THE MÉTIS AND 91(24): IS INCLUSION THE ISSUE?

by Don McMahon and Fred Martin

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EXECUTIVE SUMMARY

This paper examine ways in which Métis communities in Canada can preserve and enhance their collective existence as a people. The first issue addressed is the meaning of the term `Métis'. The various communities that might be included in this term are considered, and the perspectives of national Aboriginal political organizations on the identity of Métis communities is discussed. The paper then considers strategies by which Métis communities might sustain a distinctive Aboriginal existence within the context of existing Canadian institutions. First is inclusion of Métis people within the category of Indians as defined in section 91(24) of the *Constitution Act, 1867*. This would place Métis exclusively under the authority of the Parliament of Canada.

Inclusion in section 91(24) has been a long-standing demand of many Métis organizations. The historical and legal literature dealing with this issue is examined at some length. The conclusion is that although 91(24) may be of some use in advancing Métis goals, its value is limited. With the proclamation of the *Constitution Act, 1982*, there are better constitutional mechanisms available to Métis people to protect and foster their continuing identity as an Aboriginal people. Recent Canadian case law interpreting section 35 of the *Constitution Act, 1982*, is then examined to determine how this might assist Métis communities in protecting their distinctive identity.

Since the fundamental thesis of this paper is that there are in Canada a variety of self-defining Métis communities, there must also be a variety of methods by which their collective aspirations can be furthered. The paper considers several such methods. The first is the role of litigation in establishing Métis rights. The case of Dumont v. A.G. Canada and A.G. Manitoba, a legal action launched by the Manitoba Métis Association concerning the land rights of the Red River Métis community and their descendants, is discussed as offering a way in which Métis communities might use the courts to advance their interests. The paper concludes that although this may be a powerful tool for some Métis communities, is unlikely to be effective for all.

Comprehensive land claims agreements are considered next. They offer significant advantages for Métis beneficiaries, but, like the litigation approach, this is not a means which can be used successfully by most Métis communities in Canada.

Next the attempt at comprehensive recognition of Aboriginal self-government contained in the Charlottetown Accord next receives extended consideration. Although the constitutional

agreement failed to find support among the Canadian people, it provided a model for dealing with many of the problems of identification of the Métis community and determining how the constitutional entitlements of that community should be recognized. This paper suggests that even though the proposals contained in the Accord failed to become part of the Canadian Constitution they contain a number of helpful suggestions for proceeding with the delineation of Métis constitutional rights.

The paper concludes with a consideration of the possibilities that exist for the formal recognition and protection of Métis rights following the defeat of the Charlottetown Accord. Various options for enabling recognition of such rights are discussed, and the Alberta Metis settlements legislation of 1990 is considered as one example of a self-government scheme not dependent on comprehensive constitutional changes. Finally, the paper proposes a model statutory framework within which the Parliament of Canada might provide recognition of the right of Métis communities to self-government and as well provide a framework for conveying resources to these communities so that self-government might become a reality.

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INTRODUCTORY NOTE

We should make clear from the start that neither of the writers is Métis. We are practitioners of Canadian law with some experience in that law as it relates to Aboriginal peoples. Our views have no doubt been influenced by the years we have spent working with the people of the Métis settlements of Alberta. Their struggle to secure, protect, and govern a land base has provided ideas, approaches, and principles that may be useful to Métis in other parts of Canada as they wrestle with similar issues. That said, it is clear that other groups of Métis will need to adopt different models to meet their different purposes. Consequently any new structure to recognize Métis self-government aspirations must articulate a few basic principles and then be flexible in implementation. That was the essence of the Charlottetown Accord.[i] We consider it a good starting point for future discussions.

We should also make clear that the views in this paper are ours and ours alone. We are not speaking for any other group of people. We do not know to what extent, if any, they are shared by the Métis Nation of Canada, the Native Council of Canada, the Metis Settlements of Alberta, or any other organization. What we have tried to do is review the legal and historical literature and draw on our own experience. It is not intended as a legal brief or a thesis. It is our view of the current state of Canadian law, whether we approve of it or not.

In preparing this paper we have made a number of assumptions. We believe a good case can be made that the Métis are one of the founding nations of Canada. We also believe many Métis in Canada value, and wish to preserve and enhance, their existence as a people. This paper was prepared in the hope that it will contribute to creating a framework in which that wish can be realized. That framework will require the use of many tools — educational, political, social, legal, and others. Our focus is limited to the tools provided by the lawsii of Canada. In this paper we try to identify the most obvious such tools and to evaluate how useful each may be in constructing the new framework. The initial focus is on 91(24) status — the legal recognition of Métis as Indians for the purposes of section 91(24) of the Constitution Act, 1867.iii

Our conclusion is that it would be a long, costly, and uncertain process to rely primarily on 91(24) to build a suitable framework. Although it may have some value, it would be dangerous to rely solely on that tool to accomplish the multitude of tasks at hand. Having come to that conclusion we look to see what else is available. There are a variety of other models, from litigation based on principles derived from the decisions of Canadian courts concerning Indian cases, comprehensive land claims agreements, legislative approaches used in Alberta, and the Charlottetown Accord process. We consider some of these models as a source of ideas and principles for a future framework. We then look at one possible model for a framework. We hope an analysis of that model will further the discussion of what principles should underlie a future framework, what realistic frameworks are possible based on those principles, and what tools of law and policy are needed to make them a reality.

The framework we consider is based on Canada recognizing that Métis people have the capacity to define, create, and empower their own institutions. By translating that recognition into a framework in Canadian law, the rules or laws of those institutions become recognized and enforceable on the same footing as other laws of Canada. In many ways this allows a statute of Parliament to accomplish what the Charlottetown constitutional process could not. The constitutional elevation of this statute could come later when these issues once again become part of the national agenda.

PART 1 — THE QUEST FOR CLEAR JURISDICTION

The Focus on 91(24)

For years governments, academics and Aboriginal leaders, have struggled with the question, are the Métis[iv] federal jurisdiction? To be more precise, are Métis included in the term `Indians' in class 24 of section 91 of the *Constitution Act, 1867*?

In some circles the answer to this 91(24) inclusion question has become a Holy Grail. Over a year ago we set out on our quest hoping to review academic, judicial, and political views on the question. We hoped to report on how finding the Grail would affect federal and provincial government jurisdiction and responsibility with respect to the Métis. We also hoped to identify significant remaining questions and essential research.

After a year reviewing the literature, and considering the discussions leading to the ill-fated Charlottetown Accord, we have abandoned our quest. We are not sure the question is

appropriate or the answer possible.

In our view, the jurisdictional question, can Parliament alone make laws about Métis and lands reserved for them?, cannot be answered without also asking, what do you mean by `Métis'? There are many possible answers. In the past the term has referred to many groups, including descendants of the Red River Métis community; mixed bloods, with a specified minimum Indian blood content; a defined base group plus those they accept; a self-defining group with some objective and some subjective criteria; and other mixed-blood groups with some Aboriginal ancestry. The definitions have been as varied as the context, with only one common element — some Aboriginal ancestry.

It may not be possible to provide a general answer to the question, what do you mean by `Métis'? Existing answers have usually been given in the context of a specific purpose. For example, the Metis Settlements Act of Alberta provides one statutory definitionv of Métis for the purpose of establishing eligibility for membership in a Métis settlement in Alberta. Regulations under the federal Fisheries Act contain a different and anachronistic definitionvi based on blood quantum for the purpose of establishing eligibility for certain fishing rights. The Métis Nation Accord, proposed in conjunction with the Charlottetown package, contained a third definition as a start for defining membership in the Métis Nation for purposes of that accord. Métis under any one, or none, of these three may be included in the meaning of “Métis peoples” in section 35 of the Constitution Act, 1982. The Constitution uses the term but does not define it.

The Limited Effects of 91(24) Inclusion

Insisting on a general definition outside of a particular context has in the past led to confusion and frustration. No one definition seems to fit all purposes. The failure to agree on a definition may provide an excuse for failing to address the basic needs of individuals, or communities, that are considered `Métis' by themselves and their neighbours.

Since a general definition of Métis is so difficult, is it really necessary? Maybe not. Métis leaders looking for solutions to problems faced by their people have for years called on both federal and provincial governments for recognition and assistance. The response has been uneven and uncertain ─ a lack of jurisdiction often being given as the reason for inaction. Too often what is really lacking is commitment, not jurisdiction. For example, a commitment in Alberta led to legislation regarding the Métis even though the province's jurisdiction was uncertain. With

similar commitment other provinces could do the same. In short, although answering the 91(24) inclusion question may remove an excuse for inaction, it will not necessarily produce action.

While clarifying jurisdiction would make it easier to say who should act, it will not necessarily broaden the base of legal rights supporting Métis demands for action. It is very difficult to say what additional rights will accrue to a Métis person or community as a result of including Métis with Indians in the class of matters under exclusive federal jurisdiction. Certainly such a clarification will not change any existing Aboriginal rights now recognized in section 35 of the Constitution Act, 1982. It is also questionable whether confirming Métis inclusion in 91(24), without more, would imply federal statutory obligations to Métis similar to those owed to Indians under the Indian Act. Certainly those obligations have not been assumed equally for the Inuit and non-status Indians who are also included in class 24.

Federal jurisdiction also would not change any existing Métis Aboriginal or treaty rights under section 35, although it might encourage land claims agreements setting out such rights. In that context, however, issues of jurisdiction, duties, and rights will be resolved by participating Métis and governments and not as a necessary result of federal jurisdiction. In other words, as Métis address the question of what they need to survive as a people, federal jurisdiction may be an ill-defined tool of limited utility.

More is Needed Than Just 91(24) Inclusion

Like any other nation, the survival of the Métis as a people requires appropriate psychical and physical frameworks. The psychical framework is external and internal ─ external in that it demands recognition as a people, internal in that it builds on pride, confidence, and commitment. The physical framework is built on the cornerstones of land, power, and money. Jurisdiction, duties, and rights for Métis are relevant to the extent that they help answer the question, what legal tools are available to help us acquire recognition as a people and the necessary land, power, and money to survive as such? Usually the question is not put that bluntly, but it underlies land claims, selfgovernment initiatives, economic development efforts, and social program access. Clarifying jurisdiction, duties, and rights for Métis ─ what we will, for simplicity, call the framework issues ─ helps identify the legal tools available. What the law cannot provide can then be sought by other means.

The Charlottetown Accord provided a means of addressing the fundamental survival issues facing Métis. Without it, the difficulty in providing a general answer to the question of whether Métis are 91(24) Indians may outweigh any benefit resulting from the answer. In our view a more useful exercise is to address the underlying issues that the Charlottetown Accord sought to help resolve. From that perspective we see the question as, what tools in Canadian law can be used to build a framework of jurisdiction, duties, and rights for Métis?

With that question in mind, the purpose of this paper is to review political, academic, and judicial comments related to jurisdiction; consider how the jurisdiction question affects the defining of duties and rights for Métis; and identify some approaches that could help clarify these framework issues for Métis.

PART 2 ─ THE LIMITATIONS OF EXISTING LEGAL TOOLS

Jurisdiction, Duties, and Rights in Current Law

Sources of law

It is reasonable to assume that, in spite of the failure of the Charlottetown Accord, the Métis will continue their efforts to build new frameworks for self-determination and economic well-being. The legal tools for that effort can be found in four places:

- **The Constitution**

  Pre-1982 ─ federal jurisdiction via 91(24) ─ any rights that may arise as a result of including Métis in the term `Indians' as used in the 91(24) class of matters exclusively within the jurisdiction of the Parliament of Canada

  Post-1982 ─ section 35 of the *Constitution Act, 1982*[vii] recognizes existing Aboriginal and treaty rights, the latter including rights recognized in land claims agreements

- **Common Law** ─ common law Aboriginal rights recognized in case law
- **Legislation** ─ federal or provincial statutes and regulations, such as the *Indian Act* or the Métis settlements legislation in Alberta
- **Agreements** ─ land claims and otherwise between Métis groups and governments

The problem for the Métis is that, with the exception of the Métis legislation in Alberta, the current law from these sources is unclear and uncertain.

Before the *Constitution Act, 1982* was adopted the legal situation for Métis people was even more uncertain. Virtually nothing in law recognized a distinctive status for Métis as an Aboriginal community. Métis tried to have the federal government accept jurisdiction under the provisions of section 91(24) of the *Constitution Act, 1867* in order to gain such recognition. Prior to the 1982 amendment to the Canadian Constitution, this was seen by many as the only way in which Métis communities could obtain distinctive entitlements deriving from their status as Aboriginal people.

Unfortunately, the historical evidence used to maintain this position was susceptible to differing interpretations, and the issue was never determined decisively. With the adoption of the *Constitution Act, 1982*, however, a new basis for the legal recognition of the Métis people as an Aboriginal people was established. This was provided in section 35.

The 1982 constitution gave recognition without definition

Section 35 of the *Constitution Act, 1982* states:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> 5(2) In this *Act*, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

In the 10 years since its enactment, a number of attempts have been made, through the vehicle of first ministers conferences and other constitutional amending processes, to give further particularity to this provision of the *Constitution Act, 1982*. The clause has also been the subject of much scholarly commentary and some judicial decision, most notably *R.* v. *Sparrow*.[viii]

This attention to section 35 has resulted in some clarification of what the provisions of the section entail, but much uncertainty regarding the scope, content, and meaning of the section remains. This is especially true with regard to the Métis people.

Charlottetown sought to address the need for definition

For the decade following the adoption of the *Constitution Act, 1982*, and until the amendment process that resulted in the Charlottetown Accord, these uncertainties were fundamental. Who were the Métis people recognized by the new Constitution? What were their "existing aboriginal and treaty rights"? How were such rights to find constitutional expression? What jurisdiction of

Canadian government had ultimate responsibility for fulfilling such rights and protecting the constitutionally recognized interests of Métis people? This last question in turn raised another long-standing issue. Which groups of people, given constitutional recognition as Aboriginal peoples in Canada, were entitled to be considered `Indians' for purposes of section 91(24) of the *Constitution Act, 1867* and thus within the exclusive legislative authority of the Parliament of Canada?

In 1992 the Charlottetown Accord proposed answers to some of these questions ─ or established a process that might have done so. With the failure of the accord, these questions continue to await some definitive answer. The means now available for providing such answers is the topic explored in this paper.

The Problem of Defining Métis

Métis roots in Manitoba's Red River

Of the three groups of Aboriginal people identified in section 35 of the *Constitution Act, 1982*, the Métis have the least determinate identity. The word has been given a variety of historical and contemporary political uses, and it is far from self-evident which of these uses was intended by the framers of the *Constitution Act, 1982*.

The origin of the word Métis is French and simply means `mixed'. In the Canadian context, the word came to be applied to the French- and Cree-speaking descendants of European men and Indian women who had, by the mid-nineteenth century, established mixed-race communities in the Red River basin south of Lake Winnipeg. In contrast, the term `half-breed' was applied to members of those Red River communities that had similar origins to those of the French- and Cree-speakers, but who were English-speaking and pursued a more agrarian lifestyle. Unlike their French- and Cree-speaking counterparts, these `half-breeds' were largely Protestant in religion.[ix]

Political developments at Red River in the late nineteenth century gradually led to a terminological fusion regarding references to members of both of these mixed-race communities. The transfer of Rupert's Land to Canada, the political organization of some of the mixed-race people under the leadership of Louis Riel, the passage of the *Manitoba Act*[x] and the creation of the province of Manitoba led to the more general characterization of all mixed-race inhabitants of the Red River Valley as Métis.[xi]

The Manitoba Act *recognized Métis*

All such inhabitants, regardless of linguistic or religious identity, were granted entitlements under the land allocation provisions of the *Manitoba Act, 1870*. This statute provided that ungranted lands, to the extent of some 1.4 million acres, were to be set aside "...for the benefit of the families of the half-breed residents". The *Manitoba Act* stated further that the basis for such allocation was that it was "expedient, towards the extinguishment of the Indian title to the lands of the Province," to provide this entitlement to the half-breed residents.[xii]

Potential beneficiaries of the land settlement scheme established under the *Manitoba Act*, or their descendants, established themselves in a number of other locations across the northern prairie in the 1870s and '80s. There, under the provisions of various enactments of the *Dominion Lands Act*,[xiii] these individuals became eligible for allocation of halfbreed land or money scrip, through which they could obtain land under a scheme similar to that established by the *Manitoba Act, 1870*. As well, the legal basis under which such land allocations were made was similar to that underlying the *Manitoba Act*. Section 125 of the *Dominion Lands Act, 1879*, stated:

> To satisfy any claims existing in connection with the extinguishment of Indian title preferred by half-breeds resident in the Northwest Territories, outside the limits of Manitoba, on the 15th day of July one thousand eight hundred and seventy, by granting land to such persons, to such extent and on such terms and conditions as may be expedient.[xiv]

The eligibility for such allotments provides a basis for one definition of Métis. As one legal commentator has stated,

> If there is a legal definition of Métis, it means the people who took half-breed grants under the *Manitoba Act* or the *Dominion Lands Act* and their descendants. Section 12(1)(a)(i) of the *Indian Act* excludes these people from registration as Indians.[xv]

This is a useful definition that can be made slightly more accurate by rephrasing it to state that

> the Métis are the descendants of the people who were *entitled* to half-breed grants under the *Manitoba Act* or related legislation.[xvi] [emphasis in original]

Although the mixed-race population of the pre-Confederation Red River communities and their descendants provides one group that may be clearly designated as Métis, many other groups, at one time or another, have also been so characterized. Such groups may have little or no direct relationship to the Red River community; they may share with that community only a

mixed European-Aboriginal origin.

