

## ERRATUM

The footnotes to the article "Who Are the Metis People in Section 35(2)?" by Catherine Bell, which appeared in volume 29 number 2 of the *Alberta Law Review*, were printed with a number of errors. Notes 108 through 128 should have appeared as follows:

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- <sup>108</sup> J.E. Foster, "Some Questions and Perspectives on the Problem of Metis Roots," in *The New Peoples: Being and Becoming Metis in North America*, *supra*, note 4 at 73.
- <sup>109</sup> M. Dunn, *supra*, note 102 at 6.
- <sup>110</sup> J. Brown, "Metis" in *The Canadian Encyclopedia*, vol. 2 (Edmonton: Hurtig, 1985) at 1124. See also Metis National Council, "The Metis Nation" (Paper presented to the United Nations Working Group on Indigenous Populations, August 1984) in *The New Peoples: Being and Becoming Metis in North America*, *supra*, note 4 at 6.
- <sup>111</sup> There are numerous references on the question of scrip distribution. See, for example, N.O. Cote, "Grants to the Half-Breeds of the Province of Manitoba and Northwest Territories" (Department of the Interior, 1929) P.A.C. RG 15 Vol. 227; Metis Assoc. of Alberta, *supra*, note 4 at 118-151; D.N. Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims" (1980) 10 Man. L.J. 415; Sanders, *supra*, note 33 at 9-19.
- <sup>112</sup> See, for example, A. Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* (Toronto: Bedford, Clarke and Co., 1880) at 294-295.
- <sup>113</sup> See, for example, *The Indian Act*, S.C. 1876, c. 18, s. 3(3)(e); S.C. 1951, c. 29, s. 12(1)a.
- <sup>114</sup> Sanders, *supra*, note 3 at 254.
- <sup>115</sup> Pentney, *supra*, note 5 at 97.
- <sup>116</sup> See, for example, *R. v. Thomas*, (1891) 2 Ex. C.R. 246; *Indian Act*, S.C. 1879, s. 3(e), as am. S.C. 1879, c. 34; Sanders, *supra*, note 17 at 11-16.
- <sup>117</sup> Sanders, *supra*, note 24 at 65; Chartier, *supra*, note 92 at 5-6.
- <sup>118</sup> *Supra*, note 102 at 5.
- <sup>119</sup> *Ibid.* at 5-8.
- <sup>120</sup> Metis National Council, "The Metis: A Western Canadian Phenomenon" quote in Chartier, *supra*, note 92 at 22-23.
- <sup>121</sup> M. Dobbin, *The One-and-a-Half Men: The Story of Jim Brady and Malcolm Norris* (Vancouver: New Star Books, 1981) at 61.
- <sup>122</sup> Purich, *supra*, note 18 at 14.
- <sup>123</sup> A. Lussier, "The Metis: Contemporary Problem of Identity" in *The Other Natives*, vol. 2 (Winnipeg: Manitoba Metis Federation Press and Editions Bois Brules, 1978) at 190-191; Manitoba Federation Inc., *Manitoba Metis Rights Position Paper* presented at the Manitoba "Metis Rights Assembly", Winnipeg, 11 March 1983 at 11; J. Sawchuk, *The Metis of Manitoba: Reformulation of An Ethnic Identity* (Toronto: Peter Martin Assoc. Ltd., 1978) at 48.
- <sup>124</sup> A. Lussier, *ibid.*, at 191.
- <sup>125</sup> J. Sawchuk, *supra*, note 123 at 12-13.
- <sup>126</sup> *Supra*, note 62.
- <sup>127</sup> See for example, *DenelMetis Comprehensive Land Claim Agreement in Principle* (Ottawa: Department of Indian Affairs and Northern Development, 1988) sections 3.1.9, 4.1 and 4.2.
- <sup>128</sup> *Sparrow*, *supra*, note 6.

## WHO ARE THE METIS PEOPLE IN SECTION 35(2)?\*

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*Section 35 of the Constitution Act, 1982 recognizes the aboriginal and treaty rights of the aboriginal peoples. Section 35(2) defines "the Aboriginal peoples of Canada" as Indian, Inuit and Metis peoples. Although s. 35 may appear straightforward, the author points out its ambiguity. This article attempts to clarify it. The ambiguity stems from the fact that the section does not define the term "Metis" nor does it say whether the "Metis" have existing aboriginal rights recognized in s. 35(1). These questions arise because self-identifying Metis are not a homogeneous group that lend themselves to easy definition. Moreover they have traditionally been excluded from federal programs benefitting Indian peoples. The author examines the difficulties involved in defining the term 'Metis' and analyzes some of the frameworks that have been suggested by various groups, including Metis organizations. She concludes that the term must be defined according to logical and political considerations in addition to self-indentification based on racial, cultural and historical criteria.*

*L'article 35 de la Loi constitutionnelle de 1982 vise deux objectifs. Premièrement, il reconnaît les droits ancestraux ou issus de traités des peuples autochtones. Deuxièmement, il définit les "Peuples autochtones du Canada" comme incluant les Indiens, les Inuit et les Métis. Bien que cet article paraisse clair, l'auteur relève une ambiguïté qu'elle s'efforce d'élucider. Elle provient du fait que le terme "Métis" n'y est pas défini et qu'il ne précise pas non plus si les "Métis" reçoivent les droits des peuples autochtones reconnus par l'article 35(1). Ces questions sont soulevées parce que les Métis ne forment pas un groupe homogène qui se prête à une définition aisée. De plus, ils ont traditionnellement été exclus des programmes fédéraux dont profitent les Indiens. L'auteur examine les problèmes que pose la définition du terme "Métis" et analyse certains des cadres qui ont été suggérés par divers groupes, dont plusieurs organisations métis. Elle conclut que le terme doit être défini sur des bases logiques et politiques plutôt que d'après des critères raciaux, culturels ou historiques.*

## TABLE OF CONTENTS

I. INTRODUCTION . . . . .	352
II. THE IMPACT OF THE PHRASE "ABORIGINAL PEOPLES" . . . . .	353
A. THE TERM "PEOPLES" . . . . .	353
B. ABORIGINAIS AND ABORIGINAL GROUPS . . . . .	365
III. WHO ARE THE METIS? . . . . .	370
A. THE COMPARATIVE APPROACH . . . . .	370
B. HISTORICAL, POLITICAL AND LEGAL USAGE OF THE TERM "METIS" . . . . .	375
IV. RESOLUTION OF THE DEFINITION DEBATE . . . . .	379

\* A condensed version of this paper will be included in a chapter on Metis Rights to be published in the second edition of B. Morse, *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985).

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## I. INTRODUCTION

Throughout the course of Canadian history various terms have been adopted to refer to Canada's native population including Indians, status Indians, non-status Indians, treaty Indians, non-treaty Indians, Inuit, metis, half-breeds, Metis nation, registered Indians, non-registered Indians and urban Indians.<sup>1</sup> This fragmentation is partially due to the introduction of legal and administrative definitions for various native groups through federal Indian legislation and assistance programs. These essentially created four legal categories of native people: status Indians, non-status Indians, Inuit, and half-breeds (commonly referred to as "metis"). Further divisions have been created by the denial of federal responsibility for metis and non-status Indians; the consequent uniting of these groups into national and provincial organizations for the purpose of achieving common political and economic goals; attempts by provincial governments (namely Alberta and Saskatchewan) to establish programs in response to the exclusion of these groups from federal jurisdiction; the creation of independent metis political organizations after the recognition of "Metis" as a distinct aboriginal people in s. 35(2) of the *Constitution Act, 1982*; and the subsequent reinstatement of designated categories of non-status Indians to Indian status for the purpose of applying federal Indian legislation.<sup>2</sup> As a result of these developments, the formulation of legal criteria to identify the "Metis" is a complicated exercise.

The first national legal usage of the term "Metis" is found in s. 35 of the *Constitution Act, 1982* which states:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Unfortunately, the selection of criteria to determine which individuals or groups of individuals fall within the named categories of "aboriginal peoples" is left open for debate. The debate is of particular importance to metis and non-status Indians who through the process of political policy and legal definition have been excluded from federal schemes designed to benefit Indian peoples. It is clear that the definition section was included to satisfy claims of self-identifying metis to recognition as an aboriginal people. However,

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<sup>1</sup> For the purpose of this paper a distinction is drawn between small "m" and capital "M" Metis. Written with a small "m" the term is a racial term referring to self-identifying metis of mixed Indian-European ancestry including the Metis Nation discussed in this paper. The term "Metis" in quotation marks refers to the term as it appears in s.35(2) of the *Constitution Act, 1982*.

<sup>2</sup> Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11.

the decision to include "Metis" in s.35(2) was done without a previous determination of whether the "Metis" had aboriginal rights and how they would be identified.<sup>3</sup>

This paper examines the difficulties that arise in attempts to define the term "Metis". In particular, it analyzes the importance of the constituent elements of s.35(2) and the selection of alternative interpretive frameworks in determining minimum criteria that must be met by a group asserting constitutional recognition as "Metis". In this context, various legal, political, historical, and cultural definitions are explored. A survey of the alternative definitions suggest that the term "Metis" as a contemporary legal concept cannot be given a single definition. However, this does not mean it is impossible to derive identification criteria. Rather, specification of criteria is possible if the term "Metis" is limited in its application to one of two possible groups:

- (a) the descendants of the historic Metis nation, or
- (b) people associated with, and accepted by, self-identifying contemporary metis collectivities.<sup>4</sup>

## II. THE IMPACT OF THE PHRASE "ABORIGINAL PEOPLES"

### A. THE TERM "PEOPLES"

It has been suggested that the word "peoples" is included in s. 35 to clarify the collective nature of aboriginal rights.<sup>5</sup> However, this interpretation may place unnecessary restrictions on content of, and entitlement to, "existing aboriginal and treaty rights." Although the courts have ruled on the collective nature of specific aboriginal rights, there has not been a judicial determination of whether an individual has aboriginal rights because she is an aboriginal, or a member of an aboriginal collectivity or both. Rather, entitlement to particular aboriginal rights is determined on a case by case basis. In this context, the phrase "collective" or "group" rights has been used in two different ways to describe aboriginal rights. First, it refers to rights which only group members have that are exercised by individuals, such as the right to hunt and fish. The court has

<sup>3</sup> D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S.M. Beck and I. Bernier, eds, *Canada and the New Constitution: the Unfinished Agenda*, Vol 1. (Montreal: Institute for Research on Public Policy, 1983) at 232; B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-84* (Kingston: Institute of Intergovernmental Relations, 1985) at 188.

<sup>4</sup> Examples of such collectivities would include fairly autonomous groups of metis people which do not necessarily have a social or historical connection to the Metis Nation such as the mixed communities in Grande Cache, Alberta. For further information see Metis Association of Alberta, *et al.*, *Metis Land Rights in Alberta: A Political History* (Edmonton: Metis Association of Alberta, 1981) at 215-241 and J. Peterson & J. Brown, eds, *The New Peoples: Being and Becoming Metis in North America* (Winnipeg: University of Manitoba Press, 1985).

