Confronting the 'Mixed-Blood Majic': Towards a definition of 'Metis' for purposes of section 35 of the Constitution Act 1982.

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by

Paul L.A.H. Chartrand
Teach.Cert.; B.A.; LL.B.(Hons.); LL.M.
Victoria, B.C. Canada

Email >p34ch@aol.com

INCOMPLETE FIRST DRAFT: FOOTNOTES WILL BE ADDED

The 'Metis Nation' of Western Canada is well known in Canadian history, which has focussed mainly on two events and two men from Metis history. The events are the 1869-70 formation of the Provisional Government that gave birth to the Province of Manitoba, and the Battle at Batoche in 1885. The two men are Louis Riel, the political leader in those events, and Gabriel Dumont, the legendary hunter and businessman, and the military strategist in the skirmishes leading up to and including the Battle at Batoche. The Metis Nation, as evident in the cultural symbols that represent it today, centred historically around the buffalo hunting culture of the northern portion of the Great Plains of North America, and its traditional homeland then is the Prairie region of Western Canada and the northwestern United States of America. I shall call this Metis Nation 'Riel's people'.

In the last generation, social, political and constitutional changes have resulted in a wide-ranging debate about the identity or nature, the scope, and the rights of the Metis people. One of the most contentious aspects of the debate has been the definition of the 'Metis people' the rights of which are recognized and affirmed as part of the protection accorded in section 35 of the Constitution Act 1982 to the 'aboriginal and treaty rights of the aboriginal peoples of Canada'. The contention arises mainly because many groups and individuals not associated with Riel's people are claiming identity as 'Metis' as a vehicle for asserting aboriginal and treaty rights. Although the facts of history show that only Riel's people received recognition in law and policy as a distinct society with group rights distinct from Indian (now often called 'First Nations) rights, the claims of others to group rights are being made in the courts, with some degree of success. The leading case is the recent *Powley* decision in the Ontario Court of Appeal, which decided that two individuals from the Sault Ste. Marie area who claim a Metis identity based upon a 'mixed-blood ancestry' have an aboriginal right to kill moose over the same land that was recognized as Ojibway land in a 1850 Indian treaty. The case was decided without Ojibway representation in court, and the decision was given in spite of the court's recognition that the 'Metis' community had practically disappeared from the neighborhood in the 19th century. The Government of Ontario has sought leave to appeal the *Powley*

case to the Supreme Court of Canada, while the Canadian government lawyers are viewing proceedings from the benches reserved for onlookers.

This brief introduction provides a mere glimpse at some of the complex and contentious issues swirling around the debate on Metis identity today. I suggested in 1995 that 'Canada has never quite known how to react to the enigmatic presence of the Metis, a so-called 'in-between' people; it is as if Canada is still embarrassed by the persistent presence of its illegitimate child, born prior to a proper union with the Aboriginal peoples of this country' [ ] In reviewing the complex issues coming before the courts, I proposed that the Metis represent the enigmatic hard case of Aboriginal law in Canada. In a recent address in May, to western judges in Saskatoon, I characterized the judicial task of defining Metis rights and the Metis as one that seems futile, recalling the myth of Sisyphus. Searching for encouragement to the judges to persevere in a role left to them because it was not done by the elected politicians, and recalling the function of judicially created rights as providing some measure of justice to groups who can not wield power at the ballot box or through contributions to political party coffers, I resorted to Albert Camus' perception that Sisyphus is smiling, which ended up as the title of the paper.

Legal analysis, of course, is not the only avenue to the discovery of answers to some of the difficult questions dogging the question of Metis identity. Political science can bring its own insights into the policy debates, focussing on the interests and institutions at stake, as shown by the reactionary approach of Thomas Flanagan, a former advisor to the former Reform Party at the University of Calgary, who opposes Metis rights.

History is involved necessarily. Although legal rights are conventional and not absolute, and develop to reflect emerging social norms, the common law aboriginal rights are history based rights. One of the difficulties in the debate on Metis rights happens to be the clash between the preferred insights of historians and those of legal counsel in litigation. Professors and students of Native Studies who have followed the debates between proponents of oral and written accounts of history will appreciate the fact that there are other clashes resulting from different ways of interpreting the past. The view of history and historical analysis from the bench is not the same as the

perspective of historians in the hallowed halls of learning at our universities.

The social sciences bring insights that usefully complement other avenues of inquiry. Because this paper is addressed to an audience interested in Native Studies that is comprised of professional persons from several disciplinary backgrounds, I trust I will be allowed a brief tangential exposition to set out an approach that would seem to be able to provide a focus for either a short term inquiry or the devotion of an entire career if applied to the case of Metis identity in Canada. I refer to the concept of 'ethnicity' done by social scientists. I find particularly helpful the views that identify three forces that create, sustain, dissolve and reform 'ethnic groups', namely shared interests, shared institutions, and shared culture.

Spickard and Burroughs argue that all three are important, contrary to the ideas of most theorists who have been inclined to see one of them as fundamental. [ ] Shared interests, both political and economic are what brings an ethnic group together in the first place. If a set of people perceive themselves to share a common heritage and also have concrete economic or political reasons for affiliating with each other, they may begin to form an ethnic group. As with the persons calling themselves 'Metis' today, they may all share some cultural similarities but not exhibit strong cultural uniformity; what they share is an interest, and in time they may form shared institutions and create a shared culture that will sustain the group.