Other people are also considered Métis

A number of mixed-blood communities have been identified throughout what has become Canada. A striking example can be found in the issuance of half-breed scrip under successive *Dominion Lands Acts*. Such issuance was not confined solely to the descendants of members of the Red River community. As the treaty-making process continued across the western prairie and in the North, people of at least some Aboriginal ancestry, who appeared to be leading an Aboriginal lifestyle but had not entered treaty, were allotted half-breed scrip to extinguish whatever pre-existing Aboriginal interest they might have had in the lands in question. Further, in a number of instances, individuals who initially entered treaty subsequently became enfranchised and received allocations of half-breed scrip.[xvii]

In other parts of Canada, there were communities of mixed European-Aboriginal ancestry that had no connection whatsoever with the historical Red River community. For example, in the Acadian region and in Quebec, there were identifiable groups sharing French-Indian heritage.[xviii]

In both southern and northern Ontario, communities had emerged by the middle of the nineteenth century that had European-Indian heritage. Members of such communities sought either the issuance of scrip on the model employed in western Canada or equal treatment with Indians by way of the taking of treaty and the creation of reserves.xix

Across northern Quebec and Ontario, northeastern Manitoba and the western part of the Northwest Territories, communities of European-Indian origin initially connected with the Hudson's Bay Company came into existence and developed distinctive identities.xx Members of such communities in the Northwest Territories received half-breed scrip during the making of Treaties 8 and 11 and are parties to ratified or proposed comprehensive land claim settlements in the western Arctic today.

In addition to all of these groups there are a number of other communities of mixed European-Aboriginal ancestry in Canada whose members might also qualify as Métis. These include those InuitEuropean-Indian descendants living in Labradorxxi and Indian-European descendants living in the Grand Cache area of Alberta.xxii

There are at least two legislated definitions

There are currently at least two different legislated definitions of Métis, one made by the legislature of Alberta and one by the Parliament of Canada. In Alberta, the term Metis has for more than 50 years been defined in the statute providing for a system of Métis settlements in the northern part of the province. These settlements were established in the late 1930s in response to the desperate economic situation in which communities of mixed European-Aboriginal ancestry found themselves during that time. The definition of Métis employed in the original *Metis Betterment Act*, under which the Métis "colonies" (later "settlements") were established, stated:

> "Metis" means a person of mixed white and Indian blood having not less than 1/4 Indian blood, but does not include either an Indian or a non-treaty Indian as defined in the *Indian Act*.[xxiii]

The *Metis Betterment Act* was repealed and replaced in 1990 by the *Metis Settlement Act*. In this statute, Métis simply defined as

> a person of aboriginal ancestry who identifies with Metis history and culture.[xxiv]

A regulation under the federal *Fisheries Act* still includes a definition almost identical to the definition in the old *Metis Betterment Act*:

> "Métis" means a person of mixed white and Indian blood having not less than one quarter Indian blood but does not include an Indian.[xxv]

The individuals included under this definition did enjoy an Aboriginal entitlement; they were given essentially the same rights concerning the taking of fish for food as were treaty Indians in at least some parts of western Canada.

National Aboriginal groups have given varying definitions

The establishment of Aboriginal political organizations in the 1970s lent further complexity to definitions of Métis. The Native Council of Canada was founded as a national organization with a stated purpose of representing Métis and non-status Indians. This latter group consisted of individuals who, although potentially eligible for registration as Indians under the provisions of the *Indian Act*, had either never been registered or had been deprived of their status as Indians under the *Indian Act* for a variety of reasons, often having to do with the marriage provisions of the *Act*.[xxvi]

In 1983, a split developed within the Native Council of Canada, and the Métis National Council, based in western Canada, was established. In a pamphlet entitled the "The Métis ─ A

Western Canadian Phenomenon" the newly established Métis National Council outlined the following criteria for determining who were Métis. The pamphlet stated:

1) The Métis are:
   • an aboriginal people distinct from Indian and Inuit;
   • descendants of the historic Métis who evolved in what is now western Canada as a people with a common political will;
   • descendants of those aboriginal peoples who have been absorbed by the historic Métis.

2 The Métis community comprises members of the above who share a common cultural identity and political will.[xxvii]

The Native Council of Canada continued to maintain that it represented a national constituency of Métis and other people of Aboriginal ancestry. The perspective of the Native Council of Canada on the definition of Métis was articulated in a pamphlet published by the New Brunswick Association of Métis and Non-Status Indians in 1984. As stated there,

> The Métis people are generally defined as persons of Indian and non-Indian ancestry. Some limit the definition of Métis to the historical Métis of the Prairie Provinces. It was in the Red River settlement that the Métis developed a sense of nationalism. In 1869, under the leadership of Louis Riel, they formed a provisional government which negotiated Manitoba's entry into Confederation. However, Métis exist in all parts of Canada. In Ontario, there were half-breed reserves. In Quebec, the Métis are accepted by neither status Indian communities, nor the French communities, although they are called `Sauvages'. In New Brunswick, the census returns of 1901 enumerated Métis as a distinct group from Indians and whites.…
>
> There is no one exclusive Métis people in Canada any more than there is any one exclusive Indian people in Canada. The Métis of eastern Canada and northern Canada are as distinct from the Red River Métis as any two peoples can be. Yet all are distinct from Indian communities by ancestry, by choice, and their selfidentification as Métis. As early as 1650, a distinct Métis community developed in Le Heve, Nova Scotia, separate from Acadian and Micmac Indians. All Métis are aboriginal people, all have Indian ancestry, and all want options.[xxviii]

Difficulties with the definition of Aboriginal communities in Canada are not unique to the Métis. The Indian community, and the Inuit, are also subject to them. In many ways, however, Métis people are in a distinctive situation. There is a wide variety of self-identifying mixed-race communities throughout the country, with diverse historical origins and contemporary identities. The same is true of the Indian community, but with regard to that community there have been legal definitions, widely used in practice, that have provided a set of standards against which a wide variety of groups can be measured. To date, this has not been so true with regard to the

Métis people of Canada.

The Meaning of `Indian' in 91(24)

The context for defining 91(24)

If the question is, are the Métis included in 91(24)?, an answer is clearly made more difficult if there are problems defining what we mean by Métis. To complicate matters, section 91(24) of the *Constitution Act, 1867*, while giving the Parliament of Canada exclusive legislative authority for "Indians, and Lands reserved for the Indians", does not state clearly which Aboriginal people are to be considered Indians for purposes of this section. The resulting uncertainty has produced much scholarly commentary and a need for judicial clarification. We will consider the comments and case law briefly.

The Indian Act *complicates matters*

Parliament has chosen to exercise its 91(24) jurisdiction in relation to some groups of `Indians` extensively over the years, beginning in 1868 with the passage of *An Act Providing for the Organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordnance Lands*.[xxix] This enactment has been succeeded by a series of statutes asserting federal jurisdiction over many aspects of both the collective and individual activities of people defined in the legislation as Indian. The *Indian Act*[xxx] currently in force states that an Indian means

> a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.[xxxi]

Section 6 of the current Act provides a detailed itemization of the requirements that must be met in order to establish eligibility for registration as an Indian under the Act. It should be noted, however, that registration as an Indian is not synonymous with inclusion on a band list and consequent membership in an Indian band. The requirements that must be met in order to obtain such membership are specified in sections 8 through 13 of the current *Indian Act*.

This is a significant qualification in many respects, not the least of which is that the right to reside upon an Indian reserve is legally dependant upon membership in the band for whose use and benefit the reserve has been established. Such residency has considerable practical

significance for the actual exercise of effective federal power concerning Indians, since the government of Canada has chosen to exercise the full range of its jurisdiction for Indians only in relation to Indian reserve lands and those resident upon them. Those people registered as Indians who live off-reserve are entitled to some federal government programs designed for registered Indians, but are generally subject to the jurisdiction of the province within which they reside.

The status categories that have been established in successive Indian Acts have greatly complicated the process of legally defining the various Aboriginal peoples of Canada. As noted, there are significant numbers of people throughout Canada who are descendants of registered Indians but who have either lost their status through the operation of some provision of the *Indian Act*, or who, although entitled to be registered, have never been registered as Indians. Such people are characterized as `non-status Indians' and have political representation through Aboriginal organizations such as the Native Council of Canada, which also represents self-identifying Métis communities located in some parts of the country. Since these non-status Indians fall outside the federal statutory registration scheme for Indians, and since they are not eligible for residency on reserves, the Parliament of Canada chooses to exercise little or no responsibility for them.

However, the term `Indians' in section 91(24) of the *Constitution Act, 1867* is not simply coterminous with the statutory definition of Indian provided by Parliament in the *Indian Act*. This was determined conclusively by a 1939 judgement of the Supreme Court of Canada in a reference case, *Re: Eskimos*.[xxxii]

Re: Eskimos *extended the 91(24) definition to include Inuit*

More than 50 years ago the question of the scope of 91(24) came before the courts in *Re: Eskimos*. A dispute had developed between the governments of Canada and Quebec over jurisdiction and responsibility for the Inuit population of northern Quebec. Acting under the authority given by section 55 (now section 53) of the *Supreme Court Act*,[xxxiii] the governor general in council made a reference to the Supreme Court of Canada directing it to respond to the question:

> Does the term “Indians” as used in head 24 of s.91 of the *British North America Act, 1867* [now the *Constitution Act, 1867*] include Eskimo inhabitants of the Province of Quebec?[xxxiv]

There were three judgements by the Court. All concurred in the result that the Inuit inhabitants of Quebec, and by implication in all other parts of Canada, were indeed `Indians' for purposes of section 91(24) of the *British North America Act, 1867*.[xxxv] This conclusion meant that jurisdiction over matters relating to Inuit properly belonged to the Parliament of Canada.

In reaching this result, each judgement used a method of inquiry that was essentially historical. In the judgement of Chief Justice Duff and Justices Davis and Hudson (Crockett J. concurring) the Chief Justice characterized the approach used in this way:

> The *British North America Act* is a statute dealing with British North America and, in determining the meaning of the words "Indians" in the statute we have to consider the meaning of that term as applied to the inhabitants of British North America.[xxxvi]

To do this, the author of each decision examined a variety of historical materials from the period, such as parliamentary reports, official proclamations, missionary reports, and the correspondence of public officials. Special attention was given to the 1857 Report of the Select Committee of the United Kingdom House of Commons on the Hudson's Bay Company. The Committee had been struck in 1856 to investigate the affairs of the Company, which at the time exercised governmental authority in what was to become northern and western Canada.

The assessment of all these materials led each of the three judges writing decisions to the conclusion that the word Indian as used at the time of Confederation was also used to designate Inuit. The three judges drew some further implications from this as well. As Chief Justice Duff stated:

> it appears that, through all the territories of British North America in which there were Eskimo, the term `Indian' was employed by well-established usage as including these, *as well as the other aborigines*, and I repeat the *British North America Act* insofar as it deals with the subject of Indians, must, in my opinion, must be taken to contemplate the Indians in British North America as a whole.[xxxvii] [emphasis added]

After extensive consideration of the text of the Resolutions of the Quebec Conference of 1864, Canon J. (Crockett J. concurring) stated:

> This I think disposes of the very able argument on behalf of the Dominion that the word `Indians' in the *British North America Act* must be taken in a restricted sense. The Upper and Lower Houses of Upper and Lower Canada petitioners to the Queen understood that the English word "Indians" was equivalent to or equated with the French word "Sauvages" and *included all the present and future aborigines native subjects of the proposed Confederation of British North America* …[xxxviii] [emphasis added]

Finally, Kirwin J. stated, in a judgement concurred in by Cannon and Crockett JJ.:

> In my opinion, when the Imperial Parliament enacted that there should be confided to the Dominion Parliament power to deal with "*Indians and Lands reserved for the Indians*", *the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation*.[xxxix] [emphasis added]

The court did not venture beyond these words and indicate exactly who these other "aborigines" might be. Nor was the inclusion of Métis people within this term considered. Subsequent to the *Re: Eskimos* decision, however, attention would turn to this issue.

There is no agreement on 91(24) inclusion among scholars or politicians

One of the earliest pieces of academic commentary on this matter was an article in 1979 by Clem Chartier.[xl] Following the practice established by the Supreme Court of Canada in *Re: Eskimos*, Chartier examined historical materials from the late eighteenth century and the nineteenth century to determine which groups of people were characterized as Indians by contemporary observers.

As did the Supreme Court, Chartier placed considerable emphasis in his analysis on the 1857 Report of the Select Committee of the United Kingdom House of Commons on the Hudson's Bay Company. His conclusion was that the witnesses who appeared before that committee, and the materials it examined, tended to identify Indians and `half-breeds' as constituting an Aboriginal population and thus both would be considered, like the Inuit, `Indians' in the parlance of the period.

Chartier also considered statutory and other official materials from the British North American colonies roughly contemporary with the Constitution Act, 1867. His reading of this evidence was similar to his interpretation of the 1857 Select Committee materials. There was, in Chartier's view, a general tendency to characterize all people of any Aboriginal ancestry as Indians, although other terms might also be used to designate `half-breeds' more specifically. As a result, Chartier concluded that for purposes of the Constitution Act, 1867, `half-breeds' had to be considered Indians and thus, like Inuit, to be covered by the provisions of section 91(24) of the Constitution Act, 1867.

Some other scholars, examining the same historical materials assessed by Chartier, have reached different conclusions. Bryan Schwartz in First Principles: Constitutional Reform with

Respect to the Aboriginal Peoples of Canadaxli also analyzed the 1857 Report of the Select Committee of the United Kingdom House of Commons relied upon by both the Supreme Court in the Re: Eskimos decision and by Chartier. Schwartz drew the conclusion that the evidence in the report showed that `half-breeds' (unlike Inuit) were not comprehended in general contemporary usage of the word Indian.xlii

Unlike Chartier, however, Schwartz drew distinctions between various categories of mixed-race or `half-breed' peoples in his discussion of the subject. For example, the `half-breeds' referred to in the 1857 report were members of the Red River community. Schwartz's reading of the historical materials was that such peoples were not included in the category Indians as that term was generally used in the mid-nineteenth century. As a result, following the method employed by the Supreme Court of Canada, Schwartz concluded that such people, and their descendants, to whom alone he applied the term `Métis', could not be regarded as Indians for purposes of section 91(24) of the Constitution Act, 1867.

In addition to the Red River Métis, Schwartz went on to consider the situation of other mixed race groups, whom he described as "people, usually of mixed ancestry, who continued to closely associate with traditional Indian groups". With regard to these people, Schwartz concluded that "historical legal practice supports their inclusion within section 91(24)."xliii

Schwartz's subsequent discussion of the Métis and section 91(24) does not really consider the people whom he placed in this category of section 91(24) Indians. Perhaps Schwartz felt that eventually most people who constituted this category were absorbed through the registration system established by the Parliament of Canada in various Indian Acts for people therein defined as Indians. Whatever the case, for Schwartz such people were not Métis. Like the Métis National Council, Schwartz confined that term to members of the historical Red River community, their descendants, and people who had subsequently adhered to that community throughout western Canada. These people, he concluded, were not regarded as Indians in the mid-nineteenth century and therefore could not be regarded as included within section 91(24) either in 1867 or today.