<sup>5</sup> W.F. Pentney, *The Aboriginal Provisions in the Constitution Act, 1982* (Saskatoon: Native Law Centre, University of Saskatchewan, 1987) at 100; 45-51.

recognized the legal entitlement of an individual aboriginal person to enforce these rights.<sup>6</sup> Second, collective rights also refers to rights of a collectivity which can only be claimed by a collectivity. An example is aboriginal title which is a collective right vested in a group. Claims to title can only be advanced by an organized group of aboriginal people.<sup>7</sup>

The assumption that all aboriginal rights are collective fails to recognize that courts have not rendered a comprehensive definition of aboriginal rights that embraces all uses of the term.<sup>8</sup> It suggests that certain criteria can be generalized and applied to all aboriginal rights. This approach is questionable in light of the Supreme Court's classification of aboriginal rights as *sui generis* pre-existing rights.<sup>9</sup> Douglas Sanders suggests that the implication of this characterization is to recognize "Indian rights based on the pre-contact Indian legal order."<sup>10</sup> Consequently the classification of "existing aboriginal rights" as collective, individual or both may depend upon the definition of that right by the aboriginal community within which it was originally created.

The definition of rights based on the history and tradition of a particular aboriginal claimant is also supported by the *Sparrow* decision.<sup>11</sup> In *Sparrow*, the Supreme Court refused to set limits on the type of rights which can exist and stated that aboriginal rights must be interpreted flexibly to permit their evolution over time. Rather than identify characteristic features of aboriginal rights, the court developed general principles of interpretation and indicated that the definition of rights in s.35(1) begins with the perspective of the aboriginal claimants. Given the above, the "generous and liberal" interpretation of s.35 demanded by *Sparrow* suggests restrictions as to the collective nature of aboriginal rights should not be read into the term "peoples". Rather, the characterization of a right as collective or individual should depend on the right at issue and traditions of the aboriginal claimants.

It is beyond the scope of this paper to provide a detailed analysis of collective rights and their application to aboriginal rights. The point is that one cannot assume that the word "peoples" is only included in s.35 to clarify that the rights involved are collective

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6. E.g., *Simon v. R.* (1985), 24 D.L.R. (4th) 390 (S.C.C.); *Sparrow v. R.*, [1990] 1 S.C.R. 1075 (S.C.C.).

7. E.g., *Calder v. A.G. British Columbia*, [1973] S.C.R. 313 at 328; *Guerin v. R.*, [1984] 2 S.C.R. 335 at 376ff; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979), 107 D.L.R. (3d) 513 at 542-43 (F.C.T.D.); B. Slatery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 756-57.

8. For an interesting discussion on different classes of aboriginal rights see D. Ahenakew, "Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition" in M. Boldt, J.A. Long & L. Little Bear, eds, *The Quest for Justice* (Toronto: University of Toronto Press, 1985) 24 at 25-26; and M. Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984).

9. *Guerin*, *supra*, note 7.

10. D. Sanders, "Pre-Existing Rights: The Aboriginal Peoples of Canada (Sections 25 and 35)" in G. Beaudoin and E. Ratushny, eds, *Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1984) 707 at 708.

11. *Supra*, note 6.

or group rights. The better interpretation is to view the term "peoples" as describing the collective nature of the beneficiaries of s. 35 and not the collective nature of their rights. According to this interpretation, the existing aboriginal and treaty rights of the aboriginal peoples, whether collective, individual or a combination of both, are recognized and affirmed by s. 35.

If one accepts the above argument, there are two possible ways to read s. 35(2). The first assumes that there are only three distinct aboriginal peoples in Canada — the Indian, Inuit, and Metis. The second assumes that "peoples" also refers to numerous smaller aboriginal collectivities constituting the three broader named groups. That is, the aboriginal peoples of Canada are the Indian peoples, Inuit peoples, and Metis peoples of Canada. There are several reasons why the second interpretation is preferable to the first:

1. Groups which identify as Inuit, Indian and metis view themselves as distinct from other self-identifying groups of Inuit, Indian and metis;
2. Contemporary aboriginal collectivities organized for social, political or legal reasons may draw their membership from two or more of the named groups in s.35(2) and therefore will not fall within any particular named group; and
3. Cultural, social and political differences among aboriginal groups result in the law's treating them as distinct peoples.

The first reason is illustrated by the definition of "aboriginal people" adopted by the Joint Council of the National Indian Brotherhood in the Declaration of First Nations:

"Aboriginal people" means the First Nations or Tribes of Indians in Canada and each Nation having the right to define its own citizenship.<sup>12</sup>

This viewpoint is also reflected in the title of the national status Indian organization (The Assembly of First Nations), Indian literature and government literature.<sup>13</sup> Similarly, the Inuit peoples of Canada are viewed as a distinct group, but a group composed of various tribes or bands.<sup>14</sup>

Among the metis, there is disagreement whether the "Metis" in s.35(2) are a single people or several peoples. However, it is clear that a variety of mixed blood aboriginal

<sup>12</sup> Reprinted in *The Quest for Justice*, *supra*, note 8 at 359.

<sup>13</sup> E.g., D. Opekokew, *The First Nations: Indian Government and the Canadian Confederation* (Regina: Federation of Saskatchewan Indians, 1980); Ahenakew, *supra*, note 8; *Report of the Special Committee on Indian Self-Government in Canada* (Ottawa: Queen's Printer, 1983) (Chair: K. Penner).

<sup>14</sup> T. Berger, *Northern Frontier, Northern Homeland* (Vancouver: Douglas and McIntyre, 1988) at 40-41.

collectivities identify as "Metis." This is reflected in the following statement by a New Brunswick member of the Native Council of Canada:

There is no one exclusive Metis People in Canada, any more than there is one exclusive Indian people in Canada. The Metis of eastern Canada and northern Canada are as distinct from the Red River Metis as any two peoples can be. Yet all are distinct from Indian communities by ancestry, by choice, and their self-identification as Metis. As early as 1650, a distinct Metis community developed in LeHeve, Nova Scotia, separate from Acadians and Mic Mac Indians. All Metis are aboriginal people. All have Indian ancestry.<sup>15</sup>

The metis people living on the settlements in northern Alberta are an example of a contemporary collectivity, recognized by law, that draws its membership from more than one of the named groups in s.35(2). The *Metis Betterment Act*, which outlines the provincial settlement scheme, defines "Metis" on a racial basis as persons with a minimum of one-quarter Indian blood who are not status or treaty Indians as defined by the *Indian Act*.<sup>16</sup> This definition reflects the fact that the settlements were not created for a single people that could trace their origins to a single Indian tribe or to the Metis nation. Many of the original settlement members were status Indians who surrendered their treaty rights or were struck from government band lists. Many identified as "metis" but not all claimed to be descendants of the Metis nation.<sup>17</sup> The legal recognition of this group of "metis" resulted from the political unification of non-status individuals from distinct cultural backgrounds who lived in the northern portion of the province. Faced with similar problems created by poverty, homelessness, disease, and hunger, they organized to achieve common economic and social goals. United under the Metis Association of Alberta, they successfully lobbied for the creation of the metis settlements.<sup>18</sup> The negotiators of the new *Metis Settlements Act* have moved away from a racial definition and propose that "Metis" be defined as "an individual of aboriginal ancestry who identifies with Metis history and culture."<sup>19</sup> Although this suggests affiliation with a single people, it does not change the original composition of the group or assist substantially in the process of defining the "Metis."

It is clear that up to April 17, 1982 Canadian law recognized and responded to Indian tribes as separate cultural groups. This approach is reflected in aboriginal title cases,<sup>20</sup> historical legal documents and the pattern of treaty making with different tribal groups

<sup>15.</sup> R.E. Gaffney, G.P. Gould & A.J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (New Brunswick Association of Metis and Non-Status Indians, 1984) at 62.

<sup>16.</sup> R.S.A. 1980, c. M-14, s.1(b).

<sup>17.</sup> D. Sanders, "A Legal Analysis of the Ewing Commission and the Metis Colony System in Alberta" (Paper prepared for the Metis Association of Alberta, April 4, 1978) [unpublished] at 19.

<sup>18.</sup> For a discussion on the history of the Metis settlements see e.g., Metis Association of Alberta, *supra*, note 4, at 187-214; Alberta Federation of Metis Settlement Associations, *Metisism: A Canadian Identity* (Edmonton: Alberta Federation of Metis Settlement Associations, 1982) at 5-11; D. Purich, *The Metis* (Toronto: James Lorimer & Company, 1988) at 133-150.

<sup>19.</sup> Bill 35, *Metis Settlements Act*, 2d Sess., 22d Leg. Alta., 1990, s. 1(1)j.

<sup>20.</sup> *Supra*, note 7.

across Canada.<sup>21</sup> In May of 1990, the Supreme Court took this recognition one step further and acknowledged that "Indian nations were regarded in their relations with European nations which occupied North America as independent nations."<sup>22</sup> Relations with Indian tribes were categorized as *sui generis*, falling between "the kind of relations conducted with sovereign states and the relations that such states had with their own citizens."<sup>23</sup> This legal treatment of Indian tribes as distinct legal entities, coupled with political negotiations on self-government for individual Indian bands at the First Ministers Conferences on aboriginal matters, provides further support for the argument that "peoples" refers to smaller aboriginal collectivities of the three named aboriginal groups in 35(2).

The Metis National Council contends that s. 35(2) refers to a single Metis people. Underlying this position is the assumption that only descendants of the Metis nation can legitimately identify as "Metis". Allowing other mixed-bloods who are not connected to the Metis nation to identify as "Metis" distorts the history of the Metis as an indigenous nation in Western Canada. Whether or not this interpretation is upheld by the Canadian courts will be affected by:

1. the definition of the word "peoples." Is the term synonymous to "nation" or is it something less?
2. the temporal nature of the word "peoples."

The word "peoples" is not defined in the constitution nor has it been defined in Canadian law. One possible interpretation is the word "peoples" refers to indigenous nations. This interpretation arises from claims of Canada's aboriginal peoples to recognition as nation states. As the notion of indigenous nationhood was part of the

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<sup>21.</sup> For a general discussion see D. Sanders, *supra*, note 3 at 241-49; M. Jackson, "The Articulation of Native Rights in Canadian Law" (1984) 18 U.B.C. L. Rev. 255 at 257-69; Slatery, *supra*, note 7 at 732-36; and A.G. *Quebec v. Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.) at 1043-1061.

<sup>22.</sup> *Sioui*, *ibid.* at 1053.

<sup>23.</sup> *Ibid.* at 1038.



national and international climate within which s.35 was negotiated,<sup>24</sup> it is properly considered in a purposive interpretation of s.35.<sup>25</sup>

International law identifies four criteria for recognition as a nation state, namely: a permanent population, a defined territory, an effective government, and the ability to enter international relations.<sup>26</sup> Of these criteria, the most critical is the existence of a "government" that has effective control over the territory and population. Modern developments suggest this government need not be a sophisticated government in the western sense of the word. Rather, what is needed is some "form of organization that can handle and structure the society and is in control in a general way."<sup>27</sup> The final criterion is also the subject of debate as it assumes the need for recognition by other states. Where some argue recognition is an element of statehood, others dilute the criteria by arguing that the first three elements are requisite elements of the fourth. Capacity and recognition are the effects, not the prerequisites, of statehood.<sup>28</sup>

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<sup>24.</sup> See, for example, "Draft Declaration of Principles for the Defence of Indigenous Nations and Peoples of the Western Hemisphere" in National Lawyers Guild, eds, *Rethinking Indian Law* (New Haven, Advocate Press, 1982) at 137-138; M. Davies, "Aboriginal Rights in International Law: Human Rights" in B. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis, and Inuit Rights in Canada*, revised ed. (Ottawa: Carleton University Press, 1989) at 745-793; "Dene Declaration" in M. Watkins, ed., *Dene Nation: The Colony Within* (Toronto: University of Toronto Press, 1977) 3; Native Council of Canada, *Declaration of Metis and Indian Rights With Commentary by Harry W. Daniels* (Ottawa: Native Council of Canada, 1979); Opekokew, *supra*, note 13. For a general discussion of the negotiations and the aboriginal perspective see Asch, *supra*, note 8 at 30-38; D. Sanders, "The Indian Lobby and the Canadian Constitution, 1978-1982" in N. Dyck, ed., *Indigenous Peoples and the Nation State* (St. John's: Institute of Social and Economic Research, 1985) 151; D. Sanders, "An Uncertain Path: The Aboriginal Constitutional Conferences" in J.M. Weiler and R.M. Elliot, eds, *Litigating the Values of a Nation* (Toronto: Carswell, 1986) 63; H. Cardinal, "Indian Nations and Constitutional Change" in J.A. Long and M. Boldt, eds, *Governments in Conflict: Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) at 83-89; and W. Many Fingers, "Commentaries: Aboriginal Peoples and the Constitution" (1981) 19 Alta. L. Rev. 428.

