently employed as a Manager (Human Resources Training) with the LMN."

[32] Trent Parr in is affidavit of May 18, 2005 identifies himself as of Inuit descent. He states at paragraphs 2 to 8 inclusive:

> "THAT I am an individual of Inuit descent, currently residing in the community of Port Hope Simpson, which is located in southern Labrador.
>
> THAT I am a member of the Labrador Metis Nation ("LMN").
>
> THAT I was born in Happy Valley/Goose Bay, which is located in Central Labrador on Lake Melville.
>
> THAT since the age of four, I have resided in Port Hope Simpson.
>
> THAT my parents are William Par and Doren Parr. They have resided, for the majority of their lives, in Port Hope Simpson, Labrador. Both of my parents have lived a traditional Aboriginal lifestyle. For a short period of time, my father fished cod commercially. Both my father and my mother hunted seals, seabirds, fished for various species, hunted small game and gathered firewood.
>
> THAT my ancestry is of mixed Inuit and European, similar to the other members of the LMN.
>
> THAT I have been a member of the LMN since the mind-1980s and have lived within my ancestors' traditional Inuit-Metis lifestyle. I have kept closely involved in Metis issues throughout my life."

[33] Bernard Heard in his affidavit filed with the court as Consent Exhibit #16, November 23, 2005 also identifies as of Inuit descent. He states:

> "THAT I am an individual of Inuit descent, currently residing in the community of Happy Valley-Goose Bay, which is located in central Labrador on Lake Melville.

> THAT I have been a member of the Labrador Metis Nation ("LMN") for approximately nineteen years.
>
> THAT I am the Membership Facilitator for the LMN and to the best of my knowledge and belief there are approximately 6,000 LMN members.

[34] From these affidavits it is apparent that the claim for Metis status is founded on claimed common European/Inuit ancestry. It is also to be noted that with the exception of the Happy Valley-Goose Bay area, the Labrador Metis, who form the Labrador Metis Nation, are distributed all along the south coast and south central regions of Labrador in a number of small settlements and are not confined to a single community of Metis people. This is not surprising since the early lifestyles and the sparce early means of making a living dictated that the population would have dispersed itself along the coastline in small village-type communities. On the island part of the province these communities are referred to as "outports". It is also apparent that the organization representing the Metis is a single entity, "The Labrador Metis Nation." There do not appear to be other separate Metis groups or organizations claiming to represent the Labrador Metis. There was no evidence before me of any conflicting claims and indeed it seems to be generally accepted that the Labrador Metis Nation is the representative body for all those claiming aboriginal Metis status and the only organization to be dealt with on all levels. More will be said on this later.

[35] Dr. J. Garth Taylor, Ph. D. a recognized scholar and consultant in Anthropology and History shares a different view as to the time frame when the Inuit people may have occupied the southern region of Labrador along the coastline south of Hamilton Inlet. He is strongly of the view that this did not happen until very late in the fifteenth century but more probably in the sixteenth and seventeenth centuries. He discounts Dr. Stopp's analysis and conclusions as being based on her reading too much into the existing archaeological evidence. He states in his Supplemental Affidavit at page 8 that:

> "Stopp distinguishes between types of archaeological evidence in support of her conclusions. The first (summarized in Table 2) is material which, in the author's opinion, has "a high probability of being of Inuit origin" and the second (summarized in Table 3) is material which "may be Inuit in origin" (Stopp 2002:84). The "probable" material (Table 2) consists of artifacts, burials, tent rings, stone fox traps, and sod houses that appear to have entrance passageways. These are all features that the author considers similar to known Inuit features

> elsewhere in Labrador. The "possible" material (Table 3) includes sod houses and cobble beach pit caches that "share characteristics with acknowledged Thule or Inuit features north of Hamilton Inlet" but cannot be assigned Inuit affiliation with certainty for various reasons. Included in the latter are the facts that beach pits "lack cultural identifiers" and that sod houses were extensively used by Europeans in the study area.
>
> The author concludes that the archaeological evidence "shows Inuit presence" (ibid. 85) in southern Labrador and, moreover, that "the nature of Inuit presence points to a variety of resource-based, multi-season activities" (ibid. 93). These are not surprising conclusions, since it is widely recognized that Inuit were present on the coast of southern Labrador at various times in the historic period, and that Inuit, like nearly all traditional societies around the world, engaged in "resource-based multi-season activities." However, Stopp reads too much into the existing archaeological evidence when she claims that it "presents a good case for year-round Inuit occupation and land use in southern Labrador and the North Shore between the mid-1500s to the mid-1700s." Since almost none of the material in the "probable" category (Table 2) is dated, and since most of the dated material in the "possible" category (Table 3) is from the late eighteenth and nineteenth centuries, therefore falling outside this time period, it is hard to see how this evidence can be said to indicate Inuit occupation "between the mid-1500s to the mid 1700s."

[36] He further concludes that Dr. Stopps papers, based on her research, were deficient. He stated:

> "As discussed above, these papers display serious shortcomings. Included among these are numerous errors of fact, unjustified inferences or assumptions, and illogical arguments. In short, the papers reviewed here fail to substantiate their author's conclusions about Inuit settlement in southern and central Labrador from the mid-1500s to the mid-1700s."

[37] In the same vein Dr. Taylor takes academic exception to paragraphs 15 - 17 in the Supplemental Affidavit of Carter Russell, of October 21, 2005 wherein Mr. Russell stated:

> "THAT Dr. Taylor expresses the academic opinion in paragraph 16 of his affidavit that the Inuit that met with Governor Palliser were not "Inuit of south and central Labrador" but were summer visitors from northern Labrador. I note that the Report of Dr. Rollman tells me that:

a) The Inuit at the Treaty Conference identified themselves on September 12, 1765 as being from "Arbatok", which the Moravians identify as being Esquimeaux Bay, or what we now call Hamilton Inlet;

b) On September 16, 1765, the Moravians spoke with Inuit from a fjord south of Nisbet Harbour, or what we now call Cape Harrison;

c) On September 21, 1765, the Inuit described a series of places where they lived, each being between 54 and 55 Northern latitude;

d) On October 4, 1765, the southern Inuit said they numbered about 600 people but they did not have any good relations with the Inuit of the north. (This is repeated at page 13 of the Rollman report where the southern Inuit say that they do not have good relations with the Inuit of the northern area (those around 57 degrees North) and "murder occurs always whey they meet".) The Moravians were intent on settling in the Lake Melville area to become acquainted with the Inuit living there;

e) The Moravians prepared maps which show the coast line from south to modern-day Davis Inlet down to an area north of the Strait of Belle Isle. Many of the southern "Arbatok" Inuit lived in the area from Hamilton Inlet/Lake Melville down to the area near Charlottetown. These Inuit live in what the Moravians describe as "houses".

f) The Moravians describe the islands in Hamilton Inlet as being "here in the middle of this entire nation" (page 15).

THAT I understand the report from Dr. Rollman to evidence strongly that the Inuit who entered into Treaty with Governor Palliser in 1765 were Inuit from south and central Labrador and were not, as Dr. Taylor suggests, "summer visitors from northern Labrador".

THAT members of the LMN currently reside in the same geographic area as those Aboriginal persons who were the original signatories of the Treaty relationship entered into between Governor Palliser and the Inuit of south and central Labrador in 1765."

[38] Dr. Taylor's reaction to Carter Russells reference to the report of Dr. Rollman was that:

> "I do not agree with Mr. Carter's interpretation of these sources, as quoted in the previous paragraph. In fact, it is my opinion that this same material supports my original contention that "most (perhaps all) of the Inuit with whom Palliser met during his 1765 visit to southern Labrador were not 'Inuit of south and central Labrador' but were rather summer visitors from northern Labrador."

[39] As well, Dr. Taylor disagreed with the six conclusions drawn by Mr. Carter Russell. It was Dr. Taylor's opinion that:

(a) The Morivians on the 1765 voyage had not been in either the Hopedale or Hamilton Inlet regions and their assumption that "Arbatok" was the Inuit toponym for Hamilton Inlet was incorrect.