While interests are what bring a group together initially, according to these learned commentators, [at 9] interests change easily; they are external to the group and largely determined by others. If an ethnic group endures, it is usually because it forms shared institutions and builds up shared culture. 'Shared institutions are the ways people within the ethnic group organize themselves to achieve their interests, practice (sic) their culture, and maintain their group identity. ' [at 10] Ethnic institutions are the places where members of a group come together to pursue group interests, and also where shared culture is created and maintained. 'Shared culture may be outward and apparent', or it may be inward and more or less invisible. [10] 'It can have to do with shared values, orientations, ways of framing issues or seeing the world'. [at 10] According to the same authors, 'we see the forces of shared

interests, institutions and culture interacting in a dynamic way to provide the glue that holds together ethnic consciousness.' [...] 'Institutions and culture are much longer lived than are interests. They enable ethnic groups to survive changing circumstances. After an initially shared interest changes or disappears, culture and institutions may even hold the group together long enough for a new set of interests to emerge.'[at 10-11] This seems to be a particularly helpful way to view both Metis history and contemporary issues of identity.

Spickard and Burroughs apply their conceptual framework to the case of American Indians, and show how renewed interests that emerged in the 1960s and 1970s resulted in many individuals who formerly asserted no Indian connection proclaiming and connecting themselves with their 'Indianness'. [at 11] Between the 1970 and the 1980 censuses, the number of people who called themselves Native Americans went up significantly for the first time in United States history, and the number rose again in 1990. 'In the cases of many native peoples, the remnant had kept Indian culture alive and Indian institutions functioning - albeit in changing ways - until a new interest gave power to tribal ethnicity once again.' [at 11]

This tangential explanation seems to support the proposition I advance, namely that much of the jostling about around a Metis identity reflects a new trend to construct a pan-Aboriginal identity around the shared interests created by the recognition and affirmation of aboriginal and treaty rights in the 1982 Constitutional amendment. Our own Canadian census statistics show the considerable increases in the number of persons taking on a new Metis identity since 1982. It is also important however, to observe that a significant number of individuals, more than one hundred thousand, have also opted to take on an Indian identity where this has been made possible through the 1985 amendments to the Indian Act that permitted the expansion of the 'status' Indian category, that is, the group of persons recognized as Indians by federal legislation. My submission is that Metis identity is being built by personal and group claims and proclamations, and may become supported by the courts, at the boundary of Indian identity as recognized in the Indian Act. This, I suggest, is a mistake because the legal category of

'Indians' at the boundary of which this new Metis identity is sought to be crafted, is itself very uncertain, and certainty about Metis identity can not be grafted onto another identity whose boundary is not clear. The solution would be to review the category of 'Indians' for legal and policy purposes, and respect the history of past recognition in Canadian law and policy for Riel's people. This would allow people who seek to identify themselves as Aboriginal persons for the pursuit of their interests, would be able to do associate themselves with a group because they prefer to be associated with that group, and not because they believe they must.

The following outline of the history of legal and policy responses to 'mixed-blood' people in Canada is designed to explain the conclusion that Riel's people comprises the 'Metis people' for s.35 purposes. This conclusion also relies upon the following propositions, first that Metis identity for legal purposes ought to reflect social and moral values that deserve the protection of the law. Having 'mixed-blood' as a matter of personal antecedents reflects no such values. The second proposition is that . Metis identity ought to be approached by the courts as an exceptional case arising from historical, social and economic circumstances unique to the Canadian West; mixed-blood or 'mestizo' communities are generally not recognized as indigenous peoples in other countries.

In this paper, then, I propose to contribute to the current debate on Metis identity, and I will conclude by suggesting that Metis nationalism, centred around the notion of Riel's people, or, as it is sometimes called, 'the Red River Metis', is not likely to survive Canada. I believe that the fragile project of resurrecting Metis nationalism will have difficulty to withstand the powerful countervailing forces of competing Canadian institutions, in particular, federal/provincial federalism, and judicial activism which upholds new social and political values and is likely to apply them in defining the Metis people and its rights. It seems more likely that a new ethnic identity will be created with judicial assistance. The identity will be based upon the recognition of legal rights that will do little to enhance the political resources of the Metis as a distinct nationalist group, and that will likely work against a nationalism that would transcend provincial boundaries. The result will be a

new 'Metis' identity reflecting a convergence around newly emerged interests, an identity that was formerly recognized as a 'pan-Indian' identity, and which will submerge Riel's people.

Of course, I may be mistaken, and if I am, unlike most other commentators, I have an excuse to lean on if I am disposed to use it. I disclose that I grew up in St.Laurent, in the Interlake region of Manitoba, and I provide here a quotation from the work of Marcel Giraud, the anthropologist who wrote the seminal work on the Metis of Western Canada, which identifies my excuse.

'... tiny half-breed (sic) villages such as .. St.Laurent, ... are now occupied by very backward groups...'

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In St.Laurent, they are mostly engaged in hunting roebuck (deer) and duck, in trapping muskrat, fishing in Lake Manitoba, and picking 'snake' root.

Here their mental traits appear as incompletely developed as their biological composition....'

... they are fitted for manual and closely supervised work but not for supervising activity...

... as soon as severe intellectual discipline is required, the mixed-blood gives up every exertion, and, ridiculed by the whites, abandons himself to laziness and to that sensitive shyness with with French-Canadians reproach him. His qualities are gradually paralyzed by the lack of will power which may ultimately result, among the adults, in a complete disintegration of moral principles.'[1]

In the Lovelace case, the Supreme Court of Canada noted that the appellants had not advanced a common definition of 'Metis', and that 'the issue remains politically and legally contentious...'[2]

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[1] Marcel Giraud, 'A Note on the Half-Breed Problem in Manitoba', (1937) The Canadian Journal of Economics and Political Science, pages 541-549, at 542.

