DO THE METIS FALL WITHIN SECTION 91(24) OF THE *CONSTITUTION ACT, 1867?*

by Bradford W. Morse and John Giokas

Contents

EXECUTIVE SUMMARY

This paper examines the question of whether Metis are included in section 91(24) of the *Constitution Act, 1867*, drawing on existing literature and jurisprudence, as well as historical and political aspects of the relationship between the Metis and Canadian governments. It addresses definitions of Metis; federal policy, legislation, academic commentary and judicial decisions related to the pre-1982 constitutional status of the Metis; more recent federal and provincial constitutional policy, the *Constitution Act, 1982* and subsequent first ministers' conferences; and the potential consequences of the inclusion of Metis within the label `Indians' for the purpose of section 91(24) of the *Constitution Act, 1867*. The paper argues that it is logical and sensible to consider persons of mixed ancestry of all kinds to be within section 91(24) jurisdiction and that the Metis are included within the fiduciary relationship owed by the Crown to Aboriginal peoples.

Arguments pointing to the inclusion of the Metis within the category of constitutional `Indians' in section 91(24) are several. First, there is evidence of the inclusion of Metis in the treaty-making process throughout Canadian history, including the adhesion to Treaty 3 by "halfbreeds", and the issues of "half breed" scrip under the *Manitoba Act* of 1870 and later under several of the *Dominion Lands Acts*. A second line of reasoning in favour of federal jurisdiction is the legislative history of inclusion of persons of `Indian blood' associated with Indian tribes or bands on membership lists as `Indians' for purposes of the *Indian Act*. A third argument draws upon the wording of the *Manitoba Act*, the *Dominion Lands Act* and other legislation and orders in council implementing the land grant scheme. A fourth thesis for Metis inclusion lies in the modern federal practice of treating Metis as equivalent in constitutional status to the other Aboriginal peoples. The recognition of Metis as one of the "aboriginal peoples of Canada" in section 35 of the *Constitution Act, 1982* reinforces this federal practice.

Thus, on the balance of historical probabilities, practical convenience, and legal and constitutional logic, and to maintain the honour of the Crown, it is concluded that section 91(24) includes persons of mixed ancestry. It is also more feasible for the federal Crown to exercise the treaty-making power and to discharge constitutional obligations to the Metis. The role of Canadian courts in this regard should be to interpret the Constitution of Canada in such a way as to confirm primary federal responsibility and authority to advance the interests of all Aboriginal peoples as reflected in subsections 35(2) and 91(24).

The ramifications of section 91(24) inclusion are several. It would affirm the constitutional jurisdiction of Parliament to enact legislation in relation to the Metis, and confirm the authority of representatives of the Crown in right of Canada to treat with the Metis as collectivities and to conclude land claims settlements with them. The Department of Indian Affairs and Northern Development would lose one of its primary excuses for refraining from dealing with the Metis. In terms of the federal machinery of government, the role of the Federal Interlocutor for Metis and Non-status Indians and the Privy Council Office might be collapsed into a new Minister of Aboriginal Affairs and a restructured and renamed Department of Indian Affairs.

While this issue to some degree transcends the paper, the question arises, perhaps of equal significance, as to whether inclusion in section 91(24) means that Parliament has not only the capacity, but also an obligation to legislate for the benefit of Metis people. The constitutional entrenchment of Aboriginal and treaty rights in section 35(1) and the judicial articulation of the Crown's fiduciary obligation in the *Guerin* case suggests that the federal government may be breaching its fiduciary obligations if it refuses to initiate legislation needed to acknowledge the existence of certain Aboriginal peoples or to meet basic economic or social needs. The inclusion of Metis in section 91(24) also means that provinces cannot enact restrictive or negative legislation concerning the Metis specifically. Alberta Metis legislation likely would be readily subject to constitutional challenge.

Recommendations

1. The Royal Commission should formally conclude that Metis are included within the expression `Indians' within section 91(24).

2. Commissioners should recommend to the Government of Canada that it renew efforts at constitutional reform to build upon and improve the Aboriginal provisions that were contained in the Charlottetown Accord.

3. The Royal Commission should conclude that the Metis are beneficiaries of the fiduciary relationship with the Crown. Further, it should recommend that the federal government respect its fiduciary obligation such that it immediately enter into comprehensive negotiations with representatives of the Metis people.

4. Commissioners should recommend to the federal government that it take immediate action to implement the amendments to the *Alberta Act* sought by the Alberta government and the Alberta Federation of Metis Settlements Associations. This will provide constitutional protection of the land rights of the Metis settlements and will address concerns about the invalidity of the provincial legislation.