An even more emphatically negative position toward consideration of Métis as section 91(24) Indians, or even as an Aboriginal people, has been expressed by Thomas Flanagan. In a number of scholarly pieces,xliv Flanagan has argued that the members of the Red River community, to whom alone of all mixed-race people he ascribes the term Métis, cannot be considered Aboriginal people at all. Analyzing the historical development and the mixed-race

origins of the Red River Métis community against Canadian judicial decisions setting out the criteria that must be met before a group of people can be acknowledged to possess an Aboriginal title to land, Flanagan has argued that the Red River Métis cannot successfully establish that they possess such title. The essence of his position was well summarized when he stated:

> There were some mixed blood people who had Indian wives, lived with Indian bands, and were scarcely distinguishable from Indians. But they could be, and usually were, allowed to adhere to treaty as part of the bands with whom they lived. To the extent that the Métis led a truly aboriginal life, they were not distinct from the Indians; and to the extent that they were distinct from Indians, their way of life was not aboriginal.[xlv]

The mere fact that the federal government acknowledged through statutory recognition that the Red River Métis had some type of interest in the lands they had traditionally occupied could not provide a basis for the ongoing recognition of full-fledged Aboriginal status for the descendants of that community. The same right was given to long-time white inhabitants of the Red River valley who made no pretence of being Aboriginal people.[xlvi]

The courts have given no clear direction on 91(24) inclusion

The debate on whether some Métis are included in the term Indians in section 91(24) and the jurisdictional implications of such inclusion has not been limited to scholars. The courts have been compelled to address this issue on occasion and to apply the reasoning adopted in *Re: Eskimos* to the particular facts before them.

As in the scholarly forum, conclusions have been mixed. In some cases, such as *R* v. *Rocher*,[xlvii] the court was at the very least sympathetically disposed to the position taken by Chartier and was prepared to consider the possibility that Métis might be considered Indians for purposes of section 91(24). Other decisions, such as *R.* v. *Genereaux*,[xlviii] reached the opposite result, often after evaluating the same historical materials that had led Chartier to his conclusions.

More recently, some Alberta courts have held that an individual who was a descendant of scrip takers but who followed an Indian way of life should be considered an Indian within the meaning of section 12 of the Natural Resources Transfer Agreement[xlix] and might thus avail himself of all of the hunting, fishing, and trapping rights guaranteed to Indian people under that section of the Agreement.[l] These decisions did not consider whether the inclusion of such people within the terms of the Transfer Agreement might generally extend to considering them Indians for purposes of section 91(24).

The views of political bodies differ

The controversy regarding which level of government had constitutional responsibility for Métis peoples was not confined to academic debate or to the courts. The federal government long maintained that it had no jurisdiction to legislate for Métis peoples. In the view of successive federal government representatives, even the recognition of the Métis people as an Aboriginal people in section 35 of the *Constitution Act, 1982* had no readily apparent jurisdictional implications.[li] This position did ultimately change in 1992, when the government of Canada agreed, in the Charlottetown Accord, that, for purposes of section 91(24) of the *Constitution Act, 1867*, all groups identified as Aboriginal peoples in section 35(2) of the *Constitution Act, 1982* should be considered `Indians'.

The provinces, with the exception of the province of Alberta, have generally held that responsibility for Métis peoples was a federal responsibility and that the Métis were included within the provisions of section 91(24) of the *Constitution Act, 1867*. Such unresolved jurisdictional wrangling meant that the legal entitlements of Métis as Aboriginal people tended to receive little concrete attention, since both levels of government maintained that this was not within their area of responsibility. Although the Charlottetown Accord did offer a way out of this impasse, what impact on future events this agreement will have remains to be seen.

The Native Council of Canada and the Métis National Council have both maintained that, like the Inuit, the Métis should be considered as included in class 91(24) and consequently within the jurisdiction of Parliament. The justification offered for this was essentially that proposed by Chartier: the Métis were an Indigenous people, and the term Indians in section 91(24) should be interpreted as applying to all Indigenous peoples in Canada. Representatives of both organizations pressed throughout the 1970s and '80s to have explicit constitutional recognition given to this interpretation.[lii]

The Métis settlements of Alberta have been less clear-cut on this issue. During the constitutional debate of 1982 a paper by the Alberta Federation of Metis Settlement Associations, “Metisism: A Canadian Identity”, stated:

> Perhaps the most compelling reason for us opting out of an exclusive relationship with the federal government is that, while it might enhance our political status, it does not fit with the Métis way of doing things. More than any other Canadians, we recognize the importance of western provincial rights: our ancestors formed two provisional

> governments to defend them. We are proud to be western Canadians and proud to be Albertans.[liii]

The paper went on to state the settlements' position that

> we are prepared to accept provincial jurisdiction over the Metis Settlements except in matters relating to our aboriginal rights.[liv]

The accord between the settlements and the province that provided for provincial jurisdiction so long as it did not affect Aboriginal rights was consistent with this position.

The Role of 91(24) in the Future

In 1982 a new constitution provided a new foundation

As indicated by the range of opinion outlined above, the analysis of historical materials roughly contemporary with the *Constitution Act, 1867* may lead to very different conclusions about the meaning and jurisdictional reach of the term Indian in 91(24). Such an approach has not, and probably cannot be, conclusive given the ambiguities in the evidence. Even if the ambiguities could be removed, it is not clear the result would resolve issues arising in different historical circumstances and contexts. Might there not be a better way to address and resolve these issues? We think so, and it has been provided by the scope of the provisions of section 35 of the *Constitution Act, 1982*.

Section 35 of the *Constitution Act, 1982* not only recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada but also defined Aboriginal peoples as including the Indian, Inuit and Métis peoples.

This acknowledgement of rights and of the constituent groups that are the beneficiaries of such rights did not, however, include any further enumeration of who constituted the defined groups. Although Métis were acknowledged as Aboriginal people, it was not clear who were regarded as Métis or exactly which rights they might enjoy.

For all of these difficulties, however, the adoption of section 35 held out the potential to substantially advance recognition of the legal entitlements of Métis people as an Aboriginal community. The constitutional recognition that the Métis were an Aboriginal people whose existing Aboriginal and treaty rights were recognized and affirmed made possible consideration of a new approach to clarifying both legal rights and jurisdictional issues.

Such an approach would not be based exclusively on the interpretation of ambiguous historical materials; it would be derived instead from an understanding of what purposes the

Canadian constitutional order should be trying to realize with regard to Aboriginal peoples and their rights. Rather than trying to fit contemporary realities of Canadian public life within categories first developed in another era, such a `purposive' interpretation of the provisions of section 35 would elucidate the public values by which Canadian governments should be guided in their relationships with Aboriginal communities. This approach is far removed from the scheme developed in *Re: Eskimos* and in the debates about jurisdiction and entitlements organized around the categories derived from that judgement.

Although Chartier's article was written before the passage of the *Constitution Act, 1982*, he raised (but did not pursue) considerations that would be open to much greater elaboration under the approach suggested above. At the conclusion of his article, Chartier stated:

> The writer suggests that a further argument, which has not been entered into, can be based on "aboriginal title". This title is based upon a common law principle "… resulting from an unseverable imperial policy applying to all natives, of whatsoever description, that the imperial power comes into contact with; …". This aboriginal title gives the Indians, or Aborigines, a certain right to the lands they occupy. In passing the *B.N.A. Act, 1867*, the Imperial Parliament must have had in mind the protection of the land rights of all "aborigines". Prior and subsequent dealings with the half-Indians or half-breeds portrays that their aboriginal title was recognized.[lv]

This theme was not developed by Chartier, but it suggested directions that might be pursued once a clear basis for recognizing Métis Aboriginal and treaty rights had been adopted.

Some question the legal effect of section 35 recognition

Not all commentators on section 35 saw its provisions as significantly enhancing, at least in the short term, the legal recognition of a distinctive constitutional position for Métis people or of their Aboriginal rights. Both Bryan Schwartz and Thomas Flanagan had to consider what the inclusion of Métis as a constitutionally recognized group of Aboriginal people might mean. Both raised the issue and both concluded it potentially meant little or nothing. Each author defined Métis for his own purposes as being members of the Red River community and their descendants. Neither gave extensive consideration to the large number of other mixed-race communities in the country, except to say that where such people enjoyed an Indian lifestyle, or were associated with Indians, they should be (and probably had been) regarded as `Indians'.

With regard to those whom they had defined as Métis, however, both authors expressed considerable doubt that the constitutional recognition of these people as Aboriginal people had, or (in the case of Flanagan) should have, any great immediate significance. Schwartz stated:

Section 35(2) of the *Constitution Act, 1982* says that the aboriginal peoples referred to in the *Constitution Act, 1982* include "Indian, Inuit, and Métis peoples of Canada". On its own, the section confers no rights of the Métis. It may turn out that the Métis have very few entitlements under the other sections of the *Act* which do speak to the rights of aboriginal peoples. Section 35(1) recognizes and affirms "the aboriginal and treaty rights" of the aboriginal peoples of Canada. It may be on April 17, 1982, the Métis had no aboriginal or treaty rights. In any event, the survival of the constitutionally protected Métis rights does not require parliamentary, as opposed to judicial authority. An expansive interpretation of section 91(24) is not justified by a necessity for Parliament to protect the newly assured rights of the Métis from local interference. The courts can do that. Nor is it legitimate to combine the judgment of Canon J. [in *Re: Eskimos*]—"Indians are all aborigines"—with section 35(2)—"Métis are aboriginal peoples" in order to conclude that Métis are section 91(24) Indians.[lvi]
For Flanagan:

> …the best policy for the time being would be to emphasize the word "existing" in section 35(1) of the *Constitution Act, 1982*. If there is to be a major change in the status of the Métis as a corporate entity, there ought first to be full and informed public discussion culminating in parliamentary debate over such fundamental issues as who the Métis are and whether they are different from non-status Indians, why they are thought to have a share of aboriginal title, and why the historical mechanisms of extinguishment are now considered to have been ineffective. None of this discussion took place in the rapid series of political deals which led to the final wording of the constitutional amendments [made in the *Constitution Act, 1982*].[lvii]

A purposive reading of section 35 may help define `Métis'

Other commentators disagree with these conclusions of Schwartz and Flanagan and have maintained that the adoption of section 35 offers at least the possibility of new departures in the articulation of Métis rights. Most of the authors who have engaged in this enterprise have adopted what will be characterized, following William Pentney, as a "purposive" view of the provisions of section 35.

In an extended analysis of the Aboriginal rights provisions of the *Constitution Act, 1982*,[lviii] Pentney considered the definitions of Aboriginal peoples under the Canadian Constitution and the relationship between section 91(24) of the *Constitution Act, 1867* and section 35 of the *Constitution Act, 1982*. Pentney posited two different methods for determining which peoples were intended to be included within the provisions of subsection 35(2) of the *Constitution Act, 1982*.

One of these approaches was to identify such peoples as being included within the definition of Indian in section 91(24) of the Constitution Act, 1982;lix the other would be to analyze the terms used in section 35(2) "…sui generis, on the basis of the contemporary

understanding of these terms and in light of the purpose of the constitutional guarantee."[lx]

The first of Pentney's methods for determining the identity of Aboriginal peoples was derived from the historical approach to the interpretation of section 91(24) that had been used by the Supreme Court in Re: Eskimos and by Chartier, Schwartz and Flanagan. After reviewing some of the historical evidence presented to sustain a claim that Métis might be considered section 91(24) Indians, Pentney concluded that it could

> …reasonably be inferred that the Métis, or half-breeds who ordinarily resided with, and shared the lifestyle of, Indian bands, were contemplated [as "Indians"] when the Resolutions which preceded the enactment of the *Constitution Act, 1867* were drafted.[lxi]

On this interpretation, Métis who were the descendants of inhabitants of those communities that in 1867 resided with and shared a lifestyle with Indian bands could make a claim to be considered Indians under the terms of 91(24) and would constitute the Métis people whose Aboriginal and treaty rights were recognized and confirmed by section 35. The nature and content of such rights would have to be further defined, through either constitutional amendment or court actions; but whatever entitlements might exist, they were to be enjoyed only by those individuals who could prove descent from mixed-race people who would have been regarded as essentially indistinguishable from Indians by the authors of the *Constitution Act, 1867*.

The other approach suggested in Pentney's analysis is to attempt to define the terms used in section 35 of the Constitution Act, 1982 in light of our contemporary understanding of these terms and in the context of what the purposes of section 35 are interpreted to be in an ongoing way. In his discussion of how the term Métis might be interpreted in this context, Pentney begins with existing definitions of the term in Canadian law.[lxii] Many of these have been generated through efforts to define the mixed-race communities of Red River and their descendants. Pentney notes, however, that other such definitions exist as well and points to the Alberta Metis Betterment Act (now repealed and replaced by the Metis Settlements Act and related legislation) which, as noted above, defined Métis solely in terms of mixed Indian-European ancestry and made no reference to identification with the historical Red River community.

In Pentney's view, a purposive interpretation of section 35 must move beyond the purely historical approach adopted in Re: Eskimos. In determining who constitutes Métis (and other Aboriginal groups as well), he states:

> …ancestry will no longer be the determinative factor. Here...a court should evaluate a

> person's claim to the entitlement to aboriginal rights as a Métis by referring to several factors, including ancestry, kinship, culture, community acceptance, lifestyle and self-identification.[lxiii]

A purposive approach has practical advantages

Adopting Pentney's type of interpretive perspective would eliminate the need to sift the ambiguities of the historical record to determine who, at a given point in time, might have been regarded by some set of privileged observers as `Métis'. Instead, the focus would shift to contemporary expressions of community identification, bounded by a set of legally determinable criteria. These would be fixed by the courts, by constitutional negotiations or through other types of formal interjurisdictional agreements. As Pentney observes, one of these criteria should be that some Aboriginal ancestry would be required for group membership in all those communities that desired to make a claim for entitlements as Aboriginal peoples.[lxiv]

Other scholars have suggested more detailed sets of criteria as well, and some of these will be considered below. Pentney's contribution to the definitional debate was to suggest that historically derived criteria for the constitutional definition of Aboriginal peoples need not be relied upon to the exclusion of a broader range of considerations, which would give expression to the self-understanding of contemporary Aboriginal communities.

In addition to Pentney's work, there have been other scholarly efforts to consider a purposive definition of section 35. Catherine Bell has written extensively on this subject[lxv] and has suggested that the definition of Métis should not be considered closed based purely on historically determined criteria. She says,

> Taking into consideration the minimal criteria set out in s.35, and the difficulty in identifying a single Métis people, the most logical solution to the definition debate is to define the "Métis" in s.35(2) as belonging to one of two possible groups.
> - The descendants of the historic Métis Nation [i.e., the Red River community];
> - People associated with ongoing Métis 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 "Métis" for Constitutional purposes as small "m" Métis. 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.[lxvi]

Professor Bell has pointed out elsewhere that such a purposive reading of constitutional texts relating to Aboriginal people has some support even in relation to section 91(24) itself.[lxvii]

As was noted above, Canon J. in his judgement in *Re: Eskimos* indicated that in his view the term Indians as used in the *Constitution Act, 1867* included

> All present *and future* Aborigines native subjects of the proposed Confederation of British North America.[lxviii] [emphasis added]

Such a prospective definition of Indians, when combined with the purposive reading of the provisions of section 35, affirms the position that categories of Aboriginal peoples cannot, for constitutional purposes, be considered closed simply on the basis of historically determined factors.

Brian Slattery has also made suggestions concerning the criteria to be adopted in determining whether peoples are to be regarded as `Native' for the purpose of obtaining constitutional entitlements. After stating that

> [h]istorically, groups composed mainly or entirely of Métis or "half-breeds" have been accepted as native groups and this fact is now recognized in s.35(2) of the *Constitution Act, 1982* which states the phrase "aboriginal peoples of Canada" as used in the *Act* includes the Indian, Inuit, and Métis peoples of Canada.[lxix]

Slattery goes on to list a number of factors that should be considered when a determination is to be made as to whether a group of people should be regarded as `Native'. Among these factors are the self-identity of the group, its culture and way of life, the existence of group norms or customs similar to those of other Aboriginal peoples, and the genetic composition of the group.[lxx]

The Supreme Court has recognized section 35 and the purposive approach

To the scholars adopting what has been characterized as a purposive understanding of section 35 has been added an authoritative pronouncement by the Supreme Court of Canada in 1990. In *R.* v. *Sparrow*, the Court gave its first extended consideration to the meaning and purpose of section 35. In that judgement, a unanimous court stated:

> It is clear, then, that s.35(1) of the *Constitution Act, 1982* represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal people made the adoption of s.35(1) possible and it is important to note that the provision applies to the Indians, the Inuit, and the Métis.[lxxi]

With regard to the interpretation of the provisions of section 35, the court said:

> The nature of s.35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s.35 has no effect on

aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following at page 322 [page 168 C.N.L.R.]:

> "The submission would give no meaning to s.35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the near future…. To so construe s.35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that the principle applies less strongly to aboriginal rights than to the rights guaranteed by the *Charter* particularly having regard to the history and to the approach to interpreting Treaties and statutes relating to Indians required by such cases as *Nowegijick* v. *R.* [1983] 1 S.C.R. 29"….[lxxii]

With this perspective, it is difficult to maintain that the provisions of section 35 have no meaningful content for Métis. As the Supreme Court held in *Sparrow*, "…s.35(1) is a solemn commitment that must be given meaningful content."[lxxiii] To have given the Métis recognition in the Constitution of Canada as an Aboriginal people and to then maintain that this means nothing in terms of substantive entitlements would be unacceptable. Such a general proposition cannot detail the content of the rights to be enjoyed in any particular case, but it does establish that there must be some bundle of rights that are the entitlements of some identifiable group, or groups, of Métis.

