UNRAVELLING THE RIDDLES
OF
MÉTIS DEFINITION

by

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1. **a) Objective**

   This paper has been written at the request of Senator Thelma Chalifoux. The objective is to explain, for the general reader, a number of facts, issues, and principles which should assist the reader in gaining an understanding of the debate over the meaning of “Metis” in Canada.

   We conclude with the observation that the debate is centred around a 1982 Constitutional provision, that only the courts can decide the meaning of the Constitution, and therefore the meaning of "Metis" in s. 35 is currently an open question. We show that whatever meaning is adopted will not be based solely on the idea of 'mixed-ancestry' and self-declaration alone, and we offer a tentative description of the kinds of groups that may have a legal claim to Metis identity.

**b) The Riddles of Metis definition**

   It was late afternoon on January 30, 1981, and Harry Daniels, the President of the Native Council of Canada, was at a meeting of the Special Parliamentary Committee on the Constitution in the West Block of the Parliament Buildings in Ottawa. Negotiations on the wording of the Aboriginal Rights provision in the Constitutional amendment were not going well. With clenched fist, he told Jean Chretien, then the Minister of Justice negotiating the Aboriginal rights provisions in the Constitution of Canada, ‘then I mobilize my people; that is the only thing we’ll accept!’

   What was it that got the famously genial Metis leader so upset?

   It was the refusal of his demand that the 'Metis' be included in the new section that was to recognize and affirm ‘the aboriginal and treaty rights of the Aboriginal peoples of Canada.’ We all now know that Mr. Daniels succeeded; Prime Minister Trudeau accepted what Mr. Daniels insisted upon, and now section 35 (2) of the Constitution Act 1982 states that the ‘aboriginal peoples of Canada includes the Indian, Inuit and Metis peoples’.

   What was an obvious political victory, however, has many twists that
were not clear to everyone at the time, and that dog debates today amongst
the public, and within Metis communities and political organizations. Who
are these Metis people who got recognized and affirmed in the Constitution,
along with their rights? And what does this new 'recognition and
affirmation' mean? What are these 'existing aboriginal and treaty rights'
that got in s. 35? These are all important questions to unravel the riddle of
'Metis' definition for purposes of s. 35.

And that is the first important point that deserves emphasis right
away. A definition of 'Metis' for purposes of s. 35 is only good for that
purpose. It does not attempt to say anything about the question of defining
'Metis' for other social or political purposes. For example, Metis political
representative organizations are free to decide who will be a member of
their organization without regard to the legal definition of 'Metis' in s.35, or
anywhere else, for that matter. Whether to do so or not, would be an
important political issue, but it is a task that must be clearly distinguished
from the task of defining the "Metis" for Constitutional purposes. This, only
the courts can do.

Another example can be given. Often an individual has been heard to
state at a meeting of a Metis organization: 'I am a Metis, and I don't need a
card to prove it!' That is correct. Anyone can assert that he or she is a
Metis for his own purposes. But if an organization is formed, and it decides
to set some membership rules about who can belong to the organization,
then fairness demands that everyone who wants to join the organization
must comply with the membership rules. These are voluntary organizations,
and no one is forced to join.

So far we have seen that various actors are entitled to define 'Metis'
in accordance with their own preferences or requirements, without asking
permission from anyone, or from the courts. Individuals can assert or
declare their identity for their own reasons; volunteer political
organizations are free to decide their membership rules. But only the
courts have the legal authority to interpret the meaning of every word in
the Constitution, including the word "Metis" in s. 35.

An important point that arises here, apart from the legal issue, is that
a question of definition, like "Metis", only becomes important when it is in
dispute. Disputes will only arise when there is a contest over something. In
Canada today, there is much dispute about the meaning of "Metis", but
mainly over the question of who has 'aboriginal and treaty rights'. No one
really cares much, in the abstract, about whether a recent immigrant from
Scandinavia or Uzbekistan calls himself a Metis, but many will care if he
asks anyone to recognize his self-declaration of identity, because they will
worry that the contest over newly recognized legal rights in s.35 might be
resolved in a way that would recognize 'self-declaration' as a sufficient
factor to identify a 'Metis' who is entitled to whatever rights are
recognized in s. 35.

We are able to state that the question of who is a Metis only matters
whenever a person who declares that he or she is a Metis expects someone
else to care about that self-declaration. And many people will care about
the legal question of entitlement to Metis rights. Of course, this feeling of
ownership about those rights is not necessarily selfish or motivated by any
but the loftiest ideals. The question of personal and group identity is itself
a very important thing over which people will fight. So even if the only thing
that s. 35 protected was some official right to call oneself "Metis" and to
have some form of official recognition of that right, with nothing more, we
suspect there would still be a dispute over Metis definition.

That leads us to make the point that there was a time when things
were different. There was a time in the second half of the 19th century,
when people calling themselves 'Metis', and 'the New Nation', were
recognized as such. Riel's people, as they can be called, were recognized
largely because of what they did. And since what they did is battle
intruders who came into their country, they were able to 'self-identify' as
Metis by carrying a rifle and pointing it in the direction of an intruder. And
recognition by Canada was swift and official; the Canadian and British
regulars and militia recognized the Metis without hesitation, returning fire. Things are different now. The question is to identify the historic nation whose rights are recognized in the Constitution, and its members, and the question will be resolved in the courts, and not on the battlefield. The political battlefield did not produce an answer during the negotiations from 1983 until 1992, and now the courts seem to most people to be the last resort to wage the contest over the meaning of a word that means so much.

It is difficult to decide where to begin in tackling such a complex and emotive issue as the definition of a ‘people’ and its most fundamental rights. We start by listing a number of propositions that allow us to develop a number of points and lead us to some helpful observations and conclusions. This is the riddle of Metis definition.

1. The Western Metis Nation played a prominent role in Western history, and was widely recognized as ‘a new people’, by the Aboriginal peoples and by the Government of Canada.

2. In 1982, the Constitution of Canada was amended, and the ‘Metis people’ was included as one of the ‘aboriginal peoples of Canada’ with recognized rights. The “Metis people” was not defined; nor were their rights defined. The same is true for the ‘Indians’ and the ‘Inuit’, the other aboriginal peoples mentioned in s.35.

3. Many ‘Indians’ are recognized as such by federal law, but the Indian Act recognizes only the ones who are accepted by the government as having the right to live on ‘reserves’ that the Government has set aside for Indians to live on. Treaty nations’ own views of their membership has never featured in the Indian Act definition of ‘Indians’ or of ‘Indian Bands’, who now call themselves ‘First Nations’.

4. There are many other Indians, who are also included in s.35, but since they are not accepted by the Indian Act, they are sometimes called ‘non-status’ Indians. Many have joined Metis organizations, and many were
5. Metis organizations have provided many 'non-status' Indians, who
can not join recognized 'Indian Bands', an opportunity to fight for their
rights against the government. In the result, Metis organizations have
members who fit into the "Metis" category of s. 35, and many other
members who fit in the category of "Indians" in s. 35.

6. It is obvious then, that the judicial resolution of the legal
definition of "Metis" will have a significant effect on the members of
these organizations. People who see an advantage in shifting their identity,
will do so when the opportunity arises. This process happened when the
federal government changed its definition of 'Indians' in 1985. Many people
who previously called themselves "Metis" shifted their identity and adopted
a new 'Indian' identity according to the Indian Act. This is what is meant
when it is said that a legal identity is seen as something worth fighting for;
it is seen as a resource with value.

7. In the same way, many non-Aboriginal people who did not grow up as
Metis, or in Metis communities, have, or will begin, to shift their identity if
they believe that a Metis identity is worth having.

8. In some places in Canada, some Aboriginal people, who have not
been accepted as Indian or Inuit by the Government, or by recognized
'Indian' or 'Inuit' organizations, have shifted their identities and call
themselves "Metis" as a tool to fight for their claims. The newly labelled
'Labrador Metis Nation' is a well-known example of a situation where no one
claims Metis ancestry, but many claim their own contemporary Metis
identity.

9. The courts are slowly defining the rights of the Metis that were
recognized by the Constitution as they decide cases brought before them.
It is in this process of defining legal rights that "Metis" will be defined by
the courts for legal purposes.

10. The uncertainty about Metis rights is important: Metis rights,
even undefined ones, seem, to many people, to be something worth fighting
over, and so the question of "Metis" identity for s. 35 purposes is contested not only in courts but also in the political arena.

11. One task in this paper is to explain some of the most important ideas, institutions, and practices that help to understand the riddles behind the definition of "Metis".

12. A second task is to identify some features of what the courts might determine to be Metis rights-bearing communities, and to explain that it is probably only persons who belong to such communities who will be recognized as "Metis" for the purposes of s. 35.

2. The 'mestizo' factor in the Canadian frontier

Whenever groups of different people meet over a period of time, children result who have parents from both groups. This is neither unique nor unusual. Neither, contrary to much bad humour about 'Metis origins', does the fact that a child is born to parents from two different ethnic groups, mean that the child becomes, by some transcendental magic, a member of a third ethnic group, an automatic ingrate who, at birth, rejects the identity and culture of both parents. Yet, this nonsense is exactly what the confused anecdote about 'the first Metis child was born nine months after white people landed in America' suggests. More than that, the nonsensical idea may belong in the category of racist thinking that subscribes to the notion that Aboriginal people are less than human, and therefore, a child of an Aboriginal person, when one parent is from a human group, acquires unique characteristics, and deserves to be identified by a special label, a 'Half-Breed', one who is only half human. This racist thinking of the 19th century encouraged 'breeding out' the genes of Aboriginal ancestry, and spawned a ridiculous vocabulary fit for animal husbandry, including 'quadroon' and 'octoroon', reflecting the myth of portions of 'blood' tainted by Aboriginal biological inheritance.

The common sense, and not the nonsense, is that when the parents come from different cultures or ethnic groups, the children usually grow up
in the mother’s or the father’s culture. It is within the culture of the
community in which she grows up that the child acquires a sense of self, and
a sense of belonging. ‘Blood’, or ethnic membership by birth, is viewed as a
very important factor in making up the fictive kinship that binds ethnic
communities, and the parent from the local community in which the child
resides will confer that ethnic identity and status upon the child, and the
child will be accepted as such by the community. Blood and belonging in this
sense are powerful associates.

We can conclude on the basis of observation of these social
phenomena, that the identity of people with ‘mixed-ancestry’ can not be
established by the fact of ‘mixed-ancestry’ alone, what we call the ‘mestizo’
factor. It is an unremarkable feature common in all exogamous communities,
in which members marry outsiders.