(b) The idea that the Inuit lived south of Nisbet Harbour (which is near Cape Makkovik rather than Cape Harrison) was another Moravian assumption based on lack of information.

(c) The latitudes in this case mean absolutely nothing. The Moravians on the 1765 voyage could not know where the Inuit with whom they spoke in Chateau Bay lived during the winter because they had not been able to see a single Inuit winter home by this time.

(d) The term "southern Inuit", used here by Mr. Russell, appears in neither Rollman report nor the original journal of the Moravians.

(e) The Moravian maps of 1765 were completely inaccurate and do not provide credible evidence of Inuit "houses" or any other sign of Inuit occupation on the southeastern coast of Labrador.

(f) This is a misleading statement. It is more likely that the Inuit were referring to the Nain area a "the middle of this entire nation."

[40] In his principal affidavit, filed with the court on October 11, 2005 Dr. Taylor states that the historical information set out in paragraph 9 of Mr. Russell's Affidavits as "notorious and well known" is at odds with both the primary and secondary historical sources on Labrador. He also states at paragraph 8 of his Affidavit:

> "That the assertion in paragraph 9(b) of Mr. Russell's affidavit, that "*At the time of European contact in Labrador, Inuit resided on the Quebec North Shore and*

all the way throughout what is now known as Labrador to Cape Chidley" is not supported by historical evidence."

[41] It was Dr. Taylor's position as set out in paragraph 10 to 12 of his Affidavit that:

"The scholars who have studied the early historical record agree that Inuit arrived much later than Europeans throughout southern Labrador. W.G. Gosling, based on his thorough examination of early documents and maps from the region, reached the following conclusion:

> ....the Eskimos did not frequent southern Labrador and the Straits of Belle Isle at the time of the discovery. I am of opinion that they did not move south until some time after the coast began to be frequented by Basque, French, and English fishermen, and that it was the desire of obtaining iron tools an weapons and other European articles which induced them to do so. This period I place at the end of the sixteenth and early seventeenth centuries.

That the opinion, as put forth by G.W. Gosling, is supported by more recent scholars in this area. In a collection of papers focusing on Inuit presence in south/central Labrador, Charles Martijn makes similar observations:

> The available ethnohistorical evidence examined in this paper suggests that around A.D. 1580 Inuit groups, descendants of the late prehistoric Thule Culture, began to frequent the Strait of Belle Isle region on a seasonal basis. A primary attraction was the presence there of European fishermen from whom they obtained iron objects, small boats and other items through plunder or trade.
>
> That Martijn's estimate of 1580 as the time of historic Inuit arrival in southern Labrador is just two decades earlier than that suggested by Gosling. Aside from this minor variation, both authors agree on the motive for Inuit expeditions to the south. In addition, Martijn makes the important point that, for many years after Inuit began to frequent the south, their visits were of a seasonal nature only. Elsewhere, he illustrates this point with maps which attempt "to summarize the present state of our knowledge regarding Paleo-Eskimo and Neo-Eskimo population movements in southern Quebec-Labrador and Newfoundland." The maps in this series suggest that, prior to about 1630, Inuit forays into the Strait of Belle Isle were carried out on a seasonal basis only and that the Quebec North Shore was occupied by Indian (not Inuit) cultures."

[42] Dr. Taylor as well disagrees with the position put forward by Carter Russell at 9(c) of his affidavit that the British did not exercise any effective exertion of sovereignty until at least the mid-1900's in many parts of Labrador. Dr. Taylor states that this position is contradicted by the documentary evidence and he lays out his own position at paragraph 14 as:

> "That among the facts which would suggest that the British not only asserted but also exerted sovereignty in south and central Labrador are the following:
>
> > i. The British prevented French fishing vessels from operating in Labrador. As early as August 1760, HMS *Antelope*, Captain Webb, chased some French ships to the north coast of Newfoundland and destroyed French fishing stages at Quirpon. Webb subsequently crossed over to the Labrador shore where, for approximately one week, he remained at Chateau Bay, which he renamed York Harbour.
> >
> > ii. Following the signing of the Treaty of Paris in 1763, the governor of Newfoundland, Captain Thomas Graves, was instructed to encourage an English fishery in Labrador and to prevent the French from either fishing or attempting to contact natives there. To assist in this task, the new governor set James Cook to prepare an accurate chart of York Harbour [Chateau Bay], then considered the most suitable base for an English fishery on the Labrador coast.
> >
> > iii. Sir Hugh Palliser, who took over as governor of Newfoundland from 1764 to 1768, assigned one or two ships from his squadron to cruise the coasts during the summer months. As an additional precaution, Palliser ordered that a timber blockhouse, known as York Fort, be built at Chateau Bay in 1766 in order to protect the boats of English fishermen from both American colonials and Inuit. The fort, which remained in operation until 1775, was manned with small garrison of marines throughout the year.
> >
> > iv. In the early 1770s, British government authorities began to expand their knowledge of southern Labrador beyond their former limited area of operations in the Strait of Belle Isle. A major contribution to this end was made by Michael Lane of HMS *Grenville* who, in the summers of 1771 and 1772, surveyed and mapped that portion of the southern coast between Cape Charles and Sandwich Bay under orders from Commodore John Byron, then governor of Newfoundland. In 1773, the new governor, Commodore Molyneux Shuldham, sent a young naval officer, Lt. Roger Curtis, to explore the coast even further to the north. Curtis travelled well

> beyond southern Labrador, visiting the new mission station at Nain, founded by Moravians in 1771, and joining the missionaries in a reconnaissance of the coast as far north as Okak Bay. He subsequently prepared detailed reports of his findings and prepared a rough map of the Labrador Coast for his superiors in Britain."

[43] It is apparent that there is strong disagreement among the scholars and experts as to the precise dates of Inuit presence and or occupation of the southern region of Labrador. A lot of difficulty appears to be around the concept of "occupation". The evidence impies that because the Inuit were transitory in their lifestyles, following the seasonal changes and food sources, theirs was not for the most part a settled lifestyle in large communities. Prior to that however, it seems likely that the Inuit people had the ability, the technology, and need to range over great distances all along the coast of Labrador. Dr. Taylor under cross-examination testified that the ancestors of the present day Inuit people were the Thule Eskimo who migrated from Alaska arriving in Labrador about 1400 AD. It was his evidence that the research indicated that these people had visited the Bell Isle area round 1550 and consequently he accepts that it was fair to say that the Inuit were in Hamilton Inlet around 1500 AD. However, Dr. Taylor states in his evidence that it was not until around 1580 that there was any evidence of Inuit presence in southern Labrador, meaning south of Hamilton Inlet. He testified while there is evidence of Inuit in Southern Labrador, there is no evidence of Inuit belonging to southern Labrador. Barry J. in **Newfoundland (Minister of Government Services and Lands) v. Drew**, 2003 NLSCTD 173 (Nfld. S.C. (T.D.)); (2003) 228 Nfld & P.E.I.R. 1 (Nfld. T.D.) at paragraph 79 also recognized the difference in scholarly opinion as to the date of the arrival of Inuit people in southern Labrador, however, he states that by the early 1500's the Labrador Inuit had migrated as far south as northern Newfoundland. He states:

> "The Labrador Inuit are cultural and racial descendants of Thule people who first arrived on the Labrador coast from Baffin Island and possibly Greenland during the period A.D. 1350-1500. By the early 1500s their southward migration had taken them as far as the Strait of Belle Isle and northern Newfoundland. There is no agreement among scholars as to whether the southward movement of the Inuit was encouraged or interrupted by the presence of Europeans. Up to the mid-1700s the Inuit were seasonally settled on both sides of the Strait of Belle Island and along the shores of the St. Lawrence. Here, they traded baleen and ivory with established French traders and seasonal European fishermen for manufactured items. These encounters were often marked by violence and after the ousting of the French following the Treaty of Paris in 1763 the British sought to keep the

> Inuit confined to the northern regions and have there their seasonal forays. The establishment of forts in southern Labrador by Governor Palliser and his invitation to the Moravian Brethren to establish a mission along the north coast of Labrador were efforts to bring about this desired outcome."