Section 35, Charlottetown and federal policy make 91(24) inclusion less crucial

This scholarly and judicial consideration of section 35 is relevant to the issue of section 91(24) and its jurisdictional implications for Métis. In our view, the effect is to make this issue less crucial. The delineation of substantive rights in section 35 will ultimately determine issues of both jurisdiction and legal obligation. Jurisdiction will thus be an implication of entitlements, rather than the reverse. This fact represents one of the most significant elements in the constitutional protection now afforded treaty and Aboriginal rights by the Constitution of Canada.

Before the adoption of the *Constitution Act, 1982*, the only way Aboriginal peoples could obtain recognition of separate jurisdictional status was to be regarded as `Indians' and thus subject to special federal jurisdiction under section 91(24) of the *Constitution Act, 1867*. Since for many recognition was seen as a cornerstone for survival, Métis groups sought inclusion in

91(24). The logic was that recognition of their Aboriginal status by the government of Canada would also strengthen legal arguments that Métis should receive special entitlements as incidents of Aboriginal status.

From the `recognition' perspective, 91(24) is now less crucial. The Constitution of Canada explicitly recognizes Métis as having distinct juridical status as an Aboriginal people, with some as yet to be determined group of rights. Since two of the three Aboriginal groups recognized as such in section 35 are regarded as `Indians' for purposes of section 91(24), it is submitted that it is not possible to interpret 91(24) in isolation from section 35. These two sections of the Constitution must be read together. This principle received explicit recognition in the Charlottetown Accord, which stated:

> 91A. For greater certainty, class 24 of section 91 applies, except as provided in section 95E, in relation to all the aboriginal peoples of Canada.[lxxiv]

Under this proposed amendment, `Indian' was to be constitutionally a synonym for `Aboriginal'. The effort made by so many Métis to effect this change had been rewarded.

Section 35 of the *Constitution Act, 1982* provided a foundation for recognizing and defining Métis Aboriginal rights. The Charlottetown Accord built on that foundation. Although the Accord was rejected by the people of Canada and did not become law, it provides a starting point for defining law in the future. By explicitly identifying the categories enumerated in section 35(2) of the *Constitution Act, 1982* with the general category of `Indians' in section 91(24) of the *Constitution Act, 1867*, it made the proper constitutional connection. That connection will not be forgotten as attempts are made to further define the meaning and content of the constitutional rights of Aboriginal peoples in Canada.

In some ways, the identification of Métis as section 91(24) Indians will solve jurisdictional uncertainties. If this identification is definitively established, either through future constitutional or other jurisdictional agreements, or as a result of legal determinations, it will finally be clear that the federal government has constitutional responsibility for dealing with the Métis.

The significance of 91(24) inclusion is reduced by another consideration: federal jurisdiction does not imply federal action.[lxxv] For example, the Parliament of Canada has long been acknowledged to have exclusive jurisdiction over Inuit and non-status Indians but that *authority* to act has not always produced an attendant *resolve* to act.

Confirming that the Métis fall under the exclusive legislative authority of the Parliament of Canada will not answer the most perplexing questions raised by section 35 with regard to Métis people. The problems of definition (Who are the Métis?) and entitlements (What Aboriginal and treaty rights do they enjoy?) will not be much advanced by the mere constitutional recognition that Métis are section 91(24) Indians. In order for a grant of federal jurisdiction to convey something concrete to the Métis, some type of legally *recognizable* or *enforceable* obligation will have to attach to this jurisdiction. This issue takes us to the heart of section 35 guarantees.

The reality is that the Métis are faced by many of the same dilemmas as off-reserve status Indians with regard to the definition of section 35 entitlements. If there is no agreement among Canadian jurisdictions to further define in formal constitutional terms what these entitlements may be, other means will have to be used to effect such definitions. This paper explores some of these means.

As in the Charlottetown agreement, however, different groups of Métis will have to use a variety of methods to give some content to the provisions of section 35. This may well result in a range of legal regimes offering recognition of different kinds of rights to different types of Métis communities. This situation will not be peculiar to the Métis, however. It is already true among status Indians and, depending upon constitutional evolution in Canada, it may become more and more the case among them as well.

The Role of Litigation in Establishing Métis Rights

Manitoba Métis raise fundamental issues in the Dumont *case*

One means of defining and enforcing legal entitlements is through court actions. Since the adoption of the *Constitution Act, 1982*, this has been a method increasingly used by Indian claimants. For some groups of Métis, it may be productive of results as well. One instance of the use of this approach is the case of *Dumont et al.* v. *Attorney General of Canada and Attorney General of Manitoba*. This case offers an instructive model of an attempt to obtain a judicial definition of Métis rights that may be used by other groups of Métis claimants in the future.

Dumont et al. v. *Attorney General of Canada and Attorney General of Manitoba*[lxxvi] is a lawsuit concerning the allocation of land to Métis residents of Manitoba under the provisions of the *Manitoba Act, 1870*. The relevant provisions of the Act are found in sections 31 and 32:

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.
32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:

(1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.
(2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
(3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
(4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian title has not been extinguished, shall have the right of pre–emption of the same, on such terms and conditions as may be determined by the Governor in Council.
(5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.[lxxvii]

The plaintiffs are officers of the Manitoba Métis Federation (a constituent organization of the Métis National Council) suing on their own behalf and on behalf of the descendants of all Métis persons entitled to benefits under the *Manitoba Act*. The Native Council of Canada is also a plaintiff in the action.

A number of complex issues are raised by this litigation, but the essence of the claim is that significant alterations were made by both the Parliament of Canada and the Manitoba legislature to the land rights promised the Métis community under the *Manitoba Act* subsequent to the passage of that Act by the Parliament of Canada and its confirmation by the Imperial

Parliament in 1871 (the *British North America Act, 1871*, now known as the *Constitution Act, 1871*).[lxxviii]

The plaintiffs allege that because of these alterations, approximately 85 per cent of the Métis who were to benefit from the land distribution scheme established under the Act failed to benefit.[lxxix] It is the contention of the plaintiffs that these changes in the land distribution scheme mandated by the *Constitution Act, 1871* were beyond the powers of either the Canadian Parliament or the Manitoba legislature. The Act states explicitly that only certain of its provisions may be altered, and those contained in sections 31 and 32 are not among these. As a result, the plaintiffs are seeking a declaration that these alterations are invalid and of no effect.[lxxx]

The plaintiffs in *Dumont* contend that the impugned legislative acts by Canada and Manitoba are beyond their jurisdictions. They also claim that the activities of the Manitoba legislature are doubly illegitimate because legislative authority concerning Métis beneficiaries of the *Manitoba Act* falls exclusively within the competence of the federal Parliament. The reason for this is that the Métis should be considered Indians under the terms of section 91(24) of the *Constitution Act, 1867*.[lxxxi] Thus, from the plaintiffs' perspective, the *Dumont* case turns upon the exercise of legislative power without valid authority, a familiar argument in the jurisprudence of Canadian federalism.

However, in a statement of claim on the same matter,[lxxxii] filed against Her Majesty in the Federal Court of Canada, the same plaintiffs specifically plead their Aboriginal entitlements. In this pleading the plaintiffs allege that a number of imperial enactments ─ the *Royal Proclamation of 1763*; the *Constitution Act, 1867*, section 91(24); the *Rupert's Land Act, 1868* and the *Rupert's Land Order, 1870* ─ establish a fiduciary relationship between the Crown and the Métis as an Aboriginal people.

The *Manitoba Act, 1870* is also alleged to have created a fiduciary relationship between the Crown and members of the Red River Métis community and their descendants with regard to the land allotments and the allocation of other rights promised under the Act. The allegation is then made that the Crown breached these fiduciary obligations to the Red River Métis and their descendants through its failure to ensure that the promises made in the *Manitoba Act* were properly implemented.[lxxxiii] As a remedy, the plaintiffs are requesting

- a declaration that, in connection with rights promised them in *Manitoba Act*, the Crown was in breach of its fiduciary obligations to the members of the Red River community

and their descendants as well as being guilty of fraud or fraudulent breach of trust;

● damages to make good the losses suffered by the plaintiffs due to this conduct by the Crown; andan order that the Crown provide the Métis with alternative lands.[lxxxiv]

Dumont *raises the issue of fiduciary duty to Métis*

The pleadings of Dumont et al. in these actions illustrate the nature and the variety of legal arguments that are open to at least some groups of Métis claimants under the legal and constitutional order that now exists in Canada. More traditional arguments based on jurisdictional considerations are joined with assertions about the Crown's fiduciary obligations toward Aboriginal peoples, which it is the Crown's legal duty to fulfil.

The assertions regarding the Crown's fiduciary obligations made by Dumont et al. raise a powerful argument that has, since the decision of the Supreme Court of Canada in *Guerin* v. *The Queen*,[lxxxv] been used frequently in legal proceedings by status Indian plaintiffs to compel the federal Crown to honour commitments made by it to Indian people.

The facts in *Guerin* concerned the long-term surrender of Indian reserve lands to the Crown for lease. The Supreme Court of Canada's decision in the case was well summarized by the Court in *Sparrow*:

> This court [in *Guerin*] found that the Crown owed a fiduciary obligation to the Indians with respect to their lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation.[lxxxvi]

Although the plaintiffs in *Dumont* are not status Indians, and although the lands in question were not reserve lands, the Métis claimants are clearly an Aboriginal people, and the land benefits promised to them by the *Manitoba Act* were given explicitly toward the extinguishment of "Indian title to the lands in the province."

The *Guerin* principles of fiduciary obligation were taken out of their explicit factual context by the Supreme Court of Canada itself in its decision in *Sparrow*. As the court stated,

> In our opinion, *Guerin* together with *R.* v. *Taylor and Williams* (1981) 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, ground a general guiding principle for s.35(1), that is, the Government has the responsibility to act in a fiduciary capacity with respect to *aboriginal peoples*. The relationship between the Government and *aboriginals* is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[lxxxvii] [emphasis added]

Here the court is taking principles formulated with respect to status Indian reserve land transactions and extending them to define the Crown's relationship with Aboriginal peoples generally. In fact, this is done explicitly in *Sparrow*.

> We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principle outlined above, derived from *Nowegijick* [a Supreme Court of Canada decision that ruled that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians], *Taylor and Williams* [an Ontario Court of Appeal decision that held that Indian rights should not be determined in a vacuum since the honour of the Crown was involved in the interpretation of Indian treaties and, as a result, fairness to Indians must be the governing consideration] and *Guerin*, should guide the interpretation of s.35(1). As commentators have noted, s.35(1) is a solemn commitment that must be given meaningful content.[lxxxviii]

It is not difficult to see how such principles apply to a fact situation such as that pleaded in *Dumont*. Members of the Red River community, having an Aboriginal right to the lands that they occupied recognized explicitly by the government of Canada in the *Manitoba Act,* agreed to give up certain claims they had to this land in exchange for the consideration offered them in the *Manitoba Act*. This statute, made part of the Constitution of Canada by the Imperial Parliament, gave solemn undertakings to deal with an Aboriginal people in certain stated ways. It is now claimed that these undertakings were explicitly breached. Arguably, if the Crown's conduct was as the plaintiffs claim, the remedy should be similar to that provided Indian plaintiffs alleging similar circumstances.

A further conceptual point might be made in connection with the *Dumont* proceedings, and it has been made in the work of Paul Chartrand.[lxxxix] The same observation has also been made in pleadings prepared by the other plaintiff in the *Dumont* case, the Native Council of Canada,[xc] and in the dissenting judgement of Mr. Justice O'Sullivan in the Manitoba Court of Appeal decision in *Dumont*.[xci]

The point made in all of these materials is that section 31 of the *Manitoba Act* is in essence a land claims agreement or `treaty' whose provisions are now protected by section 35 of the *Constitution Act, 1982*. As Chartrand has stated,

> Section 31 can take on a contemporary significance as a part of the national land claims agreement process involving aboriginal peoples and the Crown. Abbe Ritchot, the special negotiator for the Métis, bargained with the federal ministers in 1870 to obtain lands in satisfaction of the Métis claim and section 31 [of the *Manitoba Act*] expressly recognized its object of extinguishing Métis Indian title to the lands in the province. In terms, then, section 31 is a land claims agreement and is therefore arguably entrenched as one of the

"treaties" which are now afforded protection in s.35 of the *Constitution Act, 1982*.[xcii] O'Sullivan J.A. also articulated this view of the *Manitoba Act*:

> The *Manitoba Act* sanctioned by imperial legislation, is not only a statute; it embodies a treaty which was entered into between the delegates of the Red River Settlement and the imperial authority.[xciii]

The implications of Dumont *may differ for different Métis*

The plaintiffs in *Dumont* have faced difficulties in pursuing their action. In 1988, the Manitoba Court of Appeal granted an application brought by the federal government to have the claim struck down on the ground that it disclosed no legal cause of action. The grounds upon which the Court granted the application may be instructive for other Métis claimants.

Among other determinations, the Court of Appeal found that the land rights created under section 31 of the *Manitoba Act* were individual rights and did not create a community of interest for Métis people. More significantly, however, the Métis claimants had indicated to the Court that their principal interest in obtaining the requested declaration was to assist them in negotiating a *political* settlement of their outstanding claim to land, in compensation for the losses they and their ancestors had suffered in the 1870s and '80s. The Manitoba Court of Appeal decided (with Mr. Justice O'Sullivan in dissent) that such a declaration would be of no real advantage to the plaintiffs.[xciv]

On appeal, the Supreme Court of Canada disagreed and set aside the decision of the Manitoba Court, allowing the *Dumont* litigation to proceed. As Madam Justice Wilson stated for the Court,

> The Court is of the view also that the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the *Manitoba Act*, is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in the aid of extra-judicial claims in an appropriate case.[xcv]

The implications of this proceeding should be noted. In *Dumont*, the plaintiffs are simply seeking a statement from the court that, if granted, will materially assist them in negotiating with the federal and provincial governments a resolution of their outstanding land claim. Without recognition of a legal entitlement of some kind, Manitoba Métis claimants have had no success in obtaining the land base they feel to be crucial to their continuing existence as an autonomous people. As Douglas Sanders has observed in connection with litigation of a similar kind initiated by status Indians,

> …Indians needed some recognition of rights ─ some cards ─ some status ─ if negotiations had any chance.[xcvi]

The same statement applies, with even greater force, to Métis claimants. As a result, one of the principal objectives in *Dumont* is to obtain a legal basis upon which political negotiations can begin, and perhaps be attended with some success.

There is, in summary, a broad range of potential arguments, drawn from the existing jurisprudence on status Indian matters and the application of this jurisprudence to the judicial interpretation of section 35 of the *Constitution Act, 1982*, that are readily applicable to the situations of Métis claimants such as those in *Dumont*. Should any of these arguments be successful they may lead to a legal determination of specific Aboriginal entitlements, subject to all the protection and benefits that such entitlements now possess under Canadian law.[xcvii]

There is, however, one immediately apparent difficulty with this approach, at least as an exclusive focus for all Métis communities throughout Canada. Very few such potential claimants are situated similarly to those in *Dumont*. Other groups in western Canada (scrip takers or their descendants under various Dominion Lands Acts), or Métis communities in Northwestern Ontario whose ancestors attempted to adhere to Treaty No. 3, may be able to make such arguments. Many other self-defining Métis communities are not so fortunate. For them, this approach to defining Aboriginal entitlements may be less successful.