DO THE METIS FALL WITHIN SECTION 91(24) OF THE *CONSTITUTION ACT, 1867*? *

BY BRADFORD W. MORSE AND JOHN GIOKAS

INTRODUCTION

Aboriginal constitutional and legal issues are notoriously complex, and none more so than those surrounding the Metis.[i] There are several reasons for this. In the first place, there is no complete agreement on who the Metis are, although there are many different views, including among Metis people themselves. The term "Metis" has historically been largely associated with the French speaking and Roman Catholic population of Rupert's Land reflecting the results of intermarriage among Indian women and *les Canadiens* along with their descendants. Now it is widely and popularly used to identify a larger and still imprecisely defined group of persons of mixed Indian and non-Indian ancestry,[ii] some of whom also fall within the category of non-status and status Indians as a result of the registration rules under the *Indian Act*.[iii] At the same time, and especially since the 1960s and the revival of pride in Aboriginal origins, it has also been adopted as a self-description by many people of origins far removed from the Red River in Manitoba. The result is considerable confusion among non-Metis and no small degree of disagreement regarding who the `real' Metis are by the various groups and political organizations that today attempt to represent Metis interests in different parts of the country. While each group is clearly entitled to decide for itself how it wishes to define its own membership, and any external intrusion in this regard would be thoroughly improper, clear and fundamental disputes exist among Metis people reflecting both different historical experiences and different visions for the future.

Another reason for the complexity of issues surrounding the Metis lies in the conspicuous lack of judicial guidance. There are extremely few cases dealing with Metis rights or status as such. Coupled with this relative absence of caselaw is an inconsistent pattern of colonial, and subsequently federal and provincial, government legislation, policy and practice with respect to the Metis. Consequently, one is obliged to examine legal history and to proceed both from first principles and by way of analogy to a much greater extent than is normally the case with respect to Aboriginal issues. This paucity of jurisprudence linked with inadequate legislative initiatives has opened the debate to a wide range of views that are difficult to reconcile.

A third complicating element lies in the fairly recent renewal of the drive of all Aboriginal peoples for new power-sharing arrangements within the Canadian federation. This has resulted in recognition of the Metis for purposes of the "existing aboriginal and treaty rights" protected in section 35 of the *Constitution Act, 1982* as well as in their inclusion over the last decade in a series of multilateral meetings and first ministers' conferences on constitutional issues affecting them. How this relatively recent renewal of recognition of the existence of another constitutional category of Aboriginal peoples alongside the Indian and Inuit dovetails with the earlier pattern of inconsistent treatment by the governing authorities is a mystery that has yet to be clarified, let alone fully resolved.

Given the foregoing, it is advisable to proceed in stages. Accordingly, it is proposed to divide this overall inquiry into five sections in order to come to grips with the complexities inherent in the issues to be addressed in a more effective and thorough fashion. These five sections are as follows:

1. Who are the Metis?
2. What do federal policy, legislation, academic commentary and judicial decisions indicate regarding the pre-1982 constitutional status of the Metis?
3. What light is shed on Metis issues by more recent federal and provincial constitutional policy, the *Constitution Act, 1982* and the subsequent first ministers' meetings regarding Aboriginal constitutional issues?
4. Are the Metis included within the label "Indians" in the sense of section 91(24) of the *Constitution Act, 1867* and, if so, the more important question becomes, what are the ramifications in 1993?
5. Concluding observations.

Before proceeding further, a general caveat should be noted, namely, that this paper contains a number of generalizations as well as summations of historical development that naturally mask to some degree the complexities and contradictions always evident in the interplay among government policies and historical events embedded in two centuries of Aboriginal-Crown relations. In addition, we must also register our discomfort with the use of the terms `half-breed' and `mixed blood' because of their inevitably racist overtones and the derogatory way in which they have been used. We have nonetheless felt compelled to use them

with some regularity, as they were common words of the nineteenth and much of the twentieth century developed by the newcomers and imposed upon the descendants of mixed marriages. Furthermore, these expressions were regularly used in legislation and other legal documents as well as serving as a way of distinguishing between the Red River French-speaking Metis and others of mixed ancestry, often to isolate the Metis from non-Aboriginal society. Wherever possible we prefer to use the term `Metis', as it has become the title of choice of the people concerned and has now been accepted in a non-derogatory manner.

In addition, this paper is limited in several critical senses. It is directed at the relatively narrow question that has been asked of us, namely, whether Metis people are included within section 91(24) of the *Constitution Act, 1867*. We do not address, except in passing, fundamental issues surrounding the land rights of the Metis, their inherent right to self-government and the degree to which they possess other Aboriginal and treaty rights.