[2] Lovelace v. Ontario. SCC file No.26165, Dec.7, 2000 at para. 13.

In Blais,[3] Swail, J. considered the problem faced by the courts in attempting to define Metis for purposes of deciding aboriginal rights claims, and identified the following three ways in which the term 'Metis' has been used over time;

1. associating English and French mixed-ancestry groups from Rupert's Land and the North Western Territory as if they were the same group;
2. including other mixed-ancestry persons whose origins may have been far removed from 'Riel's people' of the Red River, Rupert's Land and NorthWest Territories region;
3. referring loosely to persons of mixed ancestry who may never have had Indian status, or who, having had status, may then have lost it through the operation of the membership code in the *Indian Act*.

I adopt this categorization, and begin with an overview of each category.

1. English 'Half-Breeds'[4] and French 'Michif' in the West in 19th century

'Go on, return peaceably to your farms. Stay in the arms of your women. Give this example to your children. But watch us act. We will work and obtain our rights and yours. You will come in the end to share them.'[5]

Louis Riel speaking to the English 'Half-Breeds' of Red River in 1870.

These are the two primary groups of mixed-ancestry people in the Red River area at the time that annexationist Canadian interests first brought it to the West in 1869-70, where a substantial population of some 10,000 'mixed-ancestry people resided. The 'English-speaking HB were largely Protestant, English speaking,

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[3]R v. Blais, [1997] 3 CNLR 109, at 114-115.

[4]For a discussion of the odious pejorative term, which is often sharpened to do its nefarious work by using a lower case 'h', see P.Chartrand, 'Terms of Division. etc.

[5] Raymond Huel, ed. The Collected Writings of Louis Riel Vol. 1 Edmonton. University of Alberta Press. 1985, at p. 31. This is the author's translation of the French text.

politically more conservative, more sedentary, more oriented to the riverine agriculture and the Hudson's Bay Company as a governing and commercial entity.[6]

The largely Roman Catholic speakers of a 'mongrel French' or Michif [7] on the other hand, were politically more independent and more inclined to trading and buffalo-hunting than to agriculture.

Clearly there was overlap in the kinship, associations, and lifestyles of the two groups, and the distinction must not be overblown [8] but is is well-known that the resistance to Canada in 1869-70 was largely inspired and carried out by the Michif under Riel's inspiration and leadership, as illustrated by the above quotation.

2. Other mixed-ancestry persons in Western Canada and elsewhere

In 1880, Alexander Morris, who was the Lieutenant Governor of Manitoba and a negotiator of Western treaties, noted what he viewed as three types of mixed-ancestry persons in the West at the time;

1. Those who, as at St.Laurent near Prince Albert, the Qu'Appelle Lakes and Edmonton, who have their farms and homes;
2. Those who are entirely identified with the Indians, living with them and speaking their language;
3. Those who do not farm, but live after the habits of the Indians, by the pursuit of the buffalo and the chase.[9]

The members of the first and third groups were expressly recognized as having aboriginal rights as Metis by federal policy[10], whereas those in the second group were accorded status as 'Indians', as shall be discussed below.

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[6]Cite W.L. Morton, History of Manitoba; Stanley, Birth of Manitoba; Bryce, History of Manitoba; Alexander Ross, The Rise, etc. of Red River Settlement...

[7]Cite Chartrand, Bakker, Havard, 1880 from where the term is taken.

[8]Nicole Ste-Onge PhD dissertation...

[9]Citation for Morris ...

[10]Cite Orders in Council of 1901, from the Hodges and Noonan report of 1943.

In the regions of Canada east of the Prairies and the NorthWest, with the possible exception of Ontario, what eastern Canada seems to show is a history of Indian-White relations that is much longer and less marked by the type of clear demarcations between groups that was demonstrated by the rapid and visible collision between peoples and cultures in the West. There were, and continue to exist, however, 'boundary people'[11] of mixed ancestry. People of mixed ancestry today are coming out claiming, particularly since 1982, an identity that may, or may not, have a continuity with a clearly visible mixed ancestry group or community in the past. This is the issue to be resolved in Powley.[12] This is the political aspect, also, of the issue identified by Swail, J. in the Blais case, *supra,* where the judge noted that 'the question of who is or is not a Metis has been highly politicized by some fairly disparate organizations claiming to speak for the Metis of today'.

It may be emphasized that the idea of recognizing an 'in-between' people has generally not occurred in other countries where the indigenous population was colonized in circumstances similar to those in Canada. Mixed-ancestry people, or *mestizos*, are not regarded on that account alone, as indigenous people elsewhere, either as individuals or as communities.[13] Thus, there are no 'mixed' communities in the United States, Australia, or New Zealand, although, as a fact, most if not all the individual members of the Aboriginal nations in these countries today are 'mixed-blood.'

3. Persons who never had Indian status or who lost Indian status

Indian status for purposes of federal policy administration has been conferred by federal statute, the Indian Act, which was first enacted as a consolidation of existing statutes in 1876.[14] Status was initially granted to 'charter groups' of 'Indians' who were politically recognized as Aboriginal communities with

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[11] I adopted this term in a speech given at the NITA law conference in 1995.

[12] Cite Ontario Court of Appeal decision, 2001.

[13] Cite Douglas Sanders, *Human Rights Quarterly* article.