<sup>25.</sup> In the decision of *Sparrow v. R.*, *supra*, note 6, the Supreme Court of Canada develops an interpretive framework for s.35 which calls for consideration of principles of constitutional law, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. For a limited discussion of this approach see text.

<sup>26.</sup> *Montevideo Convention on Rights and Duties of States*, 26 December 1933, U.S.T.S. No. 881, 165 L.N.T.S. 19, art. 1.

<sup>27.</sup> S.A. Williams and A. de Mestral, *An Introduction to International Law*, 2d ed. (Toronto: Butterworths, 1987) at 45. The right of territorial and political sovereignty has been extended to peoples with little in the way of formal government. See, for example, *Western Sahara*, Advisory Opinion [1975] I.C.J. Rep. 12 at 31-33; D. Sanders, "The Re-emergence of Indigenous Questions in International Law" (1983) 4 *Canadian Human Rights Yearbook* 2 at 25-30.

<sup>28.</sup> See, for example, Williams and de Mestral, *ibid*; M.F. Lindley, *The Acquisition of Backward Territory in International Law* (Longman's Green and Co. Ltd., 1926; reprint, New York: Negro University Press, 1969) at 19; R. Coulter, "Contemporary Indian Sovereignty" in *Rethinking Indian Law*, *supra*, note 24 at 117.

Regardless of how these debates are resolved, it is difficult for most contemporary self-identifying metis groups to develop arguments in support of nationhood. Perhaps the only group that can are the descendants of the Red River Metis who in the late 18th century emerged as a distinct national entity. Metis nationalists will argue that mixed blood populations originated in Eastern Canada from the time of first contact between Indians and Europeans, but only in the Northwest did a distinct political and national consciousness develop among the mixed blood population. Some argue this consciousness is attributable to the geographic and social isolation of the Metis populations in the Northwest brought about by the lack of settlement and the importance of the fur trade.<sup>29</sup> Others argue that Metis nationalism was fostered by the North West Company in order to protect its economic interest in the West.<sup>30</sup> Whatever the source of this consciousness, it manifested itself in the social and political unification of various Metis collectivities in what was then known as Ruperts Land, to oppose Canadian expansion into the Northwest. These collectivities constituted a broader political collective commonly referred to as the Metis nation.

From the mid-sixteenth century until the early nineteenth century diverse Metis communities were forming in Western Canada. The population consisted of two fairly distinct groups, the French Metis or "Bois Brules", whose paternal language was French, and the English Metis, whose paternal language was English.<sup>31</sup> Among these groups distinct lifestyles developed. They included provisional bands of Metis who hunted buffalo and after the hunt returned to permanent sites in the Red River region, trappers, farmers, fisherman, voyageurs, interpreters, and freighters.<sup>32</sup> Although it is clear that a definite political and social organization evolved around the buffalo hunt, the diverse elements of the population did not crystallize into a united people until the early nineteenth century.

It is difficult to pinpoint the exact date the Metis nation came into being. The development of their political consciousness as a people can be traced from their initial unification in 1816 at the Battle of Seven Oaks (where the Metis fought against the creation of a settlement of white settlers by Lord Selkirk), to the establishment of a

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<sup>29.</sup> See, for example, D. Redbird, *We are Metis: A Metis View of the Development of a Native Canadian People* (Willowdale: Ontario Metis & Non-Status Indian Association, 1980) at 5; A.H. de Tremaudan, *Hold High Your Heads: History of the Metis Nation in Western Canada*, trans. E. Maguet (Winnipeg: Pemmican Publications, 1982) at 8.

<sup>30.</sup> See, for example, G. Stanley, *The Birth of Western Canada* (Great Britain: Longman's, Green and Co., 1936; reprint, Toronto: University of Toronto Press, 1960) at 11; A.S. Morton, "The New Nation: The Metis" in A. Lussier and D. B. Sealey, eds, *The Other Natives*, vol. 1 (Winnipeg: Manitoba Metis Federation Press and Editions Bois-Brules, 1978) at 28.

<sup>31.</sup> Tremaudan, *supra*, note 29.

<sup>32.</sup> For a discussion of the various lifestyles among the Metis see, for example, D.B. Sealey and A. Lussier, *The Metis: Canada's Forgotten People* (Winnipeg: Manitoba Metis Federation Press, 1975) at 17-30; M. Giraud, *The Metis in the Canadian West*, trans. G. Woodcock (Edmonton: University of Alberta Press, 1986); E. Pelletier, *A Social History of the Manitoba Metis: The Development and Loss of Aboriginal Rights* (Winnipeg: Manitoba Metis Federation Press, 1987).

provisional government under Louis Riel in 1869 (which negotiated what is now known as the province of Manitoba into the Canadian confederation).<sup>33</sup> Although Lord Selkirk was successful in establishing a white settlement at Red River, the Metis nation grew. By 1871 the population of the Red River area consisted of 5,720 French-speaking Metis, 4,080 English-speaking Metis and 1600 white settlers.<sup>34</sup>

After the creation of Manitoba, a significant number of Metis migrated west and northwest into what is now Saskatchewan and Alberta.<sup>35</sup> Many joined mixed-blood communities indigenous to Alberta and Saskatchewan while others formed groups to continue the nomadic pursuit of the buffalo.<sup>36</sup> Independent metis communities with their own political organization flourished once again. However, prosperity was short lived. The Metis, white settlers, and Indians were threatened by poverty, an influx of new settlers, and changes to the existing land holding system. Numerous petitions were sent to Ottawa from various Metis and white communities seeking a redress of grievances. Although government compromises were made to satisfy the predominantly white communities (such as St. Albert), Metis concerns remained unresolved. Once again, the Metis political consciousness was manifested in the formation of a provisional government. However, this time the Metis were not given the opportunity to negotiate their rights. Troops were sent to assert Canada's control in the Northwest. A number of battles were fought. The Metis were defeated and their leaders either fled the country or were prosecuted. Riel faced trial and execution. The scrip system adopted in Manitoba was unilaterally imposed in Alberta and Saskatchewan to extinguish potential Metis claims.<sup>37</sup>

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<sup>33</sup> See, for example, *Dumont v. A.G. Canada*, [1988] 5 W.W.R. 193 at 198 (Man. C.A.), O'Sullivan J.A. (dissenting); Stanley, *supra*, note 30 at 107-125; Tremaudan, *supra*, note 29 at 89-95; Diary kept by the Reverend Father N.J. Ritchot when negotiating the entry of Ruperts Land into Confederation in 1870, trans. Berlitz Translation Service, Public Archives of Canada, Ottawa, photocopied 14; D. Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation" in H. Daniels, ed., *The Forgiven People: Metis and Non-Status Land Claims in Alberta* (Ottawa: Native Council of Canada, 1979) at 10; D.N. Sprague, *Canada and the Metis, 1869-1885* (Waterloo: Wilfred Laurier Press, 1988) at 55-68. There is some disagreement on whether Ritchot exceeded his authority during the course of the negotiations and the treatment of the Provisional Government as a legitimate government. See, for example, T. Flanagan, *Riel and the Rebellion: 1885 Reconsidered* (Saskatoon: Western Producer Prairie Books, 1983) at 59-62, 79-85; and T. Flanagan, "The Case Against Metis Aboriginal Rights" (1983) 9 *Canadian Public Policy* 314 at 316-319.

<sup>34</sup> D. Sanders, *ibid.* at 8.

<sup>35</sup> Gerhard Ens, "Dispossession or Adaptation: Migration and Persistence of the Red River Metis 1835-1890" (Paper presented to C.H.A. Annual Meeting, 9-11 June 1988) [unpublished].

<sup>36</sup> See, for example, discussion of early metis settlement in Prince Albert, White Fish Lake, St. Albert, Lac la Biche, Lac Ste. Anne and St. Laurent (Batoche) in Stanley, *supra*, note 30 at 178-192; Tremaudan, *supra*, note 29 at 112-114; Metis Association of Alberta, *supra*, note 4 at 14-16; Sealey and Lussier, *supra*, note 32 at 91-108.

<sup>37</sup> Academic sources on Metis history in the North West Territories are numerous. See, for example, Stanley, *supra* note 30 at 243-265 and 295-326; Sealey and Lussier, *supra*, note 32 at 111-131; Tremaudan, *supra*, note 29 at 112-159. Thomas Flanagan challenges the reasons for the 1885 insurrection arguing that the Metis wanted money, not land, and violence was not necessary to resolve Metis grievances in the northwest. See T. Flanagan, *Riel and the Rebellion: 1885*

Keeping this history in mind, were the Metis a sovereign nation? It is undisputed that in 1871 the predominant population in Manitoba was Metis and that Metis populations can be traced around this time to specific geographical areas in Alberta and Saskatchewan. However, problems arise in defining Metis territory if emphasis is placed on Metis land use. If one takes into consideration land uses ranging from freighting to hunting to cultivation, the extent of the Metis homeland is vast. On the other hand, if emphasis is placed on cultivation, the area is significantly reduced.<sup>38</sup> For now, it is sufficient to establish that the Metis nation had use and control of a certain amount of territory, the definition of which may vary depending on the criteria of proof adopted. Identifying specific boundaries is properly considered in defining the territorial scope of national rights and not the existence of a nation. The focus on defining stable boundaries avoids the real issue; that is, existence of a territory that can be identified as Metis. This is not an unusual variable in international law which is often concerned with boundary identification.<sup>39</sup>

Another argument against the recognition of the Metis as an indigenous nation concerns the legitimacy of Riel's government. According to this argument, the proper governing body in the Red River Settlement from 1835 until Canada assumed jurisdiction over the Metis in 1870, was the Council of Assiniboia established by the Hudson's Bay Company.<sup>40</sup> Whether Riel's provisional government is defended on the basis of the failure of the Council to represent the Red River population, effectively, or on the basis of an inherent right to aboriginal sovereignty and the requirement of voluntary surrender of aboriginal lands,<sup>41</sup> it is clear that representatives of Riel's provisional government negotiated the terms of the *Manitoba Act* with Ottawa.<sup>42</sup> The Act was "endorsed by the

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*Reconsidered, supra*, note 33 at 14-74.