Furthermore, this study concentrates its attention upon Canadian domestic law. This is not intended to suggest that international law is not relevant to Metis people, but that the nature of the question under study is one that warrants examination within this narrower context.

We also assess Canadian caselaw for what it says and implies for future judicial rulings without commenting specifically upon its fairness or its inglorious history of bias and prejudice. There is no doubt that Canadian judges, like Canada's politicians, have demonstrated racism and a belief in their own superiority for many generations. As a result, they have ignored the law and legal systems of Aboriginal peoples as well as their opinions and aspirations. The courts and governments have regularly seen section 91(24) as involving jurisdiction `over' constitutional `Indians' in the same fashion as they have regarded federal and provincial governments as having jurisdiction over `inland fisheries' or the `administration of justice' respectively. There has been little apparent recognition that Aboriginal peoples are in a dramatically different position, let alone seeing them as possessors of a sovereign order of government inside or outside Canada. Pursuing such a critique, although warranted, is beyond the scope of this paper.

WHO ARE THE METIS?

The Many Definitions of Metis

In a relatively recent study of the question of Metis identity by a Metis scholar, Antoine Lussier notes that at a 1981 conference "there appeared to be much confusion regarding the term to be

used when discussing the mixed-blood people of nineteenth-century Canada and the northern United States."[iv] After citing the essential portions of seven current definitions of Metis, Lussier observes that in some cases they allow not only for non-status Indians to join Metis organizations, but that in one case even certain non-Aboriginal people are eligible to join (through marriage and subject to associate member status without voting rights or the ability to hold executive office).[v] Somewhat ironically, one other Metis organization mentioned in his article-a small association with a primarily cultural rather than political focus-requires that its members be French-speaking, Roman Catholic and Metis, but offers no definition of the latter term.[vi] "These new criteria," he remarks, "have not brought the diverse Metis cultural groups together but have more or less separated them."[vii] Recent constitutional history supports Lussier's cogent observation.

Originally formed in 1968 to represent non-status Indian and Metis people, the Native Council of Canada (NCC) has a broad definition of Metis encompassing virtually all persons of mixed Aboriginal and non-Aboriginal blood in Canada, irrespective of historical origins, who self-identify as Metis. While the history of the Metis inhabitants of western Canada provides much of the legal and historical foundation for Metis claims to Aboriginal and treaty rights by the NCC, it does not exhaust them.[viii] Despite the success of the NCC, and particularly through the efforts of its then vice-president and noted Metis leader Harry Daniels, in bringing about the constitutional recognition of the Metis, however defined, as one of the "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982*, the three prairie Metis organizations left to form the Metis National Council (MNC) before the commencement of the 1983 first ministers' conference (FMC). The public rationale for this separation was the desire to ensure direct representation by Metis leaders at the FMC table and to advance positions in favour of the Metis Nation.

The purpose of the MNC was to lobby exclusively for Metis, as opposed to jointly with non-status and off-reserve Indians, issues in the subsequent first ministers' conferences on the Constitution.[ix] The MNC definition of Metis focuses primarily on the descendants of those persons in western Canada to whom the federal government made promises of land in the late 1800s as well as others with Aboriginal blood accepted by successor Metis communities as Metis:

> ...all persons who can show they are descendants of persons considered Metis under the 1870 *Manitoba Act*; all persons who can show they are descendants of persons considered as Metis under the *Dominion Lands Act* of 1879 and 1883; and all other

> persons who can produce proof of aboriginal ancestry and who have been accepted as Metis by the Metis community.[x]

This definition was slightly revamped for the Metis Nation Accord proposed by the MNC to Canada, the five western-most provinces and the Northwest Territories in 1992 during the Charlottetown Accord process:

> (a) "Metis" means an Aboriginal person who self-identifies as Metis, who is distinct from Indian and Inuit and is a descendant of those Metis who received or were entitled to receive land grants and/or scrip under the provisions of the *Manitoba Act 1870*, or the *Dominion Lands Act*, as enacted from time to time.
>
> (b) "Metis Nation" means the community of Metis persons in subsection a) and persons of Aboriginal descent who are accepted by that community.[xi]

This accord has yet to be signed by the government of Canada, the five provinces or the government of the Northwest Territories, however, the MNC is continuing its efforts to obtain formal acceptance of the accord and to move forward with its implementation.