We can now apply these ideas to the facts of Canadian frontier
history, that is, the history of contact between intruders into the ancient
homelands of the Aboriginal peoples. (Aboriginal is made up of two words
from Latin, ‘ab’, which means ‘from’, and ‘origine’ which means ‘the beginning’)
The courts will establish a date that will be decide legally what is the
relevant beginning. We shall return to this topic below.

In the eastern parts of Canada, when European intruders first
established themselves, there were obviously Aboriginal communities in
which any offspring of a ‘mixed union’ could grow up and nurture a sense of
identity and belonging. These individuals were ‘Indians’, with mixed
parentage.

In some places there were, initially, forts, and later, towns and cities,
and the child could also be brought up in the European place of residence of
the one parent, probably the father, and grow up and identify as a European
or French-Canadian. These individuals were ethnic Europeans or ‘pre-
Canadians’ until 1867, with mixed parentage.

Now, when we throw in the added feature of time, we see an
interesting human phenomenon in places where the frontier, or the place at
which the institutions of the intruders meet the institutions of the local
indigenous people. Over the space of time, when the frontier remains in the
same geographic place, the institutions and cultures of the two will mix and
match. Each culture will borrow from the other. The American folk singer,
Woody Guthrie, described the process of cultural borrowing this way,
'Plagiarism is basic to all culture'. And of course, the individual members of
the two communities will intermarry, so there will be 'blood relations'
established.

So we can see that the mere fact that some colonial families might
form communities over time, and borrow some of the cultural practices and
institutions of the local folks, the ones who have been here 'Ab-origine',
does not make the 'frontier families', or their communities, part of the
Aboriginal world. And so it is around the former colonial world, in all the
countries where intruders from somewhere else have in time taken over
political control and now govern the Nation-States in which the indigenous
peoples find themselves as enclave populations. A great proportion of Latin
America is biologically 'mestizo'; a lessor proportion identifies itself, and is
recognized as, part of the indigenous world. As a matter of human
experience, we find that the 'mestizo' factor does not create an Aboriginal
people. As a matter of moral or social theory, we find nothing in the mestizo
factor as such, which is worthy of the protection of the law of the
Constitution. In fact, the Charter of Rights and Freedoms requires that the
law not discriminate on the basis of 'race' or 'ethnic origin'.

Below, we shall examine what the legal tests for proof of Metis rights
might be, in anticipation that the definition of "Metis" will depend upon the
nature of the rights that are 'found' by the judicial process, but for the
present we return to what we have called 'frontier families'.¹ What we see
now is that there is a difference between frontier families who plagiarize
some of the lifestyle of the Indians, just as the Indians plagiarize some of
the frontiersmen's lifestyle, and that the law will have to set a test to
establish the difference.
The idea of a 'new nation' born in a frontier situation that is part of the indigenous world is unique to Canada, although there are frontier communities in many places, and the 'mestizos' make up a large part of the population of Latin American countries. We shall review the history of Canada below to get an insight into how a distinct people arose, apart from the ordinary process of 'ethnogenesis' or ethnic community formation that takes place in frontier situations, and came to be seen as an Aboriginal people.

We have seen, too, that a person's ethnic identity is derived from the group or community to which the person belongs. On this view a Metis is a person who belongs to a Metis community; such a person may or may not be descended entirely from Metis parents. Furthermore, we have seen that a Metis might be a person who identifies personally with an ethnic group made up of like persons. This is not enough to conclude, however, that all such persons are members of the "Metis" people with rights recognized in s.35.

We have already used some words, such as 'ethnic group', that can mean different things to different people. The story of the Metis people, and the task of defining who are the Metis for s. 35 purposes, are not only complex but politically contentious. By this, we mean that different people have different views on the matter, and hold these views with deep conviction. Accordingly, we will now examine a few conceptual tools that will help us to explain the issues with as much clarity as the subject matter permits. These concepts reside in specialized words and languages which we now examine.

3. Ideas and words that help explain identity

The idea of 'race'

Biological meaning debunked

We can rely on the following extract to make the point that there is
no legitimate basis for viewing 'race' as a biological concept.\textsuperscript{2}

'The concept of race as a biologically distinctive category was
developed by northern Europeans who for much of their histories had
been largely isolated from contact with people who differed from
them physically or culturally.

... The idea of race was not developed from close scientific observations
of all human beings.

... By the late nineteenth century numerous European and U.S. scientists
and popular writers were systematically downgrading all peoples not of
northern European origin, ...'

The basic tenet of racist thinking is that physical differences such as
skin color or nose shape are intrinsically and unalterably tied to
meaningful differentials in basic intelligence or 'civilization'.

The following view of a reverend Minister of the Church in the 19\textsuperscript{th}
century illustrates this racist thinking:

'My criterion for distinguishing a halfbreed (sic) from an Indian is not
colour, hair or morals, for these all fail in pointing out your man at
times. I take the nostrils. The pure Indian, whose blood has never
been polluted by Europeans, has a large distended nostril, all of those
who have any portion of European blood, have their nostrils
contracted in proportion to their approximation to Europeans.\textsuperscript{3}

The authors just cited prior to this extract, continue their
explanation as follows:

'Indeed, there is no distinctive biological reality called 'race' that can
be determined by objective scientific procedures. The social, medical,
and physical sciences have demonstrated this fact.

... Human populations singled out as 'races' are simply groups with visible
differences that Europeans and European Americans have decided to
emphasize as important in their social, economic, and political
relations.' [at 57]
This should be sufficient to bury the idea that Metis people are a biological species with biologically determined characteristics. Regrettably, however, the language of some judges indicates that racist notions of Metis identity persist and are not likely to be absent from ultimate legal determinations of Metis rights and identity. In the Powley case, Mr. Justice Sharpe of the Ontario Court of Appeal, made his notorious 'Metis strain' remarks, labelling Metis people as if they were biological specimens; 'Unions between Scottish employees of the Hudson's Bay Company and Native women produced another strain of Metis children'. In the Sawridge Band case, Mr Justice Muldoon of the Federal Court made such shocking and gratuitous remarks about Metis people that they are not reproduced here, and ought not to be considered as having been uttered judicially, but as simply expressions of the judge's personal view.

We conclude this discussion of the biological concept of 'race' with the following conclusion of the leading 20th century author on the subject of the race myth:

'Since the meaning of a word is the action it produces, this was racism.'

'Social meaning has a political function:

Section 15 of the Charter of Rights and Freedoms of Canada, includes the concept of 'race'; it must have a legal meaning. A legal meaning would have to be defensible in accordance with morally justifiable standards. Social scientists argue that 'race' has a social meaning, which is used for political purposes.

"Today social scientists view race not as a given biological reality but as a socially constructed reality. Sociologist Oliver C. Cox, one of the first to underscore this perspective, defined race as "any people who are distinguished, or consider themselves distinguished, in social relations with other peoples, by their physical characteristics" From the social-definition perspective, characteristics such as skin color have no self-evident meaning; rather, they have social meaning. ...[at 58]
So, the 'Indian' and 'Metis' or 'mixed-blood' categories, as racial
categories, are social constructs created by Canadians, and by British
colonists before them. The Supreme Court of Canada has interpreted s.
91(24), a provision of the 1867 Constitution giving authority to the federal
Parliament to make laws about 'Indians' and 'Indian lands' a racial meaning.
In this way, the diversity of 'Indian' or 'Aboriginal' societies was eliminated
in the mind of the Canadians, and in their policies, treating one and all as
fungible items in a surreal world of imaginary 'Indians' all fitting the same
mould.

**Ethnic identity and 'race'**

It is convenient to use brief extracts from the experts to explain the
relationship between these two concepts, which will help us with our
explanations later.¹⁷

'... ethnicity [is] a subjective sense of loyalty based on imagined
origins or parentage rather than something to be measured by objectively
present cultural criteria or historical facts.'

And how is 'ethnicity' related to the social concept of 'race'? Again, we
cite the views of experts:

'In Banton's view, race refers to the categorization of people, while
ethnicity has to do with group identification. He argues that ethnicity is
generally more concerned with the identification of "us", while racism is
more oriented to the categorization of 'them'. However, ethnicity can
assume many forms, and since ethnic ideologies tend to stress common
descent among their members, the distinction between race and ethnicity is
a problematic one, even if Banton's distinction between groups and
categories can be useful. I shall not, therefore, distinguish between race
relations and ethnicity. Ideas of 'race' may or may not form part of ethnic
ideologies, and their presence or absence does not seem to be a decisive
factor in interethnic relations.'

'Etnogenesis' as community formation
'Ethnogenesis' was used by the Ontario Court of Appeal recently in the Powley case cited earlier, to describe the evolution of a Metis community distinct from the local Indian community. The above discussion was intended to show that 'ethnogenesis' is a process of community formation. By itself, it only shows that people identity themselves as members of a group or community. Putting the label on a group of people is, by itself, not sufficient to categorize the new ethnicity as belonging to the Aboriginal world.

'Nation'

Although there would be no agreement on the precise meaning, a 'nation' is generally understood today to mean the entire citizen body of a State. All 'nationals' of the State form the nation. In each State there is one nation, and this leads to the common designation of 'Nation-States', such as the States that are members of the United Nations. This approach views the State's objective as the creation of a Nation. In this sense, Canada's politicians, and some philosophers and others, try to describe what makes up Canada as a 'nation'. Within one State and one Nation, in this sense, there can be included a number of 'peoples' large and small. In this usage, the 'aboriginal peoples of Canada' are sub-State groups within the Nation.

'State'

The State is the political structure or apparatus that governs the nation, in the sense of the words used above.

'people'

A 'people' is hard to define, but there would seem to be two essential elements, one subjective and one objective. First, subjectively, a people is both entitled and required to identify itself as such; this is a present state of mind that characterizes the group. The subjective element expresses the will of the people to live together and to continue common traditions.

The objective element is that there has to exist an ethnic group linked by common history. The rise of a 'people' is viewed as a process that takes time, that develops by trial and error in a crucible for the ethnic
identity. In time, or in space, the group’s identity may disappear or mutate. As one scholar explained it, ‘peoplehood’ is cemented by shared memories of common suffering.\textsuperscript{11} People can come together in one space for a time, for a temporary purpose, lacking common traditions and not be categorized as a people. A common example cited is the tens of thousands who attend a football game.\textsuperscript{12}

A ‘people’ enjoys the right of self-determination at international law, and Canada, as all Nation-States who are members of the United Nations, have a legal duty to recognize and protect this right, including the equal right of self-determination of all Aboriginal peoples.