38. Some argue Metis territory encompasses the entire area known as Ruperts Land prior to its surrender in 1870 (approximately 123,000 square miles). See, for example, Tremaudan, *supra*, note 29 at 19; *Native People and the Constitution of Canada* (Ottawa: Mutual Press, 1981) (Commissioner: H. Daniels) at 52. If territory is limited to settlements, at least 33 communities can be identified along the Assiniboine River, Red River, Whitemouth River, Seine River and Lake Manitoba. See, Pelletier, *supra*, note 32 at 4-5. The identification of territory is further complicated by the lifestyle and migration patterns of the Metis. For a general discussion of Metis territory and land use see, C. Bell, *Metis Aboriginal Title* (LL.M. Thesis, Faculty of Law, U.B.C., 1989) [unpublished] at 269-271; Pelletier, *supra*, note 32; Metis Association of Alberta, *supra*, note 4 at 16-20; Sealey and Lussier, *supra*, note 32 at 8-30; and Ens, *supra*, note 35. The fluidity of Metis boundaries and their mode of existence has caused positivists to cast doubt on the ability of the Metis to establish aboriginal title claims. See Flanagan, "The Case Against Metis Aboriginal Rights" *supra*, note 33 at 320 and *Dumont v. A.G. Canada, supra*, note 33 at 203ff, Twaddle J.

39. Williams and de Mestral, *supra*, note 27 at 44-45.

40. Flanagan, *Riel and the Rebellion, supra*, note 33 at 80-83.

41. See, for example, *ibid.*; C. Bell, *supra*, note 38 at 256-268; M. Hudson and M. Fladell, "The Development of Government in Red River" (paper prepared for the Native Council of Canada, undated) [unpublished]; D. Morton, ed., *The Queen v. Louis Riel* (Toronto: University of Toronto Press, 1974) at 352-359; and Native Council of Canada, *Statement of Claim Based on the Aboriginal Title of Metis and Non-Status Indians* (Ottawa: Native Council of Canada, 1980).

42. *Supra*, note 33.

provisional legislature in the Red River, enacted by the Parliament of Canada and confirmed by the Imperial legislature."<sup>43</sup> For this reason, some commentators have characterized the *Manitoba Act* as a treaty between the government of Canada and the Metis nation.<sup>44</sup>

On the question of ability to conduct international relations, Metis nationalists would argue that they had a choice to either accept offers of annexation to the United States or strike a deal with Canada in which a level of Metis autonomy could be maintained. In this sense, the Metis nation was capable of, and did conduct, international relations with other nations. The form of government envisioned by the Metis nation was a non-ethnic provincial government forming a component part of a federated state. By virtue of their numbers, the Metis would hold the majority of the seats in the newly created province of Manitoba. However, the massive influx of settlers soon resulted in the Metis' becoming a minority in their homeland and control in the local legislature was lost.

Despite claims of aboriginal peoples to international status as nation states, there are several reasons why this claim should not determine the definition of "peoples" in s.35(2). First, this interpretation only accounts for one side of the debate on the question of status. When the constitution was negotiated, both the federal and provincial governments rejected the concept of aboriginal sovereignty. Although some recognition has been given to an aboriginal right of self-government, self-government has yet to be defined and accepted by all provinces.<sup>45</sup> Second, the federal and provincial governments did not intend to give aboriginal peoples additional rights under the Constitution other than those they already had by virtue of legislation, treaties, or common law. Consequently, they would not intentionally acknowledge the international status of aboriginal peoples as sovereign states.<sup>46</sup> Finally, Canadian courts have recognized aboriginal groups as distinct cultural groups with their own unique set of rights arising from historical use and occupation, but not as sovereign peoples.<sup>47</sup> This was the legal climate within which s.35 was negotiated. Since the enactment of the Constitution, the Supreme Court of Canada has recognized aboriginal peoples as nations but describes their relationship with Canada as *sui generis*.<sup>48</sup> Although certain aboriginal groups may eventually be able to convince the courts of their international status, *Sioui* suggests Canadian courts are moving towards

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<sup>43.</sup> Sanders, *supra*, note 33.

<sup>44.</sup> S.C. 1870, c. 3. Riel characterized the *Manitoba Act* as a treaty between two nations. This same characterization is accepted by O'Sullivan J. in the *Dumont* decision, *supra*, note 33. For Riel's position, see Morton, *supra*, note 41 at 352-362.

<sup>45.</sup> See, for example, D. Sanders, *supra*, note 3 at 263-267; R. Romanow, "Aboriginal Rights in the Constitutional Process" in *The Quest for Justice*, *supra*, note 8 at 73-82; R. Dalon, "An Alberta Perspective on Aboriginal Peoples and the Constitution" in *The Quest for Justice*, *supra*, note 8 at 107-112; and Cardinal, *supra*, note 24.

<sup>46.</sup> See, for example, Dalon, *ibid.* at 96; Sanders, *ibid.* at 236. For a discussion on various academic views on the intended meaning see Pentney, *supra*, note 5 at 181-188.

<sup>47.</sup> See discussion herein.

<sup>48.</sup> *A.G. Quebec v. Sioui*, *supra*, note 21 at 1038.

a unique concept of nationhood linked to historical recognition of independent status by the British Crown and the government of Canada.

Some assistance in the interpretation of the word "peoples" may be obtained from a review of its treatment in international law. Debate over the meaning of this word was initially raised by its use in United Nations documents upholding a right to "self-determination of peoples" and the increasing activity of the United Nations aimed at putting an end to colonial domination.<sup>49</sup> Academic interpretation on what the United Nations has meant by peoples in this context varies from identifiable, homogenous groups aware of their collectivity,<sup>50</sup> to cohesive national groups that may choose self-determination in the form of recognition as nation states.<sup>51</sup> Interpretations offered by international indigenous organizations recognize distinctions between indigenous nations and other indigenous groups, but accord them equal rights of self-determination as indigenous peoples.<sup>52</sup> In April of 1981, a draft International Covenant on the Rights of Indigenous Peoples was tabled for discussion at the World Council of Indigenous Peoples in Melbourne. Article 2 of the draft defined indigenous peoples with a right of self-determination as follows:

The term Indigenous People refers to a people (a) who lived in a territory before the entry of a colonizing population, which colonizing population has created a new state or states to include the territory, and (b) who continue to live as a people in a territory and who do not control the national government of the state or states within which they live.<sup>53</sup>

The interpretation of the word "peoples" has been raised before the International Court of Justice and the United Nations Human Rights Committee. In 1975, the former gave an advisory opinion on the Western Sahara which clarified that the term "peoples", when used in relation to self-determination of colonized peoples, does not necessarily refer to a nation state. In that decision, nomadic tribes, which associated as a collectivity on a limited basis, were found to have sufficient political organization to require colonizing powers to obtain consent for the legal acquisition of sovereignty over their territories.<sup>54</sup> In March of 1990, the Human Rights Committee rendered its opinion on a petition submitted by Bernard Ominayak, chief of the Lubicon Lake Band. Ominayak alleged that Canada was in breach of several provisions of the Covenant on Civil and Political Rights, including its undertaking to respect and ensure the self-determination of peoples.<sup>55</sup> Canada argued that the Lubicon, being only one of 582 bands in Canada and a small portion of a larger group of Cree living in Northern Alberta, were not a "people" within

49. Williams and de Mestral, *supra*, note 27 at 57-59.

50. *Ibid.* at 57.

51. I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1979) at 593.

52. "Draft Declaration of Principles for the Defence of Indigenous Nations and Peoples of the Western Hemisphere", *supra*, note 24, art. 2.

53. Reproduced in Davies, *supra*, note 24 at 780.

54. *Western Sahara*, *supra*, note 27.

55. Communication submitted by Bernard Ominayak, Chief of the Lubicon Lake Band, 26 March 1990 (CCPR/c/38/C/167/1984).

the meaning of the Covenant.<sup>56</sup> The Committee declined to give an opinion on this issue on the basis that a violation of the right to self-determination cannot be raised before the Committee by an individual.<sup>57</sup>

The International Commission of Jurists has proposed a definition of people based on the following criteria:

1. a common history;
2. racial or ethnic ties;
3. cultural or linguistic ties;
4. religious or ideological ties;
5. a common territory or geographical location;
6. a common economic base; and
7. a sufficient number of people.<sup>58</sup>

This definition accords with the social-science criteria of nationhood which emphasize a psychological bond joining a people and differentiating them from others, an aversion to being ruled by others, common ideology, common institutions and customs, and a sense of homogeneity.<sup>59</sup> Adopting this definition, a collectivity may be a state or nation but not a people. For example, Canada is a state but its population does not constitute a single "people" given criteria one to four above.

There are several reasons why this definition of peoples could operate as a useful guide in the interpretation of s.35(2). First, the criteria are broad enough to encompass all self-identifying groups that existed on April 17, 1982. Second, a broad interpretation follows the direction of the Supreme Court in *Sparrow* that a generous and liberal interpretation of the words in s.35 is demanded when one considers that the purpose of s.35(1) is to affirm aboriginal rights.<sup>60</sup> For the metis, adopting this definition means a group identifying as "Metis" people need not establish a link to the Metis Nation.<sup>61</sup> Third, this approach accords with the political climate surrounding the negotiation of s.35(2) by

<sup>56.</sup> *Ibid.* pars. 6.1-6.2.

<sup>57.</sup> *Ibid.* pars. 13.3-13.4 and 32.1-32.2. The Optional Protocol to the Covenant on Civil and Political Rights affords the right of petition to individuals and groups of individuals. If individuals or groups of individuals cannot invoke a breach of the right to self-determination as stated by the Committee, the Human Rights Committee may be procedurally blocked from ruling on that right as there is no specific provision for a right of petition by "peoples" of states that are party to the Covenant.

<sup>58.</sup> Indian Law Resource Centre, *Indian Rights — Human rights: Handbook for Indians on International Human Complaint Procedures* (Washington, D.C.: Indian Law Resource Centre, 1984) at 14.

<sup>59.</sup> M. Boldt and J.A. Long, "Tribal Traditions and European — Dilemma of Canada's Native Indians" in *The Quest for Justice*, *supra*, note 8 at 344.

<sup>60.</sup> *Supra*, note 6 at 1106.