[14] Citre RC Daniel. History of Indian Act, and Imai Indian Act annotated, and Venne, Historical compilation.

aboriginal rights, and with whom Canada entered into relations, either by treaty or by setting aside lands for their exclusive use and occupation.[15] The Act necessarily required a membership code to define the continuing body corporate that had been recognized, and the model settled upon by the draftsman was the contemporary nuclear family of the day, that is, the membership rules revolved around kinship and descent from the male head of the nuclear family. To illustrate, a woman marrying an Indian man (a member of the community recognized as a charter group) would acquire status, whereas a daughter of such a couple would lose status upon marrying outside the group, that is, anyone not a status Indian. Consequently, status Indians today are the descendants, through the male head of family, of members of historic small communities who were recognized as Indians.

A consequence of the tortured administration of the Indian Act rules of membership is that by the time the Act was amended in 1985 purportedly to comply with the *Charter of Rights and Freedoms*, there was a very large population of Aboriginal people who had never had status or who had lost status through a variety of ways. The operation of the 1985 amendment granted or returned status to over 100,000 persons. [16]

A consequence of the amendment itself, it has been concluded in a 1992 study, is that if out-marriage rates increase at a rate of 10% over 40 years, there will be a significant reduction of status Indians and a corresponding increase in non-status Indians.[17] This anticipated result moved the Royal Commission on Aboriginal Peoples to comment that the provisions, 'like their historical predecessors, ... appear to continue the policy of assimilation in disguised but strengthened form".[18]

I have commented elsewhere on the general result of these statutes and policies upon politically and economically weak people;

'*Everywhere we look in Canada, especially since 1982, we see people and*

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[15]Cite R.H. Bartlett, Indian Reserves and Lands in Canada, and The Indian Act...

[16]RCAP Volume one.

[17]Ctie Study and RCAP

[18]RCAP Vol 1 at p. 304

organizations jostling and shifting their identities to try to conform with the expectations of what are guessed to be official policies and constitutional meanings in order to get what they ask for from the government. Hardly a process to make the heart soar.'[19]

An analysis of the law and policy response to the three categories of 'mixed-ancestry' persons and groups.

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

The lands set aside 'towards the extinguishment of the Indian title' pursuant to s.31 of the Manitoba Act 1870 were provided for both groups.[20] Notwithstanding the tensions between the two ethnic groups, as illustrated by Riel's quotation, their self-definition as a 'nation', their ability to form a government, to establish civil order, and to effectively defend their territory through arms, their diplomatic recognition from Canada and recognition in the Manitoba Act 1870 all have inspired the assertion and the perception that this was a new nation.

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

Generally little attention is paid to the difference between the two groups today, and the descendants of both groups are referred to as 'Metis' in current

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[19]Cite Chartrand Vanocuver speech. 1996?

[20]The writer has argued that this was a correct interpretation of s.31. See Paul L.A.H. Chartrand, *Manitoba's Metis Settlement Scheme of 1870*. Saskatoon. University of Saskatchewan Native Law Centre. 1991.

cases.[21] The political representative organizations all style themselves as 'Metis' organizations, even though their membership is open to descendants of both groups.[22] Exceptionally, the Societe Historique des Metis St.Joseph in St. Boniface restricts membership to French-speaking Catholic 'Metis', but the membership consists by and large of persons descended from the Manitoba Michif who have been culturally assimilated into the French-Canadian culture of southern Manitoba towns and cities. [D. Bruce Sealey, ...]

2. Mixed-ancestry persons and groups elsewhere

As previously noted, when the numbered treaties were signed in the West, "Half-Breeds' ... entirely associated with the Indians, living with them and speaking their language' were allowed to 'take treaty' as Indians. The others who farmed, and those who lived 'after the habits of the Indians', were offered scrip. 'Scrip' was a certificate which entitled the bearer to receive an alienable parcel of land, or money in lieu of land. From 1885, 'Half-Breed Commissions' devoted entirely to scrip distribution were a regular feature of the Indian title extinguishment process in the West and NorthWest, along with the Indian treaties.[23]

In 1876, the *Indian Act* definitions of "Indian" and "non-treaty Indian" each required "Indian blood". Non-treaty Indians, defined as members of an "irregular" band or those following an "Indian mode of life", were those who belonged to as yet unrecognized bands that had not entered into a treaty relationship with Canada or those who lived in smaller family groups in more isolated areas. The treaty-making process would continue until 1921 (and afterwards, in the form of adhesions) and Indian Branch officials needed some term with which to refer to those Aboriginal persons who were clearly Indians, but with whom Canada had yet to establish a formal relationship.

In 1876 there were also Indian groups present in Canada (like the Sioux in southern Manitoba and Saskatchewan) that were normally resident in the United States, but which had fled north as a result of conflicts with American authorities.

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[21]Cite Blais, Howse, Ferguson, Grumbo, McPherson

[22]Cite Joe Sawchuk, *A History of the Manitoba Metis* Federation.

[23]Cite Joe Sawchuk, Theresa Ferguson, et al in **Alberta, etc..**

They were clearly Indians, but not Indians with whom Canada had a treaty relationship.

However, blood alone was not the distinguishing characteristic of Indians and non-treaty Indians, for, by definition, Métis/"Half-breeds" also had Indian blood. Thus, the *Indian Act* also provided that Manitoba "half-breeds" who had participated in the Métis land distribution would not be recognized as being Indian.