S.35 adopts the term ‘peoples’ in referring to the groups in which are vested aboriginal and treaty rights, and we shall focus on this language later on. For the moment, we would like to introduce the concept that a ‘people’ has a right to define its membership. Since a people must express its collective will to maintain its historic existence as such, it follows that a people must itself describe the ambit of its common existence, the boundary of its collective being. There is no room to argue that an outside agency, whether a State or another people, has a right to define the existence of a people by decree. It also follows that an individual can not ‘gate-crash’ and compel a people to admit him to membership. The group must make up its collective mind and resolve whether or not such an individual qualifies. Self determination includes self-definition.

Unilateral declarations of ‘self-identification’, regardless of their basis, are never sufficient to identify individuals as members of a ‘people’, including an ‘Aboriginal people’ in s. 35. On the other hand, since the law will apply differently to those who belong to an ‘Aboriginal’ people, compared to all members of the public, the subjective element of self-identification will always be a necessary factor. In conclusion, ‘self-identification’ is always a necessary factor, but never a sufficient factor, to identity a ‘Metis’ who is a member of the ‘Metis people’ in s. 35.

\textit{Ethnic Nationalism}
Social scientists indicate that there is no common agreement about how to define nationalism, but it is a very potent ideology of our times. It has been described as 'a doctrine of political legitimacy subjected to diverse uses and interpretations, and invoked by people seeking radically different objectives. Nationalism is sometimes associated with xenophobia and racism, sometimes with movements which defend the rights of oppressed peoples.'

A central feature of nationalism is its emotional character. This is a useful resource for nationalists whose project is the creation of a State for the nation.

The relationship between 'ethnicity' and 'nationality' is complex. Scholars tend to view nationalism as related to ethnic ideologies in the sense they both stress cultural similarity, and, by implication, draw boundaries in relation to others, who are viewed as outsiders. The distinguishing mark of nationalism is its relationship to the state. A nationalist believes that political boundaries should be coterminous with cultural boundaries, whereas many ethnic groups do not demand control of a State. When the political leaders of an ethnic movement make demands for political autonomy, the ethnic movement, by definition, becomes a nationalist movement. This sort of nationalism is called 'ethnic nationalism'.

Scholars also use 'nationalism' to refer to the 'nation' within one political unit, or state. The latter variety is called 'civic nationalism', or 'state nationalism'. We can test the application of these ideas and words to the Canadian situation. The ethnic nationalism of the French-Canadians, after a long period of trial and error in the fight for hegemony with the 'English-Canadians', metamorphosed itself into the new 'Quebecois' nationalism, by taking refuge within the existing political boundaries of the province. This civic nationalism is viewed with scepticism by the Aboriginal people and others in the province, seeing the ethnic character of the movement when things get tough. Of course, Canada itself as a State has proponents of its own state nationalism. Since the objective of the State is
to seek political legitimacy as a representative of the people it rules, the
existence of more than one nation within a state implies potential conflict
and tension and a threat to the state project of homogenizing its citizens
by establishing links of solidarity among them.

Who do you love?

Those who have an ideological commitment to the present State in
Canada, will emphasize Canadian Unity, and be cautious about sub-state
nationalist movements, which are adverse to the project of national
solidarity. This approach is exemplified by the work of Professor Cairns. 14

Those, on the other hand, who argue for Aboriginal self-government,
and emphasize the right of self-determination of all peoples, may be viewed
as ethnic nationalists. The 'Metis Nation' is a concept dating back to the
early 19th century; the recent Dene Declaration is a recent example of an
Aboriginal people taking on the language of nationalism to promote its vision
of sub-state political autonomy within Canada. Aboriginal self-government is
inherently a challenge to Canadian political legitimacy. 15

Those with an ideological commitment to the political legitimacy of
existing States will emphasize 'national unity' and support policies of
national reconciliation. Others with a commitment to sub-state ethnic group
identities, will emphasize the legitimacy of 'self-government' and the right
of self-determination of all 'peoples'. The United Nations deals with such
tensions in the Friendly Relations Convention, which promotes self-
determination but not at the expense of territorial sovereignty of existing
States, where the State respects the equal right of self-determination of
all peoples.

The history of tribal and ethnic loyalty and political accommodation
stretches beyond human reckoning. In the more recent history of Nation-
States, Canada actually stands as one of the successful examples of federal
institutions, which can effectively mediate the tensions between local,
regional, tribal, or ethnic loyalties, on the one hand, with the goals of
existing States to legitimize their governance over all within their borders.
We can understand the debates of the 1980s about Aboriginal self-government in terms of the ideas we have just reviewed.

Federal institutions, that combine institutional 'self-rule', such as 'Aboriginal self-government' and 'shared-rule' over matters of national interest, are familiar in Canada, where provinces and the federal government have shared and exclusive powers. The new call since 1982 has been for a 'third-order' of Aboriginal government. This term refers to the idea that the State and the ethnic group, or the 'people', ought to be the same. The objective of nationalists is generally seen as one to gain control of the State on behalf of their ethnic community. Applied to Aboriginal self-government discourse, the rhetoric becomes. 'What we want is self-government and a land base.' The State is the political apparatus that governs the people on a territory.

*Metis identity as pan-Indian identity*

As we mentioned earlier, the federal government has, from the beginning, decided who would be Indians for its purposes, and it has denied recognition to others. To make matters worse, the administration of Indian affairs has been such that the Indian definition system makes no sense, as will be shown by the evidence to be reviewed below. It does not make sense in keeping a Treaty Nation intact. It does not make sense by focussing on lifestyle, kinship or blood relations in its definition. The result is that a lot of people who see themselves as 'Indians' for various reasons, can not become recognized members of an 'Indian' community. The government controls access to Indian communities. Since 1985, the government has officially allowed 'Indian bands' to decide their own membership, but the law is drafted in such a way that only federally recognized 'status Indians' can, generally, be included in current Indian bands without a financial penalty resulting to the band.

So many people, who would wish to become members of an Aboriginal group such as the Cree, the Ojibway, the Tlingit, Haida, Mohawk or Dene,
can not do so officially. Further, many individuals have a very loose personal
affiliation with any traditional Aboriginal community. Perhaps they were
adopted at birth; perhaps they have been out of the country, or perhaps
there parents are from different Aboriginal communities, and contact has
been lost. For whatever reason, many people wish to assert an Indian
identity and it is not convenient to do so. In the United States, the
movement towards a homogenization of Indian identity and social solidarity
has been called the pan-Indian movement. In Canada, it seems fair to say
that many persons who want to identify as Aboriginal end up adopting a
Metis identity. This trend is supported by the popular misconception that
"Metis" is an appropriate label to take on if one has only one parent through
which an Aboriginal ancestry can be established.

Might s. 35 recognize some right of pan-Indian movement members?
This is an entirely open legal question. It may be noted, however, that the
courts have already stated that the purpose of Aboriginal rights is to
recognize the existence of historic communities, and it seems that pan-
Indian movements create new groups that lack the common memory of the
kinds of groups contemplated by Aboriginal rights. Furthermore, it appears
that a theory of rights for members of such a modern group would be quite
distinct from the collective group theory of Aboriginal rights. The rights
would belong to the individuals, although they could only be enjoyed in
common with others. In such a case, the group itself does not have an
identity separate from its individual members. We shall return briefly to
this question below, after we have considered the question of Metis rights
in formulating Metis identity.

The role of Metis political representative organisations

It is the political community which appeals to shared ethnicity and
brings it into action. Metis political representative organizations act upon
existing loyalties to group identities, and help to create and sustain group
identities. They are, in a sense, promoters of ethnic nationalism, who aim to
change society in a way that promotes the interests of the people they
represent.

The different organizations have not agreed on a common definition of "Metis" for their common purposes. Although the Metis National Council has promoted a particular definition in national discussions, it has not been able to secure the agreement of its provincial affiliates to it.

The Congress of Aboriginal Peoples purports to represent both Metis and non-status Indians, and allows membership to persons who declare themselves to be "Metis" on the basis of Aboriginal ancestry alone.

4. The Western Metis: The story of Riel's people.

No discussion of Metis identity can avoid a special focus on the story of Riel's people. One reason for doing so is because of its historical recognition as 'the Metis Nation'. The one Canadian national historic figure most likely to raise emotions today is Louis Riel, the political leader of the Metis Nation of Western Canada. Through him, the Metis have acquired a place in the history of the West and of Canada that is unique. The image and story of the Metis Nation comes with a complete package of nationalist symbols and mythology that is typical of mythic senses of ethnic nationalism. It is only in very recent times that newly emerged groups calling themselves 'Metis' have not called in aid the symbols of Riel's people, the buffalo-hunting culture of the Plains. Some of those artifacts include fiddle and jig; the sash, the Red River cart, the rifle emblematic of the Metis militias which defended the buffalo hunters camps, and the groups of Metis who fought against Canadian intruders in the second half of the 19th century.

The Metis Nation of the West is sometimes called 'the Red River Metis' because that is the place where the early population first came together, where 'Metis' as such first encountered and battled Europeans, where 'Falcon's Song', the Metis national anthem was born, and from which the Metis buffalo-hunting culture then spread all the way to the foothills of the Rocky Mountains. It can quickly be clarified that today the term 'Red
River Metis' is generally used today in a symbolic way to refer to the entire Metis population of the Plains area. These are the descendants of those who established themselves in communities along the rivers and lakes that had served as the transportation routes of their forebears, the rivers and lakes of Manitoba, the Assiniboine and the two branches of the great Saskatchewan River that now cross both Saskatchewan and Alberta, and to the south, the Bow and the Elbow, and in American territory, the Milk and the Missouri, along which Riel himself lived in 1884, and which marks the westward boundary of the Plains. The little wooden church where Riel worshipped in St. Peter's mission still stands today in a farmer's field near Great Falls, Montana, a monument that recalls times and events when there seemed no question about Metis identity.

The story of the Metis of the West permits us to associate a particular territory with a particular ethnic group. Upon closer examination, we find that the descendants who today identify themselves under the banner of Western Metis nationalism, actually comprise two quite distinct ethnic groups, the largely Catholic, French-patois speaking Michif, and the largely Protestant, English-speaking 'Half-Breeds'. It is well known that it was primarily the Michif who developed the culture of the buffalo hunt, and who led the political resistance to the Canadian intruders. Today, many of their descendants have been assimilated into the populations of French-Canadian parishes, towns or cities like Saint-Boniface, and others into the Anglophone community.

Some of the English 'Half-Breed' folks have been absorbed into Indian or First Nation communities, while others, like the Michif, have assimilated into the general Canadian population.