More recently, the MNC proposed a constitution for discussion purposes entitled "Draft Constitution of the Government and People of the Metis Nation" which contained a slightly different formulation for a definition of the Metis, namely,

> 6.(1) For the purposes of this Constitution "**Metis**" means an Aboriginal person who self-identifies as Metis, who is distinct from Indian and Inuit and
>
> > (a) is a descendant of those Metis who received or were entitled to receive land grants and/or scrip under the provisions of the *Manitoba Act, 1870*, or the *Dominion Lands Acts*, as enacted from time to time or
> >
> > (b) is recognized as a Metis pursuant to laws enacted by the Metis Nation Parliament.
>
> (2) For the purposes of identifying the people of the Metis Nation, the Metis Nation Parliament shall establish laws for the enumeration and registration of the Metis people of Canada.[xii]

The issue of how to define Metis is not a new one. Lussier's research into the question uncovers historical evidence of a similar debate more than 100 years ago. A list drawn from an anthropological journal from 1875 reveals nine different categories of persons classifiable as members of the "mixed-blood race".[xiii] We know from other historical records that there was some degree of confusion throughout the 1800s and early 1900s concerning who was Indian and who was `Metis' or `half-breed' and whether and under what circumstances the latter were also

Indians. For example, in the negotiation of the Robinson-Superior and Robinson-Huron treaties in the province of Canada in 1850 it is reported that the chiefs urged the inclusion in treaty benefits of the `half-breeds' living among them. The colonial negotiators left it to the chiefs to decide how and to what extent to allow these people to participate.[xiv]

Treaty 3 actually includes "half-breeds" as such "by virtue of their Indian blood "[xv] through the Rainy River adhesion of 1875, but this is the only known case of its kind. Adhesions to Treaty 5 between 1876 and 1910 show mixed-blood persons participating as such on an individual basis in that portion of the treaty that extends into Ontario.[xvi] A Metis group from Moose Factory in Ontario applied to take treaty under Treaty 9 in 1903 but was refused by the federal and provincial Crown negotiators. Nonetheless, many individual mixed-blood persons were included as Indians at that time and through adhesions to Treaty 9 in 1929-30.[xvii]

In the prairies, the situation was different. The francophone Metis and anglophone half-breeds were not only more numerous and militarily cohesive, they were also highly useful if not essential to the Crown as go-betweens and interpreters in the negotiation of the numbered treaties. Apparently a distinction was drawn in the minds of federal negotiators, however, between Metis who farmed in settled communities in the fashion of non-Aboriginal settlers, those who hunted buffalo in the Metis and Indian fashion, and "those who are entirely identified with Indians, living with them and speaking their language."[xviii] Members of this last group were permitted to take treaty as Indians if they wished and if accepted by the band as members. Those who took treaty were then absorbed within the `bands' that were later defined as such under the *Indian Act* without any distinction being made between them and other Indians.

Later on the federal government amended the *Indian Act* on several occasions to provide "half-breeds" who had taken treaty with an incentive to self-identify as Metis, take scrip and renounce their treaty rights and Indian status.[xix] But still the confusion continued. Even after these amendments, federal negotiators for Treaty 8 apparently encouraged Metis to take treaty and not scrip, but many Metis resisted this suggestion.[xx] Until the 1930s so many individuals were still moving back and forth between the `Indian' and `half-breed' categories that the Department of Indian Affairs decided it had to investigate the band lists and chose to discharge hundreds of people.[xxi] It is also important to realize that many people solely of Indian ancestry, particularly in the northern part of what are now the prairie provinces, chose to take scrip, and thereby became identified as Metis, because of their resistance to the idea of relocating to

reserves and their preference to maintain their traditional lifestyle as wildlife harvesters in the bush.

Definition proved difficult even for Metis who were only a few generations removed from the events surrounding President Louis Riel and the Provisional Government in that period of Metis history. The Metis Association of Alberta offered an initial definition to the Ewing Commission (established by the Alberta government in 1934 to look into the health, education and general welfare of the "half-breed" population) as being "anyone with any degree of Indian ancestry who lives the life ordinarily associated with the Metis." Later, the Association expanded the definition to include anyone who self-identified as a Metis and who was accepted by the Metis community as belonging to it.[xxii]

The Ewing Commission, which saw the position of the Metis largely as a social welfare problem for the province, appears to have viewed the Metis as Indian in culture, for the Commission report from 1936 uses the following definition of Metis: "...a person of mixed blood, white and Indian, who lives the life of the ordinary Indian, and includes a non-treaty Indian."[xxiii] In 1938 the *Metis Population Betterment Act* of Alberta simply eliminated the cultural or lifestyle component: "...a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in the *Indian Act*".[xxiv] In 1940, the Act was amended to impose a rule requiring at least one-quarter Indian blood to qualify as Metis.[xxv]