Thus began the second confusion: associating the term 'Métis' with land as opposed to membership in a political group or historic nation.[24]

During this period the Government of Canada purported to implement the Metis land scheme in the Manitoba Act 1870, a process that is notorious for its administrative failures, and which, it has been argued, was done in breach of Canada's duties under the law of the Constitution.[25] In the result, by 1886, only about fifteen per cent of the approximately 10,000 Metis persons resident in the small province of Manitoba in 1870 had received and retained land. Those who left established themselves for the most part on the three areas mentioned by Alexander Morris: the Cypress Hills and Batoche-St. Laurent areas of Saskatchewan and in Alberta around Edmonton, Lesser Slave Lake and in other smaller communities. With Canada's westward expansion, they too demanded that their land rights be dealt with, which Canada undertook to do pursuant to the authority of the Dominion Lands Acts , beginning with the Street Commission in 1885.

Money scrip, which was instantly redeemable, was often issued in western and northern Canada in place of land scrip. Between 1885 and 1921 a total of 12 Half-breed commissions allowed more than 13,200 scrip claims, two thirds of which were for money scrip. The procedure was for the commissioners to examine the applicants to ensure that they were of mixed ancestry and had not already received scrip either in Manitoba or elsewhere in the North West Territories. As in the case of the earlier Manitoba Métis scrip issuance, many of the scrip certificates were disposed of quickly, leaving the original recipients landless. In this regard, Mr. Justice Street reports that the very first person to receive scrip from his

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[24] This confusion was adopted and built upon by the Metis National Council for the purpose of rebuilding the modern Metis Nation in the Charlottetown Accord.

[25] Refer to P. Chartrand book, and to Dumont v. Canada, and to argument of fiduciary and treaty, and that damages available re breach of fiduciary obligation. Cite Sprague, Ens and Flanagan literature, and PC review in CBA article.

commission sold it on the spot for one half its face value.[26]

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

> *It is well-known that among the aboriginal inhabitants there were many individuals of mixed blood who were not properly speaking Halfbreeds. Persons of mixed blood who became identified with the Indians, lived with them, spoke their language and followed the Indian way of life were recognized as Indians. The fact that there was white blood in their veins was no bar to their admission into the Indian bands among whom they resided.*[27]

The lifestyle approach to Metis definition was followed in lower court decisions.[28] This was generally a period in the development of Canadian Indian policy when, after the costly North-West Rebellion, the emphasis was on reducing expenses in the Indian Branch and of encouraging Indians to take more responsibility for themselves wherever possible through farming, learning trades, residential schooling and local municipal-style government (the *Indian Advancement Act*[29], for instance, had been passed in 1884). It was also a time when individual enfranchisement was encouraged, and when the out-marriage rules of the *Indian Act* were beginning to disrupt the cohesiveness of Indian reserve communities. In 1887 Sir John A. Macdonald noted in this context that the "great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as

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[26] Saskatchewan Archives Board (SAB) Saskatoon. Report of Mr Justice W.P.R. Street when he was made Chairman of a commission to settle the claims of the Half-Breed Indians in the North West Territories. Saskatoon, Saskatchewan. at page

[27] Citation for Macdonald inquiry quotation

[28] Cite from Mellon, Howson, to McPherson

[29] Citation

they are fit for change.[30] Part of doing away with the tribal system was to encourage persons who had taken treaty to withdraw and to take half-breed scrip instead and thus establish themselves in settled occupations in the prairies instead of being a continual drain on the public purse.

With this in mind, the *Indian Act* was amended twice. The first amendment in 1879 would have required applicants for scrip to repay treaty annuity money received.[31] The second amendment in 1884 removed this condition. In this regard, the Street Commission reported that, out of a total of 3446 scrip claims allowed, over one third (1292) were issued to persons withdrawing from treaty. Another Half-breed commission one year later reported that of 349 claims allowed, fully 321 represented people leaving treaty to take scrip.[32]

The treaty and Half-Breed commissions did not deal with everyone in western and northern Canada who was eligible either for treaty or scrip and applications for both continued after 1921. At a certain point, the Indian Branch became concerned about the number of treaty-takers, and following the late treaty adhesions in the Lesser Slave Lake area, the local band lists were examined and over 600 people were discharged on the sole basis that they were of mixed ancestry. The resulting furor led to an inquiry by Judge W.A. Macdonald of the Alberta District Court who found that only around 200 of the discharged persons had taken scrip earlier and therefore merited discharge under Canada's scrip policy. The rest, in his view, ought to have been reinstated on the basis of the long standing policy of giving mixed-ancestry persons who lived an Indian lifestyle the choice of taking treaty. Nonetheless, the Department reinstated only about a third of those that he recommended be returned to band membership.[33]

Because of the focus on land, the notion of Indian lifestyle, language, culture and band affiliation that had guided earlier Canadian policy was abandoned. This issue has now become prominent in a series of hunting and fishing cases from the prairies. For example, in the recent *Morin and Daigneault Case* the accused were

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[30]Reference.