[44] While it may be necessary for certain claims purposes to be able to closely define first contact periods between aboriginal peoples and the European newcomers, it is not always the case that such precise definition is possible or perhaps necessary. Barry J. in **Newfoundland v. Drew** (supra) at paragraph 162 stated that:

> "It is also true that, from an anthropological perspective, contact is more than just a date on a calendar. It is a simple word that expresses the complex concept of cultural adaptation and transformation that occurred over the transitional period known as the "protohistoric". In testimony, Dr. von Gernet defined this as:
>
> .....a transitional period between the time that Europeans first arrived and the time that there is actual sustained face-to-face contact that results in the production of a significant documentary record. A written record."

[45] And at paragraph 168:

> "In addition, the earliest travel accounts offer only vague descriptions of the geography and people, so we really do not know if the "savages" were Beothuk, Mi'kmaq, Abenaki, Iroquois, Montagnais, or, in some cases even Inuit. Dr. von Gernet warned in his testimony.
>
> > There's often a tendency for the 16th century for scholars to try to squeeze out of these documents more than the evidence warrants simply because they are so vague that you can interpret them according to any pet theory that you have, and that tendency, I think, is one that we have to be mindful of when we look at interpretations of this material."

[46] 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. The Supreme Court of Canada in the **Powley** case (supra) clearly recognized this when it stated at paragraph 10 that:

> "Metis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent." (Emphasis added).

[47] And at paragraph 16 and 17:

> "16. The emphasis on prior occupation as the primary justification for the special protection accorded aboriginal rights led the majority in Van der Peet to endorse a pre-contact test for identifying which customs, practices or traditions were integral to a particular aboriginal culture, and therefore entitled to constitutional protection. However, the majority recognized that the pre-contact test might prove inadequate to capture the range of Metis customs, practices or traditions that are entitled to protection, since Metis cultures by definition post-date European contact. For this reason, Lamer C.J.C. explicitly reserved the question of how to define Metis aboriginal rights for another day. He wrote at para. 67:
>
> The history of the Metis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal [page 10] peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is necessarily determinative of the manner in which the aboriginal rights of the Metis are defined. At the time when this Court is presented with a Metis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Metis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Metis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Metis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. (Emphasis added)
>
> 17. As indicated above, the inclusion of the metis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Metis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Metis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Metis in s. 35 represents Canada's commitment to recognize and value the distinctive Metis cultures, which grew up in areas not yet open to colonization, and which the framers of the Constitution Act, 1982 recognized can only survive if the Metis are protected along with other aboriginal communities." (Emphasis added)

[48] It seems to me from the scholarly evidence presented so far, notwithstanding disagreement as to the time that the Inuit people fully occupied southern Labrador,

that 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. Dr. Stopp argues for year-round Inuit occupation during that time while Dr. Taylor can only agree that the northern Inuit belonged north of Hamilton Inlet and only travelled to the south coast for trade with the European fishermen.

[49] 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. Admittedly there does not appear to be a great wave of migration of the Inuit people from north to south. There would have been no major reason for a mass exodus of northern Inuit to the south. It was simply a natural migration. However it can equally be said that during that period neither were the numbers of European fishermen sufficient to gain effective control over the region. The history of that coast at that time recounts numerous aggressive encounters with the Inuit (as well as harmonious encounters) in which the Europeans did not always come out unscathed, and it was well into the mid-1700's before sufficient force was brought to bear on the southern coast of Labrador to accept that European control had begun. During that interval it is highly likely that the seeds of many European fishermen had been implanted into the Inuit culture as happened in all circumstances in Canada where Europeans first encountered the native peoples. I am satisfied therefore on the evidence that there is a high degree of probability that early control between the Europeans and Inuit people resulted in a mixing of the two cultures which continued over the period of British control and which is now manifest in the present day people of southern Labrador who call themselves Metis. These are the Labrador Metis referred to in the Royal Commission on Aboriginal Peoples and the same people referred to by the Supreme Court of Canada in the **Powley** case (supra). In present day Labrador there are two distinct first nations people, the Inuit, and the Innu. As well, there are people of European descent who have no Inuit or Innu ancestry. Then, there are those people who have both Inuit and European ancestry. There are also to a lesser degree people of mixed European and Innu ancestry. The Labrador Metis people of mixed Inuit and European descent represent the people who now call themselves the Labrador Metis Nation (LMN).

[50] The fact that the Labrador Metis people do not occupy a single fixed community should not be surprising considering that the lifestyles of the early Inuit was not one of settlement, but migratory in the sense that the people followed the animals, fish, and plant life on a seasonal basis. The Europeans with whom they eventually mixed also were scattered along the harsh coast of Labrador in small numbers necessary for the prosecution of the fishery. However, in order to survive in the harsh Labrador climate they soon adopted the Inuit means of survival off the land. This resulted in a regional identification of settlement such as the "straits" area of southern Labrador or the "Belle Isle" area or the "South Coast" area. This is not, I would suggest, dissimilar to the Metis concept of community which the Supreme Court of Canada in **Powley** (supra) accepted as having emerged in the upper Great Lakes region, that is, it was regional in nature. Counsel for the Respondent refers the court to **R. v. Jacobs**, [1999] 3 C.N.L.R. 239 (B.C.S.C.) as authority for the position that Aboriginal rights are not portable from one community to another. He quotes Macauly J. of the British Columbia Supreme Court at paragraph 126 of that case as stating that:

> "Nor do I view a test based solely on residency, or domicile, to be sufficient. The sui generis nature of Aboriginal rights connotes an historical connection between the community rights and the territory where the rights were exercised."

[51] In that case an individual who had no connection to a particular aboriginal community was seeking protection from charges under the *Customs Act* as an aboriginal person attached to a local aboriginal community because he lived in the area.

[52] 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.

[53] I find that the use of the word "community" by itself is presumptively restrictive and implies perhaps a single group of people in a single place. This use of the word would make it impossible to deal with determining the rights of any large group of aboriginal people and inject legal frustration into the resolution of their circumstance and result in endless applications before the courts.

[54] Unless specified otherwise, the court in the present case, views the community of Labrador Metis people as those represented by the Labrador Metis originated the south coast of Labrador and who share the same customs, traditions and heritage.

3. Identification of the contemporary rights - bearing community

[55] In **Powley** (supra) at paragraph 23 the Supreme Court of Canada stated that:

> "In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Metis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Metis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Metis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim." (Emphasis added)

[56] And further at paragraph 24:

> "Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community."

[57] Counsel for the Respondent, Province of Newfoundland and Labrador, argues that the Labrador Metis Nation is a political organization and a stakeholder on a political level only and does not constitute a community for constitutional purposes obliging the government of the province to consult with it. He argues that the honour of the Crown requires the Crown to consult with the community, not a political organization and that a corporate body can not represent the aboriginal people. He argues further that for a community of people to fit the Section 35 constitutional reference to Metis people, those people must be represented by a governing body of the community. Such a governing body, he argues, can be a Band Council, or a Council of Elders, or even a person appointed by the community such as a chief, but it can never be a corporate person because the corporation can never be the holder of aboriginal rights and can not be assigned such rights.