The Ewing Commission's main recommendation was to establish rural Metis settlements akin to reserves, originally and rather ironically called `colonies'. This is somewhat surprising, given that its mandate was to deal with the problems of the "half-breed population of the province", that is, destitute mixed-blood individual residents throughout the province. One comment on the ambiguity of the treatment of Metis in this regard is worth repeating in its entirety:

> Throughout much of the report of the Commission, the uniqueness of the Metis is seen to consist in their poverty, poor health, and lack of education. But of course the Metis were not really unique in these respects...plenty of white settlers shared these debilities [although not as entire communities]....many persons of mixed Indian and white ancestry did not. If the Metis were in fact just ordinary victims of the Depression, they could have been dealt with by the same measures of relief granted to other citizens. That the Commission did not recommend that they be treated in the ordinary way...was at least an implicit recognition that the Metis had something else in common....The Commissioners mention frequently the propensity of the Metis to pursue a common style of life. Only this commonality could justify the recommendation that colonies be established

> exclusively for Metis. The striking ambiguity here is that the Metis are characterized as both ordinary and special. Clearly, the Commissioners, while steadfastly opposed to granting the Metis special status like that of the Indians, were constrained to admit that the Metis were unique. This ambiguity emerges most clearly in the recommendation, that, while the Metis should not be compelled to join the colonies, they would have no other claim to public assistance if they did not.[xxvi]

The point is, of course, that the Metis were treated by the province more or less the way Indians would have been treated by the federal government‑as a culturally and racially distinct group meriting separate group treatment, including recognition of the need to establish a distinct land base, as they frequently lived in distinct communities separate from both the Indian reserves and non-Aboriginal settlements. At the same time, they were also being treated like non-status and off-reserve Indians in that the Metis would receive special attention only if they resided within government-approved segregated communities; otherwise they were left to their own devices.

The Phenomenon of Mixed-Blood Populations

It is not immediately apparent why there is so much confusion surrounding this issue. In etymological terms, Metis means simply `mixed' and is defined as follows in the French dictionary *Le Petit Robert*:[xxvii]

> 1. Vx. Qui est mélangé; qui est fait moitié d'une chose, moitié d'une autre.
> 2. (Metice, 1615; du port. de même orig.) Qui est issu du croisement de races, de variétés différentes dans la même espèce. Dont le père et la mère sont de races différentes.

Once this *croisement* is made, the `Metisness' is never lost in a sense, as the offspring of subsequent unions will retain this Metis ancestry. Intermarriage among Metis, however, gives rise to a distinct identity, and thus a new people is born‑and some would suggest a new race.

Harrap's Shorter Dictionary (French-English) translates Metis as `halfcaste' or `halfbreed'.[xxviii] The historical record supports the continuity of these definitions. Both `Metis' and `half-breed' were the terms generally in use in the nineteenth century on what was seen by the dominant Euro-Canadians of the east as the western frontier[xxix] to describe persons of mixed Indian and white blood. A number of writers note that `Metis' was first recorded in use in what is now Manitoba to refer to persons of mixed French-Indian ancestry, while `half-breed' and `country-born' were reserved for persons of other European (primarily English or Scottish) and Indian ancestry.[xxx]

Persons of mixed blood are not restricted to Canada, as attested to by the term *Mestizo*, the Spanish equivalent of Metis that refers to the mixed-blood populations of Central and South America.[xxxi] In the United States, `half-bloods' have always existed, although not usually as a population separate from Indian bands or tribes as such as in Canada, except to a limited degree in Montana and North Dakota. In fact, over the course of American history, `half-bloods' have often played a leading role in domestic tribal affairs.[xxxii]

Moreover, the mixed-blood phenomenon is not limited to the Americas. An initial comparative study of the Canadian west and the southern African colonies reveals the existence of several `hybrid' or `Metis' groups in southern Africa.[xxxiii] Although generally known as *Basters*, over time this category of persons came to be differentiated by lifestyle into *Griquas*, *Berganaars* and *Orlams*. The political evolution of these southern African groups shows startling parallels with that of the Metis in the Canadian prairie provinces, including a series of uprisings against the African colonial authorities around the turn of the century.

The term Metis first appears in Canadian historical records mainly with respect to the mixed-blood population of western Canada. These are the people often referred to as the historical Metis Nation connected with the fur trade and the creation of the province of Manitoba in 1869-70. Because of the historical importance of the emergence of a relatively large and distinct Metis population in western Canada in the nineteenth century and the central role played by Louis Riel in two conflicts with the Canadian state, there has been an understandable tendency to associate the term Metis only with the historical Metis Nation, the entry of Manitoba into Confederation, and the subsequent land distribution under the *Manitoba Act*[xxxiv] and later the *Dominion Lands Act*[xxxv] to `half-breeds' presumably connected to that Metis Nation.