From the story of Riel's people in the Western Provinces of Canada, we can discern the existence of two distinct ethnic communities or charter groups, and one larger community made up of all those persons who received lands under the authority of s. 31 of the Manitoba Act, or scrip or lands or money under the 1874 federal legislation for Manitoba Metis heads of
family, or the *Dominion Lands Acts* 1879, as amended. These communities were:

1. The French-Michif associated with Riel and Dumont, who were the main participants in the buffalo hunt culture and the military and political defence of the Metis homeland;

2. The 'English' 'Half-Breed' people associated with the Hudson’s Bay Company forts and fur-trading activities, and residing in parts of Red River, and along the string of rivers and forts in the northern portion of the current provinces;

3. All those persons who received scrip or money, which includes members of both groups identified above, and, in addition, a number of persons of ‘mixed-blood’ who belonged to neither of those groups, as well as many ‘Indians’ who were enfranchised by the scrip distribution process.

5. About 'rights'

Many people who talk about rights do not share the same ideas when they use the language of rights. The result may be confusion. In this section, we set out what we mean when we talk about rights, in order to avoid confusion about our meaning. This is important for the reason mentioned before, that is, the definition of “Metis” in s.35 will be based upon the courts’ interpretation of Metis rights. The definition of “Metis” in s. 35 will determine who has Metis rights, because the purpose of s. 35 is to recognize and affirm those rights. This is why it is important to explain what are rights.

Some people adopt ‘rights talk’ whenever they want to make a claim against someone else. For example, if a student in the local school does not like the fact that there are no windows in his classroom, he might assert that he had a “right” to a window so he can see outside when he attends classes. Others will say they have the “right” to be respected by others. Yet everyone is familiar with the idea of legally binding rights. Examples would include rights that are based upon a contractual agreement, human
rights that States must respect and can not alter, and rights that come
from laws passed by the Legislatures of province and the Parliament of
Canada. The latter are 'statutory rights', and the rights of 'Indians' that
come from the Indian Act, like the income tax exemptions, are an example
of statutory rights. That is why the beneficiaries are called 'status Indians'.
Aboriginal rights, on the other hand, come from the common law decided in
cases, and do not depend upon statutes passed by the Parliament.

In all these cases, we can see that the existence of a right requires
someone else to do something, or to refrain from doing something. If the
student has a right to a window, the School Board must put one up, and so
on. Rights seem less desirable as selling points when their 'flip side' is
examined; one who asserts a right makes a demand on someone else. That
demand may not appear onerous where the claimed right is a 'negative' right
that must only be respected by refraining from doing things to impair the
right. For example, things that are the subject of property rights of one
person require others to refrain from using the thing without permission.
You can not use your friend's car without his permission. But sometimes even
negative rights can be very onerous. For example, aboriginal title is a
property right, and if an Aboriginal group has Aboriginal title over a
territory, the group can prevent hydroelectric developments. So we see
that rights are always important to others, whether they are positive rights
or negative rights.

We should emphasize another feature of rights, the difference
between 'absolute' rights and other rights, because this is important in
understanding debates about the rights of Aboriginal people. One view of
rights sees them as 'absolute' or not subject to change. Rights may, for
example, be understood as God- given rules that can not be changed by man.
Some tribal people have legal systems which contain rules with a content
that can not be changed. Many First Nations people have asserted that
their laws 'come from the Creator'.

It is important to explain that the rights of the Metis in s.35 are not
absolute rights. Even if the origin of some Metis rights were said to be 'God-given' all rights in the Canadian legal system are subject to change and evolution, and all of them may be infringed in some way by actions of Governments or others. Although the doctrine of aboriginal rights is still evolving, it is established as a matter of law that aboriginal rights may be lawfully impaired by both provincial and federal governments, if the infringement can be justified in accordance with legal tests that the courts have developed since 1982. The Constitution Act 1982 did not provide in its terms, anywhere, that aboriginal rights were not absolute. But the courts interpreted them that way. The courts made up the theory about the infringement of aboriginal rights, and now that is the law of the Constitution. This shows that it is the courts, in our legal system, that, alone, have the power or legal authority to interpret the Constitution. The statesmen who negotiated the terms of the Constitution, and the draftsmen who penned them, have no say in the meaning of its terms. (Later on, we shall review what was the intention of Harry W. Daniels when he negotiated the inclusion of "Metis" in the Constitution, and this point will have to be recalled.) Only the courts do, and the only way to change a court interpretation of the Constitution is to change the Constitution. That can only be done in accordance with some complex rules that are explained in the Constitution. It is not politically easy to change the Constitution, in part because the agreement of many Governments is necessary to do it.

One of the legal issues about Aboriginal rights that has already been decided by the courts is that where a province, or Canada, intends to do something that might infringe the aboriginal rights of an Aboriginal people, the Government must first consult with the Aboriginal people. For example, government plans to carry on an activity that would affect the habitat of animals or fish that may be taken as an aboriginal right arguably carry the legal requirement to consult with the Aboriginal people who have the aboriginal right to hunt or fish. If Metis people have Aboriginal rights, governments must consult with them before undertaking actions that might
infringe them.

All this should make it clear that the courts have a lot of power in their job of defining the Metis people. Once they have done it, it is not likely to be changed soon, if ever. That may not be good news for everyone, but at the same time it must be remembered that the definition will only be for the purpose of s. 35, that is, deciding who has Metis rights that are enforceable in the courts. Volunteer organizations and individuals who fall outside the court definition, will still be free to call themselves “Metis” if they wish; but they will not win if they try to come within the Constitutional meaning of “Metis”. The Inuit people of Canada know what this is like. In 1939 the Supreme Court of Canada decided that Inuit people were “Indians” for some Constitutional purposes. No Inuk is likely to have lost sleep over that judicial finding; the Inuit can happily continue to call themselves whatever they want. The court’s decision only means that they are included in a legal category called ‘Indians’. The name alone has no practical effect on anyone’s life.

There is a lesson here for those who are members of Metis organizations, and who may be ousted from the “Metis” category (this is not at all a prediction about the likelihood of that result) by a judicial definition of “Metis”. They may be included in the ‘Indian’ category. In fact, in a number of cases already, people who call themselves Metis and who belong to Metis organizations have argued that they are ‘Indians’ for some legal purposes.

Since we have stated that a Metis definition for s. 35 purposes will be based upon the courts’ interpretation of Metis rights, it is useful to explain briefly how the courts make judicial decisions about legal rights. Before we discuss how the courts make law, we want to emphasize that the courts actually develop law by giving decisions in cases based upon facts that are brought before them.

It is not only the Government that makes laws; the courts do it too. Sometimes politicians unhappy with the result of a court decision will whine
that the job of making the law is the job of Parliament alone. This
statement can be a useful political device, but it is not based on a sound
understanding of how law is created. The Canadian system of governance, as
in other democracies, is structured to distribute political power because
the truth of the dictum that 'power corrupts and absolute power corrupts
absolutely', is widely appreciated. Some scholars and political
commentators have argued that the Canadian system concentrates too much
power in the office of the Prime Minister. The American system divides the
power of the Executive, (the President and his appointed advisors), the
Legislative (Congress and Senate) and the Judicial branches. In Canada,
these divisions are not institutionally respected. The Executive and the
Legislative branches overlap, and the Judicial function overlaps with that of
the Executive when the higher courts are asked for an opinion in a
"reference" case not based upon disputed facts.

Putting this in the context of the debate on Metis definition, if the
Prime Minister could decide who is a s. 35 Metis, then that office would be
the focus of some intense lobbying. If the Parliament decided, then
attention would focus on Members of Parliament and Senators, to a lesser
extent. But it is the judges who will decide. This may seem disappointing to
those who only saw the benefits of getting constitutional recognition of
Metis rights in 1982. Now we find that unelected judges will decide who is
entitled to claim the rights that derive from the history of the Metis
people in Canada.

How will they do it? That will be discussed below, in section 7.

5. About Government policy and practice

Governments are expected to abide by the law. The law of the
Constitution both prescribes the authority of Parliament and the Executive,
and also proscribes, or limits it. It is fair to say, however, that generally
speaking, it is difficult for citizens to be able to force the Government to
do something it does not want to do through the courts. The best court is
still the court of public opinion, in the long run. The reason is that
Governments are elected, and they will pay attention to views that are
generally held by the public. Aboriginal people make up about three percent
of the Canadian population, so they wield relatively little power at the ballot
box. Moreover, Aboriginal rights are not well developed yet by the common
law courts, and this adds to the difficulty of getting courts to help change
government policies and practices to protect the interests of Aboriginal
people.

Sometimes Governments will have policies that, in a general way,
describe how a Government will act or respond in regards to any particular
issue. For example, the current federal Government has policies on Metis
self-government that were announced in 1995, and again in 1998. Under
that policy, the Government refuses to discuss land as part of Metis self-
government negotiations, even though Canadian delegations have told the
United Nations that Canada understands the significance of lands and
resources for feasible self-government arrangements for Aboriginal people.
What a government states officially it will do in regards to an issue is its
policy; we can see that its practice, or what is actually does, may not
necessarily reflect that policy in everyone’s eyes.

One policy-making technique that has been used for centuries in the
British and Canadian system, is the Royal Commission. Private citizens with
relevant expertise are appointed to advise the Government on policy. An
example is the Royal Commission on Aboriginal Peoples appointed in 1991 by
Prime Minister Mulroney. The first Royal Commission on Aboriginal issues in
colonial Canada was appointed in the first half of the 17th century. When the
RCAP opened its public hearings in Winnipeg, Elijah Harper said that he
hoped this would be the last Commission on Aboriginal Peoples. By the time
the RCAP reported, a new Liberal Government was in power, and it
discounted the recommendations that were published in 1996. The Minister
of Indian Affairs, a non-Indian in charge of Indians, as all these Ministers
have been, opined that the money spent on the Commission would have been
better spent on building houses for Indians. Although the United Nations
has urged Canada to adopt the RCAP recommendations on Aboriginal self-
government, the Government has so far resisted doing that. Later on, we
shall review the main recommendations of the RCAP on the subject of Metis
definition.

How likely is it that Metis people could get together and convince the
Government of Canada and some Provinces to agree to recognize them as
such, and to pass laws that require government action and expenditures?
That would be one way of dealing with the question of Metis definition. It is
beyond the scope of this document to deal with that question in detail, but a
few points can be made.

First, commentators have explained that Canadian politics are
dominated by national unity concerns, much of it generated by Quebec
separatism, and that the Canadians system favours a centralization of power
in Ottawa, specifically, in the Prime Minister’s office, that is far beyond
what would be possible in States like Great Britain or Australia. Moreover,
[t]here is no indication that the one person who holds all the cards, the
prime minister, and the central agencies which enable him to bring effective
political authority to the centre, are about to change things.”