[58] In support of this position, Counsel for the Respondent cites McCartney J. of the Ontario Court of Justice (General Division) in **Anishinaabeg of Kabapikotawangag Resource Council Inc. v. Canada (Attorney General)** [1998] O.J. wherein at paragraph 10 of that decision the court in referring to the Supreme Court of Canada's decision in **Delgamuukw v. British Columbia 153** D.L.R. (4th) 193 quotes Lamer C.J. in relation to the assignment of aboriginal rights as:

> "The idea that aboriginal title is sui generis is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to any one other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a license to use and occupy the land and cannot compete on an equal footing with other proprietary interests: see Canadian Pacific Ltd. v. Paul, [1988] 2 S.C.R. 654 at p. 677, 53 D.L.R. (4th) 487.
>
> Another dimension of aboriginal title is its source. It had originally been throught that the source of aboriginal title in Canada was the Royal Proclamation, 1763: see St. Catherine's Milling. However, it is now clear that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant to two different ways, both which illustrate the sui generis nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, Common Law Aboriginal Title (Oxford: Clarendon Press, 1989), at p. 7. Thus, in Guerin, supra, Dickson J. Described aboriginal title, at p. 376, as a legal right derived from the Indians historic occupation and possession of the tribal lands. What makes aboriginal title sui generis is that it arises frorm possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., Aboriginal and Treaty Rights in Canada (Vancouver: U.B.C. Press 1997), 135, at p. 144. This idea has been further developed in Roberts v. Canada, [1989] 1 S.C.R. 322, 57 D.L.R. (4th) 197, whereas this Court unanimously held at p. 340 that aboriginal title predated colonization by the British and survived British claims to sovereignty (also see Guerin, supra, at p. 378). What he suggests is a second source for aboriginal title and relationship between common law and pre-existing systems in aboriginal law.
>
> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective

> right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal titled which is sui generis and distinguishes it from normal property interests."

[59] McCartney J. then concludes that:

> "It is quite evident to me, therefore, considering the above description of this very unique right, that it is and must continue to be a collective right of the aboriginal community which holds it, and cannot be transferred to anyone else, even if the purported transferee were a corporate body purportedly controlled by the aboriginal community."

[60] I fully agree that the aboriginal rights held by an aboriginal community are "sui generis", in that they cannot be bought, or sold or transferred however, in the instant case there is not the slightest indication that the Labrador Metis Nation as a corporate entity had assumed into itself or had been granted any aboriginal rights or privileges that would apply to the Metis community as a whole. Further I am more in agreement with Counsel for the Applicant when he argues that the law of agency applies and that the aboriginal community can be represented by an agent, in this case the Labrador Metis Nation or LMN. I would add however, that in such a circumstance as this, the LMN as agent could not have any interest of its own by way of control or benefit from the inalienable rights of the Metis people. How could it? It is accepted that it is impossible under the laws of this country that aboriginal rights can be transferred to any other entity other than the Crown. Clearly in the instant case the Metis people of Labrador have chosen the LMN as their agent to make their case for them. It is equally clear that there was no transfer of any aboriginal rights to the LMN. I should add that it has not gone unnoticed by the court that at the same time that the Province of Newfoundland and Labrador was preparing its response to the present Metis case before this court it was completing the final stages of a Treaty with the Labrador Inuit. What is remarkable about that Treaty (Consent Exhibit #5) (Labrador Inuit Land Claims Agreement), which was signed on the 22nd day of January 2005, is that the signatories to that Treaty were (1) The Inuit of Labrador as represented by Labrador Inuit Association; (2) Her Majesty the Queen in Right of Newfoundland and Labrador; and (3) Her Majesty the Queen in Right of Canada. Under part 1.1.1 of the Treaty; "Labrador Inuit Association" means the body corporate of that name organized and existing under the "*Corporations Act*". It is further declared in the Inuit Treaty at Part 2.1.1, in relation to the status of the agreement, that:

> "The Agreement is a treaty and a land claims agreement within the meaning of section 25 and 35 of the Constitution Act, 1982."

[61] And further at Part 2.2.2, the Treaty declares that:

> "On the Effective Date, the Nunatsiavut Government becomes the successor of Labrador Inuit Association for purposes of the Agreement."

[62] In fact the Treaty or Land Claims Agreement was ratified and passed into law on June 23, 2005.

[63] In the present case the Application was filed with the court on May 18, 2005.

[64] Counsel for the Respondent reminds the court that there is a very important distinction between Treaty rights and rights under Section 35 of the Constitution. He states that a Treaty is a contract or an agreement and is essentially whatever the parties agree that it is. I understand the distinction, however the Inuit Treaty or contract was the end result of a long period of negotiations and consultations involving the constitutional rights of the Inuit people as protected by Section 35 of the *Constitution Act*, 1982. The Treaty was the result of the constitutional means to get there. The Preamble to the Labrador Inuit Land Claims Agreement (Treaty) involves the *Constitution Act, 1982* as affirmation of the rights upon which the Treaty is based. It states:

> "WITNESSES THAT WHEREAS:
>
> 1. Inuit claim aboriginal rights in and to the Labrador Inuit Land Claims Area based on their traditional and current use and occupancy of the lands, waters and sea ice of the Labrador Inuit Land Claims Area in accordance with their own customs and traditions;
>
> 2. Inuit are an aboriginal people of Canada;
>
> 3. Inuit have never entered into a treaty or land claims agreement with the Crown;
>
> 4. The *Constitution Act*, 1982 recognizes and affirms the existing aboriginal and treaty rights of the aboriginal peoples of Canada, and "treaty rights"

> includes rights that may be acquired by way of land claims agreements; and
>
> 5. The Agreement sets out principles for the establishment of a free and democratic government for Inuit;....

[65] As I referred to above clause 2.1.1 treats the agreement as a Treaty under the *Constitution Act, 1982.*

[66] The process underway in relation to the recognition of Aboriginal rights for the Labrador Metis Nation seems to be following the same general format as that which was finalized by the Inuit Treaty.

[67] It is not the treaty or contract or any other agreement that is the issue in the instant case but whether or not the Labrador Metis people potentially have a legitimate claim of the right to be consulted about conduct by the Government of Newfoundland and Labrador that might adversely affect them.

[68] It seems to me therefore that for the Crown to have been engaged in complex negotiations on a Constitutional level concerning aboriginal rights issues with a corporate person representing the Inuit people on the one hand and now take the position that it is improper to do so when dealing with the Labrador Metis people on the other hand is simply confusing and not in keeping with the high principled honour of the Crown.

[69] If I were to agree with the Crown on this issue, that is, that it is impossible for an aboriginal people to have representation by a corporate person as agent then I would have to conclude that the Labrador Inuit Land Clams Agreement can be challenged on that basis since it was signed not by any governing body of the Inuit community, or council of elders, or chief, but by the incorporated Labrador Inuit Association or LIA.

[70] Clearly the Government of Canada and the Government of Newfoundland and Labrador as representatives of the Queen treated the LIA as the agent for and indeed representing the Inuit people of Labrador. I would think that they are 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.

In any event the named Plaintiffs include Carter Russell in his own right as well as the Labrador Metis Nation as a Corporate person.

[71] The affidavits of Todd Russell, Carter Russell, Trent Parr, and Bernard Heard, are representative of the larger community of people who call themselves Labrador Metis. They in effect state that they can trace their ancestry without challenge to the early European settlers of Labrador who co-habituated with the Inuit native people there at that time. As was stated earlier these early settler/Inuit families lived along the coastline of Labrador but migrated with the land and sea animals to survive, combining the talents and skills of both the Inuit and European cultures. They stated that they hunted both sea and land animals and that they trapped the interior regions of Labrador. As well, they state that they foraged on the land for its vegetation and berries. These assertions are not seriously in dispute. In **Powley** (supra) at paragraph 10 the Supreme Court of Canada recognized the evolutionary development of a new Aboriginal culture when it stated:

> "Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, [page8] distinct Metis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. Economics played a major role in this process. The special qualities and skills of the Metis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures ..... As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Metis people contributed massively to European penetration of North America."

[72] From the above 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. While more difficult to define, this land use may have

extended further inland than just the coastal areas, using the land and its resources in the same manner as their ancestors. This does not mean that the Metis people have remained static or trapped in the primitive cultural ways of the early period. They have now evolved into the modern era and into a multicultural society with all of the joys and sorrows that such evolution brings. However, the Labrador Metis people state that can identify themselves and their origin and the communities from which they came and to a large degree still inhabit. This does not mean they have forfeited any traditional aboriginal rights. These communities are traditionally found all along the south coast of Labrador from Hamilton Inlet to Blanc Sablon. As well, the more recently developed communities in the Upper Lake Melville area and central Labrador are claimed by the Labrador Metis Nation as being within their land claims area. More evidence is needed however, in relation to the central regions of Labrador before the same case can be made as applies to the traditional coastal regions.