For Métis generally, both litigation and land claims are difficult

The difficulties in pursuing a litigated definition of Aboriginal entitlements are well known, even for status Indian claimants. In establishing a right to land based on possession of Aboriginal title, absent a formal agreement to make land available, Métis claimants, like all Aboriginal plaintiffs, may be held to the test for establishing such title laid down in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*.[xcviii] In this case the court established a four-part test:

> 1. That the aboriginal plaintiffs and their ancestors be members of an organized society;
> 2. That the organized society occupied a specific territory over which the aboriginal title is asserted;
> 3. That the occupation was to the exclusion of other organized societies; and
> 4. That the occupation was an established fact at the time sovereignty was asserted by England.[xcix]

Although frequently criticized in the academic literature,[c] this decision remains good law and has been applied very recently in the case of *Delgamuukw* v. *British Columbia*.[ci] It would be a difficult test for many potential Métis claimants to meet.

There are also difficulties with the land claims approach. A plausible case can be made for viewing the *Manitoba Act* as a land claims agreement that may be construed, under the terms of section 35(3) of the *Constitution Act, 1982*, as giving treaty rights to the beneficiaries of the agreement.[cii] Historically, however, many communities of self-identifying Métis people have never entered into such agreements, and as a result there is no documented standard against which the conduct of governments toward such groups may be judged and found to be deficient in law.

Statutory obligations, such as those assumed by the federal government under the *Dominion Lands Act* toward scrip recipients, may offer a basis for pursuing legal claims against the government of Canada, with some prospect of a specific remedy if the litigation is successful. However, there are many Métis communities in Canada that have never been the beneficiaries of such schemes or that have never received an acknowledgement by the government that it has any obligation toward them at all. For such communities, articulation of Aboriginal rights through litigation poses some major, perhaps insuperable, difficulties.

Difficulties with fiduciary obligations and the `existing' rights requirement

Some communities may choose to rely solely on the recognition of Aboriginal rights provided for in section 35 of the *Constitution Act, 1982* and press forward with the weapons provided in judicial decisions such as *Guerin* and *Sparrow*. The concept of a unique set of fiduciary obligations, owed to Aboriginal peoples by the Crown, that has begun to be defined in these judgements may offer some assistance to Métis plaintiffs.

To date, however, the relief offered Aboriginal claimants in these judgements has turned on highly particular findings of fact, involving the exercise of a well recognized Aboriginal entitlement (use of Indian reserve lands, Aboriginal right to fish for food) and failure by the government properly to assist Aboriginal beneficiaries in the continuing enjoyment of that entitlement. Only those Métis claimants who could make a strong case that their Aboriginal entitlements would fit within the same set of categories could anticipate much success in a litigated defence of these rights.

Finally, the qualification in section 35 that only the *existing* Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed must be noted. *Sparrow* establishes clearly that rights extinguished before 1982 are not revived by the *Constitution Act, 1982*:

> The word existing makes it clear that the rights to which s.35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*.[ciii]

Although *Sparrow* establishes a fairly stringent test by which extinguishment is to be proven, many Métis claimants may face difficulty in showing that the Aboriginal rights they possessed were not extinguished prior to 1982.

In conclusion, although litigation may offer the prospect of success to some groups of Métis claimants, it is not a tactic that can be relied upon by all such claimants. Other means of asserting and protecting Métis Aboriginal identity will have to be found. Among the most promising of these is participation in comprehensive land claims agreements, where that is a possibility. For the Métis communities of the Western Arctic, this is a route that is already being taken.

Comprehensive Land Claims Agreements Create a Framework

Federal government policy provides for comprehensive claims

In the early 1970s, the government of Canada made a policy determination that there would be two major types of claims agreements with Aboriginal peoples. `Specific claims' would deal with claims made against the Crown that related to the administration of land and other Indian assets and to the fulfilment of treaties.[civ] `Comprehensive claims' would designate claims based on traditional Aboriginal use and occupancy of land and would deal with a broad range of subjects ─ land, hunting, fishing, trapping rights and associated economic benefits.[cv]

There are a number of comprehensive claims areas in Canada, located for the most part where no treaties or half-breed scrip had attempted to deal with Aboriginal interests in the land. Although treaties had been made with the Indian residents of the Mackenzie Valley in the Western Arctic, and although half-breed scrip had been issued there as well, the government of Canada decided to treat the entire region as a comprehensive claims area. In the mid-1970s, negotiations toward settlement of a comprehensive claim were begun by the government of Canada jointly with Dene Indians and Métis, represented by territorial organizations.

The Dene/Métis agreement provides an example

The Dene/Métis comprehensive claim agreement was under negotiation for a number of years, and a draft final text was initialled by both parties in April 1990.[cvi] This draft agreement was never finally ratified, and Aboriginal groups in the Western Arctic are proceeding with claims settlements on a regional basis. One such settlement has been ratified, another has been accepted by its Aboriginal beneficiaries in a referendum, and a third is at the opening stages of negotiation. To date these regional claims settlements have proceeded within the general parameters set out in the Dene/Métis Comprehensive Land Claim Agreement.

Under the terms of the Dene/Métis Comprehensive Land Claim Agreement, Dene Indian communities and the Mackenzie Valley Métis communities were to be equal beneficiaries. The agreement provided a land base for the Aboriginal participants,[cvii] financial payments,[cviii] and a designated share in resource revenues generated in the claims settlement area.[cix] The Aboriginal participants were to enjoy certain priorities in wildlife harvesting as well as the right to extensive hunting, fishing and trapping entitlements throughout the settlement area.[cx] Further, the draft agreement established an extensive regulatory regime for land and water management within which the Aboriginal participants were to play a major role.[cxi] The agreement did not make provision for self-government, but it did establish that once it had been ratified, self-government negotiations would follow.[cxii]

This comprehensive claims approach extended the same rights to both Indian and Métis participants. It provided these participants with land, money, protected resource use and a significant share of decisionmaking power regarding development in the Western Arctic. The agreement would have required ratification by Parliament as well as the Aboriginal participants and, given the provisions of section 35(3) of the *Constitution Act, 1982*, would have received the protection given treaty rights by section 35(1) of that Act.

From most perspectives, this was an optimal situation for Métis participants. The federal government was, through the negotiation of the agreement, explicitly acknowledging the right of Métis to participate in, and benefit from, Aboriginal claims agreements. Special entitlements, based upon Aboriginal status, were guaranteed to Métis communities under the agreement, and a land base was to be provided to them. The self-government agreements that were to follow the

ratification of the land claim agreement would have established a basis for Métis self-government.

Even though the Dene/Métis Comprehensive Land Claim Agreement was never finally ratified, regional settlements with the same general terms and provisions have been or are being negotiated in some other parts of the Western Arctic. Where this is the case, Métis communities have the opportunity to negotiate a package of constitutionally protected Aboriginal rights and obtain a land base without resorting to legal action. Although there may be differences about the value and desirability of specific parts of such agreements, as a general approach to obtaining Aboriginal entitlements, they offer many obvious advantages to Métis communities.

The difficulty is that, as with a litigated approach to rights, there are very few Métis communities that can avail themselves of the comprehensive claims approach. The Métis residents of the Western Arctic may be fortunate that through an almost unique combination of circumstances, a comprehensive claims approach is open to them. Most of the Métis communities in Canada do not enjoy the same combination of circumstances; consequently they must find other means to protect their Aboriginal identity.

PART 3 — THE CHARLOTTETOWN ACCORD: CREATING A NEW FRAMEWORK

Charlottetown — Tools to Build on the 1982 Foundation

The Constitution Act, 1982 *provided recognition without clarification*

Before the *Constitution Act, 1982*, the most straightforward way for Métis to achieve constitutional recognition as an Aboriginal people was to be included with Indians in class 24 of section 91 of the *British North America Act, 1867*. This clause in Canada's founding constitution establishes Parliament's exclusive authority to legislate with respect to “Indians, and Lands reserved for the Indians”. The decision by the Supreme Court of Canada that “Indians” included the Inuit meant to many that it was the benchmark of recognition as a *people* present at the creation of the country. This acknowledged the existence of Aboriginal founding peoples in Canada's basic constitutional document. The only other people so recognized were the French Canadians.

The *Constitution Act, 1982* preserved the recognition of Aboriginal peoples but made it more explicit and meaningful. In particular, section 35

- recognized Aboriginal and treaty rights,
- recognized Métis as an Aboriginal people, and
- enabled Aboriginal peoples to acquire treaty rights by land claims agreements.

The Constitution thus clearly recognized the Aboriginal rights of Métis. It did not, however, say what those rights were or who held them. Consequently it raised new questions about the legal framework of jurisdictions, duties and rights for the Métis.

As indicated in Part 2 of this paper, providing a generic and definitive answer to the 91(24) inclusion question on the basis of historical evidence is difficult. Scholarly opinion has been divided, partly because there is no common definition of Métis. However, when the status and rights of Métis were recognized in section 35, the role of 91(24) inclusion for such recognition became less critical. The question, do the Métis have Aboriginal rights?, has been answered "Yes!". The new question is, what are they? To be more precise, what are the Aboriginal and treaty rights of Métis under section 35? Although the *Constitution Act, 1982* provided for a series of first ministers conferences that could address this question, the conferences were inconclusive. Without a formal process in place, Métis leaders were left with a fundamental question for the `old' Constitution ─ are the Métis in 91(24)? ─ and for the `new' Constitution ─ what rights do they have under section 35?

The only source for an answer appeared to be the courts. Unfortunately, that rigorous and antagonistic atmosphere was unlikely to provide broad public policy answers. The analytic approach of the courts would more likely proceed along the lines of, what Métis? What rights? Who owes them? Who holds them? In the context of litigation, these questions would likely be answered no more broadly than needed to address the issues at hand.

The Charlottetown Accord held out the hope of answering the basic questions of jurisdiction, duties and rights in a broader and more constructive context. Although that initiative failed, it is worth reviewing because

- it was developed with significant Métis participation,
- it may still have legal influence, and
- it contains ideas for new approaches.

The Charlottetown Accord developed a framework that remains relevant

Canadians rejected the package of constitutional amendment proposals agreed to by Aboriginal leaders and first ministers at the Charlottetown conference in August 1992. If adopted, the amendments and related accords would have created a new constitutional framework for relations between federal, provincial and Aboriginal governments. The package included proposed amendments to both the *Constitution Act, 1867* and the *Constitution Act, 1982*. Those amendments would have confirmed the Métis as exclusively[cxiii] within federal jurisdiction and recognized Aboriginal governments as a third order of government distinct from federal and provincial governments.

The proposals may have legal influence even though they were not formally incorporated in the Constitution. The package represents an agreement between leaders of the constitutionally recognized Aboriginal groups and the first ministers of all provinces and Canada. As such it is historic. A lack of public support does not mean it will be ignored by the courts. In fact, the courts may find the Charlottetown Accord and its accompanying political accords and legal text helpful when divining the contents of the existing Aboriginal rights" included in section 35. Furthermore, it is highly unlikely that, if faced with the generic question, are Métis included in 91(24)?, the courts would give a blanket "No!" in the face of such an agreement. In that context, it is useful to consider certain parts of the package even though they may never become a constitutional amendment.

Charlottetown proposed a comprehensive set of changes

The Charlottetown Accord included a consensus report of ministers, best efforts legal text of proposed constitutional amendments, and attendant political accords with representatives of Aboriginal peoples. The parts of the package particularly relevant to Métis were:

- The Consensus Report on the Constitution, August 28, 1992, (including Final Text and Political Accords);
- Amendments to the *Constitution Act, 1867*,
    - Canada Clause provisions
    - Application of 91(24) to all Aboriginal peoples (91A)
    - Concurrent jurisdiction in Alberta (95E)
    - Non-derogation of jurisdictional provisions (127);
- Amendments to the *Constitution Act, 1982*,
    - Accord on Aboriginal Constitutional Matters
    - Métis Nation Accord

- Alberta Act Amendment.

Given the nature of the package and the amount of material it contained, it is impossible to predict with any certainty what impact it would have had on the Métis and their relationship with federal and provincial governments. However, the package did three fundamentally important things:

- **confirmed jurisdiction** - it confirmed that Métis are within the federal jurisdiction provided by section 91(24);
- **recognized authority** - it recognized that Aboriginal governments derive their authority from their own people and accepted these governments as a third order of government in Canada;
- **provided a framework** - it provided a solid legal framework for determining how the inherent authority of Aboriginal governments could be implemented.

In short, it provided a foundation and a process for resolving many of the jurisdiction, duties, and rights issues related to the survival of Métis. The significance of that accomplishment should not be underestimated.

The Charlottetown Accord proposed amendments to the *Constitution Act, 1867* and the *Constitution Act, 1982*. From the perspective of the Accord's effect on the Métis, the *Constitution Act, 1867* was to be amended to provide a `characteristics of Canada' interpretation guide, to confirm that Métis are within federal jurisdiction, to enable Alberta's Métis legislation to stand in spite of this, and to ensure that the redistribution of powers between provincial and federal governments did not detract from federal jurisdiction and responsibilities.

The *Constitution Act, 1982* was to be amended to recognize the inherent right of self-government, to provide a means for defining it, and to address related Charter issues. This was done by replacing section 35.1, the commitment to constitutional conferences, with a series of sections dealing with the inherent right of self-government. These sections

- recognized the inherent right of self-government [35.1];
- provided a means for implementing the right [35.2];
- delayed legal action on the right for five years [35.3];
- related Aboriginal governments' laws to other laws [35.4];
- enabled affirmative action by Aboriginal governments [35.5];
- provided for interpreting and implementing treaties [35.6];
- protected gender equality [35.7];
- provided for consultation before future amendments [35.8]; and
- ensured four more conferences on Aboriginal issues [35.9].

The provisions relating to the *Canadian Charter of Rights and Freedoms* were also amended so that the Charter did not reduce Aboriginal peoples' rights to exercise or protect their language,

culture and traditions [section 25(c)]. The Charter would, however, apply to Aboriginal governments [section 32], subject to the `notwithstanding' provision that is available to the federal and provincial governments.

The Canada Clause provided a context for interpretation

The Accord proposed amending the *Constitution Act, 1867* by adding as section 2 a `Canada clause' expressing fundamental Canadian values. As part of the Canadian Constitution this clause was to guide the courts in interpreting the entire Constitution. The Charlottetown proposals may be dead, but the fact remains that all first ministers and representatives of national Aboriginal organizations agreed on the Canada clause as a shared vision of the place of Aboriginal peoples and their governments in the Canadian system. The courts are unlikely to dismiss this consensus vision as irrelevant when called on to determine, particularly in relation to self-government, the contents of the existing Aboriginal and treaty rights protected by section 35.

> The components of the Canada clause particularly relevant to Métis were as follows:
>
> 2.(1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:
>
> > (a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;
> > (b) the Aboriginal peoples of Canada, being the first people to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;...
> > (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
> > (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
> > (g) Canadians are committed to the equality of female and male persons;[cxiv]
>
> These clauses said the courts should be guided by the recognition that
>
> ● Canada is a democratic, parliamentary, federal system;
>
> ● in that system Aboriginal governments are a third order of government;
>
> ● Aboriginal peoples have the right to promote their cultures and ensure the integrity of their societies;

- Canadians are committed to racial, ethnic, and gender equality and to a respect for individual and collective human rights.

These interpretation guidelines are qualified by subsequent clauses that say the guidelines do not derogate from the powers of legislative bodies or governments, including Aboriginal governments, or from Aboriginal and treaty rights.

In short, the Canada clause would have provided the fundamental guidelines for interpreting the entire Canadian Constitution, including the Charter. The courts, when interpreting a provision of the Constitution in respect to Aboriginal peoples, would need to keep in mind that

- these people were the first to govern this land,
- they have the right to ensure the integrity of their societies, and
- they are the source of their governments' authority, not Parliament or a provincial legislature.

The last assertion follows logically from the recognition of Aboriginal governments as a third order of government. This is a fundamentally different view of the legal relationship between Aboriginal peoples and governments in Canada. It also represents the core of a new approach that may be possible even without constitutional amendment. We explore that approach later in this paper.

While providing a new recognition of the right of Aboriginal peoples to govern themselves, the Canada clause would have required the courts to be mindful of the Canadian commitment to racial and ethnic equality and to respect for individual and collective human rights ─ without taking anything away from treaty or Aboriginal rights. This might have been a tall order for the courts, but it provided at least some guidelines to fill the current vacuum. At a minimum these statements would have provided a very general context for considering the scope of self-government rights. They were essentially positive statements. In simplest terms, they recognized Aboriginal peoples' right of self-government.