Individual Members of Parliament will always be able to carry small
favours, but the prospects for political change within Government do not
appear particularly bright. The political culture of Canada is vastly different
from the ideals of Aboriginal society generally, and of Metis society in
particular. Men like Gabriel Dumont were leaders because of their skills,
courage, and the support of their people. The Canadian political system, on
the other hand, tends to attract the ambitious, who will not always be the
best and brightest and most deserving. There will be the ambitious who
secure and maintain power, and there will be the followers, who are willing
to bend their moral and political convictions to the dictates of a political
party and the politicians who are in control. The scope available to individual
members of Parliament to assist Metis constituents appears to be very
limited indeed.

The above review of the Canadian political system helps to explain why
the Metis representatives were unable to secure a definition of Metis in
the Constitution in the 1980s First Ministers Conferences on Aboriginal
Constitutional Reform. Aboriginal issues are dealt with like many others;
only as grass fires to be stamped out when they create a distraction for the
agenda favoured by those who wield power. The way the Canadian system
works explains both how 'Metis' got into the Constitution, and how it is stuck
there without a definition. And now the Courts will decide the very meaning
of an historic political community.

6. A review of Canadian policy and practice concerning 'mixed-blood'
people in the context of its 'Indian' policy

It is notorious that there are two predominant views on the popular
meaning, (as opposed to the legal meaning) of "Metis" in Canada. The broad
view looks at individuals, and asserts that anyone who has some Aboriginal
ancestry may identify as a Metis. This view fits with a 'pan-Indian'
sentiment or movement, and focuses on personal identity and aspirations.

The other, more narrow view, asserts that the term"Metis",
regardless of the origins of the term, should be reserved to refer to the
members of a group, namely those who belong to a small historic nation of
Western Canada, sometimes called 'the Metis Nation", which figured
prominently in Western history in the 19th century.

In this section we try to throw light on the significance of these
views for public purposes, by reviewing the way in which "mixed-blood"
people, and groups calling themselves "Metis", have been seen in Canadian
law and policy. One inescapable conclusion is that much of the debate
around 'Metis' identity has taken place at the margins of 'Indian' identity,
with those not fitting the official definition of 'Indians' often being seen as,
and identifying themselves as, Metis. Definitions of human groups are
inherently difficult, and it is to be expected that there will be ambiguity at
the boundary of Indian definition. Because of this close relationship
between Indian and Metis identities, we review the official system of
Indian definition in order to explain how "Metis" has become a boundary
issue to the question of Indian definition.

In a Metis case in Manitoba, the Blais case, Swail, J. considered the
problem faced by the courts in attempting to define Metis for purposes of
deciding aboriginal rights claims, and identified the following three ways in
which the term 'Metis' has been used over time:18

1. associating English and French mixed-ancestry groups from Rupert's
Land and the North Western Territory as if they were the same

group;

2. including other mixed-ancestry persons whose origins may have
been far removed from 'Riel's people' of the Red River, Rupert's Land
and NorthWest Territories region;

3. referring loosely to persons of mixed ancestry who may never have
had Indian status, or who, having had status, may then have lost it
through the operation of the membership code in the Indian Act.

We can adopt this categorization for the following review.19

English 'Half-Breeds' and French 'Michif' in the West in 19th century

These are the two primary groups of mixed-ancestry people in the
Red River area at the time that annexationist Canadian interests first
brought it to the West in 1869-70, where a substantial population of some
10,000 'mixed-ancestry people resided. The 'English-speaking 'Half-Breeds"
were largely Protestant, English speaking, politically more conservative,
more sedentary, more oriented to the riverine agriculture and the Hudson's
Bay Company as a governing and commercial entity.

The largely Roman Catholic speakers of a 'French patois', or Michif, on
the other hand, were politically more independent and more inclined to trading and buffalo-hunting than to agriculture. It is well-known that the resistance to Canada in 1869-70 and in 1885, were largely inspired and carried out by the Michif under Riel’s inspiration and leadership.

Clearly there was overlap in the kinship, associations, and lifestyles of the two groups, and the distinction must not be overblown. It has been concluded that the Metis lands provision in the Manitoba Act 1870 was intended for, and was in fact distributed to, members of each of the two ethnic groups. Notwithstanding the tensions between the two ethnic groups, their self-definition as a 'nation', their ability to form a government, to establish civil order, and to effectively defend their territory through arms, their diplomatic recognition from Canada and recognition in the Manitoba Act 1870 all have inspired the assertion and the perception that this was a new nation.

The Manitoba Act began the change in the use of the term 'Metis', by confounding the two terms 'Half-Breeds' and 'Metis', adopting the term 'Half-Breed' in the English version of the Act, and the term 'Metis' in the French version. From that point on, Canadian legislation does not distinguish between the two groups. Thus, the Dominion Lands Act provided for the extinguishment of the Indian title of the 'Half-Breeds' of the North West Territories, which were later formed into the Provinces of Saskatchewan, Alberta, and northern Manitoba.

Generally little attention is paid to the difference between the two groups today, and the descendants of both groups are referred to as 'Metis' in current cases. Their political representative organizations all style themselves as 'Metis' organizations, even though their membership is open to descendants of both groups. The Societe Historique des Metis St. Joseph in St. Boniface has restricted membership to French-speaking Catholic 'Metis', but it is not a political representative organization.

Mixed-ancestry persons and groups elsewhere
When the numbered treaties were signed in the West, "Half-Breeds"... entirely associated with the Indians, living with them and speaking their language] were allowed to 'take treaty' as Indians. The others who farmed, and those who lived 'after the habits of the Indians', were offered scrip. 'Scrip' was a certificate which entitled the bearer to receive an alienable parcel of land, or money in lieu of land. From 1885, 'Half-Breed Commissions' devoted entirely to scrip distribution were a regular feature of the Indian title extinguishment process in the West and NorthWest, along with the Indian treaties.

In 1876, the Indian Act definitions of "Indian" and "non-treaty Indian" each required "Indian blood". Non-treaty Indians, defined as members of an "irregular" band or those following an "Indian mode of life", were those who belonged to as yet unrecognized bands that had not entered into a treaty relationship with Canada or those who lived in smaller family groups in more isolated areas. The treaty-making process would continue well into the 1930s, and Indian Branch officials needed some term with which to refer to those Aboriginal persons who were clearly Indians, but with whom Canada had yet to establish a formal relationship. In 1876 there were also Indian groups present in Canada, such as the Dakota in southern Manitoba and Saskatchewan, that had recently been resident in the United States, but which had fled north as a result of conflicts with American authorities. They were clearly Indians, but not Indians with whom Canada had a treaty relationship.

However, blood alone, was not the distinguishing characteristic of Indians and non-treaty Indians, for, by definition, Métis and "Half-breeds" also had Indian blood. Thus, the Indian Act also provided that Manitoba "Half-Breeds" who had participated in the Métis land distribution would not be recognized as being Indian. Thus, began the second confusion, that of associating the term Métis with land as opposed to membership in a political group or historic nation. The historic association of individuals with a method of Indian title extinguishment policy has appealed to the Metis
National Council, which adopted this charter group as the basis for identifying its Metis constituents today.

During the 1870s and 80s, the Government of Canada purported to implement the Metis land scheme in the Manitoba Act 1870, a process that is notorious for its administrative failures, and which, it has been argued, was done in breach of Canada's duties under the law of the Constitution. In the result, by 1886, only about fifteen per cent of the approximately 10,000 Metis persons resident in the small province of Manitoba in 1870 had received and retained land. Those who left, established themselves, for the most part, on the three areas mentioned by Alexander Morris: the Cypress Hills and Batoche-St. Laurent areas of Saskatchewan and in Alberta around Edmonton, Lesser Slave Lake and in other smaller communities. With Canada's westward expansion, they too demanded that their land rights be dealt with, and this Canada undertook to do, although not until the start of military action by the Metis, beginning with the Street Commission in 1885.

Money scrip, which was instantly redeemable in cash, was often issued in western and northern Canada in place of land scrip. Between 1885 and 1921 a total of 12 Half-breed commissions allowed more than 13,200 scrip claims, two thirds of which were for money scrip. 21

The procedure was for the commissioners to examine the applicants to ensure that they were of mixed ancestry and had not already received scrip either in Manitoba or elsewhere in the North West Territories. As in the case of the earlier Manitoba Métis scrip issuance to the Metis heads of family under an 1874 federal statute, and also the lands provided under the authority of s. 31 of the Manitoba Act 1870, many of the scrip certificates were disposed of quickly, leaving the original recipients landless.

Not everyone who took scrip after 1885 was a member or descendant of the Métis of the Red River or of the Métis communities elsewhere in Rupert's land mentioned by Lieutenant Governor Morris. Many were persons living an Indian lifestyle as Indian band members whose only distinction was their mixed ancestry. Nor, as noted later by Justice W.A. MacDonald, was
their mixed ancestry ever much of a distinction:

It is well-known that among the aboriginal inhabitants there were many individuals of mixed blood who were not properly speaking Halfbreeds. Persons of mixed blood who became identified with the Indians, lived with them, spoke their language and followed the Indian way of life were recognized as Indians. The fact that there was white blood in their veins was no bar to their admission into the Indian bands among whom they resided.\textsuperscript{22}

The lifestyle approach to Metis definition was followed in lower court decisions in the late 19\textsuperscript{th} century.

This was generally a period in the development of Canadian Indian policy when, after the costly North-West Rebellion, the emphasis was on reducing expenses in the Indian Branch and of encouraging Indians to take on new lifestyles that would reduce government expenditure, including farming, learning trades, residential schooling and local municipal-style government. It was also a time when individual enfranchisement was encouraged, and when the out-marriage rules of the Indian Act were beginning to disrupt the cohesiveness of Indian reserve communities. Part of doing away with the tribal system was to encourage persons who had taken treaty to withdraw and to take half-breed scrip instead and thus save the government expenditures for treaty payments and the support of Indians on reserves. In this regard, the Street Commission reported that, out of a total of 3446 scrip claims allowed, over one third, or 1292, were issued to persons, withdrawing from treaty. Another Half-breed commission one year later reported that of 349 claims allowed, fully 321 represented people leaving treaty to take scrip.

The treaty and Half-Breed commissions did not deal with everyone in western and northern Canada who was eligible either for treaty or scrip and applications for both continued after 1921.