[73] Lamer C.J.C. in **R. v Van der Peet** (supra) at paragraph 64 affirmed this evolutionary position where he stated:

> "The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow, supra*, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time. The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, traditions and customs protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights."

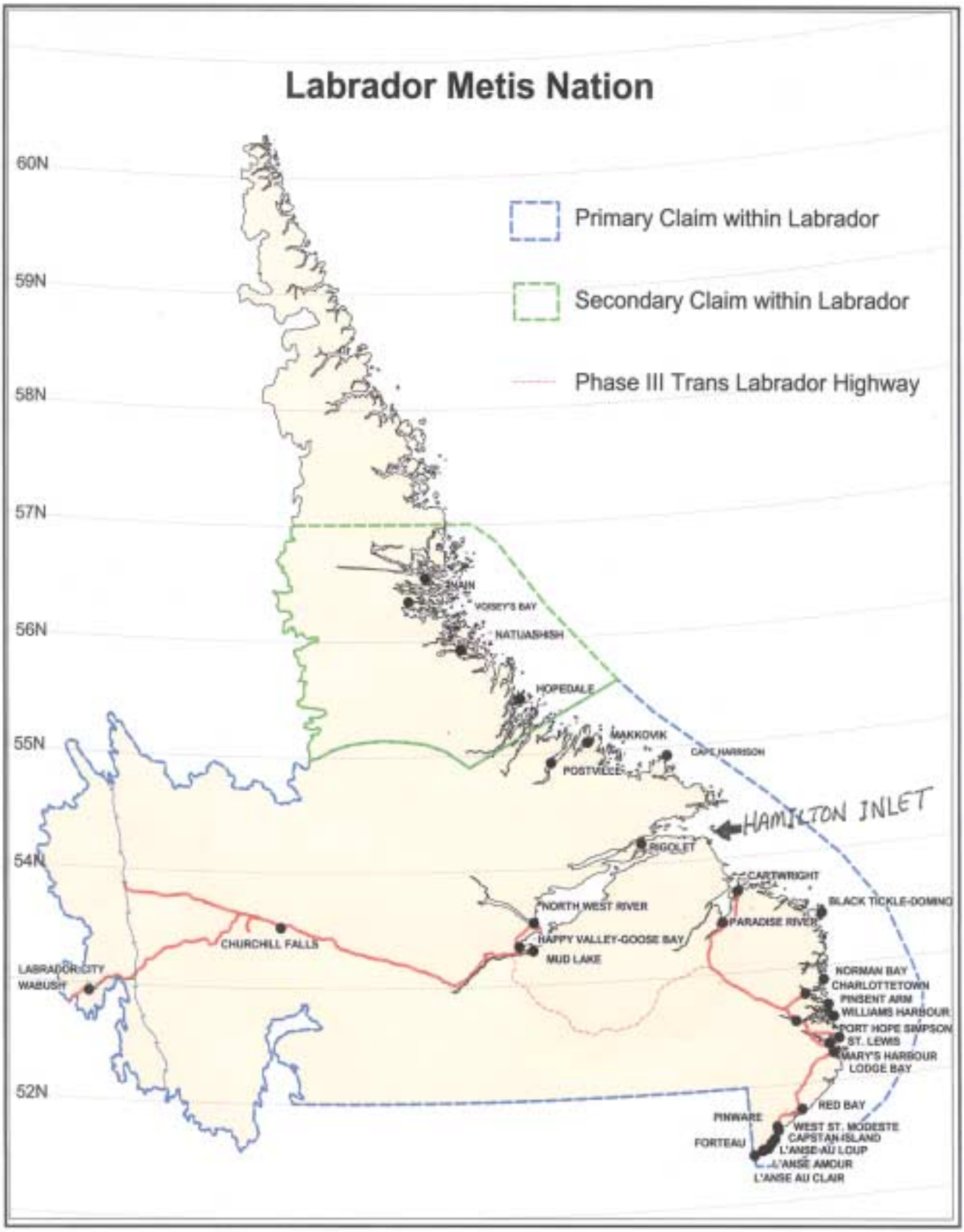
4. Verification of the claimants membership in the relevant contemporary community

[74] From the previous analysis it can be said that there is a high degree of probability that the ancestral people of those people who call themselves Labrador Metis were of Inuit origin. It is also significant to note that there are no other groups or communities other than those represented by the Labrador Metis Nation

who are claiming Metis aboriginal status. I remind myself here that I am not being asked to make a definitive finding that the people who are members of the Labrador Metis Nation are Aboriginal people under Section 35 of the *Constitution Act*, 1982. I can say however that there is a high degree of probability that this will happen when an appropriate occasion arises for the matter to be decided.

[75] The communities which have been identified as Metis communities are set out graphically in the following map of Labrador showing the area claimed by the Labrador Metis Nation. This map was entered into evidence as Consent Exhibit #7. I have indicated Hamilton Inlet by an arrow. It is the position of the Labrador Metis Nation and Carter Russell that all communities south of Hamilton Inlet or approximately 54˚N Latitude form part of the overall claimed Labrador Metis lands.

[76] In the case before this court the Applicant, Carter Russell, in his Affidavit filed on May 18, 2005 and referred to earlier in this decision referred to his



Aboriginal ancestry. 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, but it is not for this court to make a definitive ruling on that matter.

[77] Also, as I referred to earlier and repeat here for the purpose of clarity, Mr. Carter Russell also stated at paragraph 8 of his affidavit that:

> "Over 90 % of Inuit-Metis hunt, 93% fish for food, 90% collect their own wood, almost 70% trap, and almost all Inuit-Metis harvest berries and other flora in the lands of south and central Labrador in which they live."

[78] And at paragraph 5:

> "The LMN is Labrador's largest Aboriginal organization, numbering approximately six thousand individuals in twenty-four communities. We are predominately Inuit-Metis, people of mixed European and Aboriginal descent. The majority of our people are of Inuit descent although a few members have Micmac, Innu and Cree ancestry."

[79] In like manner the Affidavit of Todd Russell states that he was the former President of the Labrador Metis Nation and an Inuit descendant person from Williams Harbour on the south-east coast of Labrador. As well Bernard Heard of Happy Valley-Goose Bay in his Affidavit states that he is of Inuit descent and has been a member of the LMN for approximately nineteen years.

[80] In his Affidavit, Trent Parr also states at paragraphs 2 to 8, which I have referred to earlier, that he can trace his ancestry and practices to his culture back to the beginning of mixed Inuit and European cultures.

[81] I would seem from the Affidavits that there is a high degree of probability that the declarations made therein would qualify the declarents as being of Aboriginal ancestry. These individual affidavits have not been seriously challenged nor have the declarents been cross-examined by the Respondent on their individual ancestry. However, for the same reason, this court will not determine the Aboriginality of these people.

[82] It would not however, be a gigantic leap of credibility to extrapolate from these examples to the majority of those people claiming to be members of the

Labrador Metis Nation and therefore claiming to be Aboriginal people. I recognize however, that for more certainty in determining Aboriginal status in individual cases, more information might be necessary to confirm their Aboriginal status as Metis when argued at another time before the courts.

[83] By accepting the high degree of probability that the Labrador Metis Nation membership is made up of Metis people, for the reasons stated earlier, it is also this court's opinion that the same level of probability links these people to the Inuit people who migrated from the northern coast of Labrador to south of Hamilton Inlet between the mid-sixteenth century and ongoing into the eighteenth century. This is a real link, not some fanciful connection, to the original historic community of mixed Inuit and European people who emerged in the region at that time. The historical and anthropological evidence is strong enough in my opinion to accept this connection.

[84] It has been the affidavit evidence of Carter Russell that since the 1980's the Department of Indian Affairs (Canada) has communicated to the Inuit descendants of Labrador that they must be represented by one or more bodies corporate under Canadian Law before the federal government could enter into any negotiations or agreements with Inuit collectivities in Labrador.