<sup>61.</sup> An example of a group would be the metis in Grande Cache, Alberta. These people trace their origins to Iroquois-Cree and White-Cree marriages between fur company men and Cree women. See Metis Assoc. of Alberta, *supra*, note 4 at 16-17 and 216-222; Trudy Nicks and Kenneth Morgan, "Grande Cache: The historic development of an indigenous Alberta metis population" in *The New Peoples: Being and Becoming Metis in North America*, *supra*, note 4 at 163-181.

recognizing a form of indigenous nationhood and the right to self-identification without conferring international status. Finally, a broad definition of aboriginal peoples will not necessarily expand the rights that existed in 1982 when the Constitution came into effect. The onus is on the claimant to establish the right and to prove *prima facie* infringement of s.35(1). Being recognized as an aboriginal people is not enough to prove a particular right.<sup>62</sup>

Before leaving the discussion of the term "peoples," brief mention should be made of its temporal nature. Whether it refers to historical or contemporary groups is significant for two reasons. First, an individual may not be associated with an ongoing collectivity but may be able to establish descent from a historical aboriginal collectivity. Second, contemporary aboriginal groups may not be able to trace a link to a single historical "people" or they may have difficulty showing they have sufficient coherence and permanence to constitute a contemporary people. Rules of statutory interpretation are of little assistance in this regard. On the one hand, constitutional documents are to be defined broadly so that they are flexible enough to permit their evolution over time. On the other hand, one can argue there is no need for flexibility because Inuit, Indians and Metis are historically identifiable people.<sup>63</sup> The obvious problem with the second approach is that it freezes aboriginal collectivities at a particular point in history and denies them the ability to reformulate for the purpose of achieving specific political, economic and social goals. This is contrary to the spirit of interpretation adopted by the Supreme Court when it refused to accept the frozen rights theory advanced in the interpretation of s.35(1).<sup>64</sup>

This issue was briefly mentioned by Mr. Justice O'Sullivan of the Manitoba Court of Appeal in his dissenting opinion in *Dumont v. A.G. Canada* wherein he stated that s. 35(2) recognizes the Metis as an aboriginal people and "[it] must be noted that the existence of the Metis people is asserted in the Constitution as of the present, not simply as of the past."<sup>65</sup> By this statement O'Sullivan suggests the term "people" is to be given both contemporary and historical significance. This position is given further support by the emphasis in *Sparrow* on the political context of 35(1) in developing rules for its interpretation.<sup>66</sup> Regardless of whether O'Sullivan's views are accepted, peoples must refer to one of two possible groups — descendants of historic aboriginal collectivities or peoples associated with contemporary aboriginal collectivities.

## B. ABORIGINALS AND ABORIGINAL GROUPS

The shorter Oxford Dictionary defines "Aborigines", "Indians" and "Natives" as follows:

<sup>62.</sup> *Sparrow v. R.*, *supra*, note 6 at 1091-1093, 1111-1113.

<sup>63.</sup> P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 340-342; 657-659.

<sup>64.</sup> *Sparrow*, *supra* note 6 at 1091-1093.

<sup>65.</sup> *Supra*, note 33 at 197-98.

<sup>66.</sup> *Sparrow*, *supra*, note 6 at 1103ff.



**Aborigines:** Usually explained as from the beginning, but this is not certain; inhabitants of a country; specifically the natives as opposed to the colonists, 1789.

**Indian:** Belonging or relating to the original inhabitants of America and the West Indies, 1618.

**Native:** Of indigenous origin, production as growth 1555; of or belonging to the natives of a particular place, 1796.<sup>67</sup>

These terms have been used interchangeably and conjunctively, in common and legal use, to refer to the original peoples who inhabited Canada as distinct from European colonists.<sup>68</sup> Used in this way the term "aborigine" is a generic racial term and an aborigine is a descendant of the indigenous inhabitants of Canada. However, over time the terms "aboriginal" and "Indian" have taken on non-racial dimensions. As discussed below, many persons of non-native origin or mixed native and non-native origins have been drawn into the network of federally recognized Indian bands and other contemporary metis and non-status collectivities. If the term "peoples" is to be given any contemporary significance, then the broader named group of "aboriginal people" necessarily takes on non-racial dimensions.

How then do we determine if a group qualifies as "aboriginal"? Arguably the core of the group must be descendants of the original native inhabitants of Canada. The racial boundaries of the group may be expanded by a variety of means, including legislated definitions, native customary law (e.g. marriage and adoption) and recognition (by particular aboriginal communities) of self-identifying members. Professor Slattery suggests that additional factors to consider in the classification of a group of people as aboriginal include:

1. the self-identity of its members, as shown in their actions and statements;
2. the culture and way of life of the group;
3. the existence of group norms or customs similar to those of other aboriginal people; and
4. the genetic composition of the group.<sup>69</sup>

Although Slattery's criteria are useful in attempting to define an aboriginal group, the author submits that caution must be exercised in placing too much emphasis on factors (2) and (3) in defining the term "aboriginal." Problems arise from the tendency of non-natives to hold a static view of aboriginal culture by freezing it at a particular historic

<sup>67.</sup> *Shorter Oxford English Dictionary*, 3d ed., (Oxford: Clarendon Press, 1975).

<sup>68.</sup> See, for example, *Re Eskimo*, [1939] S.C.R. 104 at 118, Cannon J., at 119 and 121, Kerwin, J. where the term "Indians" in s. 91(24) of the *British North America Act, 1867* is defined as "all present and future aborigines native subjects of the proposed confederation . . ." and *R. v. Guerin*, *supra*, note 7 at 376, Dickson J. where the Crown's fiduciary relationship to Indian peoples is stated to have its "roots in the concept of aboriginal, native or Indian title."

<sup>69.</sup> *Supra*, note 7 at 757.

moment. This perspective is described by Sally Weaver as the "hydraulic Indian" view.<sup>70</sup> The Indian or native person is a cylinder which, at some undefined point in history is full to the top with Indian culture. As time passes, a group adopts certain aspects of European culture and the level of "Indianness" is dropped to the point that the cylinder is almost empty. The native group is then accused of having "spurious ethnicity" and is no longer considered aboriginal.<sup>71</sup> This problem is compounded by the tendency of non-natives to assume one culture or custom is more aboriginal than another by an ethnocentric comparison to their own white culture or customs.

This perspective is reflected in arguments raised by opponents of Metis aboriginal rights. Emphasizing the European tendencies of the Metis of Ruperts Land in the 1870s and comparing their lifestyle to the agricultural and nomadic tribes of the plains, Thomas Flanagan argues it is difficult to show that the Metis are a distinct aboriginal people.<sup>72</sup> Flanagan describes the Metis as follows:

Now the Metis of Ruperts Land were vastly different from the Indians. They did not exist in a natural economy of hunting, fishing and food gathering. They were from the start part of the commercial economy of the fur trade. Some were long term employees of the companies. Others worked intermittently on the cart trains and boat brigades. Many hunted buffalo, but not in a subsistence fashion... . The way of life of most was much closer to that of their paternal white ancestors than to that of their maternal Indian forebears. Their religion was Protestant or Catholic Christianity. Many were familiar with and used in their life, white political institutions such as written law, courts, magistrates, elections, representative assemblies and committees ...<sup>73</sup>

He continues:

There were some mixed blood people who had Indian wives, lived with Indian bands, and were scarcely distinguishable from Indians... . To the extent that the Metis led a truly aboriginal life, they were not distinct from the Indians; and to the extent that they were distinct from the Indians, their way of life was not aboriginal.<sup>74</sup>

Similar arguments are raised by Brian Schwartz in his consideration of whether the Metis are Indians within s. 91(24) of the *Constitution Act, 1867*.<sup>75</sup> Schwartz argues that those Metis who identified as Indians and lived among Indians should be considered Indians under s. 91(24). He distinguishes these Metis from the Red River Metis described above. Of them he states:

<sup>70</sup> S. Weaver, "Federal Difficulties with Aboriginal Rights Demands" in *The Quest for Justice, supra*, note 8 at 146.

<sup>71</sup> *Ibid.* at 146-147.

<sup>72</sup> Flanagan, "The Case Against Metis Aboriginal Rights" *supra*, note 33.

<sup>73</sup> *Ibid.* at 321-322.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Constitution Act, 1867*, 30 & 31 Vict., c. 3.

The characterization of the Metis as an aboriginal people is etymologically dubious. The Metis are certainly indigenous to North America — they came into being as a distinct people on this continent. But they are not aboriginal in the same sense as the Indian and Inuit; they were not here from the beginning, but instead they developed when a large number of Europeans came to western Canada in connection with the fur trade.<sup>76</sup>

The difficulties with these arguments are the assumptions that there is a single aboriginal way of life and the treatment of the Red River Metis culture without reference to its native origins. Extremely different pictures of the Metis culture emerge if one emphasizes their maternal native ancestry: Metis arts and crafts; unique languages such as patois, Michif and Bungi; the introduction of unleavened bread (bannock); the dependence of the community on the buffalo hunt, hunting and fishing; and the adoption of the dances of the plains Indians in the form of the Red River Jig.<sup>77</sup> Like other aboriginal groups, the Metis combined the culture of their native ancestors with that of the European colonizers in order to survive political, social, and economic changes introduced by the 'whiteman'. The main distinction between the Metis culture and other aboriginal cultures is that historic and contemporary Metis culture descends from both the native and European cultures in a hereditary sense.

As an illustration of this point, consider the Cherokee Nation as it existed in the State of Georgia in the early-to-mid nineteenth century. Prior to the jurisdictional and territorial fights between the Cherokee and the State of Georgia, the Cherokees lived undisturbed within their historic territory governed by their own laws, usages, and customs. However, European contact resulted in the adoption of certain aspects of the European culture into the Cherokee way of life which, in the words of the United States Supreme Court, were intended "to lead the Cherokees to a greater degree of civilization."<sup>78</sup> A bill presented to the Supreme Court by counsel for the Cherokees described the Cherokee culture in part as follows:

They have established a constitution and form of government, the leading features of which they have borrowed from that of the United States; dividing their government into three separate departments, legislative, executive and judicial. In conformity with this constitution, these departments have all been organized. They have formed a code of laws, civil and criminal, adapted to their situation; have erected courts to expound and apply those laws, and organized an executive to carry them into effect. They have established schools for the education of their children, and churches in which the Christian religion is taught; they have abandoned the hunter state and become agriculturalists, mechanics and herdsmen; and under provocations long continued and hard to be borne, they have observed, with fidelity, all their engagements by treaty with the United States.<sup>79</sup>

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<sup>76.</sup> Schwartz, *supra*, note 3 at 228.

<sup>77.</sup> See, for example, descriptions in B. Sealey, "One Plus One Equals One" in *The Other Natives, supra*, note 30 at 7-8; Purich, *supra*, note 18 at 10-12; Pelletier, *supra*, note 32 at 15-90.

<sup>78.</sup> *Cherokee Nation v. Georgia*, 5 Peters 1 (1831) at 5.

<sup>79.</sup> *Ibid.* at 6.

The aboriginal and treaty rights of the Cherokee were argued before the United States Supreme Court again in 1832.<sup>80</sup> Eventually the Cherokee Nation was destroyed and displaced. Not once did the Court, or opponents of the Cherokee, take issue with the assertion that they were an aboriginal people despite their surrender of the nomadic hunting lifestyle traditionally associated with native cultures and the adoption of European cultural institutions. More modern examples of cultural blending are seen among tribes such as the West Coast Squamish who rely on real estate as a significant contribution to their economic base and the Hobbema in Alberta who are the beneficiaries of oil and gas development on their lands. It is ludicrous to suggest these people are not aboriginal because they have satellite T.V., drive Ford trucks, send their children to accredited provincial schools and have expanded or replaced their historic economic base.

As Professor Slattery implies in his suggested criteria, it is misleading to speak of a single contemporary or historic aboriginal lifestyle or culture among aboriginal groups. A comparison of aboriginal groups across Canada from the West Coast Haida, through the Plains Cree, to the Mic Macs of the East Coast illustrates the diversity of historic aboriginal cultures in areas such as religion, economic development and political organization. Although one might find several common features among groups within close geographic proximity, similarities are less frequent as the geographical distance between groups increases and the topography of the earth changes.<sup>81</sup>

Given the diversity among historical aboriginal groups and the inevitability of the co-mingling of the aboriginal and colonizing cultures, it is difficult to identify a single common factor linking all aborigines together as a group other than one: the ability to trace the descendency of the core of the group to indigenous inhabitants of Canada through maternal or paternal lines. Consequently, it is more appropriate to consider culture, custom and lifestyle when defining composite groups of aborigines than to consider these factors in the definition of the term "aboriginal." Even then, the emphasis given to these factors must vary in accordance with the cultural evolution of a particular aboriginal group. Again, this accords with the spirit of interpretation set out in *Sparrow*.<sup>82</sup> Ultimately, this may mean that traditional and contemporary cultures, customs, and lifestyles become more important when defining entitlement to, and the content of, aboriginal rights rather than being determinative of whether a group is "aboriginal."