Some writers and, more important, many Metis people in eastern Canada oppose this traditional western frontier and fur trade-oriented explanation of the origins of the Metis, however, and focus on the presence of mixed-blood persons and groups from the earliest periods of European exploration and colonization.[xxxvi] The writings of an early French colonist in Acadia refer to the children produced by the interaction between local Mi'kmaq women and French sailors.[xxxvii] More recent writers note the existence of a separate Metis community in what is now Nova Scotia as early as 1650.[xxxviii] The presence of sizeable numbers of people of mixed ancestry among the Indians in Ontario and in at least one separate community of their own is also referred to in contemporaneous accounts of the nineteenth-century treaties in that province.[xxxix] The

existence of a distinct Aboriginal population in southern Labrador that has chosen quite explicitly and consciously to identify itself as Metis and to form the Labrador Metis Association in recent years to advance their political and legal interests, including pursuing a comprehensive land claim, is further indication not only of historical but also of contemporary realities of "Metisness" far removed from the Red River settlements and the territory of the Metis Nation.

Even in the frontier western provinces and the northern territories there are communities of people of mixed ancestry who call themselves Metis yet have no connection with the historical Metis Nation of early Manitoba and Saskatchewan. Many of these persons took treaty as members of Indian bands during the negotiation of treaties 5, 8, 10 and 11, or received scrip or were eligible to receive scrip as "half-breeds" under the *Dominion Lands Act*. It is, of course, possible that individual Metis were also included in the remaining numbered treaties in the prairie provinces. There are also mixed-blood persons in British Columbia who self-identify as Metis but have no connection at all with any of these events.

Academic Commentary on Metis Identity

Many modern academic commentators have attempted to come to grips with the riddle of Metis identity. Donald Purich in his 1988 book, *The Metis*, notes that `Metis' is used in three different ways: to embrace all Aboriginal peoples who are neither status Indians nor Inuit; to refer to all mixed-blood persons, even those resulting from modern intermarriage; and to describe the descendants of the historical Metis-"that is, those whose origins can be traced back to the Red River in the early 1800s."[xl] The first usage is incorrect in his opinion, as it covers mainly non-status Indians who, unlike the Metis, wish to acquire Indian status under the *Indian Act* and see themselves more in terms of their descent from a particular Indian nation. The second is apparently acceptable to him to the extent that such persons self-identify as Metis and are recognized as such by a Metis organization. The history and current struggles of the third group are covered in the bulk of his book, which certainly suggests that for him, at least, Red River Metis and their descendants are the more legitimate claimants to the modern term.

Thomas Flanagan[xli] and Bryan Schwartz[xlii] advert to two populations: the wider population of persons of mixed Indian and non-Indian ancestry, and the descendants of the historical Metis Nation in western Canada. Flanagan notes that for purposes of Aboriginal title, only a legal definition will suffice and suggests that the only available one is in *The Metis*

Betterment Act, which refers to Metis as someone of not less than one-quarter Indian blood who is not a status Indian.[xliii] Douglas Sanders agrees that the Metis proper are different from the wider mixed-blood population that he characterizes as non-status Indians. He too associates the term Metis with the historical Metis Nation of early Manitoba and finds the only available legal definition of Metis in the "half-breed" grants under the *Manitoba Act* and the *Dominion Lands Act* whereby promises were made in statutory form to them.[xliv] William Pentney generally agrees, but would include in that legal definition those who were entitled to receive scrip but who did not and their present-day descendants.[xlv] It is important to realize, however, that the approach of both Sanders and Pentney implies greater certainty than it delivers, since the legislation in question provides little direction as to who was eligible to obtain the land grants or scrip.

In a more recent article, Catherine Bell reviews the issue in terms of the requirements of section 35(2) of the *Constitution Act, 1982*. She notes that a number of terms have been used throughout Canadian history to designate the Aboriginal inhabitants and that the fragmentation of terminology in this regard "is partially due to the introduction of legal and administrative definitions for various native groups through federal Indian legislation and assistance programs" and that "[f]urther divisions have been created by the denial of federal responsibility for metis and non-status Indians...".[xlvi] Given the fragmentary and political nature of the terminology now being used, she assembles five broad categories of persons that could be defined as Metis:

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

Her own resolution of the debate is for purposes of her reading of the requirements of section 35 and focuses on those falling within the second and third categories: descendants of the historical Metis Nation, and persons associated in some way with current Metis collectivities.[xlviii]

Lussier cautions, however, against imposing on nineteenth-century mixed-blood people modern definitions and notions of their essential homogeneity in terms of the primacy of their historical sense of political collectivity. Lussier's review of the writings of certain nineteenth-century commentators indicates that the historical Metis and half-breeds of western Canada were

not necessarily a homogeneous group possessed of a shared group identity, despite the two conflicts with Canada led by Louis Riel.