Subsection 2(3) of the Canada clause went on to say that the recognition of the right of self-government had limits. It would not alter existing powers. In other words nothing in the Canada clause could be construed as removing any powers from the legislative or executive bodies of Canada, a province, or Aboriginal peoples. It is a well accepted principle of Canadian constitutional law that at any moment all powers in the federal system are in the hands of some legislative body. In this zero sum game of power sharing, if no body loses powers, no body gains

powers. At the moment Canadian law considers most legislative powers as belonging either to Parliament or to provincial legislatures. The exception would be those Aboriginal governing bodies whose powers are recognized by special legislation or land claims agreements. The Canada clause would have taken nothing away from the legislative authority of those bodies, but also could not have been relied on as a basis for additional powers for Aboriginal governments. That basis would have had to be defined in self-government agreements. To ensure such agreements were made, the package included amendments to the *Constitution Act, 1982* requiring all governments to negotiate in good faith the implementation of the right of self-government.

In other words the Canada clause recognized that there were three hands that could hold `sticks' from the bundle of law-making powers ─ federal, provincial, and Aboriginal. But it did not move any sticks from one hand to another. The determination of which sticks would be in Aboriginal hands was left to negotiation. Other parts of the package ensured that those negotiations would proceed promptly and in good faith.

Class 91(24) would apply to all Aboriginal peoples, with some provisos

For the Métis, one of the most significant of the proposed amendments was the addition of a section to the *Constitution Act, 1867* confirming that the exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians" applies to all of the Aboriginal peoples of Canada. The proposal would have added a section 91A stating:

> For greater certainty, class 24 of section 91 applies, except as provided in section 95E, to all of the Aboriginal people of Canada.[cxv]

This amendment would have resolved the long-standing question of whether Métis are caught by the federal jurisdiction provided by class 91(24). It created a new problem in Alberta, however, because of provincial legislation with respect to Métis.

In 1938 the Alberta legislature passed the *Metis Population Betterment Act*, making it possible to reserve lands as settlement areas for the Métis of the province. Métis settlement associations were established to occupy the areas set aside and provide a form of a quasilocal government. In 1989, after extensive negotiations, representatives of these associations and the provincial government signed the Alberta-Metis Settlements Accord agreeing to a new land-holding and self-government scheme for the settlements and providing a means of resolving a long-standing law suit over revenue from oil and gas found in the settlement areas. In 1990, the

Alberta legislature passed four acts to implement the Accord.

The proposed constitutional changes threatened the 1990 Alberta legislation, since they implied Alberta's legislature had acted outside its jurisdiction by legislating with respect to Métis and their lands ─ an area exclusively within the law-making power of Parliament. To solve this problem, a proposed section 95E was agreed to:

> In the context of section 91A the legislature of the Province of Alberta may make laws, and the Parliament of Canada may make laws, in relation to the Métis in Alberta and to Métis settlement land in Alberta and, where such a law of Alberta and a law of Parliament conflict, the law of Parliament prevails to the extent of the conflict.

This provided that in Alberta the province had concurrent, although subordinate, jurisdiction with respect to the Métis.[cxvi]

The proposed changes to the *Constitution Act, 1867* raised one other issue relevant to Aboriginal peoples ─ the effects of proposed changes in federal and provincial jurisdiction. Aboriginal representatives were concerned that the realignment of jurisdictions might affect federal powers or responsibilities, or treaty and Aboriginal rights. To address that concern, the package included an amendment to section 127 ensuring that none of the sections modifying jurisdiction detracted from Aboriginal rights and federal responsibilities.

Charlottetown Proposed Significant Changes to the 1982 Constitution

An amended Constitution Act, 1982 *would address self-government*

While the proposed amendments to the *Constitution Act, 1867* provided a context for interpreting Aboriginal rights of self-government and for clearing up questions on federal and provincial jurisdiction with respect to Métis, the major provisions for recognizing and implementing self-government were changes to the Aboriginal rights parts of the *Constitution Act, 1982*. Section 35 of that Act had recognized existing Aboriginal rights but given no explanation of what those rights were. Section 35.1 committed the governments of Canada and the provinces to hold conferences with Aboriginal representatives before amending any of the `Aboriginal' provisions of the Constitution. The Charlottetown Accord proposed replacing section 35.1 with a series of sections (35.1 through 35.9) that would provide for the recognition and implementation of an inherent right of self-government for the Aboriginal peoples of Canada.[cxvii]

The question, what does self-government mean?, was heard many times before and after Charlottetown. The core concept is a community's capacity to determine who will make

decisions for it and to determine what kind of decisions they can make. Within that concept, however, the scope of self-government could range anywhere from the nothing of colonialism to the everything of sovereignty. The Charlottetown Accord did not define where in this spectrum the "inherent right of self-government" would fall. Instead it left that to governments and Aboriginal peoples to flesh out in self-government agreements. It did, however, create a legal onus on governments to negotiate in good faith and provided an accompanying Accord on Aboriginal Constitutional Matters to govern the process for negotiations.

Section 35.1 of the proposed Constitution would have set out the basic parameters of Aboriginal peoples' inherent right of self-government in the following words:

> 35.1(1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.
> (2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.
> (3) The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,
>
> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
> (b) to develop, maintain and strengthen their relationship with their lands, waters and environment,
>
> so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.
> (4) Where an issue arises in any proceedings in relation to the scope of the inherent right of self-government, or in relation to an assertion of that right, a court or tribunal
>
> (a) before making any final determination of the issue, shall inquire into the efforts that have been made to resolve the issue through negotiations under section 35.2 and may order the parties to take such steps as may be appropriate in the circumstances to effect a negotiated resolution; and
> (b) in making any final determination of the issue, shall take into account subsection (3).
>
> (5) Neither the right referred to in subsection (1) nor anything in subsection 35.2(1) creates new aboriginal rights to land or derogates from existing aboriginal or treaty rights to land, except as otherwise provided in self-government agreements negotiated under section 35.2.

Given the failure of the Charlottetown proposals there is little point in a detailed analysis of what impact this provision might have had on the Métis if incorporated in the Constitution. It is still useful, however, to consider what impact it may have as a consensus view of government and Aboriginal leaders on a right to be included in section 35. As with the Canada clause

provisions, it would be difficult for courts and negotiators to ignore when determining the content of existing Aboriginal rights in section 35.

From that perspective the proposed section 35.1 provided a skeleton of recognition and a process for fleshing out the skeleton through negotiated self-government agreements. The bare skeleton acknowledged that Aboriginal peoples can empower law-making bodies to

- preserve their survival as Aboriginal peoples; and
- develop and protect their lands.

The details would have to be worked out through negotiations. How those negotiations would be carried out was set out in accompanying accords.

Matters related to self-government were addressed in accords

The Charlottetown constitutional amendment proposals were accompanied by a political accord guaranteeing all Aboriginal peoples in Canada access to the negotiation process and recourse to the courts if governments did not negotiate in good faith. Although the details were not agreed on, there was consensus among Aboriginal leaders, Canada, and the provinces that this accord should also deal with the financing of self-government. The accord was to be based on recognition of the fiduciary responsibility of the federal government and the current responsibilities of provincial governments. The underlying principle was that, in the context of self-government, Aboriginal governments would be committed to providing essential services and opportunities for their communities that were reasonably comparable to those in other nearby communities. To support that effort, Canada and the provinces would provide fiscal or other resources, taking into account the fiscal capacity of the Aboriginal governments.

A separate but related Métis Nation Accord[cxviii] provided some guidelines for those funding commitments and other self-government matters, at least with regard to some Métis. The Métis Nation Accord was proposed by the Métis National Council (MNC) and Métis organizations from the north and west of Canada. It was to be signed by those organizations, the federal government, and the provinces of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. It would have committed those governments to supporting an enumeration of Métis" as defined in the Métis Nation Accord (MNA). The Métis Nation Accord defined Métis as meaning

> …an aboriginal person who self-identifies as Métis, who is distinct from Indian and Inuit and is a descendant of those Métis who received or were entitled to receive land grants

> and/or scrip under the provisions of the *Métis Act, 1870*, or the *Dominion Land Acts*, as enacted from time to time.[cxix]

The Métis Nation was defined as

> ...the community of Métis persons in subsection a) [quoted above] and persons of aboriginal descent who are accepted by that community.[cxx]

The MNA definition of Métis would not necessarily include all `section 35 Métis' ─ that is, the Métis who might be included in section 35 of the *Constitution Act, 1982*. With respect to MNA Métis, however, the Métis Nation Accord would have committed governments to negotiating in good faith to implement Métis self-government, provide access to lands and resources, fund core costs of Métis institutions, and transfer funds to Métis institutions to enable them to deliver programs.

The Accord also insured that there would be discussions between Canada, the provinces and representatives of the Métis Nation with regard to the establishment of a land base, and that where land was to be provided, Canada and the provinces (except Alberta) would

> …make available their fair share of Crown Lands for transfer to Métis self-governing institutions.[cxxi]

For those Métis communities not caught by the Métis Nation Accord, however, the issues of jurisdiction, rights and duties were not addressed so clearly in the Charlottetown Accord.

Métis settlements were protected by an amendment to the Alberta Act

A final part of the Charlottetown Accord package was a proposal to amend the *Alberta Act*. In the Alberta-Metis Settlements Accord,[cxxii] the province made a commitment to try to protect Métis settlement lands in the Constitution of Canada by amending the *Alberta Act*. This was to be done by using section 43 of the *Constitution Act, 1982*. The view in Alberta was that since the proposed amendment would affect only Alberta, this section made it possible for Parliament and the Alberta legislature to effect the change without involving other provinces. As it developed, this view was not shared by legal advisers to the federal government and, as a result, it was not possible to enlist federal support for the effort in time for the signing of the Accord.

In response to this problem Alberta recorded its commitment to pursue the goal of amending the *Alberta Act* by including in legislation,[cxxiii] passed under the Accord to amend its constitution, the clause

> WHEREAS Her Majesty in right of Alberta has proposed the land so granted be protected

> by the Constitution of Canada, but until that happens it is proper that the land be protected by the constitution of the Province.

In keeping with that commitment the province proposed, as part of the package of constitutional changes, to include a suitable amendment to the *Alberta Act*. This proposal was accepted by the other participants.

PART 4 — CONTINUING WITHOUT CHARLOTTETOWN

Consequences of Losing Charlottetown

Charlottetown provided tools, not answers

The failure of the Charlottetown proposals was a significant setback for Métis leaders. Charlottetown resolved several basic issues and created a framework for resolving others. It recognized Métis self-government as an inherent right, characterized it as a third order of government, and provided a framework for fleshing out the jurisdictions, duties and rights of federal, provincial and Métis governments. Part of that framework, at least for MNA Métis, was a mechanism for defining Métis in at least one context. In short, instead of answers it provided tools for developing answers to the basic questions about the legal framework of jurisdiction, duties and rights affecting Métis as Aboriginal people *in a given context*.

The basic questions Charlottetown would have answered, or provided a means of answering, were as follows:

- Who is in the group? Who falls in the class of `Métis people' for this purpose?
- Who has the power? Who can make the laws and decisions needed to develop and implement rules and programs in this context?
- What are the rights of the group, or group members? In this context, what rights are recognized by section 35?
- Who owes the duty? If a right produces a corresponding duty in this context, who owes it, and to whom?

Charlottetown is still useful as a model and a method

Without Charlottetown new tools must be found. The exactitude and adversarial context of the courts is inappropriate for the policy and framework development associated with answering these basic questions. Some more open and informal forum for discussion, consensus building, and decision is required. Such a forum could operate in the more creative context of developing solutions rather than of enforcing rights. In a solution-driven environment, questions of

jurisdiction, duties and rights are secondary. Their answers follow from the answers to the more basic question, what needs to be done? The Charlottetown Accord provided such an environment. Without it, or a similar commitment to negotiations, issues of jurisdiction, duties and rights will need to be addressed in specific situations if Métis people want to use the force of law to mandate action on specific problems. A cursory analysis of these issues shows that this will be a very difficult, expensive, and time-consuming task.

The tools to build a legal framework must be found in the Constitution, common law, statutes, and agreements. The Constitution is a source in so far as 91(24) provides a hint at jurisdiction and section 35 provides recognition of the Métis people and their existing Aboriginal and treaty rights. However, given the Charlottetown experience, framework issues ─ the components of the legal framework in a particular context ─ are unlikely to be resolved in the near future through constitutional amendments.

Similarly the common law is of limited utility. As discussed earlier there is not an abundance of supportive case law at present. Furthermore, it is unlikely that the narrow focus and adversarial nature of litigation will provide broad policy answers of the type required. That leaves statutes and agreements as the vehicles for clarifying framework issues.

The strength of the Charlottetown approach was that it provided recognition and a structure for creating context-specific legal frameworks by agreement. These self-government agreements provided contextual solutions to the Métis definition problem. In the agreementbased approach, defining Métis simply becomes part of developing the agreement. If the agreement defines rights to be held by individuals or groups, the parties to the agreement will have to agree on who those beneficiaries are, or how they will be determined. Otherwise there will be no agreement.

The parties may agree to define the beneficiaries under the agreement as Métis for purposes of that agreement. That does not necessarily link the agreement to section 35 of the *Constitution Act, 1982*. The Métis of the agreement could be a subset, superset, or unrelated to the set of the Métis people of Canada found in section 35. In any case, the parties to the agreement will have to address the question, who is a Métis for purposes of this agreement? In that context it may be more productive to start with the more purposive approach of searching for consensus on what action is required and then turning to the identification of the objects of that action.

The Métis Nation Accord provides a conceptual example

A purposive approach was employed to develop the Métis Nation Accord[cxxiv] that accompanied the Charlottetown Accord. The Métis Nation Accord focused on the result of enabling Métis self-government and initiating discussions to provide a land base. To that end it defined a Métis Nation and provided a process by which groups within the Métis Nation could define their rights of self-government. The definition was structured as a core group, together with those accepted by the core group. The core group was linked via the Red River settlement or scrip entitlement to non-Indian Aboriginal people in control of land in western Canada prior to that area becoming part of Canada.

The Métis Nation included this core group of Métis and any person of Aboriginal ancestry accepted by the core group. There was no requirement that those added individuals be of mixed blood. Consequently, a person who was a full-blooded `Indian' ─ and correspondingly likely included in the section 35 class of Indian peoples of Canada ─ could be a member of the Métis Nation for purposes of defining the self-government rights of a group within the Métis Nation.

A purposive approach is also found in the Alberta legislation passed under the Alberta-Metis Settlements Accord. There Métis is defined as "a person of aboriginal ancestry who identifies with Metis history and culture".[cxxv] This implicitly distinguishes the word `Métis' applied to an individual and the same word applied to a history and culture. Since the history and culture belong to a people, the definition essentially adopts the undefined term `Métis people' in the Canadian Constitution and, without defining it, uses it to define individual membership in a class for the purpose of the agreement.

The purpose of the agreement was to protect an existing land base, to provide the people living there with the power to govern it, and to ensure funds were available to seed development. The agreement, and the legislation subsequently passed under it, provide an example of using constitutional, common law, statutory, and contractual tools to develop a legal framework for Métis self-government in a particular context. That example is worth looking at in more detail.

The Alberta Example of Limited Métis Self-Government

The Alberta-Metis Settlements Accord

The Métis settlements of Alberta provide an example of a use of all four legal resources ─ the constitution (Alberta's), common law, statute, and agreement. Settlement areas in Alberta were reserved for Métis settlement associations beginning in 1939. In 1968 these associations and their members took legal action against the province to recover the proceeds from the sale of oil and gas found in the settlement areas. In 1989, after extensive negotiations, representatives of these associations and the provincial government signed the Alberta-Metis Settlements Accord, agreeing to a new land-holding and self-government scheme[cxxvi] for the settlements and providing a means of resolving the law suit. In 1990 the Alberta legislature passed four acts to implement the Accord. One of the acts ─ the *Constitution of Alberta Amendment Act, 1990* ─ amended Alberta's constitution to protect Métis lands. In short, Alberta and the settlements began with litigation, moved to an agreement, and implemented the agreement with statutes that included a constitutional component.

The statutes implementing the agreement assumed the provincial legislature had jurisdiction to make laws respecting Métis and lands reserved for the Métis. Although this provided immediate jurisdictional clarity for the Métis settlements, the clarity may not be permanent, since the assumption of jurisdiction has not been tested in the courts. It is entirely possible that the Supreme Court of Canada may eventually rule that Métis, as the term is defined for purposes of Alberta's *Metis Settlements Act*, fall within class 91(24) of the *Constitution Act, 1867*. In that case Parliament, and only Parliament, can make laws with respect to them and lands reserved for them. The framework provided by the provincial legislation would then fall unless constitutionally protected as a treaty or land claims agreement, or adopted by Parliament as its own legislation.