In short, the phrase "aboriginal peoples" sets limits on the definition of its composite groups. The definitional impact of the phrase can be summarized as follows:

1. the term "people" implies a collectivity of persons united together into an identifiable community;

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<sup>80.</sup> *Worcester v. Georgia*, 6 Peters 515 (1832).

<sup>81.</sup> See, for example, discussions of Canadian aboriginal cultures, D. Jenness, *The Indians of Canada*, 7th ed. (Toronto: University of Toronto Press, 1977).

<sup>82.</sup> *Supra*, note 6.

2. identification as an Indian, Inuit or Metis under s. 35(2) is dependent on descent from a historical aboriginal collectivity or association with, and acceptance by, a contemporary aboriginal collectivity;
3. the collectivity must be a racial group to the extent that the core of the group must be descendants of the original inhabitants of Canada; and
4. the racial boundaries and unification of the group may be defined in numerous different ways including legislation (e.g., the *Metis Betterment Act* and the *Indian Act*), native customary law, and membership criteria of specific aboriginal groups.<sup>83</sup>

### III. WHO ARE THE METIS?

The criteria established by the use of the phrase "aboriginal peoples" are helpful in determining the minimum standards that must be met by a group purporting to be "Metis," but the criteria are not specific enough to define the Metis as a distinct aboriginal group. Within the context of s. 35, two approaches may be adopted to delineate more identification criteria. The first approach is to define the Metis by process of elimination: if an aboriginal group fits the minimal criteria set out above, but does not fall within the definition of Inuit or Indian, the group is "Metis" if it identifies as "Metis." The second approach is to treat each term separately rather than to adopt a "catch all" definition in fear of inadvertently excluding an aboriginal group from constitutional protection. The numerous problems associated with defining the terms "Indian", "Inuit" and "Metis;" the political histories of each term; and the unresolved political and legal debates concerning their meaning suggests that the only feasible way to define these groups is by defining them without reference to each other.

#### A. THE COMPARATIVE APPROACH

Prior to the definition of aboriginal peoples in s. 35(2), four main categories of aboriginal peoples were commonly used in legal and political spheres. These categories were status Indians, non-status Indians, Inuit and Metis. Non-status Indians are not specifically recognized as aboriginal peoples in s. 35(2). Consequently, in order for them to receive constitutional protection, they must fall within one of the three named groups. The central issue debated among groups purporting to represent the Metis is whether non-status persons of mixed origins that have not been reinstated to Indian status, who identify as metis but are not descendants of the Metis nation, can properly be brought within the constitutional definition of "Metis." Essential to the resolution of this debate is the scope of the term "Indian" in s. 35(2). If "Indian" refers to the same class of persons referred to in s. 91(24) of the *Constitution Act, 1867*, a narrow definition of Metis peoples focusing on a common political, national, and historic background may not affect the constitutional recognition of non-status Indians. Although the term "Indian" has been

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<sup>83</sup>. R.S.A. 1980, c. M-14, s. 1(b); R.S.C. 1979, c. I-6, s. 2(1).

interpreted to refer only to *Indian Act* Indians,<sup>84</sup> this position has been subject to strong criticism<sup>85</sup> and cannot be applied to s.91(24) in the face of the *Eskimo* decision.<sup>86</sup> The *Eskimo* decision held that Eskimo peoples are s. 91(24) Indians even though they are not included as Indians in post-confederation Indian legislation. The term "Indian" in s. 91(24) was interpreted to include "all present and future aborigines native subjects of the proposed Confederation of British North America".<sup>87</sup>

The reasoning adopted in the *Eskimo* case can be applied to non-status Indians who were never registered under the *Indian Act*, were enfranchised, were excluded from treaties, never signed treaties, or are descendants of these groups as long as their ancestors were recognized by the founders of Confederation as aborigines living within the territories to be included in the confederation of British North America. The fact that Parliament has chosen not to exercise its jurisdiction over these people and has excluded them from the definition of "Indian" in a statutory regime does not mean they cease to exist as s. 91(24) Indians. Parliament cannot control or alter the constitutional definition of the term through legislation.<sup>88</sup>

An important question is whether s.35(2) is intended to be a more explicit definition of the term "Indian" in s.91(24). In *Sparrow*, the court stipulated that the *power* to legislate with respect to Indians in 91(24) must be read in conjunction with s.35(1).<sup>89</sup> This is necessary as 35(1) is intended to place limits on the existing powers of federal and provincial governments to extinguish or interfere with the exercise of aboriginal rights.<sup>90</sup> However, this does not necessarily mean that the provisions are to be read in conjunction for all purposes or that s.35(2) aboriginals are s.91(24) Indians. Rather, there are several reasons why s. 35(2) may be read independently of s. 91(24):

1. The inclusion of the Inuit peoples in s. 35(2) suggests that the term "Indian" is not being used simply in its meaning in s. 91(24).
2. The functions of the two sections are separate. Section 91(24) centralizes control over Indian affairs by placing Indians and lands reserved for Indians under the jurisdiction of the federal government. Section 35 of the *Constitution Act, 1982* is not concerned with jurisdictional issues but is concerned with giving constitutional recognition to aboriginal and treaty rights by limiting the abilities of federal and provincial governments to impair existing rights. Section 35(2) simply defines the class of persons to whom sections 25 and 35 apply.

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<sup>84.</sup> *R. v. Laprise*, [1978] 6 W.W.R. 85 (Sask. C.A.).

<sup>85.</sup> See, for example, Sanders, *supra*, note 33 at 20; A. Jordan, "Who Is An Indian?" [1977] 1 C.N.L.R. 22.

<sup>86.</sup> *Re Eskimo*, *supra*, note 68.

<sup>87.</sup> *Ibid.*

<sup>88.</sup> K. Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 Can. Bar Rev. 513 at 515.

<sup>89.</sup> *Supra*, note 6.

<sup>90.</sup> *Ibid.* at 1109.

3. Although the Native Council of Canada argued that the constitutional provision defining aboriginal peoples should reflect intentions at the time of Confederation by providing a more explicit definition of who is an Indian,<sup>91</sup> post 1982 activity suggests that this was not the interpretation intended by the framers of the new Constitution.<sup>92</sup> The federal government has not changed its position on the issue of legislative jurisdiction. The Metis National Council continues to press for constitutional amendments to clarify the question of legislative jurisdiction and fiscal responsibility.<sup>93</sup>
4. The wording of the two sections is different. Although there are strong arguments that the word "Indian" in s. 91(24) means "aboriginal" and includes all full and mixed blood persons of aboriginal descent, there are several opposing opinions and the matter has not been resolved by the courts. If ss. 91(24) and 35(2) were intended to be read together, the use of the word "Indian" instead of the word "aboriginal" in s. 35(2) would have helped to eliminate confusion.

If the "Indians" in s. 35(2) are not s. 91(24) Indians who are they? One possibility is that they are identifiable groups of status Indians who fall within the *Indian Act* definition of "Indian." If this is so, defining "Metis" as requiring some link to the Metis Nation could result in excluding a large number of native persons from s. 35(2). However, this interpretation is questionable because it suggests Parliament can define terms in the constitution by legislative enactment. For example, since the proclamation of the Constitution, the membership criteria of the *Indian Act* have been changed to include Indian women who had previously lost status through marriage. If "Indians" in s. 35(2) are only *Indian Act* Indians, Parliament might arguably have unilaterally amended the Constitution by amending its legislation. The alternative argument is that "Indians" might mean Indians as defined from time to time by Parliament.<sup>94</sup>

The political and legal context within which the negotiations leading to the inclusion of s. 35 took place also suggests this interpretation was not intended. Prior to, and at the same time as the constitutional negotiations, the federal government was anticipating changes to the membership system under the *Indian Act*. The investigation was spurred

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<sup>91.</sup> H.W. Daniels, *We Are The New Nation: The Metis and National Native Policy* (Ottawa: Native Council of Canada, 1978) at 7-8.

<sup>92.</sup> The current policy of the federal government is to deny jurisdiction under s.91(24) over metis and non-status peoples living south of the 60th parallel, but it is willing to assume some responsibility for them as disadvantaged peoples. The majority of the provinces also deny jurisdiction but provide services to metis and non-status Indians as they would to other provincial citizens. Only Alberta has indicated willingness to accept full responsibility for metis peoples. For further information see R. Dalon, "The Alberta Perspective on Aboriginal Peoples and the Constitution" in *Quest for Justice*, *supra*, note 8 at 83-113; Purich, *supra*, note 18 at 172-177; Schwartz, *supra*, note 3 at 183-84 and c. 16; C. Chartier, *In the Best Interest of the Metis Child* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 31; and Sanders, "An Uncertain Path: The Aboriginal Constitutional Conferences", *supra*, note 24 at 69.

<sup>93.</sup> C. Chartier, *ibid.*, at 46-49 and 31-32.

<sup>94.</sup> K. McNeil, "The Constitutional Act, 1982, Sections 25 and 35" [1988] 1 C.N.L.R. 1 at 4.

by the *Lavell* and *Lovelace* decisions which challenged the existing membership provisions on the basis that they discriminated against women.<sup>95</sup> Further, despite limited litigation on the application of aboriginal and treaty rights to non-status Indians,<sup>96</sup> a pattern of judicial decisions had developed which did not differentiate between status and non-status Indians for the purpose of determining the validity of provincial laws of general application. The issue was one of federal occupation of the field.<sup>97</sup>

Support for a narrow definition of the term "Indian" arises from the decision to include the Inuit in s. 35(2) as a distinct aboriginal group rather than subsume them in the definition of "Indian". However, the support weakens if one considers the political activity leading to the drafting of section 35. The federal government was lobbied by three independent national aboriginal organizations to protect aboriginal and treaty rights in the new Constitution — the Assembly of First Nations (A.F.N.) representing status Indians, the Native Council of Canada (N.C.C.) representing Metis peoples and non-status Indians (including the Metis Association of the North West Territories), and the Inuit communities of the North represented by the Inuit Tapirisat and the Inuit Committee on National Issues (I.C.N.I.). If s. 35 is viewed as a political response to these three national aboriginal organizations, the specification of Inuit peoples can be viewed as both a matter of political expediency and the recognition of a distinct aboriginal people which accords with their own terminology.

This sophisticated distinction was not appreciated by the framers of the *Constitution Act, 1867* or their historical counterparts who lumped "Indian-Esquimaux" together with Indian nations in their usage of the terms "Savages" and "Indians."<sup>98</sup> The willingness of the federal government to recognize a distinction between these two aboriginal groups may mean the term "Indian" in s. 35(2) does not include the Inuit. Whether the term "Indian" includes status Indians has never been an issue. If one accepts that the interpretation of s.35(2) need not be analyzed by employing an "either-or" logic (that is, *either* it encompasses Indians referred to in s. 91(24) *or* it does not), then those persons who are not affiliated with the Metis Nation but identify as metis can logically be included in the reference to "Indians."