At a certain point, the Indian Branch became concerned about the
number of treaty-takers, and following the late treaty adhesions in the
Lesser Slave Lake area, the local band lists were examined and over 600
people were discharged on the sole basis that they were of mixed ancestry.
The resulting furor led to an inquiry by Judge W.A. Macdonald of the
Alberta District Court who found that only around 200 of the discharged
persons had taken scrip earlier and therefore merited discharge under
Canada’s scrip policy. The rest, in his view, ought to have been reinstated on
the basis of the long standing policy of giving mixed-ancestry persons who
lived an Indian lifestyle the choice of taking treaty. Nonetheless, the
Department reinstated only about a third of those that he recommended be
returned to band membership.

The focus on land in defining ‘Indians’ in this period, showed the
abandonment of the notions of Indian lifestyle, language, culture and band
affiliation that had guided earlier Canadian policy. This issue has now
become prominent in a series of hunting and fishing cases from the prairies.
For example, in the recent Morin and Daigneault case, the accused were the
descendants of mixed-ancestry persons who took scrip and were
characterized by counsel and by the Provincial Court as being “Métis”. Both
accused persons had been charged with fishing without a licence. However,
both were pursuing a traditional lifestyle as members of a northern
Saskatchewan Aboriginal community that continued to live off the land. In
discussing the heritage and self-description of the accused, the Court
noted the following: 23

Louis Morin... is the father of the accused Bruce Morin. While he is
of mixed white and Indian blood, fitting the definition of Metis, he
both called himself and considered himself to be a non-status or non-
treaty Indian. All of the Metis witnesses, including the accused
consider themselves as non-treaty Indians. [emphasis added]

The Provincial Court also noted that those who took scrip were
virtually indistinguishable from those who took treaty and that they took
scrip to avoid being confined to reserves or restricted in how they lived
their lives, and not because of any sense of being from a markedly different
culture than other people living the same lifestyle who took treaty as
Indians. On appeal, this finding was echoed by the Queen’s Bench:

The evidence at trial, both oral and documentary, established that in
northern Saskatchewan, historically and now, there was very little, if
any, distinction between the Indian and Metis Aboriginal people. The
distinction has always been primarily a legal one based on whether
ancestors opted for Scrip or Treaty.[emphasis added]

Similar observations emerge from other cases from western Canada.

In the Ferguson Case from Alberta, for instance, the accused was
descended from persons who took scrip, referred to by the Provincial Court
as “half-breeds”. However, Mr. Ferguson, who had been charged with
hunting without a licence, was born and raised in an isolated northern
Alberta Cree-speaking community that continued to follow what the Court
referred to as “the Indian mode of life”. In upholding his right under the
NRTA to hunt as an “Indian”, the Court rested its conclusion on the fact
that the accused Indian lifestyle made him a “non-treaty Indian” under the
1927 Indian Act notwithstanding that all four of his grandparents had taken
scrip. Not all the claims as Metis succeed, however. In Saskatchewan in
particular the trend has been mixed. For example, in R. v. Genereux the
Provincial Court found that the accused was not an Indian for NRTA
purposes because of his lack of Indian status under the Indian Act, despite
the fact that his “family were half-breeds but had lived on the reserve and
adhered to the same lifestyle for three generations.”

It emerges from these cases that the term “Metis” is used as a loose
description of individuals that is justified only by their mixed ancestry and
a history of having taken scrip. However, as discussed above, mixed
ancestry alone was historically insufficient to cause someone to lose Indian
identity. Moreover, after so many generations of inter-marriage between Indians, Métis, however defined, and non-Aboriginal people, mixed-ancestry alone is no longer a characteristic that distinguishes one category of Aboriginal people from another.

Nor does it seem that a history of having taken scrip can be relied upon with utter confidence, although that approach has tended to be favoured by the Metis National Council for its purposes. Increasingly, and as the cases cited above demonstrate, scrip-takers and their descendants are challenging their characterization as "non-Indians" for NRRA and related purposes and are finding judicial support based on lifestyle criteria. In addition, if the trend of judicial thinking continues in this direction, it can no longer be assumed that scrip takers do not have a valid claim to restoration of Indian and band status as well as treaty and reserve land rights. Scrip-takers and their descendants are now challenging the legality of the issuance of scrip and the resultant loss of status and treaty rights.

The entire scheme of scrip-taking seems to be under siege by scrip-takers and their descendants and it is too soon to say whether their claims to be "Indian" for harvesting and land rights purposes will not be vindicated by the courts as the documentary and oral evidence of what actually happened during the scrip issuance sessions comes to light.

'Mixed-blood' individuals and communities elsewhere

The previous review of how the term 'Metis' featured in issues of identity focused on the west and the north because it is here that Canada's policies of recognition of Aboriginal peoples produced the best-recorded and judicially examined results to date. The phenomenon of mixed-blood individuals and communities of course, as previously mentioned, occurred elsewhere in Canada, and in other countries where indigenous peoples were colonized. According to some learned commentators:

In eastern Canada communities distinct from both Indians and
Euro-Canadians did not arise, and mixed-race people were defined as either Indian or White. Only in the fur trade areas of Rupert’s Land and in the region of the Great Lakes did the “mixed-bloods” assume a distinctive ethnic identity - or, to be precise, two identities [English “Half-breed and French “Métis”].

In Newfoundland there were no recognized “Indians” at all until recently. In 1985 the federal government recognized a new band: the Conne River Micmac community was declared to be a band under the name of the Miawpukek Band on June 28, 1984 by order in council. The Innu of Labrador, who have resisted being registered as Indians, are clearly Indian in lifestyle, culture and language and are treated that way by the Department of Indian Affairs.

While there have clearly been mixed-ancestry people in Labrador since contact, and while they have been engaged in traditional wildlife harvesting practices, it is less clear that they considered themselves, or that they were viewed as being, “Métis”, in any self-conscious way until it became politically expedient to do so. The Labrador Inuit Association (LIA) restricts access to certain federal program benefits to its membership. However, LIA membership is a sub-group of its reported land claim beneficiary population which includes a geographically distinct group of mixed-blood Inuit. This group styles itself the Labrador Métis Association (LMA) and its members live in two dozen communities in central and southern Labrador. Many LMA members would be entitled to LIA beneficiary entitlements were they not resident in southern Labrador. Moreover, the provincial government does not recognize LMA members as being “Métis” and argues that LMA entitlements under section 35 are entirely up to the LIA.

In Ontario, “mixed-blood” communities were dealt with in three distinct ways. The community at Fort Frances, which is now part of the
Coochiching First Nation, signed an adhesion to Treaty 3 in 1873 as “Half-Breeds” and not as “Indians”. However, at Fort Albany, other persons known to be “Half-Breeds” signed Treaty 9 as “Indians”. In another instance from Treaty 9, members of an established “mixed-blood” community at Moose Factory demanded Métis “scrip” and were then promised 160 acres each by the province, a promise that has yet, after over a century, to see implementation.

With the possible exception of parts of Ontario, what eastern Canada seems to show is a history of White-Indian relations that is much longer and marked less by the type of clear demarcations between groups that was demonstrated by the more rapid and visible collision between peoples and cultures that occurred in western Canada. As in western Canada, however, there were, and are, in eastern Canada, what we call ‘boundary’ people of mixed ancestry. Unlike in the Canadian west, however, their presence does not appear to have had the same impact on the debate on who is and who is not an “Indian” for legal and related purposes that is currently taking up court time in the prairies, and to a lesser extent in Ontario.

Much of what is occurring in eastern as in western Canada is that people of mixed ancestry are claiming an identity that may, or may not, have a continuity with clearly discernible mixed ancestry groups and communities in the past. This, as discussed earlier, is the issue to be resolved in Powley. This is the political aspect of the issue referred to earlier in the Blais Case where the judge noted that “the question of who is or is not a Metis has been highly politicized by some fairly disparate organizations claiming to speak for the Metis of today.”

Nor, given the pressures exerted by federal policy on the population of recognized Indians and bands in order to hasten the integration of Aboriginal people into mainstream society, is it surprising that people of many origins are laying claim to the constitutional category of “Métis”. The special Métis edition of Canadian Ethnic Studies highlights this particular issue, and includes a case study of a non-status Alberta woman of Cree
descent who gradually redefined herself as "Métis" under these pressures. The editors note that "these enfranchised persons of Indian background, not having a distinct identity of their own, have gravitated towards the Métis, finding in their cultural and political organizations the identity they seek."  

But there is more than a question of personal identity involved. There is a clear question of ascertaining the identity of the Aboriginal groups in whom the aboriginal rights affirmed in s.35 are vested, and which persons among the Canadian public are entitled to the beneficial enjoyment of those group rights. Among 'mixed-ancestry' individuals, and others who may wish to identify with an Aboriginal 'people' or community, which ones fall within the intentions of s.15 affirmative action programmes because they are persons 'of Aboriginal ancestry', and which ones have legal rights as members of s.35 communities?

Persons who never had Indian status or who lost Indian status

The Indian Act's definition system included a requirement of 'Indian blood', or ancestry, but a person without Indian ancestry was not necessarily excluded if that person fit within the code's additional criteria of kinship, lifestyle, and charter group recognition. The clearest illustration is the acquisition of Indian status by ethnically non-Indian women by marriage to status Indian men, until 1985. Non-Indian men were not entitled to the benefits and burdens of Indian status by marriage to a status Indian woman. The reason for the difference is the original Indian Act policy goal of defining 'Indians' on the basis of the nuclear family, by focusing on kinship and descent through the father as head of the family, in accordance with the prevailing institutions and values of the day. Today, with the Charter's insistence upon sexual equality, both sexes are equally excluded from acquisition of status upon marriage to a status Indian.

The net effect of various 'enfranchisement' provisions over the years was the loss by a great many people, of Indian status and the right to
reside on reserves. Many of the persons characterized as Metis or non-status Indians in the hunting and fishing cases from the Prairies were persons living an Indian lifestyle, based upon culture and self-identity, whose mother had lost status through the Act's enfranchisement scheme.

In 1951 the Indian Act introduced a registry system based upon whatever band lists were then available. The definitions and references to 'non-treaty Indian' and 'irregular' bands were dropped, and many persons found themselves unable to register as Indians for all sorts of technical reasons, many having to do with the wide definitions and loose supervision of the Act's previous membership administration. The failure of the Indian Branch to be able to include everyone who arguably ought to have been registered in 1951 created a large category of 'non-status Indian' people; it was a population affiliated with Indian people, including by language, kinship and lifestyle, but which could not get registered as Indians. In addition, there was the large population of 'non-status Indians' comprised of descendants of persons who had been enfranchised over the years.