> It is important, therefore, to realize that there were many mixed-blood groups at Red River during the nineteenth century and that each was distinct religiously, linguistically and even geographically. To write now as if they were a homogeneous group is to distort history and, more important, attribute characteristics and historical drama to groups that did not see themselves as such.[xlix]

Likewise, there are many people today who are eligible to be regarded as Metis under whichever definition is being used who do not choose to identify themselves in this way, while there also distinctly different approaches between those who see the only Metis within the context of the Metis Nation of the West connected to the Red River era and those who favour a pan-Canadian view.

The Fluid Frontier Between Indian and Metis

The various versions of the *Indian Act* since 1876 have not clarified matters, primarily because of the failure to settle on a consistent basis for defining `Indian' even for the limited administrative purposes of the Act. The definition over the years has allowed the inclusion of persons with no Indian blood whatsoever through marriage or adoption, has resulted in the absolute exclusion of others of `pure' Indian blood and, by including some and excluding others of mixed blood (largely on a patrilineal basis) has left the overall question of the status of mixed-blood persons in doubt. Douglas Sanders notes that "mixed blood peoples were not excluded from Indian status when membership lists were first prepared and could not now be excluded from Indian status without purging the Indian-reserve communities of at least half their population."[l] A number of largely lower court decisions concerning the hunting and fishing rights of `Indians' under treaty and statute have wrestled inconclusively with the issue, sometimes finding that the relatively narrow *Indian Act* definition was controlling,[li] sometimes finding the opposite.[lii] Rather than reducing the level of uncertainty regarding who the Metis are, the amendments to the *Indian Act* in Bill C-31 in 1985‑which attempted in an incomplete way to eliminate discrimination so that the Act would not conflict with section 15 of the *Canadian Charter of Rights and Freedoms*‑have only added to the confusion.

Many individuals who had lived their entire lives as Metis suddenly found themselves eligible under Bill C-31 to be registered as status Indians, in part due to the repeal of the disentitlement of recipients of scrip and their descendants in the former sections 12(1)(a)(ii) and

(iii). Even some Metis political leaders have now been registered under the *Indian Act*, as have residents of the Metis settlements in Alberta. In the latter case this has led to a conflict with the definition of Metis in the *Metis Betterment Act*[liii] and could have required their ouster from the settlements. This problem has been overcome on the surface in the *Metis Settlements Act* of 1990,[liv] as the definition of Metis now means "a person of aboriginal ancestry who identifies with Metis history and culture",[lv] coupled with control over membership residing in each settlement council. On the other hand, subsection 75(1) of the *Metis Settlements Act* excludes from membership anyone who is registered under the *Indian Act* or registered as an Inuk under a land claims settlement (subject to a very limited exception in subsection (2)).[lvi]

As a result of Bill C-31 it is possible, therefore, for some people who define themselves as Metis to register under the *Indian Act* and to be legally labelled as status Indians. At the same time, other Metis people who are eligible for registration under the *Indian Act*, and are therefore legally Indians for some purposes (because of the definition of Indian in subsection 2(1), which includes people who are "entitled to be registered"), may choose not to seek registration for personal reasons or to avoid losing benefits and rights flowing from the Alberta Metis settlements.

Methods of Defining Aboriginal Group Membership

Historically a number of approaches have been used in Canada and elsewhere to designate certain persons as entitled to unique legal status by virtue of Aboriginal heritage. Little attention has been paid to this question in the academic literature.[lvii] Most of these approaches involve objective tests that have been applied by the dominant society to Aboriginal groups, usually without a high degree of consent by those affected or even consultation with them.

1. Blood quantum: One could simply require a set minimum percentage of Aboriginal blood. In the United States, for example, the Bureau of Indian Affairs offers a certain number of services and programs to `Indians' only if they are members of federally recognized tribes living on or near federal reservations *and* if they possess a minimum of one-quarter Indian blood.[lviii] A one-quarter blood requirement for participation in Indian monies was imposed in Canada in 1869 in *An Act For the Gradual Enfranchisement of Indians*.[lix] This requirement was not maintained when the various post-Confederation statutes were consolidated in the 1876 *Indian Act*.[lx]

2. Kinship: This is a related standard that focuses upon the family connection to members of the group already recognized or accepted as collectively Aboriginal. It is less blood quantum (although by definition kin must normally have some blood relationship unless the kinship is a construct to accommodate outsiders being absorbed) than descent from either or both of the father's or the mother's line that counts. An example is the former *Indian Act*[lxi] mixed marriage provision for conferring status on the children of Indian fathers and non-Indian mothers, but not on those of non-Indian fathers and Indian mothers. While children of the latter pairing would have the same Indian blood quantum as those of the former, they would not be recognized in law as `Indian' since the Act used a patrilineal system regardless of the tradition of the Indian nation concerned.