[85] As a result of that, two organizations were formed, the LIA or Labrador Inuit Association, which later signed a Treaty with the Federal and Provincial Crowns, and the LMN or Labrador Metis Nation, comprising what is believed to be all of the Inuit-Metis people in south and central Labrador. There is a collective acceptance by the LMN that it represents all of the Labrador Inuit-Metis people. There is also an accepted understanding that the common aboriginal thread is Inuit. This should not be surprising in light of the fact that no other group of Aboriginal people or organization has challenged this ancestry.

[86] I am satisfied therefore that the Labrador Metis Nation has demonstrated an ancestral connection to the early historic community of mixed Inuit and European peoples that would support any future claim to Aboriginal status.

5. Identification of relevant time frame

[87] I have considered this extensively at the beginning of this decision and need not repeat it again except to say that 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. It is not necessary in the case of Metis status as an Aboriginal people to find their customs, practices, and distinctiveness in the pre-contact period. If that were true, Metis by definition would be meaningless.

[88] In **Powley** (surpa) the Supreme Court of Canada stated at paragraph 38 that:

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

[89] In the case of the Labrador Metis notwithstanding the difference of opinion from the academic scholars, and as I state earlier, the period from first contact around 1550 A.D. to 1760 A.D. when the British maintained effective control over the southern Labrador region is generally accepted as the period of the mixing of the two cultures and establishment of the new aboriginal Metis people of Labrador.

6. Determination of whether the practice is integral to the claimants distinctive culture

[90] This is not a case of subsistence hunting or fishing rights or indeed the right to the land use per se. The matter before the court is the right of the people of Labrador who claim to be Metis people to have been consulted on the development of a highway across land which they claim as historically theirs. It is the position of the LMN and Carter Russell that the use by the Crown in the construction of the Trans Labrador Highway would potentially adversely affect the rights of the Metis people to hunt, fish, and trap so as to trigger the duty to consult. The evidence is convincing that the customs and traditions of the Metis people as outlined in the affidavits already in evidence 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. This was especially so in relation to the need to hunt and trap; to gather wild berries and other plant life and to obtain wood as fuel and building materials. These practices were argued to be the way of life of the Inuit-Metis people and if disrupted by the construction of a highway as in the case here raises the potential for an interference with Aboriginal rights that are integral to the Metis distinctive culture.

7. Establishment of continuity between the historic practice and the contemporary right asserted

[91] As stated above, in Labrador, the subsistence practices of hunting, trapping, and gathering which reflect back to the earliest times are very much maintained as a way of modern daily life. Labrador is perhaps the last real frontier in North America and its sparce population occupies a small number of villages or communities dispersed along the coastline and in south and central Labrador. It is a well known fact, no doubt because of the remoteness of the area, that the Aboriginal peoples of Labrador are perhaps the last Aboriginal people on the continent to rely as heavily as they do on the traditional lifestyles of subsistence living. There is an almost unbroken and continuous link with the old ways in Labrador and where unnatural physical interference takes place on the land it has the potential to adversely effect the rights of the Aboriginal people. In this case the right to consultation is being challenged.

8. Determination of whether or not the right was extinguished

[92] This is not an issue in the present case. There is no evidence before me of any doctrine of extinguishment applicable to the circumstances of this case.

9. If there is a right, determination of whether there is an infringement

[93] As stated earlier, the right of consultation is grounded in the honour of the Crown to treat the Aboriginal people of Canada with respect and dignity and fairness. It is not necessary for there to be a treaty relationship between the Crown and an Aboriginal people. The duty arrises when there is a potential threat to an Aboriginal right. The recent Supreme Court of Canada decision **Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)** [2005] 3 S.C.R. 388 focused on the Crown's duty to consult. In that case Binnie J. at paragraph 51 stated that:

> "The duty to consult is grounded in the honour of the Crown and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this court as a *treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12, per Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty." (Emphasis added)

[94] And previously at paragraph 33 of the same decision he stated:

> "The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out at paras. 19 and 35:
>
> The honour of the Crown also infuses the processes of treaty making the treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'Kmaq people to secure their peace and friendship....."
>
> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." (Emphasis added)

[95] What knowledge then, did the Provincial Crown in the present case have that would impose on it a duty to consult the claimed Labrador Metis community? Counsel for the Provincial Crown argues that it was not aware of the identity of the

Labrador Metis community, that it lacked legal definition and that the corporate body known as the Labrador Metis Nation could not be the holder of any Aboriginal rights in its own capacity and therefore there was in effect no Aboriginal entity to consult with. I have already dealt with the issue of the LMN as a corporate agent of the Labrador Metis people and will say no more on that matter. However, I cannot accept that the Government of Newfoundland and Labrador was unaware of the role and place in Labrador of the Labrador Metis Nation and the position that it was promoting. The evidence before this court is that there was an ongoing exchange of correspondence between the Government of Newfoundland and Labrador and the Labrador Metis Nation, then the Labrador Metis Association. For example, in the Forestry Agreement of May 31st, 2004 (entered as part of Affidavit of Carter Russell) entered into between the Labrador Metis Nation and the Department of Natural Resources, one of the purposes under section 1 of that agreement was for such an agreement to enable the LMN to provide input into implementation and amendments to the five-year plan for district 19.... and to provide input of their issues and concerns, with respect to forest management in district 20.... As well in that agreement at part 3, it was recognized by the province that the:

> "LMN has a responsibility to it's members to ensure that forestry activities "*...will be carried out in a sustainable manner that ensures conservation thereby protecting our wildlife, natural environment, culture, and traditions for the benefit of present and future generations*."

[96] There was, as well, at 6.7 of that agreement a commitment by the province to consult with the LMN before all public meetings on the meeting content and format in the districts.

[97] While I accept that clause 10, the without prejudice clause, protects the province from any admission on its part as to any Aboriginal rights. It also does nothing to diminish any right asserted by the LMN. It is understandable that the province was unsure of how Aboriginal rights would be determined, however what is certainly apparent from the above agreement is that the parties were fully aware of each other and thus respective roles on the political and cultural stage of this province. Clearly the Government of Newfoundland and Labrador would not enter into such an agreement with the LMN if it was uninformed as to who they were and their cultural objectives.

[98] In his September 24, 2004 letter to Mr. Todd Russell, President of the Labrador Metis Nation (Tab C, Affidavit of Carter Russell) Minister Thomas Rideout, then Minister Responsible for Aboriginal Affairs expressed the existence of a difference of opinion between the Province and LMN as to the test set out in the **Powley** case (supra) for determining who are Metis. What is significant in that letter is the acknowledgement by Mr. Rideout that in relation to enforcement policy under the Department of Natural Resources that "*This policy only applies in Labrador, where most of the LMN's membership resides.*"

[99] It is not necessary that I refer to every piece of correspondence between the LMN and the Government of Newfoundland and Labrador presented to this court as part of the affidavit list. It is clear however, that there are certain beacons of information within the records of the Province which would have given the Province knowledge of the intention of the Labrador Metis to assert an Aboriginal rights claim. For example, Consent Exhibit #8, a Statement of Claim dated November 8, 1991 from the Labrador Metis Association above the signature of David Martin, President and addressed to the Governor General of Canada, the Prime Minister of Canada, and the Minister of Indian and Northern Affairs formally claiming traditional lands in Labrador, was also copied to Premier Clyde Wells. While the form of the document is uncommon, the intent and message is clear. That is, the Labrador Metis Association had served notice of their intention to pursue aboriginal rights to lands in Labrador. This document pre-dated any completion period of either Phase I or Phase II of the Trans Labrador Highway, and was therefore well before the commencement of Phase III.

[100] As well, in the **Powley** case (supra) both the LMN and the Province of Newfoundland and Labrador had intervener status. From that case, which was a test of Metis rights, the Province was once again made aware of the agenda of the LMN. The 1996 Report of the Royal Commission on Aboriginal Peoples made specific references to the Labrador Metis as I referred to earlier. It had received and considered a lengthy submission from the LMN and then stated: "*Although we have less information about the Metis people of Labrador, we believe that they are probably also in a position to exercise the rights and powers of nationhood.*" (Volume 4, chapter 5, par. 1.3). In the affidavit of Stephen Bonnell filed with the court on November 15, 2005 he states that he is a Senior Analyst with the Department of Labrador and Aboriginal Affairs. He also stated that he conducted a search of Government correspondence files pertaining to the Labrador Metis Association and Labrador Metis Nation.