As a result of Bill C-31 of 1985, which amended the Act in the Government's purported response to the s.15 sexual equality guarantee in the Charter, around 115,000 persons have either been re-registered or registered for the first time as Indians. But many persons could not possibly get their names on the register, including those who were descendants of scrip-takers who had been barred from registration and who could not now prove descent from someone who was an Indian under the pre-1985 rules, as required by the 1985 Act. 30

There are also many people who view themselves as "Metis" and want to withdraw from registration as Indians, but there is no provision for doing so in the Act since 1985. This prevents them from joining Metis organizations who exclude Indians who are registered as such. The absence of an enfranchisement provision is Constitutionally suspect, but has not yet been challenged in court.
What can we conclude from this review?

It is safe to conclude that the meaning of the term 'Metis' is evolving in the contemporary public and policy dialogue, particularly since the inclusion of the term in s.35 in 1982. This is also true in the judicial dialogue. In western Canada, judges refer to persons who took scrip or are excluded from entitlement to register as status Indians, as 'Metis', without necessarily regarding how the individuals might describe themselves, and even when they identify themselves as 'Indians.'

It has been noted that if a remote 'mixed-ancestry' alone were to define Metis as individuals, then a large proportion of the population of the Province of Quebec would probably qualify. Indeed, recent census statistics show a marked increase in the number of persons taking on a 'Metis' personal identity. This development alone should be sufficient to make it plain that self-identification and a 'mixed-ancestry' is not a rational foundation for a judicial test for identifying Metis communities for the purposes of s.35, and that the true test must be found in historically recognized rights.

The cases from the Prairies also show the inconsistency which characterizes self-definition by Aboriginal persons, with shifting categories and the use of multiple labels. The pattern in part is a reflection of the fact that Metis definition is a boundary issue of the larger question of who is an Indian. This has been true historically, in part reflecting the effects of shifts in tribal social structures in response to the changing conditions in the West during the fur trade period.

Some of the ambivalence about identify must also be ascribed to the fact that Metis scrip was used to 'enfranchise' Indians in the West, while many Metis persons opted to join Indian communities at the time of signing Indian treaties, or thereafter. It is clear that, in principle, individuals who join Indian bands thereby acquire Indian status, and are entitled to enjoy the rights of Indians. For legal purposes, they become Indians, just as 'White' women who married status Indians did until 1985.
Since our concern is the definition of "Metis" for purposes of s. 35, the central question seems to be whether the category of 'Metis' will continue as a boundary issue to the question of Indian definition, or whether it will acquire a positive meaning, moving to the core of identity of a distinct group. The implications for social and political solidarity are obvious; is the Metis community to be a community comprised of people who would rather be in another group, or of people who, for better or for worse, know that they are where they belong? If the strength of an ethnic community is based upon the conviction of its 'common memory', is the memory of ancestors from diverse groups united only by the receipt of scrip paper sufficient to hold the 'Metis Nation' together?

Perceiving the meaning of 'Metis' as a boundary issue to the meaning of 'Indian' in s. 35 assumes that the term Indian itself has a positive meaning, which it no longer seems to have. As the review has shown, there is little consistency in Canada's recognition of 'Indians'. Status is not a function of blood quantum, and has never been. If it had been, mixed-ancestry persons would have never acquired Indian status; non-Indian women would not have acquired status by marriage, and their children would not have acquired status.

Kinship is not the key criterion, as illustrated by the scrip, marriage-out and enfranchisement factors which split up families.

The determining factor can not be lifestyle. Status and non-status Indians in many regions live similar if not identical lifestyles in communities where the members are distinguishable only by legal distinctions. This is why the equality provision, s.15 of the Charter, is a significant threat to the current status Indian registration scheme, and indeed, to the way that Canada relates to the Aboriginal peoples accorded Constitutional recognition, recognizing only some and not others.

Indian identity, moreover, can not be linked to self-identification. Many people identify as Indian but can not obtain entitlement to registration as status Indians. The converse is also true. Many people
identify themselves as Metis but find themselves eligible for registration as
Indians.

The conclusion seems inescapable that, since there is no consistent
basis for recognizing 'Indians' there can be no recognizable basis for
recognizing 'Metis' as members of a 'boundary' group. There seems to be
little logic or utility in judges attempting to define Metis in the absence of
a well developed and rational approach to the definition of 'Indian'; any such
attempt would seem bound to copy and reproduce the unfairness and
arbitrariness which has characterized the Indian Act system.

A rational judicial definition of 'Metis' must reflect the basic values
and principles of the constitution, and focus upon historical antecedents
rather than upon contemporary pressures motivated by changing political
goals and the shifting alliances and identities of Aboriginal persons. The
process must begin with some objective criteria upon which self-
identification may rationally be based.

Self-identification itself is required by the constitutional values of
freedom of association, and the right to belong to a community. Self-
identification guards against the biological determinism inherent in an
approach based upon 'blood' alone, and respects the Constitutional value of
non-discrimination based upon 'race'.

Moving away from the boundary of Indian definition into the core of a
positive Metis identity can not be accomplished by reliance upon the factors
of blood quantum, kinship or lifestyle, since these have been placed beyond
reach by the approach to Indian definition in federal legislation. That leaves
historical continuity with an identifiable community of persons historically
recognized as Metis. This approach accords with the assumption that s.35,
which recognizes 'existing' rights, was meant also to recognize, not new
entities, but those with recognized rights prior to April 17, 1982. We will
examine how this approach fits with the existing state of the law of
Aboriginal rights below.
7. The current state of Canadian Aboriginal rights law: Do the Metis have any rights?

The 1982 Constitutional amendment recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada". There were four First Ministers Conferences held in the 1980s to discuss what those rights might be. The Governments failed to agree on what they would accept, and showed where their real interest was, in the Meech Lake Accord agreement that was reached only months after the demise of the Aboriginal Constitutional amendment conferences. There would be one more try at national statecraft, the Charlottetown Accord. There, the Metis National Council was able to get an agreement on the recognition of the Metis and their right of self-government, but it fell with the Accord when that was rejected in a national referendum.

The Charlottetown Accord is the highwater mark of Metis rights recognition in Canada, and provides an insight into what might have been. That included recognition of a right of self-government and access to lands and resources. In the Accord, the MNC representatives and government officials had agreed to the following definition to guide future political discussions:

a) 'Metis' means an Aboriginal person who self-identifies as Metis, who is distinct from Indian and Inuit (sic) and is a descendant of those Metis who received or were entitled to receive land grants and/or (sic) scrip under the provisions of the Manitoba Act 1870, or the Dominion Lands Act, as enacted from time to time.

b) 'Metis Nation' means the community of Metis persons in subsection a) and persons of Aboriginal descent who are accepted by that community.

The other significant attempt to define the Metis and their rights was that of the Royal Commission on Aboriginal Peoples (RCAP). Its analysis
and recommendations remain as the most recent and comprehensive official attempt to face the issue of Metis definition and rights. Essentially, it was proposed that the Prime Minister call a national meeting of Aboriginal leaders and First Ministers to agree on a national framework for negotiations on the recognition and implementation of the right of self-government of Aboriginal 'nations', which are seen as sub-sets of the 'aboriginal peoples' in s. 35. The idea then, was to establish Aboriginal nations as sub-State entities with a significant degree of political autonomy over the people and territories in designated homelands. For the purposes of this RCAP 'nation-to-nation' approach, it was recommended that the definition of "Metis" should be the following:

'Every person who a) identifies himself or herself as Metis and b) is accepted as such by the nation of Metis people with which that person wishes to be associated, on the basis of criteria and procedures determined by that nation, be recognized as a member of that nation for purposes of nation-to-nation negotiations and as Metis for that purpose.'³¹

The RCAP recognized the fact that many people without a long history of common and sustained social and political action also have adopted the term "Metis" to describe themselves in recent times. In light of that fact the Commission was careful to allow the specific subject matter of discussion guide its use of terminology. In regards to the question regarding the identification of Metis for purposes of s. 35 the Commission noted that s. 35 embraces a broad category of 'aboriginal peoples', and accordingly, all persons who will be able to prove their entitlements as such will be included, regardless of the particular designation within the sub-categories. The above definition was offered for the purpose of political negotiations, not as a test for membership in a community claiming aboriginal rights protected by s. 35.

Under the RCAP approach, the Metis definition applies to members of
relatively large communities called 'nations', and which are identified by applying the criteria generally adopted for the recognition of 'peoples' at international law. On this view, an Aboriginal nation was described as having the following attributes:

1. the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;

2. it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and

3. it constitutes a majority of the permanent population of a certain territory or collection of territories, and in the future, will operate from a defined territorial base.

The RCAP argued that such communities, or nations, possessed a common law aboriginal right of self-government, which reflected the domestic application of the right of self-determination.

We must compare this approach to that which the courts are compelled to adopt on account of legal methodology and the facts being brought before them in contemporary Metis cases. The courts will decide the nature and scope of the rights of Aboriginal people on a case by case basis, on the facts of each case. Since most cases bring facts concerning relatively small communities before the court, the law is likely to develop a doctrine of Metis rights based upon the circumstances of relatively small communities, and on the things that are done in these small communities. The typical fact situations include claims to hunt and fish for personal consumption. Such cases are not likely to raise the kind of questions that gave rise to the creation of the Metis National Council in 1983, that is, the question of identifying an historic 'people' with a right of self-determination that must be respected within domestic law. Such a fact situation could, in theory, be brought before the court, and the questions asked. For example,
the representatives of the Metis people comprised of the descendants of
Riel's people, might bring a legal claim to an aboriginal right of self-
government. In this regard, it may be noted that the MNC itself has
promoted the idea that the Metis comprise an ethnic identity that is based
upon the community of persons who received scrip and Manitoba Act lands.
As we discussed earlier, this contemporary community is a relatively large
one; it is descended from individuals and not discrete communities as such,
and the charter group includes individuals associated with 'Indian'
communities rather than 'Metis' communities. This type of charter group is
not anywhere near like the small charter groups that must be identified to
prove Aboriginal rights according to the tests being applied in the lower
courts.

It is difficult, on the present basis of the law, to assess the merits of
particular claims to Metis identity and rights for purposes of s. 35.
Opponents of Metis rights have pointed out that the Metis of Red River in
the 19th century should be regarded as non-Aboriginal people because they
did not see themselves as Indians. While they accepted preemption rights
as settlers in s. 32 of the Manitoba Act 1870, they were also recognized as
having an Indian title in s.31. This distinguishes them from other 'mixed-
blood' communities such as the one in the Sault Ste Marie area which is the
subject of a claim in the Powley case. The latter group seemed to have
accepted preemption rights but was not provided with compensation
respecting any group rights. And, as previously noted, only the recipients of
Manitoba Act or Dominion Lands Act lands or scrip were excluded from the
definition in the Indian Act, and many persons from the latter group joined
Indian bands after 1850. This option was not open to the descendants of
the Red River Metis who were recognized as having a group Indian title that
had the result of excluding them from the ranks of Indians. Such historical
distinctions should be considered by the courts in making decisions on Metis
claims.