Who are the "Metis peoples" in this context? Why have they been given specific recognition in s. 35(2)? The "Metis" referred to in s. 35(2) may have been included as a matter of political expediency. The definition section was inserted primarily to satisfy

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<sup>95.</sup> *A.G. Canada v. Lavell*, [1974] S.C.R. 1349; Decision on Communication submitted by Sandra Lovelace, 30 July 1981 (C.C.P.R./C/DR/(XIII)/R.6/24); Sanders, *supra*, note 92 at 66-67; Gaffney, *supra*, note 15 at 27-34.

<sup>96.</sup> See, for example, *R. v. Pritchard* (1972), 9 C.C.C. (2d) 488 (Sask. Dist. Ct.); *R. v. Generaux*, [1982] 3 C.N.L.R. 95 (Sask. Prov. Ct.); *R. v. Laprise*, *supra*, note 84.

<sup>97.</sup> The question of differentiation re-emerged in *Dick v. The Queen*, [1985] 2 S.C.R. 309 which clarified that provincial hunting laws do not apply to the extent that they are inconsistent with treaty rights because of the wording of s. 88 of the *Indian Act*. The important distinction for the purpose of applying provincial laws is treaty versus non-treaty rather than status versus non-status.

<sup>98.</sup> *Re Eskimo*, *supra*, note 68.



the claims of the N.C.C. for recognition of their metis constituents as a distinct aboriginal people. They were included without a prior determination of whether they had aboriginal and treaty rights.<sup>99</sup> Further, the decision was made without determining who the Metis are. This latter point is illustrated by the subsequent debates at the First Ministers Conferences on the question of Metis identity.<sup>100</sup>

There are several broad choices from which to choose a definition for the term "Metis." Among them are:

1. anyone of mixed Indian/non-Indian blood who is not a status Indian;
2. a person who identifies as Metis and is accepted by a successor community of the Metis Nation;
3. a person who identifies as Metis and is accepted by a self-identifying Metis community;
4. persons who took, or were entitled to take, half-breed grants under the *Manitoba Act* or *Dominion Lands Act*, and their descendants;<sup>101</sup> and
5. descendants of persons excluded from the *Indian Act* regime by virtue of a way of life criterion.

Given the political history behind s. 35(2), one could argue that the Metis people are those persons intended by the N.C.C. to be encompassed by the term when it was negotiated into the Constitution. The N.C.C. definition includes populations distinct from the Metis Nation who identify themselves as "metis".<sup>102</sup> Some of these persons whose ancestors did not live an Indian way of life may not fall within the parameters of s. 91(24) and thus specific mention is necessary to ensure the application of sections 25 and 35 to this group. This definition has not been accepted by all persons who identify as metis. In March, 1983 the metis organizations in Saskatchewan, Alberta and Manitoba split from the N.C.C. and formed the Metis National Council (M.N.C.). According to the M.N.C. the "Metis" are the "Metis Nation" which is defined as

all persons who can show they are descendants of persons considered Metis under the 1870 *Manitoba Act*; all persons who can show they are descendants of persons considered as Metis under the *Dominion Lands Act* of 1879 and 1883; and all other persons who can produce proof of aboriginal ancestry and who have been accepted as Metis by the Metis community.<sup>103</sup>

<sup>99.</sup> See, for example, Sanders, *supra*, note 92 at 232.

<sup>100.</sup> See, for example, Chartier, *supra*, note 92 at 21; D. Sanders, *supra*, note 92 at 69; Metis National Council, *Statement on Metis Self Identity*, Paper presented at the "Federal-Provincial Meeting of Ministers on Aboriginal Constitutional Matters", Toronto, Ontario, 13-14 February, Doc. 830-143/016; Gaffney, *supra*, note 15 at 22-25; Schwartz, *supra*, note 3 at 183-85.

<sup>101.</sup> *Manitoba Act*, S.C. 1870, c. 3; *Dominion Lands Acts*, S.C. 1879, c. 31; S.C. 1883, c.17.

<sup>102.</sup> M. Dunn, *Access to Survival: A Perspective on Aboriginal Self-Government for the Constituency of the Native Council of Canada* (Kingston: Institute of Intergovernmental Relations, 1986) at 4-5; Gaffney, *supra*, note 15 at 19-25.

<sup>103.</sup> Purich, *supra*, note 18 at 13; Metis National Council, *supra*, note 101.

The M.N.C. was allowed a seat at subsequent s.37 constitutional conferences. The debate over the identification of Metis peoples arose in the 1984 conference.<sup>104</sup> To date, that debate remains unresolved.

The reluctance of the N.C.C. to limit the term "Metis" to the Metis Nation is more readily understood in the context of its political and economic history as a national aboriginal organization. Prior to 1982, the N.C.C. received funding on behalf of Metis and non-status Indians for certain political, legal, economic, and social activities. A large portion of its membership was composed of non-status Indian women who would ultimately be returned to status. If the N.C.C. agreed to a narrow definition of "Metis" and their need for special constitutional recognition, the N.C.C.'s effectiveness as a lobbying group could be marginalized and its funding base reduced. Furthermore, a narrow definition could potentially affect the constitutional rights of its non-status membership.

The interrelated analysis of the terms used in s. 35(2) does little to assist in the definition process as we are still left with numerous variables. However, the analysis is useful because it illustrates why non-status Indians should fall within the term "Indians." This means the central issue is not whether non-status Indians will be inadvertently excluded from s. 35(2) if a narrow definition of "Metis" is adopted. Consequently, the most logical approach to determining the identification of the Metis in 35(2) is to look at the unique history and use of the term as well as the views of the metis communities themselves.

## B. HISTORICAL, POLITICAL AND LEGAL USAGE OF THE TERM "METIS"

Basic to an understanding of the difficulties associated with defining the term "Metis" is an appreciation of the history and use of the term. The word "metis" is a French word meaning "mixed" and was first used to refer to the French speaking "half-breeds" of the Red River settlement and surrounding areas.<sup>105</sup> The term was used to refer to the French- and Cree-speaking descendants of the French-Catholic Red River Metis as distinct from the descendants of English speaking "half-breeds" or "country born," who lived a more agrarian lifestyle and identified themselves as Protestant and British.<sup>106</sup> Later, both native and non-native scholars writing histories of the Red River area used the term collectively to refer to French and English speaking "half-breeds" who emerged as a distinct cultural group in the West and spoke of themselves as the "New Nation."

By the 1970s the term extended beyond its religious, geographic, and linguistic boundaries to encompass "any person of mixed Indian-white blood who identified him or

<sup>104.</sup> Sanders, *supra*, note 92.

<sup>105.</sup> Redbird, *supra*, note 29 at 1; Metis Association of Alberta, *supra*, note 4 at 2.

<sup>106.</sup> See, for example, J. Peterson and J. Brown, eds, *supra*, note 4 at 5; T. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Irwin Publishing Inc., 1982) at 33; J. E. Foster, "The Metis: The People and the Term" (1978) 3 *Prairie Forum* 79 at 86-87.

herself and was identified by others as neither Indian or white, even though he or she might have no provable link to the historic Red River Metis."<sup>107</sup> The identification was a negative identification used interchangeably with the word "half-breed." They were Metis or half-breed because they were not somebody else. More recent historical works, focusing on the ethnic origins and changing dimensions of Metis identity, use the term to refer to

those individuals, frequently of mixed Indian, Western European and other ancestry, who are in the St. Lawrence-Great Lakes trading system, including its extension to the Pacific and Arctic coasts and chose to see themselves in various collectivities as distinct from members of the 'white' community.<sup>108</sup>

Some suggest that the contemporary usage should be extended to persons of mixed metis/Indian ancestry.<sup>109</sup>

The lack of consensus on use of the term is illustrated in an article on Metis history by Jennifer Brown in *The Canadian Encyclopedia*. Cautioning that there is no agreement among writers concerning who the Metis are, she argues that distinctions must be made based on the context in which the term is used.

It is important to define specific meanings for the terms as used in this discussion, while cautioning that writers, past and present, have not achieved consensus on the matter. Written with a small "m", metis is an old French word meaning "mixed", and it is used here in a general sense for people of dual Indian-white ancestry. Capitalized, Metis is not a generic term for all persons of this biracial descent but refers to a distinctive sociocultural heritage, a means of ethnic self-identification, and sometimes a political and legal category, more or less narrowly defined . . . This complexity arises from the fact that biological race mixture (metisage) by itself does not determine a persons social, ethnic or political identity.<sup>110</sup>

A consideration of the legal and common use of the term helps to understand how some of the confusion arose. The only legal definition of metis is in the *Metis Betterment Act* which adopts a racial view for the purpose of defining metis persons within the boundaries of the province of Alberta. This is somewhat ironic in that the only "status" metis in Canada are not descendants of the Metis nation. Although the federal government has not legislated with respect to metis peoples, it has legislated with respect to half-breeds. In the *Manitoba Act of 1870* and the *Dominion Lands Acts of 1879 and 1883*, the federal government granted lands to half-breeds. Subsequent federal legislation and subordinate legislation provided for the distribution of land grants and scrip to the half-breed people to satisfy claims existing in connection with the extinguishment of

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<sup>107.</sup> Pentney, *supra*, note 5 at 96.

<sup>108.</sup> J.E. Foster, "Some Questions and Perspectives on the Problem of Metis Roots," in *The New Peoples: Being and Becoming Metis in North America*, *supra*, note 84 at 73.

<sup>109.</sup> M. Dunn, *supra*, note 103.

<sup>110.</sup> Metis National Council, "The Metis Nation" (Paper presented to the United Nations Working Group on Indigenous Populations, August 1984) in *The New Peoples: Being and Becoming Metis in North America*, *supra*, note 4 at 6.

Indian title.<sup>111</sup> This procedure coincided with the extension of treaty making to the western prairies. For the purpose of treaty entitlement, a distinction was drawn between Indians and half-breeds on a lifestyle, self-identification, and group identification basis. Those living the lifestyle of Indians and associated with Indian tribes were allowed to take treaty. The others were entitled to receive scrip.<sup>112</sup>

A review of the historical development of the *Indian Act* reveals that the "half-breed" scrip claimants were intentionally excluded from benefits received by Indian peoples pursuant to the *Indian Act*.<sup>113</sup> The relationship between the *Manitoba Act*, *Dominion Lands Act* and *Indian Act* treatment of "half-breeds" has led Douglas Sanders to suggest that the only logical legal definition of "Metis" would be the descendants of those persons who took scrip and are excluded from status by the *Indian Act*.<sup>114</sup> William Pentney would extend this definition to include descendants of persons who were entitled to receive, but who may not have received, scrip.<sup>115</sup>

Non-status Indians emerged slowly as a group through intermarriage of Indians and non-Indians. Non-status Indians was not a category that was expected to perpetuate itself. Rather, these individuals were expected to assimilate and lose identification as Indians. Further confusion arose when mixed-blood status Indians were given the option to surrender their treaty rights and take scrip.<sup>116</sup> Eventually, popular usage came to equate metis with non-status Indians on the prairies. This equating of the two categories also occurred in federal funding, and non-status Indian membership was accepted into metis provincial organizations in order to achieve economic, social, and political goals.<sup>117</sup>

This contemporary usage of the term Metis has been adopted by the N.C.C. They argue that Metis people include "both blood relatives of the Red River Metis and completely distinct Metis populations which pre-and-post date both the history and the people of the Red River."<sup>118</sup> They contend the term "Metis" in s. 35(2) refers to their constituents who identify themselves as metis and were never included in treaty, or were excluded from treaty as half-breed, or were refused scrip on a residency basis or are

<sup>111.</sup> There are numerous references on the question of scrip distribution. See, for example, N.O. Cote, "Grants to the Half-Breeds of the Province of Manitoba and Northwest Territories" (Department of the Interior, 1929) P.A.C. RG 15 Vol. 227; Metis Assoc. of Alberta, *supra*, note 14 at 118-151; D.N. Sprague, "Government Lawlessness in the Administration of Manitoba Land Claims" (1980) 10 Man. L.J. 415; Sanders, *supra*, note 33 at 9-19.