[31]Cite

[32]Cite

[33]Cite

the descendants of mixed-ancestry persons who took scrip and were characterized by counsel and by the Provincial Court as being "Métis". [34] Both accused persons had been charged with fishing without a licence. However, both were pursuing a traditional lifestyle as members of a northern Saskatchewan Aboriginal community that continued to live off the land. In discussing the heritage and self-description of the accused, the Court noted the following:

> Louis Morin... is the father of the accused Bruce Morin. While he is of mixed white and Indian blood, fitting the definition of Metis, *he both called himself and considered himself to be a non-status or non-treaty Indian. All of the Metis witnesses, including the accused consider themselves as non-treaty Indians.*[35] [emphasis added]

The Provincial Court also noted that those who took scrip were virtually indistinguishable from those who took treaty and that they took scrip to avoid being confined to reserves or restricted in how they lived their lives - in order to be "the boss of themselves"[36] as one of the accused put it - and not because of any sense of being from a markedly different culture than other people living the same lifestyle who took treaty as Indians. On appeal, this finding was echoed by the Queen's Bench:

> The evidence at trial, both oral and documentary, established that in northern Saskatchewan, historically and now, there was very little, if any, distinction between the Indian and Metis Aboriginal people. *The distinction has always been primarily a legal one based on whether ancestors opted for Scrip or Treaty.*[37][emphasis added]

Similar observations emerge from other cases from western Canada. In the *Ferguson Case* from Alberta, for instance, the accused was descended from persons who took scrip - referred to by the Provincial Court as "half-breeds". However, Mr. Ferguson, who had been charged with hunting without a licence, was born and

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[34]Citations

[35]Citation

[36]cite

[37]cite

raised in an isolated northern Alberta Cree-speaking community that continued to follow what the Court referred to as "the Indian mode of life". In upholding his right under the *NRTA* to hunt as an "Indian", the Court rested its conclusion on the fact that the accused Indian lifestyle made him a "non-treaty Indian" under the 1927 *Indian Act* notwithstanding that all four of his grandparents had taken scrip.[38]

It should be noted that not all the cases go in favour of the accused. In Saskatchewan in particular the trend has been mixed. For example, in *R. v. Genereux* the Provincial Court found that the accused was not an Indian for *NRTA* purposes because of his lack of Indian status under the *Indian Act* - and this despite the fact that his "family were half-breeds but had lived on the reserve and adhered to the same lifestyle for three generations."[39]

The result of this and similar cases is that it is not entirely clear how people who were never part of Riel's people, or the historic Prairie Métis Nation, would choose to identity themselves. Although often described by judges, government officials and ordinary citizens as being "Métis", it seems clear that this is a loose description justified only by their mixed ancestry and a history of having taken scrip. However, as discussed above, mixed ancestry alone was historically insufficient to cause someone to lose Indian identity. Moreover, after so many generations of inter-marriage between Indians, Métis (however defined) and non-Aboriginal people, mixed-ancestry alone is no longer a characteristic that distinguishes one category of Aboriginal people from another. Commentators have noted that "mixed blood peoples were not excluded from Indian status when membership lists were first prepared and could not now be excluded without purging the Indian reserve communities of at least half their population."[40]

Nor does it seem that a history of having taken scrip can be relied upon with utter confidence. Increasingly, and as the cases cited above demonstrate, scrip-takers and their descendants are challenging their characterization as "non-Indians" for *NRTA* and related purposes and are finding judicial support based on lifestyle criteria. In addition, if the trend of judicial thinking continues in this direction, it can no longer be assumed that scrip takers do not have a valid claim to restoration

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[38]cite

[39]citation

[40]Sanders, reference.

of Indian and band status as well as treaty and reserve land rights.

This is shown by the recently consolidated actions in Federal Court by scrip-takers or their descendants (*Desjarlais, Gill, Malcolm, Pulliam* and *Parenteau*) as well as by the new Papaschase lawsuit. Scrip-takers and their descendants are now challenging the legality of the issuance of scrip and the resultant loss of status and treaty rights.[41] The Papaschase action, in particular, is based on the Crown fiduciary obligation and alleges that the issuance of scrip was tantamount to an exploitative bargain that the Crown ought not to have condoned and that the scrip-takers were misled by government officials about the consequences of their actions.

Such allegations are not easily dismissed, given that testimony in other cases has shown a strong possibility that statements were made to scrip-takers that may have induced them to give up rights they might not otherwise have given up had they been fully informed of the consequences of their actions.[42]

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

'Mixed-blood' individuals and communities elsewhere

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

> In eastern Canada communities distinct from both Indians and Euro-Canadians did not arise, and mixed-race people were defined as either Indian or White. Only in the fur trade areas of Rupert's Land and in the region of the Great Lakes did the "mixed-bloods" assume a distinctive

[41]Citation

[42]Citation

ethnic identity - or, to be precise, two identities [English "Half-breed and French "Métis"].[43]

In Newfoundland there were no recognized "Indians" at all until recently. In 1985 the federal government recognized a new band: the Conne River Micmac community was declared to be a band under the name of the Miawpukek Band on June 28, 1984 by order in council. [44] The Innu of Labrador, who have resisted being registered as Indians, are clearly Indian in lifestyle, culture and language and are treated that way by the Department of Indian Affairs.

While there have clearly been mixed-ancestry people in Labrador since contact, and while they have been engaged in traditional wildlife harvesting practices, it is less clear that they considered themselves, or that they were viewed as being, "Métis", in any self-conscious way until it became politically expedient to do so. The Labrador Inuit Association (LIA) restricts access to certain federal program benefits to its membership. However, LIA membership is a sub-group of its reported land claim beneficiary population which includes a geographically distinct group of mixed-blood Inuit. This group styles itself the Labrador Métis Nation (LMA) and its members live in two dozen communities in central and southern Labrador. Many LMA members would be entitled to LIA beneficiary entitlements were they not resident in southern Labrador.
Moreover, the provincial government does not recognize LMA members as being "Métis" and argues that LMA entitlements under section 35 are entirely up to the LIA. The federal position has yet to solidify. [45]

In Ontario, Métis were dealt with in three distinct ways. The Métis community at Fort Frances (now part of the Coochiching First Nation) signed an adhesion to Treaty 3 in 1873 as "half-breeds" and not as "Indians". However, at Fort Albany, other persons known to be "half-breeds" signed Treaty 9 as "Indians". In another instance from Treaty 9, an established "half-breed" community at Moose Factory demanded Métis "scrip" and were then promised 160 acres each by the

[43]Citation

[44]Reference in RCAP Vol. One.