[101] One of the documents he found in the files was a copy of a **Proposal for Operational Funding** submitted by the Labrador Metis Association to the Secretary of State, dated August 1986. In this document one of the objectives was to:

> "Conduct educational and informational workshops with members and potential members to assist them in understanding their rights within the Canadian framework."

[102] Another significant document which was in the files referred to above by Mr. Bonnell was a letter dated February 13, 1992 to Mr. David Martin, President of the Labrador Metis Association from the Federal Minister of Indian Affairs and Northern Development, Tom Siddon. This letter was also copied to The Right Honourable Brian Mulroney and The Honourable Clyde Wells. It can be noted that this letter was received in the Office of the Premier on February 18, 1992. The significance of this letter is that it was a reply to the Statement of Claim of the LMN, President David Martin referred to above and clearly spells out for the benefit of the Labrador Metis Association how to comply with the comprehensive land claims acceptance criteria. Having been copied to and received by the Province would surely have afforded some knowledge of the intentions of the then Labrador Metis Association to exert their Aboriginal rights agenda.

[103] There are many other pieces of correspondence on various issues having been exchanged between the Government of the Province of Newfoundland and Labrador and the Labrador Metis Nation which would indicate an understanding of what was happening on both sides of the issue.

[104] I find it difficult therefore to conclude that the Government of Newfoundland and Labrador did not have real or constructive knowledge of the potential existence of the claim for Aboriginal right or title to lands in Labrador when it commenced Phase III of the Trans Labrador Highway. Clearly it did and consequently I find that the Provincial Crown had a duty to consult the Labrador Metis Nation before commencing construction of Phase III of the Trans Labrador Highway which construction might adversely affect an Aboriginal right as claimed by the Labrador Metis Nation.

[105] Counsel for the Respondent argues that there was in fact ongoing consultation with the Labrador Metis Nation and that the present southern route of Phase III of the Trans Labrador Highway was chosen over the northern route to address the concerns of the Labrador Metis Nation.

[106] I have reviewed all twenty volumes of the Environmental Assessment Registration Document filed with this court and I am not convinced that the present route of Phase III of the Trans Labrador Highway was as a result of any consultation with the Labrador Metis Nation.

[107] In relation to consultation by the Government of Newfoundland and Labrador with the Labrador Metis Nation I can only conclude from the evidence that there was no meaningful consultation. Publication of the government's intent through the media to construct the Trans Labrador Highway and invite general public comment and input is not consultation sufficient to address an Aboriginal rights claim. (Reference Volume 17, **Environmental Assessment Registration** Document).

[108] In **Haida Nation** (supra) McLachlin C.J.C. beginning at paragraph 43 set out the parameters of consultation depending on the strength of an aboriginal claim. She refers to a spectrum where certain cases may fit. She states:

> "At the end of he 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. "'Consultation' in its least 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.
>
> At the other end of the spectrum lie cases where 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 state 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.

Between these 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 interest 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.

Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Mäori* (1998) provides insight:

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed.... (at s. 2.0 of Executive Summary)
>
> ....genuine consultation means a process that involves....
>
> • gathering information to test policy proposals

• putting forward proposals that are not yet finalized

• seeking Mäori opinion on those proposals

• informing Mäori of all relevant information upon which those proposals are based

• not promoting but listening with an open mind to what Mäori have to say

• being prepared to alter the original proposal

• providing feedback both during the consultation process and after the decision-process. (at s. 2.2 of Deciding)

[109] It is not in keeping with the honour of the Crown having, both real and constructive knowledge concerning the potential Labrador Metis Nation claim to not have entered into any level of meaningful consultative process with the people of Labrador who claim to be Metis people as represented by the Labrador Metis Nation. This is even more apparent when the same Provincial Crown in relation to the same Trans Labrador Highway project on October 3, 2002 entered into a detailed and well structured agreement or Memorandum of Understanding with the Innu Nation. That formal document is reproduced at **Volume 2 of the Environmental Assessment Registration** Document at Clause 1 page 2 defines "consult" as:

> "Consult" means to provide:
>
> > a. to the person being consulted, notice of a matter to be decided in sufficient form and detail to allow that person to prepare its views on the matter;
> >
> > b. a reasonable period of time in which the person being consulted may prepare its views on the matter; an opportunity to present its views to the peson obliged to consult;
> >
> > c. full and fair consideration by the person obliged to consult of any views presented; and,
> >
> > d. discussion with the Innu Nation where the views of the Innu Nation are not proposed to be substantially incorporated as well as provision of written reasons if any views are not substantially incorporated.

[110] In response to this MOU the Innu Nation engaged in an ongoing consultation dialogue with the Provincial Crown and rightly so, exercised significant influence on the project at all phases. The Labrador Metis Nation on the other hand are relegated to submitting comment at the invitation of the Province to public general information sessions. Once again that process is not a substitute for meaningful consultation.

[111] I was referred by Counsel for the Respondent Provincial Crown to **Volume 18 of the Environmental Assessment Registration Document** where various officials of the Government of Newfoundland and Labrador involved in the Trans

Labrador Highway Project in memoranda refer to remarks made by the Labrador Metis Nation in relation to fish and fish habitat as supporting the position that the Provincial Crown was in fact engaged in consultation with the Labrador Metis Nation. I do not share the same opinion that these documents constituted consultation.

[112] The reference by Counsel for the Respondent to Tab 6 of that document at page 8 is a memo dated 10 April 2003 from the Environmental Assessment Committee of the Department of Environment of the Province to Minister of the same Department informing the Minister that the Labrador Metis Nation rejects the highway routes based on lack of information. There is nothing in this memo which speaks of any consultation process with the Labrador Metis Nation.

[113] At Tab 7 of the same document is found another memo dated 20 January 2004 from the Environmental Assessment Committee to Minister Tom Orsborne in which at page 12 the author states that:

> "The Labrador Metis Nation advises that they are losing confidence n the entire environmental assessment process...." Again there was no indication that the comments attributed to the LMN were as a result of any consultation process."

[114] At Tab 9 of the same document is found a memo dated 06 May 2004 from the Environmental Assessment Committee to Minister Orsborne wherein at page 4 the author states:

> "The Labrador Metis Nation advises they have previously expressed concerns regarding destruction of fish habitat by installation of abutments at water crossings and the improper installation of culverts. They indicate that Phase III can be expected to repeat the mistakes they suggest occurred on Phase II. <u>They advise as well that, although the supplementary addendum requires the proponent to access traditional ecological knowledge, they have never been consulted by the proponent for information on fish life cycles or habitat in the affected watersheds.</u> They suggest the resulting knowledge gap be addressed prior to acceptance of the Supplementary Addendum." (Emphasis added)

[115] And at page 5 of the same memo:

> "The Department of Labrador and Aboriginal Affairs has advised that <u>Labrador Metis Nation are not a recognized aboriginal group and should be treated as any</u>

> other public interest. Therefore the knowledge gap they propose to exist cannot be addressed in the context of the environmental assessment." (Emphasis added)

[116] I do not agree therefore that these references could imply that there was an consultation process ongoing involving the Labrador Metis Nation. On the contrary it is a clear indication of a rejection of consultation. In fact in looking at the complete volume it is inescapable that the authors of these memos knew that the Labrador Metis Nation were not part of a consultation process. At Tab 1 page 4, Ed Kaufhold writes to Minister Aylward....

> "The Labrador Metis Nation has expressed concern over the proponents lack of consultation with them...."

[117] At Tab 2, page 4 Ed Kaufhold writes to Minister Mercer in relation to caribou populations that the Labrador Metis Nation.....

> "...question where the claimed historic knowledge came from....since they had not been consulted on Metis knowledge of the herd."

[118] At Tab 4, page 4, Ed Kaufhold writes to Minister Mercer that public comments were received from (among others)....