<sup>112.</sup> See, for example, A. Morris, *The Treaties of Canada with the Indians of Manitoba and the Northwest Territories* (Toronto: Bedford, Clarke and Co., 1880) at 294-195.

<sup>113.</sup> See, for example, *The Indian Act*, S.C. 1876, c. 18, s. 3(3)(e); S.C. 1951, c. 29, s. 12(1)a.

<sup>114.</sup> Sanders, *supra*, note 3 at 254.

<sup>115.</sup> Pentney, *supra*, note 5 at 97.

<sup>116.</sup> See, for example, *R. v. Thomas*, (1891) 2 Ex. C.R. 246; *Indian Act*, S.C. 1879, s. 3(e), as am. S.C. 1879, c. 34; Sanders, *supra*, note 13 at 11-16.

<sup>117.</sup> *Supra*, note 103.

<sup>118.</sup> *Ibid.* at 5-8.

descendants of any of the above.<sup>119</sup> The M.N.C. has rejected both the contemporary and traditional usage of the term metis and has adopted a definition consistent with the legislative and political purposes of the federal government with respect to half-breeds living in Ruperts Land and the Northwest Territories. The M.N.C. define the "Metis" as follows:

1. The Metis are:
  - an aboriginal people distinct from Indian and Inuit;
  - descendants of the historic Metis who evolved in what is now Western Canada as a people with a common political will;
  - descendants of those aboriginal who have been absorbed by the historic Metis.
2. The Metis community comprises members of the above who share a common cultural identity and political will.<sup>120</sup>

The provincial organizations comprising the M.N.C. adopt similar definitions but also accept non-status Indians who have been accepted as members of the provincial organization. For example, when the Alberta Metis Association was founded in 1932 it offered membership to anyone of native ancestry.<sup>121</sup> As recent as 1987, any person of native ancestry could be a member so long as a member of the Association was willing to take a sworn statement that the applicant was a metis.<sup>122</sup> In Manitoba, the Manitoba Metis Federation was created because of a split between status and non-status Indians. The Federation constitution provided that a non-registered person of Indian descent could become a member of the Federation. A non-native person could also become a member provided he or she was married to a metis.<sup>123</sup> It is likely the flexible nature of the membership criteria for prairie political organizations that gave rise to the self-identification element in the M.N.C. definition of the Metis Nation.

The result is that today "Metis" can be defined in many different ways. A metis person is described as a person of mixed-blood, one who considers herself a metis, a non-status Indian, one who received land scrip or money scrip, one who is identified with a group that identifies as metis, or a non-native married to a metis.<sup>124</sup> None of the definitions

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<sup>119.</sup> Metis National Council, "The Metis: A Western Canadian Phenomenon" quote in Chartier, *supra*, note 92 at 22-23.

<sup>120.</sup> M. Dobbin, *The One-and-a-Half Men: The Story of Jim Brady and Malcolm Norris* (Vancouver: New Star Books, 1981) at 61.

<sup>121.</sup> Purich, *supra*, note 18 at 14.

<sup>122.</sup> A. Lussier, "The Metis: Contemporary Problem of Identity" in *The Other Natives*, vol. 2 (Winnipeg: Manitoba Metis Federation Press and Editions Bois Brules, 1978) at 190-191; Manitoba Federation Inc., *Manitoba Metis Rights Position Paper* presented at the Manitoba "Metis Rights Assembly", Winnipeg, 11 March 1983 at 11; J. Sawchuk, *The Metis of Manitoba: Reformulation of An Ethnic Identity* (Toronto: Peter Martin Assoc. Ltd., 1978) at 48.

<sup>123.</sup> A. Lussier, *ibid*, at 191.

<sup>124.</sup> J. Sawchuk, *supra*, note 123 at 12-13.

standing alone is satisfactory to all persons who identify themselves as metis. These potential usages and definitions have created the identity debate and have resulted in major divisions in native political organizations.

#### IV. RESOLUTION OF THE DEFINITION DEBATE

Given the complexity of the definition debate, is it possible to define the term "Metis" in s. 35(2)? Must the interpreter conclude that contemporary self-identifying metis have a spurious ethnic identity and therefore the term cannot have any contemporary significance? This will depend on the view of ethnicity adopted by the interpreter and her willingness to accept varying definitions of the term "Metis" for constitutional and other purposes. Ethnic consciousness can be defined in terms of a specific cultural group with a common history, such as the Metis Nation, or it can be understood as a political consciousness that defines its members in response to many cultural stimuli.<sup>125</sup> If ethnicity is understood as both a cultural and political phenomenon, the emphasis on different identifying criteria by different metis organizations can be easily understood. The fact that the two national metis organizations cannot agree on who is or is not a metis does not mean a contemporary metis ethnic identity does not exist and that the "Metis" in s.35(2) cannot be identified. It does mean that these political organizations have adopted identification criteria that further their own political, legal and economic goals. This factor must be considered in the interpretation given to s.35(2).

Taking into consideration the minimal criteria set out in s.35 and the difficulty of identifying a single metis people, the most logical solution to the definition debate is to define the "metis" in s.35(2) as belonging to one of two possible groups.

1. The descendants of the historic Metis Nation.
2. People associated with ongoing metis collectivities.

A refusal to select identifying criteria by freezing cultural idioms at a given point in history allows the interpreter of s. 35(2) to define "Metis" for constitutional purposes as small "m" metis. This interpretation makes sense in the context of the political activity surrounding the negotiation of s. 35, avoids unilateral application of a legal definition, and allows for self-determination of membership. The result is the constitutional term "Metis" does not refer to a homogeneous cultural or political group but a large and varied population characterized by mixed aboriginal ancestry and self-identification as "Metis." This conclusion should not be surprising as the term "Indian" clearly encompasses a variety of Indian nations with different political, cultural and historical backgrounds. The common factor shared by all of these groups is their aboriginal ancestry.

So when does the distinction between small "m" metis and the Metis Nation become significant for constitutional purposes? It is significant in the context of establishing

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<sup>125</sup> *Supra*, note 62.

entitlement to specific aboriginal rights recognized and affirmed under s.35(1). Entitlement of recognition and affirmation to particular rights by aboriginal peoples will be determined by the courts on a case by case basis where political negotiations fail. The claimants will have to establish that the right asserted was in existence when the *Constitution Act*, 1982 came into effect.<sup>126</sup> If the right asserted is a collective right, it may not be enough to prove recognition as an aboriginal people. Legal, political and economic rights will vary among the various Indian, Inuit and Metis peoples that constitute the broader named groups in s.35(2).

The relationship between group identification and entitlement to particular rights affects membership criteria and group formation. Criteria will vary depending on regional, historical, cultural and political differences and the nature of claims asserted. For example, metis groups which have a difficult time establishing historical occupation of a clearly defined territory may organize a title claim around the method of extinguishment adopted by the federal government, creating a natural dividing line between those metis who took scrip and those who accepted treaty. Those Metis who took scrip under the *Manitoba Act* and *Dominion Lands Act* may separate from other scrip recipients based on possible claims arising from Metis nationality. Others living within the same geographic boundaries and joined together in pursuit of the same economic goals may select identifying criteria focused on the equitable distribution of resources within a given boundary and contemporary needs.<sup>127</sup> Consequently, it may be impossible to identify a common basis of entitlement or design a single system of compensation that accounts for their diversity. Rather, the basis to claims and appropriateness of compensation will vary from group to group.

Support for this interpretation of s.35(2) is found in the *Sparrow* decision.<sup>128</sup> In finding the appropriate interpretive framework for s.35(1), the Supreme Court of Canada considered the historical struggles of aboriginal peoples in legal and political arenas for the recognition of rights and the involvement of various native organizations in the negotiation of s.35. The court stipulated that s.35(1) is to be interpreted in a purposive way and that a generous liberal interpretation, resolving doubt in favour of aboriginal peoples is demanded given the purpose of the provision to affirm aboriginal rights.<sup>129</sup> Given that the purposes for including s.35(2) were to clarify the scope of potential claimants under s.35(1) and to satisfy the claims of self-identifying metis to recognition as an aboriginal people, the section should be interpreted to the benefit of aboriginal peoples in light of these objectives.

If inclusion in s.35(2) does not automatically give rise to rights under s.35(1), what is the benefit of inclusion? Again *Sparrow* is of assistance in answering this question. First,

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<sup>126.</sup> See for example, *Denel/Metis Comprehensive Land Claim Agreement in Principle* (Ottawa: Department of Indian Affairs and Northern Development, 1988) sections 3.1.9, 4.1 and 4.2.

<sup>127.</sup> *Sparrow*, *supra*, note 6.

<sup>128.</sup> *Ibid.* at 1101-1111.

<sup>129.</sup> *Ibid.* at 1106.

recognition as an aboriginal people provides a solid constitutional base upon which negotiations for the recognition and compensation of rights can begin. Second, it incorporates a fiduciary relationship between the federal government and aboriginal peoples and so imports some restraint on the exercise of federal power.<sup>130</sup> This latter point is of particular importance to metis groups who have been excluded from programs designed to benefit Indian peoples and over whom the federal government refuses to accept responsibility. Should a narrow interpretation of "Metis peoples" be adopted as advocated by the M.N.C., these benefits and the potential for constitutional protection of existing rights under s.35(1) may be denied to other metis groups that do not constitute part of the Metis nation and do not identify as Indian.

Given the continuation of federal policy to refuse responsibility for metis claims south of the 60th parallel, recognition may be of little practical significance to many metis without the strong arm of the court. It is unlikely inclusion will be taken as lightly by the courts. In *Sparrow*, the court stated it was important that s.35(1) applied to Inuit, Indian, and Metis. The Court stated section 35 was a solemn commitment to aboriginal peoples and should be given meaningful content.<sup>131</sup> In *Dumont*, the Supreme Court of Canada recognized that claims relating to the extinguishment of metis title were justiciable and not merely claims of a moral and political nature.<sup>132</sup> Although Canadian courts have yet to decide on the existence, nature and continuance of Metis rights, it is clear their inclusion in s.35(2) will be accorded some legal significance and will not be treated simply as a cruel deception or historical mistake.

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<sup>130.</sup> *Supra*, note 6.

<sup>131.</sup> *Ibid.* at 1105.

<sup>132.</sup> The decision of the Manitoba Court of Appeal in *Dumont*, *supra*, note 33 was reversed by the Supreme Court of Canada in *Dumont v. A.G. Canada* (2 March 1990), No. 21063. The Supreme Court held that the constitutionality of the scrip distribution system established pursuant to the *Manitoba Act* is a justiciable issue and that declaratory relief may be granted at the discretion of the court in aid of extra-judicial claims.