[45]Reference to Giokas

province, a promise that has yet, after over a century, to see implementation.[46]

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

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

Nor, given the pressures exerted on the population of recognized Indians and bands in order to hasten the integration of Aboriginal people into mainstream society, is it surprising that people of many origins are laying claim to the constitutional category of "Métis". The special Métis edition of *Canadian Ethnic Studies* highlights this particular issue, and includes a case study of a non-status Alberta woman of Cree descent who gradually redefined herself as "Métis" under these pressures.[47] The editors note that "these enfranchised persons of Indian background, not having a distinct identity of their own, have gravitated towards the Métis, finding in their cultural and political organizations the identity they seek."[48]

But there is more than a question of personal identity involved. There is a clear question of ascertaining the identity of the Aboriginal groups in whom the aboriginal rights affirmed in s.35 are vested, and which persons among the Canadian public are entitled to the beneficial enjoyment of those group rights.

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[46]Reference to John Long, The Half-Breed Adhesion to Treaty 9, etc.

[47]Reference..

[48]reference.

Among 'mixed-ancestry' individuals, and others who may wish to identify with an Aboriginal 'people' or community, which ones fall within the intentions of s.15 affirmative action programmes, and which ones are members of s.35 communities?

3. Persons who never had Indian status or who lost Indian status

The Indian Act's definition system included a requirement of 'Indian blood', or ancestry, but a person without Indian ancestry was not necessarily excluded if that person fit within the code's additional criteria of kinship, lifestyle, and charter group recognition. The clearest illustration is the acquisition of Indian status by genetically non-Indian women by marriage to status Indian men, until 1985. Non-Indian men were not entitled to the benefits and burdens of Indian status by marriage to a status Indian woman. Today, with the *Charter's* insistence upon sexual equality, both sexes are equally excluded from acquisition of status upon marriage to a status Indian, and the integrity of the nuclear family is no longer a factor in the Indian Act membership code. The net effect of various 'enfranchisement' provisions [49] over the years was the loss by a great many people, of Indian status and the right to reside on reserves.

Many of the persons characterized as Metis or non-status Indians in the hunting and fishing cases from the Prairies were persons living an Indian lifestyle, based upon culture and self-identity, whose mother had lost status through the Act's enfranchisement scheme.[50] In 1951 the Indian Act introduced a registry system based upon whatever band lists were then available. The definitions and references to 'non-treaty Indian' and 'irregular' bands were dropped, and many persons found themselves unable to register as Indians for all sorts of technical reasons, many having to do with the wide definitions and loose supervision of the Act's previous

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[49] This means loss of status.

[50] For example Laprise was 'a native of Chipewyan(that is, Dene) origin who lives in a predominantly Chipewyan community that was not a reserve and who did not have Indian status because his mother had married a non-status Indian:R v Laprise, [1978] 6 W.W.R. 85 (Sask.C.A.). In R v. Grumbo [1996] 3 CNLR 122, (Sask.Q.B.) John Grumbo followed a traditional hunting lifestyle, and was called a Metis because he mother, a 'treaty Indian ' from the reserve, had married his father who was 'Metis all the way", at 124-125.

membership administration.[51]

The failure of the Indian Branch to be able to include everyone who arguably ought to have been registered in 1951 created a large category of 'non-status Indian' people; it was a population affiliated with Indian people, including by language, kinship and lifestyle, but which could not get registered as Indians. In addition, there was the large population of 'non-status Indians' comprised of descendants of persons who had been enfranchised over the years.

By 1985, when Bill C-31, amended the Act in the Government's purported response to the s.15 sexual equality guarantee in the Charter, over 120,000 persons were returned to status or received status for the first time. But many persons could not possibly get their names on the register, including those who were descendants of scrip-takers who had been barred from registration and who could not now prove descent from someone who was an Indian under the pre-1985 rules, as required by the 1985 Act.

There are also many persons who identified as Metis prior to 1985, who acquired Indian status and who now can not do so on account of the absence of an enfranchisement provision, and who complain that they are barred from admission to membership of Metis political representative organizations, which generally exclude status Indians from their ranks. In my view enfranchisement is required by the law of the Constitution, including the freedom of association guaranteed in the *Charter*.

Notwithstanding the large number of persons who acquired Indian status under the 1985 rules, a study has concluded that the effect of the new provisions is such that, if out-marriage rates increase at a rate of ten per cent over forty years, it is projected that there will be 'a declining Indian Register population beginning in roughly fifty years or two generations.' This kind of projection has led to the comment that 'like their historical predecessors, ... appear to continue the policy of assimilation in disguised but strengthened form."

Observations from the above survey

It is safe to conclude that the meaning of the term 'Metis' is evolving in the

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[51]See John Leslie, Assimilation, Integration or Termination? The Development of Canadian Indian Policy, 1943-1963. (Ottawa. Ph. D. Thesis. Carleton University, 1999) at 80.

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

In Ontario, people of mixed ancestry living in the area of an original community of mixed-ancestry persons call themselves Metis as part of their political and social efforts to re-establish a community. It is not clear in the *Powley* case whether they are descended from that historic community or are persons who were excluded from the Indian Act status provisions. It appears that their ancestors were excluded from the recognition of Indians in the 1850 treaty, and that they accepted individual settler or squatter rights as individuals.