> "...Labrador Metis Nation."

[119] And at Tab 5, page 15, Ed Kaufhold writes to Minister Orsborne in reference to the views of the Labrador Metis Nation that:

> "They indicate the Labrador Metis Nation, as an aboriginal organization, has never been consulted on the presence of a road through traditional territory or what type of road there could be, suggesting this smacks of colonialism. They advise that, if there is to be a highway, they would want a highway that adequately addresses their concerns and that could accrue socio-economic benefits to their people. They indicate that the EIS Addendum should be sent back to the proponent to address their concerns."

[120] I have no difficulty therefore concluding that at no time was the Labrador Metis Nation engaged with the Government of Newfoundland and Labrador in any meaningful consultation process in relation to Phase III of the Trans Labrador Highway.

[121] Having found that there is a high degree of probability that the claim of the Metis people of Labrador will result in their legal recognition as an Aboriginal people and having found that the Provincial Crown had real and constructive knowledge of the potential Labrador Metis Nation claim and having found that by not engaging in meaningful consultation with the LMN, there was an infringement of the right of the Labrador Metis Nation to be consulted.

10. Determination of whether the infringement is justified

[122] Following the directions set out by the Supreme Court of Canada, the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. (Haida Nation at paragraph 33).

[123] And at paragraph 37:

> "There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. 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, as discussed more fully below. 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. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. 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." (Emphasis added)

[124] In the present case there was knowledge of a credible but unproven claim sufficient to trigger a duty to consult and accommodate and the infringement of the right to consultation in this case is not justified.

[125] And further at paragraph 39 of **Haida Nation** (supra) MacLaughlin C.J.C. states:

> "The content of duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted 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 title claimed." (Emphasis added)

[126] From my earlier analysis of the historical and anthropological evidence I am of the opinion that a preliminary assessment of the strengths of the Labrador Metis peoples' claim to Aboriginal status under section 35 of the *Constitution Act*, 1982 leads me to conclude that there is a high degree of probability that they will succeed, especially along the south coastal region of Labrador. What is not as clear from the evidence that was put before me is the northern or central geographical range that is claimed as the territory of the Labrador Metis people. While the claim to these central areas is credible but as yet unproven, without real and convincing evidence of historical land use by the Metis people to the large interior regions of Labrador, that issue is still very much uncertain. However, that was not an issue upon which I was asked to adjudicate and must be left to be argued in its own capacity at a later date when the matter presents itself before the court. Also for the same reasons I am unclear as to the actual and potential harm that is attributed to the construction of the Trans Labrador Highway across lands claimed by the Labrador Metis Nation. The evidence is clear that there were certain problems with the placing of culverts as obstructions to fish and fish habitat and the general intrusion of a permanent major highway across the land and subsequent impact on the traditional hunting and other land use of the Aboriginal people. However, the evidence before me was too general in nature to assess the degree of potential damage and this concern must, as well, wait for another day since it was not a matter upon which I was asked to decide. These are however, very serious matters and ought to have been addressed and no doubt could have been resolved in the same manner as with the Innu people had the required consultative process been effected from the beginning.

[127] With reference to **Haida Nation** (supra) McLaughlin C.J.C. stated at paragraphs 40 to 42:

> "In *Delgamuuku, supra* at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:
>
> > The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when minimum

> acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.
>
> Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be held to the procedural safeguards of natural justice mandated by administrative law.
>
> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para 168), through a meaningful process of consultation. Sharp dealing is not permitted. <u>However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted."</u> (Citations omitted) (Emphasis added)

[128] And further at paragraphs 47 and 48 McLaughlin C.J.C. stated in relation to the consultation process and the real limits on what it means. She states:

> "When the consultation process suggests amendment of the Crown policy, we arrive at the state of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.), at para. 22: " ...the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Dalgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take."

[129] In **Mikisew Cree First Nation** (supra) Binnie J. stated at paragraph:

> "Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along."

[130] In the case before me where there is a credible but unproven claim, the likelihood for recognition of the Labrador Metis people is on the high end of the spectrum and, notwithstanding that the lands claimed and use of the land claimed is still to be determined and the potential for damage or impairment to the claimed rights uncertain, the duty to consult must be on a meaningful level. Once the Trans Labrador Highway (Phase III) is completed its effects on the land and the peoples using the land no matter how serious or insignificant will be permanent. It should be clearly stated however, that the highway will almost certainly have significant positive effects both for the people of the province in general as well as the Aboriginal people of Labrador. However, this is not about "what is good for you." This case is about the right of consultation. I recognize that the LMN claim while credible, is still unproven, however, because of the permanency of any potential damage to the claimed Metis culture and use of the land if the claim is proven, the level of consultation in this case must be at least on the same level as the Provincial Crown saw necessary to implement in their dealings with the Innu Nation. It goes without saying that the Innu People are a recognized Aboriginal people who are still engaged with both the Federal Crown and the Provincial Crown in various claims settlement negotiations in the same Labrador region and which await final settlement. When the Labrador Metis people are recognized as an Aboriginal people they will have the same Constitutional status as any other Aboriginal people and are to be treated accordingly.

[131] While counsel for the Provincial Crown argues that it has a problem in determining with whom it should be consulting; "the difficulty of identifying members of the Metis community must not be exaggerated as a basis for defeating

their rights under the Constitution of Canada." (**R. v. Powley** (supra) paragraph 49)

[132] It is the finding of this court that there is a credible but yet unproven claim by the Labrador people who call themselves Metis with a coincidental high degree of probability that members of the Labrador Metis Nation will be recognized as an Aboriginal people under Section 35 of the *Constitution Act*, 1982.

CONCLUSION:

[133] The Provincial Crown (Government of Newfoundland and Labrador) had and continues to have an ongoing duty to engage in meaningful consultation with the Labrador Metis people as represented by the Labrador Metis Nation. Consequently the failure of the Government of Newfoundland and Labrador to engage in meaningful consultation with the Labrador Metis people as represented by the Labrador Metis Nation is not justified. However, where the Labrador Metis Nation's claim to central Labrador is in this courts opinion historically less defined than to the coastal region of southern Labrador, and the potential or actual harm done is equally uncertain, there is no right to frustrate developmental decisions by the Crown. (Haida Nation supra). The right at this stage is the right to be consulted.

REMEDY:

[134] I am therefore granting the Plaintiff's application for an order that:

> (a) Pursuant to Rule 54.06 of the *Rules of Supreme Court* in the nature of *Certiorari*, I am quashing the decision of the Minister of Transportation and Works, the Honourable Thomas Rideout, dated November 18, 2004, wherein the Minister denied the request of the Plaintiff LMN to:
>
> (i) Obtain a copy of applications for construction permits made by the Department of Transportation and Works or applications from contractors sanctioned by the Department of Transportation and Works for wetland and watercourse crossings pursuant to Phase III of the Trans Labrador Highway; and

(ii) Allow the Plaintiff LMN to both review the comment upon the permit applications and be invited to attend meetings convened to review these applications prior to the issuance of the various permit applications;

[135] And further I am granting the Plaintiff's application for an order that:

(b) Pursuant to Rule 54.06 of the *Rules of Supreme Court* in the nature of *Certiorari* I am quashing the decision of the Minister of Environment and Conversation, the Honourable Tom Osborne, dated November 18, 2004, wherein the Minister denied the request of the Plaintiff LMN to:

(i) Obtain a copy of the applications for construction permits made by the Department of Environment and Conservation or applications from contractors sanctioned by the Department of Environment and Conservation for wetland and watercourse crossings pursuant to Phase III of the Trans Labrador Highway; and

(ii) Allow the Plaintiff LMN to both review and comment upon the permit applications and be invited to attend meetings convened to review these applications prior to the issuance of the various permit applications;

[136] And further I am ordering the costs of this proceeding be awarded to the Plaintiffs.

[137] And further I am ordering the Government of Newfoundland and Labrador to immediately commence meaningful consultation with the Labrador Metis Nation in relation to Phase III of the Trans Labrador Highway.

Robert A. Fowler
JUSTICE