The Alberta Métis settlements package of legislation also provides some clarity with respect to duties and rights for the affected Métis. Under the package the province has a statutory duty to pay the settlements $310 million over 17 years.[cxxvii] Métis settlement land areas are protected by the constitution of Alberta.[cxxviii] The Métis have basic self-government rights such as the right to elect local councils that can pass by-laws governing life in the settlement areas. These laws must be consistent with relevant federal and provincial legislation, and with policies passed by the Metis Settlements General Council representing all the settlements. All Métis in Alberta

have the right to apply for membership in a settlement and, once a member, to apply for land. Any person whose application for membership or land is rejected can appeal to an independent Metis Settlements Appeal Tribunal, most of whose members are Métis.[cxxix]

Land legislation clarified ownership, protection and resource management

The Accord settled disputes about who owned Métis settlement lands by agreeing that the settlements should be clear owners of the land in fee simple. Subsequent legislation implemented the Accord by issuing letters patent to the General Council to hold on behalf of all eight settlements. All the land within settlement boundaries was transferred, including the beds and shores of the rivers and lakes, the road allowances and the highways.[cxxx] The Alberta legislature retained its law-making power over the areas, but title to the land itself went to the Métis. Mines and minerals were not transferred.

The *Metis Settlements Land Protection Act*[cxxxi] was passed to protect the land from further loss. It provided that no part of the land could be taken unless the government, the General Council, and most of the people on the settlements agreed to the taking. To make sure that protection was not lost, the *Metis Settlements Land Protection Act* was in turn protected by the *Constitution of Alberta Amendment Act, 1990*.[cxxxii] The original plan had been to protect it by amending the Constitution of Canada through an amendment to the *Alberta Act* under section 45 of the *Constitution Act, 1982*. When it became clear that there was little federal support for this approach, the settlements agreed to the Alberta Constitution amendment approach, provided the province continued its efforts to have the Constitution of Canada amended.

The province did continue those efforts in the Charlottetown round. The constitutional amendment proposals of the Charlottetown Accord included an amendment to the *Alberta Act* that would have provided protection in Canada's Constitution similar to the protection provided by the *Constitution of Alberta Amendment Act, 1990*. With the defeat of Charlottetown, Alberta's commitment remains unfulfilled.

Under the Alberta-Metis Settlements Accord, the Crown transferred title to the surface of all lands in the settlement areas but maintained its claim to ownership of the mines and minerals. However, the province and the settlements agreed to co-manage the development of non-renewable resources. Under this agreement, made part of the *Metis Settlements Act*, no one can enter the settlement areas to explore for or develop non-renewable resources unless they have the

approval of the settlement council and the General Council. That puts the Métis in a strong position to ensure that resource development will take place only if elected leaders consider it in the best interests of their communities.

The settlements began suing the Crown in right of Alberta for the money from the sale of oil and gas from the settlement areas on July 29, 1968. The first action was thrown out, reluctantly, by the courts because the settlements had not received the province's permission to sue it. A new action was filed on February 5, 1974. It was still in discovery in 1989 when the Accord was signed. Understandably, after more than 20 years of litigation without getting to trial, the settlements questioned the utility of the courts as a means of resolving disputes. The Accord included mutual commitments to the expeditious implementation of "a mutually acceptable process to conclude the litigation". The *Metis Settlements Accord Implementation Act* translated this into a freeze on the litigation pending the protection of Métis settlement land in Canada's Constitution.

When the Accord was signed, neither the lawsuit nor the Accord claimed a basis in Aboriginal rights. Neither the province nor the settlements wanted to do anything in creating a legal framework for the settlements that might add to or detract from the Aboriginal rights of Métis or other Aboriginal groups. Consequently both parties agreed to leave it out of the discussion. In the settlements' view, the definition of Aboriginal rights was something that should involve the federal government, the province, and all Métis. Given the fact that the Charlottetown Accord included such an agreement, at least with regard to the Aboriginal right of self-government, the decision to leave this to another forum appears appropriate.

Powers of self-government are set out in the Metis Settlements Act

The *Metis Settlements Act* creates a framework for settlement government made up of settlement councils, a General Council representing all settlements, and an Appeal Tribunal.[cxxxiii] The Act recognizes settlements as corporate entities and provides for their government by elected councils. The settlements have the powers of natural persons, with some qualifications, and settlement councils can make by-laws on local government and land-related matters. A unique feature of the legislation is that all by-laws must be approved at a general meeting of the members before becoming law.[cxxxiv] In short, the Act does three things:

- It sets up or identifies the basic institutions that can make decisions affecting settlement

government: settlement councils, the General Council, and the Appeal Tribunal.
- It says, with respect to settlement government, what each of the institutions can do and how they have to do it.
- It creates a body and procedures for resolving disputes.

The basic philosophy of the Act is that the settlement councils make the laws, but subject to constraining powers held by settlement members, the General Council, and the Appeal Tribunal.

The Act also provides for a General Council made up of the eight settlement councils.[cxxxv] The General Council has two basic functions: it holds the settlement land,[cxxxvi] and it provides a forum for making rules on matters of concern to all settlements, especially the allocation of interests in land. These rules are called `policies' and are binding on all settlement councils.[cxxxvii] Policies must be made in consultation with the responsible minister and are subject to ministerial veto for a specified time after passage.[cxxxviii] Most General Council policies require the consent of all settlements. Laws can also be made by ministerial regulation, but such regulations must be requested by the General Council.[cxxxix]

Because it provides an ongoing role for a minister, the *Metis Settlements Act* cannot be said to constitute a form of self-government on the level of a third order of government as envisioned by Charlottetown. It should be emphasized, however, that the minister's role is limited. Except in emergency situations, the minister cannot make regulations regarding the settlements except at the request of the General Council. The minister's most significant power is the authority to veto General Council policies. That veto power must be exercised within 90 days of a policy's passage, however, or the policy becomes effective as passed.

The other aspect of the Alberta-Metis accord most criticized from the Charlottetown perspective is the failure to provide for full ownership of the subsurface resources of the Metis settlement areas. The Métis Nation Accord included commitments from provincial governments, other than Alberta, to discuss resource ownership as part of the process in defining self-government and land base issues. Alberta exempted itself from that commitment at the time but has since signed a memorandum of understanding with the Metis Settlements General Council committing itself to discussions respecting the transfer of ownership of subsurface resources.

Legislation provides for a form of Métis court to resolve disputes

Compared to most land claims agreements, the Alberta-Metis Settlements Accord was a bare skeleton. The intent of the Accord was not to establish the laws for self-government but to create

a framework in which those laws could be developed. Consequently the Accord provided tools for developing a full body of Métis settlement law ─ both legislated and `judicial'. Métis legislated law can be created as settlement by-laws, as policies passed by the General Council, or as regulations made by the minister at General Council's request. Métis `judicial' law is possible in the form of decisions by the Metis Settlements Appeal Tribunal. This Tribunal is one of the most interesting components of the Accord package.

The Appeal Tribunal created by the *Metis Settlements Act*[cxl] has very broad powers to resolve disputes on the settlements. Although technically an administrative tribunal, its role in fleshing out the legislated framework makes it much more analogous to a Métis court. In addition to its jurisdiction to hear appeals from council decisions on matters of land[cxli] and membership[cxlii] the Tribunal can, if parties agree, resolve disputes on a wide range of matters affecting life in the settlement areas.[cxliii] In practice the Tribunal has already been called upon to resolve everything from builder's lien problems to dispositions of estates. Most members of the Tribunal are from the settlements, and they bring to decisions a common sense and cultural perspective rooted in the experience of settlement living that would not be available in the regular court system. As they make decisions, a body of Métis common law will develop that fleshes out the bare bones of the legislation.

A Statutory Option on the Charlottetown Model

Parliament could create a framework for deciding jurisdiction, duties and rights

Although defeated as a constitutional amendment, Charlottetown provides a useful starting point in dealing with the unfinished business left by its defeat. That is to design a mechanism for creating legal jurisdiction, duties, and rights frameworks in which Métis communities can exercise powers appropriate to their purposes. The key concept from Charlottetown was the recognition of the inherent right of selfgovernment ─ the recognition that Aboriginal governments can be based on a grant of power from Aboriginal communities rather than on a delegation of power from Parliament or a provincial legislature. Charlottetown made that explicit by recognizing Aboriginal governments as a third order of government under the Constitution. The purpose of this part of the paper is to explore another approach to this recognition within the reach of Parliament under Canada's existing Constitution.

What we are suggesting is one possible way to translate the fundamentals of the Charlottetown consensus into law. For simplicity we will refer to this as the `recognition model'. It provides for the recognition in Canadian law of governance charters granted by Métis people and constituting Métis governments. It is one of many possible models that will no doubt come forward as the participants in Charlottetown wrestle with the new reality. It is not proposed as an alternative to constitutional amendment, but as an interim step toward that goal. In our view the work that went into Charlottetown need not be abandoned just because constitutional change is currently impossible.

The Charlottetown agreement put recognition of Aboriginal peoples' inherent right of self-government in the Constitution and provided, in a political accord, for implementation by agreements. The recognition model is an approach along similar lines. It would be based on an act of Parliament (the Recognition Act, for want of a better name) that

- recognizes the right of appropriate Métis groups to exercise rights of self-government, on or off a land base;
- defines the princ iples and protocols governing the recognition of self–government powers; and
- creates an independent entity with the capacity to ensure recognition if the principles and protocols are satisfied.

A Recognition Act could also make clear that it

- in no way affects existing Aboriginal, treaty and constitutional rights or future constitutional negotiations, and
- applies only to those Métis groups that wish to participate in the proposed scheme.

Such an act would enable groups of Métis to create governance charters establishing the rules by which they would govern themselves and providing that laws made in accordance with those charters would be recognized as laws of Canada.

The essential idea of a Recognition Act is that through it Her Majesty could say to a group of Métis people, “I recognize that you can empower your own government, and if you do so I will recognize its laws on the same footing as those made by the Parliament of Canada.” That recognition would make available the entire enforcement apparatus of Canadian law. Given that, it would be politically unrealistic to expect Parliament to enable such recognition unless

- the laws recognized are not fundamentally at odds with certain basic principles of Canada, and
- procedural criteria had been followed that ensure that the people to be governed have granted the necessary authority.

The first principle is essentially what the Canada clause was about in the Charlottetown Accord. The key word in the second principle is `procedural'. A Recognition Act would have to specify a mutually acceptable protocol that, if satisfied, would result in recognition. It could not be left to the government of Canada to determine at the end of the process whether recognition should be granted to specific self-governing institutions, or to specific laws of those institutions. In other words, such an act would have to make it clear that the only question to a group claiming governance powers would be, was the protocol of our recognition agreement satisfied?

The reason for this is clear. If there is to be recognition of the inherent right of self-government, it cannot be up to the government of Canada to convey legitimacy to an Aboriginal government ─ that legitimacy can come only from the people granting the government its authority. It is reasonable, however, for one government to insist that it will adopt as its own laws only those laws of another that satisfy certain agreed upon principles. Since that approach has already been accepted in the drafting of the Canada clause, it should not prove an insurmountable obstacle.

Implementing recognition

We are suggesting the concept of the recognition model simply as a starting point for discussion. The concept may be clearer, however, if we provide a few more details. First we should be clear that when we use the terms `government' and `laws' in this discussion we mean them in a very general sense of a system of decision-making bodies that govern the exercise and scope of their authority. A governance charter could be anything from a simple document empowering the representatives of a Métis community to manage social programs to a full-blown constitution for a system of government on a Métis land base. In either case the governance charter would specify the basic purposes of the charter, the means of determining the group's leaders to accomplish those purposes, the rules governing the leaders' decision making, and the scope of authority granted to those leaders by the people to be governed. In other words, they would essentially be constitutions for Métis institutions granted by the governed.

Clearly it would not be possible to recognize the self-determined authority of every person claiming to represent a group on the basis of an inherent right of self-government. That means criteria would be needed to determine whether the person satisfies the criteria for recognition as a representative, and whether the members of the group ostensibly represented

are, in fact, prepared to grant powers of the type asserted. These recognition questions would need to be answered by an independent body jointly established by the participants in the process ─ the Métis and the government of Canada. It cannot be determined by either party on its own whether the end result is to be recognition of each other's powers. To address this recognition problem, the proposed act would establish an independent joint council representing Parliament and the Métis to manage the recognition of self-governing powers. There would also need to be an independent appeal body capable of resolving disputes.

In its simplest form, a Recognition Act could provide for a three-stage process:

- *Recognition*

  Any group of Métis could inform the council of a range of governance rights it wished to exercise. Those rights would be set out in a governance charter to be granted by those to be governed. Before discussing details of a suitable charter, the council would need to ensure that the group was really representative of the people it claimed would grant the charter. The legislation could set out basic criteria and procedures for making this decision. If the group satisfied the criteria it would be recognized by the council for the purpose of developing an appropriate governance charter. The scope of the charter could be anything from a third order of government on a Métis land base to management of a Métis institution within a city.

- *Preparation*

  Following procedures set out in the legislation, the council would work with the recognized group, affected government departments, and resource agencies (if necessary) to develop a suitable charter. Where possible, flexible, previously negotiated model charters could be used as starting points. Each charter would deal with all necessary land-related issues and required law-making authority. When all participants in the development process had agreed that a composite of rights, responsibilities, resources and rules constituted a viable unit, it would be considered a governance charter within the ambit of the Recognition Act. Consensus would also be required on the criteria for confirmation.

● *Confirmation*

When an appropriate governance charter had been prepared, it would be up to the people to be governed under it to confirm it as a grant of their authority. On that confirmation being obtained, the group would become a self-governing Métis institution owning, controlling, managing, and governing programs or land under the terms of the governance charter. Laws made under that charter would be recognized as laws of Canada.

In addition, an independent body is needed that can resolve disputes arising during the recognition process.

An alternative to a Recognition Act would be to put the basic principles in a treaty between Canada and the Métis. This idea was proposed by a number of participants in the Charlottetown negotiations. The treaty could then be recognized and given effect by an act of Parliament.

Whatever legal mechanism is employed to give the arrangement effect, the basic document defining the relationship must provide

● *Recognition* ─ an acknowledgement that there can be governments in Canada whose powers are granted and determined by Aboriginal people, not Parliament or a provincial legislature;
● *Principles* ─ a statement of the principles of Canadian law an Aboriginal government will be expected to recognize in exchange for Canadian law recognizing the laws of the Aboriginal government;
● *Process* ─ a bipartisan or independent framework, with appeal provisions, for determining
    ● representation ─ whether a group seeking recognition of its power to govern can negotiate on behalf of the governed;
    ● compatibility ─ whether the proposed system of government, including the means by which the people represented will confirm the authority they grant and their desire for it to be recognized by Canadian law, fits within the mutual recognition principles set out in the *Recognition Act*";[cxliv] and
● *Resources* ─ to ensure that the government recognized has the capacity to secure the revenues needed to meet its recognized obligations.

As mentioned earlier, the first principle is the key principle of the Charlottetown Accord. The second is essentially the Canada clause of that Accord. The third was embodied in certain ancillary accords on Aboriginal matters that were under negotiation at the time the overall Accord was announced. The fourth was addressed in the Métis Nation Accord and in the Alberta-

Metis Settlements Accord. We have discussed the first and second principles in a very cursory fashion. The third and fourth principles require similar comment.

Any structure to enable the development of workable governance charters must recognize the time, money, and communication required. Our experience with the Métis settlements in Alberta is that the people to be governed are very careful about the powers they wish to grant to those governing. For example, a crucial component of the Métis settlements legislation is the condition that by-laws must be approved at a general meeting of settlement members. This essentially puts control of all basic settlement decisions, such as budget approval, in the hands of the membership at large. It became clear in the community meetings reviewing legislation drafts that such a constraint was essential to community support. Other communities may differ, but it is reasonable to assume that any process relying ultimately on a referendum of the governed for a grant of authority will require extensive community consultation. This is expensive and time-consuming. That should be recognized at the start if there is to be any realistic hope that the process will produce self-government. In simple terms, developing governance charters will take time and money.