They may also be descendants of persons who were accepted into Indian 'bands' who were subsequently enfranchised. These facts suggest that their claims challenge both the official recognition of original Indian groups and the subsequent enfranchisement policy. Yet the court did not even refer to these matters. The model which shows the difference between individual settler rights for occupied lands, and group rights as Indian title, is the Manitoba Act 1870. Section 32 recognized the preemption rights of all persons, whether Metis or not, to individual lands, while section 31 recognized the Indian title of the Metis. Indian title is a group right recognized by the common law of Canada, and is not vested in individuals on account of their personal antecedents but because of their membership in the group.

In Newfoundland, persons of mixed ancestry who can not get Indian status as the Conne River community did, cloak themselves under the designation 'Metis'. In Labrador, mixed ancestry persons call themselves Metis because their less numerous and more northerly Inuit relatives refuse them entry into the political process designed to settle the Inuit land claim.

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

Turning to the political representative organizations, the Congress of Aboriginal Peoples allows anyone, no matter how they may have lost Indian status or whether they ever had it, to call themselves Metis if they wish. This is for the purpose of membership in a voluntary organization. In 1983 the people who were recognized in the Manitoba Act 1870, in the Dominion Lands Act, and in numerous Orders in Council, as Metis, formed the Metis National Council (MNC) and proclaimed that the Metis people of Western Canada has a right of self-determination recognized as vested in all 'peoples' at international law, and also argued that the Metis 'Nation' has substantive rights recognized by s.35. The MNC negotiated a Metis definition in the Charlottetown Accord which, though based upon the core group just presently described, nevertheless admits anyone 'of Aboriginal ancestry' who is accepted by the Metis Nation, and implicitly excludes others.

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

Some of the ambivalence about identify must also be ascribed to the fact that Metis scrip was used to 'enfranchise' Indians in the West, while many Metis persons opted to join Indian communities at the time of signing Indian treaties, or thereafter.

The key question, then, is whether for legal purposes, such as the NRTA and s.35 definitions, the category of 'Metis' will continue as a boundary issue to the question of Indian definition, or whether it will acquire a positive meaning, moving to the core of identity of a distinct group. The implications for social and political solidarity are obvious; is the Metis community to be a community comprised of people who would rather be in another group, or of people who, for better or for worse, know that they are where they belong?

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

Indian status; non-Indian women would not have acquired status by marriage, and their children would not have acquired status.

Kinship is not the key criterion, as illustrated by the scrip, marriage-out and enfranchisement factors which split up families. Moreover, the effects of the current s.6(1) and s 6(2) distinction will be to continue to split families because status is not equally transmissible between siblings who married out prior to 1985.

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

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

Entitlement to registration leads to certain benefits, and therefore it operates as an incentive to self-identification as an Indian, regardless of the strength or weakness of a personal link to one's Indian heritage. Affirmative action practices in both Canada and the United States have attracted many individuals with the slimmest of ethnic or cultural affiliation with an Indian community. Canadian policies, it must be noted, often also accord preferential treatment to 'non-status Indians' as well as status Indians.

The conclusion seems inescapable that, since there is no consistent basis for recognizing 'Indians' there can be no recognizable basis for recognizing 'Metis' as members of a 'boundary' group. There seems to be little logic or utility in judges attempting to define Metis in the absence of a well developed and rational approach to the definition of 'Indian'. The judicial task of defining 'Metis' for section 35 purposes seems bound to copy and reproduce the unfairness and arbitrariness which has characterized the Indian Act system.

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

Self-identification itself is required by the constitutional values of freedom of association, and the right to belong to a community. Self-identification guards against the biological determinism inherent in an approach based upon 'blood' alone, and respects the Constitutional value of non-discrimination based upon 'race.' Moving away from the boundary of Indian definition into the core of a positive Metis identity can not be accomplished by reliance upon the factors of blood quantum, kinship or lifestyle, since these have been placed beyond reach by the approach to Indian definition in federal legislation.

That leaves historical continuity with an identifiable community of persons historically recognized as Metis. This approach accords with the assumption that s.35, which recognizes 'existing' rights, was meant also to recognize, not new entities, but those with recognized rights prior to April 17, 1982. This is also the view of Harry W. Daniels, who negotiated the inclusion of 'Metis' in section 35, in his capacity as President of the Native Council of Canada.

Concluding thoughts

Canadian federalism is firmly based upon federal and provincial institutions which have built powerful interests since 1867. The resulting inflexible federalism has shown itself not to be able to accommodate ethnic nationalism that transcends provincial boundaries. The transformation of ethnic French-Canadian nationalism into the newly invented Quebecois civic nationalism shows us that. French-Canadian ethnic nationalism transcended provincial boundaries and clashed with a popular notion that opposes ethnic nationalism because it presumes the fundamental validity of the liberal vision which conceives Canada as a state within which all citizens are subject to the same political rights and status. Within this vision, it is easier to construct Canada as a multicultural country that accommodates individual differences than it is to construct a vision of Canada as a multinational North American country that is built upon the foundations of all its historic nations, including the indigenous nations with special group political rights and status.

In the current situation, Metis rights and identity are being developed not by Metis political action but by judicial activism, and it seems clear that the future destiny of the Metis is one of a minority ethnic group striving for

protection *by* the State, especially by its courts, and not, as in former days, a people seeking protection *from* the State. This is why I fear that Metis nationalism will not survive Canada.

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