While acknowledging the inherent difficulties of making any
propositions about future judicial development, we suggest that the law as
developed in the Indian cases, and principles derived from history, policy,
and constitutional principles permit the following tentative propositions.

1. The existing aboriginal rights of the Metis people are those which
are vested in contemporary Metis communities that are descended from
historic charter groups or communities of Aboriginal people who were
distinct from the local 'Indian' communities.

These historic Metis communities must be 'Aboriginal', and therefore
not part of the newcomers world; they must be distinct from groups of
'frontier families' who intermarried with local Indian people.

Evidence of a new Metis identity will require significant evidence of
community activity over a period of time, and over a territory. An example is
the rise of the buffalo hunt culture of the Michif of the Red River region in
the first half of the 19th century.

2. Metis persons are members of those contemporary communities
who are entitled to the enjoyment of the community rights.

3. An historic Metis community is an 'Aboriginal' community. The test
for an Aboriginal community is a legally relevant time, which has not yet
been firmly established at common law.

Tentatively, what we call the 'Original Date', is that date which, on the
facts, the law imposes a fiduciary relationship between the Crown and the
Aboriginal community, upon the assumption of Crown suzerainty. This gives
rise in law to a duty of loyalty to the Crown on the part of the Aboriginal
people, whose political autonomy is now impaired but under the protection of
the Crown, and it is also the time at which the courts acquired their
jurisdiction.

On this view, the date at which an historic Metis community is
identified by a contemporary claimant community is the same date that the
Crown established a fiduciary relationship with the local 'Indian' people.

4. Membership in a s. 35 rights-bearing community is established by
the rules of the community, which are social institutions which have
maintained the continuity of the community from the historic charter group.
This conforms with the view discussed earlier, that only a people can decide
the boundary of its collective existence. On this view, it is not the personal
antecedents of the individual entitled to enjoy the Metis rights that is at
issue, but the rules of the community, which may be formal or informal. The
right of the community to establish such rules is itself an aboriginal right
that is central to a distinctive culture.

In the contemporary community, a core of the residents will descend
from the historic community, but it is not necessary that a claimant to the
enjoyment of an Aboriginal right vested in the community be a descendent.
What is required is proof that the claimant belongs to the community today.

It is beyond the scope of this paper to assess the results of this test
on actual claimants, but it is obvious that distinct Metis communities would
not have evolved historically, except in Western areas where the Crown did
not assert sovereignty for a long time after initial contact with the First
Nations in the eastern portions of contemporary Canada. It is notorious
that the Crown did not assert effective sovereignty, in the sense of an
intention to govern the Aboriginal communities themselves, as opposed to
the clusters of English settlers who 'carried the law of England' with them,
in the western portions and northern portions of Canada until well into the
19th century, and possibly, in the 20th century. On the tentative view
offered here, the date to determine the existence of a Metis historic
community would vary from place to place, in accordance with the
assumption of sovereignty and jurisdiction of the Crown and its courts.

The Supreme Court of Canada has indicated that it will adopt a policy
approach to the meaning of Metis rights in s. 35, and the Metis will be
found to have rights. It is assumed that the above tests would permit the
courts to find, on the facts, that there were distinct Metis communities in
existence at the time that Crown sovereignty was asserted in particular
areas. For example, it seems that, *prima facie*, the Crown had not asserted sovereignty over the Metis communities which battled against the first British settlers in what is now southern Manitoba in the early part of the 19th century. In this regard, it is noted that the Crown treated Riel as a person who owed allegiance to the Crown in 1885, so the 'Original Date' for the north Saskatchewan at least, on that view, predates 1885.

It must be noted, however, that the issue of defining Metis rights, and from there, the Metis themselves, is very much an open legal question. The possibility that the courts will adopt a 'pan-Indian' view of Metis identity can not be fully discounted, as considered earlier in this paper. In 1981, when President Daniels negotiated the inclusion of "Metis" in s.35, he represented both Indians not officially recognized in the *Indian Act*, and Metis people. In a letter to the president of the Labrador Metis Association published in the RCAP Final Report, Mr Daniels explains his intention regarding the meaning of "Metis" in s. 35 at the 1981 negotiations. He is clear that he meant to include "the member organizations and their constituents who self-identified as a Metis person", and 'that the term Metis was not tied to any particular geographic area, keeping in mind that Aboriginal people from coast to coast identified with the term Metis as their way of relating to the world.' The intention was to include individuals, and for their personal way of 'relating to the world'. This is to be contrasted with the purposes of s. 35 which have, since 1982, been identified by the Supreme Court of Canada, and which include the reconciliation of Crown authority and control over Aboriginal societies or nations, with the existence of distinct societies or nations of Aboriginal occupying specific territories.

It is too early to speculate whether the courts will be able to find the existence of rights vested in individuals which fits the above-described purpose. *Prima facie*, such rights may be vested in individuals, and include rights that may only be enjoyed in company with others, but which does not necessarily require the recognition of a body corporate separate from the
individuals.

What about 'treaty rights' for the Metis? Can 'Metis' be defined in treaty cases?

The legal principles from the existing case law on Aboriginal and Treaty rights suggests that the test for proof of Metis rights will be based on the idea that a person acquires rights by virtue of membership in a contemporary community of like persons. The law recognizes Aboriginal rights that are communal in nature. Metis identity for legal purposes will be tied to membership in communities of people today. A claim to treaty rights must be based upon evidence of membership in a 'Treaty Nation', and, in principle, the membership of the Treaty Nation will be determined by the group itself, in accordance with the norms behind the right of self-determination of 'peoples' that was canvassed earlier. There would seem to be no principle to support the idea that an individual 'gate-crasher' can impose himself upon a Treaty Nation by insisting on it and asking Canadian judges to agree.

8. Unravelling the riddle of Metis definition

The question of defining the "Metis" for purposes of s.35 of the Constitution Act, 1982, is a question of deciding the meaning of a Constitutional provision. Only the courts have the authority to decide the meaning of the Constitution. It is not possible, therefore, to draw any firm conclusions about the definition of "Metis" in advance of actual court decisions on the matter.

In this paper, we have tried to discuss many of the facts, issues, and principles that we think will be important in the continuing debate about the meaning of "Metis".

We conclude by emphasizing that Metis people themselves will continue to debate the issue, and to organize themselves according to their
preferred conclusions and objectives about Metis ethnic identity and political aspirations. Whatever decision the courts adopt is not likely to enjoy widespread support and confidence among Metis people and governments in Canada which have the authority and capacity to affect and infringe the interests of the Metis people. In light of these facts, the most preferable means of deciding the meaning of “Metis” would be in a process that would enjoy the maximum measure of support and confidence of both Metis people and governments. One way of doing that would be the establishment of specialized tribunals with representation from both sides.

The Royal Commission on Aboriginal Peoples made recommendations that are, in principle, worthy of consideration in this regard. These recommendations have attracted some wide-ranging support, including from agents of the United Nations. Adopting this approach, it is possible to include many actors in the process of Metis definition, and to take the issue away from the courts, from where no reasonably legitimate decision can be expected. We conclude by encouraging all interested parties to consider what role they might play as a participant in this most challenging project; defining a small historic people which is part of the foundation and fabric of Canada.

ENDNOTES

1. As a matter of legal theory, the courts do not create new laws at the time of giving decisions in particular cases: they ‘find’ the law, ‘in gremio legis’, or ‘in the bosom of the law’.


For a satirical commentary on various published opinions and attitudes about Metis people, including some racist ones. see Paul L.A.H. Chartrand. ‘An Absolutely Uncritical Look at What Has Been Written About the Metis’, a speech delivered in Saskatoon in May, 1885. in Roger Neil. ed. Voice of the Drum. etc. 1999?


5. Sawridge Band v. Canada [1995] 4 C.N.L.R. 121. (Federal Court, Trial Division)


9. This explanation is adopted, for example, by Yoram Dinstein, in “Collective Human Rights of Peoples” in (1976) 25 The International and Comparative Law Quarterly 102. at 103-104.

10. A famous scholar who wrote about these ideas is Renan: “Qu’est-ce qu’une Nation?” (1882) 1 Oeuvres Complettes 887. at 903-904. cited in Dinstein. supra. note 8. at 104.

11. Ibid.

12. There are Aboriginal ‘peoples’ in Canada who would not be large enough to encourage prospective buyers of an American National Football League team to purchase the team and make a profit if everyone in the ‘people’ bought a season ticket. But they are a ‘people’, and the football fans. even the 100,000 plus crowds of the Melbourne Cricket Ground and South American soccer arenas. are not. Some judges in Canadian aboriginal title cases have struggled with the test to identify a local group in which group title is held. and they called it an ‘organized society’. They meant to exclude such temporary groups as football fans.


16. See. e.g. Hazel W. Hertzberg. The Search for an American Indian Identity: Modern pan-Indian Movements (Syracuse, N.Y. Syracuse University Press.1981.)

17. The view explained in the text. and the quotation. are from Donald Savoie, Governing From the Centre: The Concentration of Power in Canadian Politics. (Toronto. University of Toronto Press. 1999) at 362.


24. [1998] 1 C.N.L.R. 182 at 203. In the result. the accused were acquitted on the basis of a Metis Aboriginal right under s. 35.


28. Ibid. at 103. Trudy Nicks. “Mary Anne’s Dilemma: The Ethnohistory of an Ambivalent Identity”
29. For example Laprise was 'a native of Chipewyan (that is, Dene) origin who lives in a predominantly Chipewyan community that was not a reserve and who did not have Indian status because his mother had married a non-status Indian: R v Laprise, [1978] 6 W.W.R. 85 (Sask. C.A.).


32. We adopt this term, proposed by Professor Slattery, because it better reflects the continuing political autonomy of Aboriginal peoples following the assertion of 'sovereignty'; see B. Slattery, *infra,* note 8, at 198 and note 5; 'The term 'suzerain' is more apt than 'sovereign' in this context because it accommodates the existence of protected political entities that retain their collective identities and some measure of internal autonomy'.

33. Professor Slattery has argued for the adoption of a common 'transition date' for proof of all Aboriginal rights, because the Court's current reasoning does not produce justifiable results, and is not consistent with established legal principles: B. Slattery, 'Making Sense of Aboriginal and Treaty Rights' (200) 79 Canadian Bar Review 196. This same date, which is here called the 'Original Date', could also be the test for identification of Metis communities.

34. RCAP. *supra.* note 30. at 385.