Governing will also take money. There is no point in embarking on the process and raising the expectations of people in the communities if there is no assurance that the chartered governments will have enough money to meet their charter obligations. That money may come from members, land, economic activity, or contributions from other governments. Whatever the source, the need must be dealt with realistically by providing the authority to raise revenue in the charter and by ensuring that any commitments from other governments are adequate to the task. These financing matters were still unresolved when the Charlottetown discussions ended. The best efforts draft on the ancillary Aboriginal Matters Accord noted the commitment of Aboriginal governments to promoting opportunities and providing public services. It went on to say

> in the context of agreements relating to self-government, Parliament and the government of Canada, and the legislatures and the governments of the provinces and the assemblies and governments of the territories are committed to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments:
>
> (i) to govern their own affairs, and;
>
> (ii) to meet the commitments referred to in paragraph (a)
>
> taking into account the levels of services provided to other Canadians in the vicinity and the fiscal capacity of an aboriginal government to raise revenues from its own sources.[cxlv]

There is no reason to think federal or provincial governments have changed the view expressed in this draft agreement that their commitment of resources may be based on the "capacity of an aboriginal government to raise revenues from its own sources". Consequently, to be viable any constating charter must ensure the Aboriginal government has the capacity to raise such revenues. In this case `capacity' means more than legal authority to extract money; it means also something to extract money from. For most Métis communities for the foreseeable future, the only realistic sources are land, resources, and other governments. The communities simply do not have the economic base to support the cost of basic community services. The funding approach most consistent with the concept of an inherent right of self-government is one based on land-related revenues. The assumption of a right of self-government implies land to be governed and a right to the revenue that land can produce. In our view, every effort should be made to enable that linkage, either in the foundational treaty or the proposed Recognition Act, or in the constating charters of individual Aboriginal governments. Otherwise funding will be tied to transfers from other governments and the attendant susceptibility to suggestions of dependency ─ suggestions that damage both communities involved.

This part of the paper has provided a very sketchy outline of one option that would build on the effort that went into Charlottetown, rather than waiting for a new constitutional window to open. Our purpose is not to outline new legislation but to point out the need for creative thinking within the reality of Canada's current constitutional impasse. The situation of the Métis demands more than an excuse that Canadians won't accept constitutional change.

PART 5 ─ CONCLUSION

Eleven years after the adoption of the *Constitution Act, 1982*, the situation of the Métis peoples of Canada with regard to the recognition and protection of their Aboriginal entitlements is still uncertain. The least that can be said, however, is that there are now better opportunities available in the constitutional law of Canada for obtaining that recognition and protection than was the case prior to 1982.

Without a constitutional amendment stating definitively that the Métis are included within the term Indians in section 91(24) of the *Constitution Act, 1867*, there may be no resolution of this issue respecting all self-identifying Métis communities in Canada. Legal proceedings such as *Dumont* may resolve the issue for claimants in this action and those

similarly situated, but such recognition may not extend to all groups of Canadian Métis for the reasons discussed above.

This will not be as significant as would have been the case prior to 1982, however. Section 35 of the *Constitution Act, 1982* now gives Métis claimants throughout Canada the opportunity to establish Aboriginal entitlements, if they can bring themselves within the terms of the constitutional provisions. Some of the methods by which that might be done have been outlined in this paper.

The fundamental reality is that there are many Métis peoples in Canada. There is no uniform method for dealing with the protection of their collective identity as Aboriginal peoples. Differently situated communities will have to exploit different legal tools to address their particular situation. In this process, some communities will be better situated than others. But this is true for all Aboriginal peoples in Canada and is not unique to the Métis. At the very least, there is now some prospect that the Métis will no longer be the forgotten Aboriginal people.

NOTES

[i]The Charlottetown Accord was signed August 28, 1992. References in this paper are to the Draft Legal Text to the Accord published on October 9, 1992.
[ii]Throughout this paper, when we use the term `law' we are referring only to law currently recognized and enforceable by the Canadian legal system. Some First Nations and other Aboriginal groups have their own bodies of law and enforcement mechanisms. Some of these have been, or are being, codified. Over time these may become recognized in Canadian law. However, we cannot claim expertise in these other legal systems and consequently have not considered them in this paper.
[iii]*Constitution Act, 1867* (U.K.), 30 and 31 Vict., c.3.
[iv]The terms `Metis' and `Métis' are used in this paper without any significance being attached to the distinction.
[v]*Metis Settlements Act*, c.M-14.3, S.A. 1990, s.1(j).
[vi]*Fisheries Act* Regulation SOR/87-153, *Alberta Fishery Regulation*, s.2(1).
[vii]*Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c.11.
[viii]*R.* v. *Sparrow*, [1990] 3 C.N.L.R. 160.
[ix]See Paul Chartrand, "Aboriginal Rights: The Dispossession of the Metis" (1991) 29 *Osgoode Hall L.J.*, 457 at 460-461; Catherine Bell, "Who are the Metis People in Section 35(2)" (1991) 29 *Alta L.R.*, 351 at 359; B.W. Morse and R.K. Groves, "Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Non-status Indians" (1987) 2 *Law and Anthropology*, 139 at 143 -145.
[x]S.C. 1870, c.3.
[xi]Chartrand, *supra*, note , at 462; Bell, *supra*, note , at 359-360.
[xii]*Supra*, note , s.31.
[xiii]First enacted S.C. 1872, c.23. There were a number of subsequent enactments.
[xiv]S.C. 1879-81, c.31.
[xv]D. Sanders, "Aboriginal Peoples and the Constitution" (1981, 19 *Alta. L.R.*, 410 at 419-420, as quoted in W. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatoon: Native Law Centre, University of Saskatoon, 1987), at 96.
[xvi]Pentney, *ibid*., at 97.
[xvii]Bell, *supra*, note , at 375-376.
[xviii]Morse and Groves, *supra*, note , at 143-146.
[xix]*Ibid.*
[xx]*Ibid*.
[xxi]*Ibid.*
[xxii]Bell, *supra*, note , at 353.
[xxiii]R.S.A. 1970, c.233, s.2(a).
[xxiv]*Supra*, note .
[xxv]*Supra*, note .
[xxvi]See Clem Chartier, *In the Best Interest of the Metis Child* (Saskatoon: Native Law Centre, University of Saskatchewan, 1988), c.3.
[xxvii]Metis National Council, *The Metis: A Western Canadian Phenomenon*, quoted in Chartier, *ibid*., at 36-37.
[xxviii]R.E. Gaffney, G.P. Gould and A.J. Sample, *Broken Promises: The Aboriginal Constitutional Conferences* (Fredericton: New Brunswick Association of Metis and Non-Status Indians, 1984), quoted in Chartier, *ibid.*, at 23 - 24. See also 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.
[xxix]S.C. 1868, c.42.
[xxx]R.S.C. 1985, c.I-5, s.2(a).
[xxxi]*Ibid.*, s.2(a).
[xxxii][1939] S.C.R. 104.
[xxxiii]R.S., c.S–19.
[xxxiv]*Ibid.*, at 105.
[xxxv]Now the *Constitution Act, 1867*.
[xxxvi]*Supra*, note , at 108.
[xxxvii]*Ibid.*, at 115.
[xxxviii]*Ibid.*, at 118.
[xxxix]*Ibid.*, at 119.
[xl]"Indians: An Analysis of the Term They Used in S. 91(24) of the British North America Act, 1867" (1978-1979) 43 *Saskatchewan L.R.*, 39.
[xli]Kingston: Institute for Intergovernmental Relations, 1986.
[xlii]See the discussion in c.17, esp. at 217.
[xliii]*Supra*, note , at 218-220.
[xliv]T. Flanagan, "The Case Against Metis Aboriginal Rights" (1983) 9 *Canadian Public Policy*, 314; *Metis Lands in Manitoba* (Calgary: University of Calgary Press, 1991).
[xlv]Flanagan, "The Case Against Metis Aboriginal Rights", at 322.
[xlvi]*Ibid.*, at 318.
[xlvii][1982] 3 C.N.L.R. 122 at 131.
[xlviii][1982] 3 C.N.L.R. 95.
[xlix]*Constitution Act, 1930*.
[l]*R.* v. *Ferguson* (5 March 1993) Peace River C0280204050A01/A02 (Alta Prov. Ct); (24 September 1993) Peace River App. 9209005-S5-0101,9309005-S5-0102 (Alta Q.B.).
[li]See the discussion in Schwartz, *supra*, note , at 184-185.
[lii]See *ibid.*, as well as the discussion in Chartier, *supra*, note , c.3.
[liii]*Metisism: A Canadian Identity* (Edmonton: Alberta Federation of Metis Settlement Associations, 1982), at 17.
[liv]*Ibid.*, at 19.
[lv]Chartier, *supra*, note , at 64-65.
[lvi]Schwartz, *supra*, note , at 228.
[lvii]Flanagan, "The Case Against Metis Aboriginal Rights", *supra*, note , at 324.
[lviii]Pentney, *supra*, note , c.4.
[lix]*Ibid.*, at 84.
[lx]*Ibid.*, at 88.
[lxi]*Ibid.*
[lxii]*Ibid.*, at 95-100.
[lxiii]*Ibid.*, at 97-98.
[lxiv]*Ibid.*, at 100.
[lxv]See Bell, *supra*, note ; "Metis Aboriginal Title", LL.M. Thesis, Faculty of Law, U.B.C., 1989, c.2; "Metis Rights", unpublished.
[lxvi]Bell, *supra*, note , at 379.
[lxvii]Bell, "Métis Aboriginal Title", *supra*, note , at 82.

[lxviii] *Supra*, note .
[lxix] "Understanding Aboriginal Rights" (1987) 66 *C.B.R.*, 727 at 757.
[lxx] *Ibid.*
[lxxi] *Supra*, note , at 178.
[lxxii] *Ibid.*, at 179.
[lxxiii] *Ibid.*, at 180.
[lxxiv] *Supra*, note .
[lxxv] See Schwartz, *supra*, note , at 187-188; Bell, "Metis Aboriginal Title", *supra*, note , at 82; Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992), at 27–4.
[lxxvi] Subnom. *Manitoba Metis Federation* v. *Attorney General of Canada*, [1987] 2 C.N.L.R. 85 (Man. Q.B.), rev'd on appeal [1988] 3 C.N.L.R. 39 (Man. C.A.), rev'd on appeal [1990] 2 C.N.L.R. 19 (S.C.C.). The litigation is now proceeding.
[lxxvii] *Supra*, note . There are many analyses of these provisions in the scholarly literature. As examples, see Paul Chartrand, *Manitoba Metis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan, 1991); Flanagan, *Metis Lands in Manitoba*, *supra*, note ; D.N. Sprague, *Canada and the Metis: 1869-1885* (Waterloo: Wilfrid Laurier University Press, 1988), esp. c.4-7; "Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887" (1980) 10 *Manitoba L.J.*, 415.
[lxxviii] Amended Statement of Claim, February 18, 1987, at paragraphs 9, 10, 10A.
[lxxix] *Ibid.*, paragraph 13.
[lxxx] *Ibid.*, paragraphs 11, 14.
[lxxxi] *Ibid.*, paragraph 12.
[lxxxii] *Dumont et al.* v. *Her Majesty the Queen*, Statement of Claim, May 12, 1986.
[lxxxiii] *Ibid.*, paragraph 10.
[lxxxiv] *Ibid.*, paragraph 21.
[lxxxv] [1985] 1 C.N.L.R. 120.
[lxxxvi] *Supra*, note , at 180.
[lxxxvii] *Ibid.*
[lxxxviii] *Ibid.*
[lxxxix] *Manitoba Metis Settlement Scheme of 1870*, *supra*, note ; "Aboriginal Rights: The Dispossession of the Metis", *supra*, note .
[xc] Factum of Native Council of Canada, *Dumont et al.* v. *Attorney-General of Canada*, November 1, 1989 (S.C.C.), paragraphs 28 - 29.
[xci] *Manitoba Metis Federation Inc.* v. *Attorney-General of Canada*, [1988] 3 C.N.L.R. 39 at 49 (Man. C.A.).
[xcii] Chartrand, "Aboriginal Rights", *supra*, note , at 479-480.
[xciii] *Supra*, note .
[xciv] *Ibid.*
[xcv] *Manitoba Metis Federation* v. *Attorney General of Canada*, [1990] 2 C.N.L.R. 19 (S.C.C.).
[xcvi] D. Sanders, "Getting Back to Rights", in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Montreal: Institute for Research on Public Policy, 1992), 261 at 282.
[xcvii] For a recent judicial decision that holds that the application to Métis of hunting restrictions contained in a provincial wildlife act is a violation of their constitutional entitlements as Métis people under section 35 of the *Constitution Act, 1982*, see *R.* v. *McPherson*, [1993] 1 W.W.R. 415 (Man. Prov. Ct.). This decision is currently under appeal.
[xcviii] [1979] 3 C.N.L.R. 17 (F.C.T.D.).

[xcix] *Ibid.*, at 45.
[c] See Slattery, *supra*, note , at 759-760.
[ci] (1991), 79 D.L.R. (4th) 185 at 420-421 (B.C.S.C.). See as well the decision of the British Columbia Court of Appeal in this case, 104 D.L.R. (4th) 470 at 512-514 (per MacFarlane J.A., Taggart J.A. concurring) and at 575-577 (per Wallace J.A.). At the time of writing, application for leave to appeal this decision is pending before the Supreme Court of Canada. It should be noted that the *Baker Lake* test has never been considered by the Supreme Court of Canada.
[cii] The subsection states that "For greater certainty, in subsection (1) `treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired".
[ciii] *Supra*, note , at 169-170.
[civ] See *Outstanding Business: A Native Claims Policy* (Ottawa: Supply and Services Canada, 1982).
[cv] See *Comprehensive Land Claims Policy* (Ottawa: Supply and Services Canada, 1986).
[cvi] Comprehensive Land Claim Agreement Between Canada and the Dene Nation and the Metis Association of the Northwest Territories, April 9, 1990.
[cvii] *Ibid.*, c.21.
[cviii] *Ibid.*, c.8.
[cix] *Ibid.*, c.10.
[cx] *Ibid.*, c.13.
[cxi] *Ibid.*, c.28-31.
[cxii] *Ibid.*, c.7.
[cxiii] With suitable modifications to recognize subordinate provincial jurisdiction in Alberta.
[cxiv] Charlottetown Accord, *supra*, note .
[cxv] *Ibid.*, at 14.
[cxvi] *Ibid.*, at 24.
[cxvii] *Ibid.*, at 37-41.
[cxviii] A draft version of a Metis Nation Accord, dated October 3, 1992, was included with a package of draft legal text materials accompanying the Charlottetown Accord. It is not known to what extent this draft was agreed to by federal and provincial governments, or whether there were subsequent drafts on which there was agreement.
[cxix] *Ibid.* This definition was continuously being reviewed and revised by the MNC during the Charlottetown process. This may not be the last definition adopted during that process by the MNC.
[cxx] *Ibid.*, s.1(b).
[cxxi] *Ibid.*, s.4.
[cxxii] Alberta-Metis Settlements Accord, entered into by the Province of Alberta and the Alberta Federation of Metis Settlement Associations, July 1, 1989.
[cxxiii] *Constitution of Alberta Amendment Act, 1990*, S.A. 1990, c.C-22.2.
[cxxiv] *Supra*, note .
[cxxv] *Metis Settlements Act*, supra, note , s.1(j).
[cxxvi] The scheme is not full self-government as would have been possible under the Charlottetown Accord. It assumes provincial jurisdiction and provides a minister of the Crown with certain supervisory powers in areas of financial administration and law making.
[cxxvii] *Metis Settlements Accord Implementation Act*, S.A. 1990, c.M-14.5, Part 1.
[cxxviii] *Supra*, note , s.3, 4, 5.

[cxxix]These provisions are in the *Metis Settlements Act*. See as well "Metis Settlements General Council Land Policy", *Alberta Gazette*, July 31, 1992, at 2592.
[cxxx]These provisions are included in the letters patent.
[cxxxi]S.A. 1990, c.M-14.8.
[cxxxii]*Supra*, note , s.4, 5.
[cxxxiii]*Supra*, note , Parts 1-2 (settlement council powers); Part 8 (establishment of Metis Settlements General Council); Part 7 (Metis Settlements Appeal Tribunal).
[cxxxiv]*Ibid.*, s.55.
[cxxxv]*Ibid.*, Part 8, Division 1.
[cxxxvi]*Ibid.*, s.2.
[cxxxvii]*Ibid.*, ss.222-223.
[cxxxviii]*Ibid.*, ss.222, 223, 224.
[cxxxix]*Ibid.*, Part 10.
[cxl]*Ibid.*, Part 7.
[cxli]*Ibid.*, s.184(2).
[cxlii]*Ibid.*, s.184(3).
[cxliii]*Ibid.*, s.189.
[cxliv]These could be along the lines of the Canada clause of the Charlottetown Accord.
[cxlv]Clause 3.1 of the October 7, 1992, 10:00 a.m. Best Efforts Draft Accord Relating to Aboriginal Constitutional Matters. Newfoundland did not agree with this clause.