3. Culture, lifestyle or belief: This approach focuses on whether a people sharing certain characteristics is sociologically a distinct `group' or `community'. Blood quantum and kinship are less important than the subjective sense of belonging marked by certain objective behavioural characteristics that group life entails. One such objective characteristic might be the maintenance of cultural characteristics or institutions different from those of the dominant society.

The Red River Metis offer one example. Although they obviously had a significant degree of Indian ancestry and had kinship links to each other and to the Indian nations around them, it was their buffalo hunting lifestyle, their singular culture derived from many sources, and their sense of themselves as constituting a community or nation apart that marked them as a separate group. It is from this heritage that they trace their descent as a group. But it is precisely this mixed cultural heritage and the fact that it contains European elements that makes it difficult for some people to classify the Metis as `Indians' in a constitutional sense.

4. Acceptance by an Aboriginal group: This approach also focuses on sociological criteria, namely, whether the group itself recognizes someone as a member of the community. As mentioned previously, in the United States the federal government will accept someone as Indian (for purposes of their participation in the separate sovereign political entity represented by the tribe under American law) if that person is accepted by the tribe in question as one of its members. Formal enrolment on tribal membership rolls is not a necessary condition. Depending on the tribal membership code in question, this

approach may often allow inclusion of those with a relatively small degree of Indian ancestry. This approach of emphasizing community acceptance is an essential element of the systems in place in New Zealand and Australia, both of which also require self-identification and some undefined level of indigenous ancestry.

As already noted,[lxii] during the negotiation of the Robinson-Superior and Robinson-Huron treaties in Canada, the chiefs urged the inclusion of the "half-breeds" living among them in treaty benefits; the colonial negotiators left it to the chiefs to decide how and to what extent to allow these people to participate. In other words, if the band accepted them as members, the government would not object and would treat them the same as all other members.

5. Acknowledgement as Aboriginal by the dominant society: This is really the reciprocal of the preceding approach, as it concentrates upon whether the dominant society recognizes someone as belonging to a different group or community. It is the acknowledgement of difference: the recognition and acceptance that the `others' collectively form a distinctive group. This approach often lies at the base of racism and some forms of nationalism generally.

The fact that this approach often but not always leads to invidious consequences must not be allowed to diminish its possible validity. It is to this sense of difference on the part of the dominant society that the national Aboriginal organizations have been appealing in their recent efforts to obtain constitutional recognition of Aboriginal peoples as societies apart under a separate legal regime that will enable them to protect that difference.

6. Charter designation: Recognition of special status by some criterion as of a certain date, with ineligibility to obtain such status after that date except perhaps through direct descent. The most familiar example would be the *Indian Act* registration system introduced by the 1951 amendments: existing band lists or the general list at the time the Act came into force became the register (subject to verification, correction and protest) of the charter members of the group that the federal government was prepared to recognize as status Indians.[lxiii]

7. Self-identification: Unlike the other approaches, this is a subjective test that relies on the individual concerned to know whether he or she is part of a group or community set apart from others in a given society. Shared group consciousness is the essential factor in

> this approach. The federal government has relied on self-definition in the past through its encouragement to `half-breed' members, and sometimes as well to `full-blood' members, of Indian bands in some of the numbered treaties to renounce their treaty rights as Indians so as to self-identify as Metis and thereby to take scrip.[lxiv]

Today, entitlement to Aboriginal-specific federal programs‑ranging from those offered by the Central Mortgage and Housing Corporation to Aboriginal-operated housing authorities, to services offered by friendship centres funded by the Secretary of State, to benefits such as entry into the Legal Studies for Aboriginal Persons Program through the Department of Justice, or to opportunities for employment within the federal public service through the Public Service Commission‑is based on self-identification as an Aboriginal person. This likewise applies in reference to many programs operated or authorized by provincial governments.

In Canada colonial and later federal governments have used most of the approaches listed above at one time or another since 1850 in attempts to designate those for whom they were willing to take responsibility.

The use of one or the other criterion, or several in combination, has not been consistent, however, and has rarely enjoyed a wide degree of support from the Aboriginal peoples to whom such criteria were applied. The federal government recently attempted in the 1985 amendments in Bill C-31 to alleviate some of the problems it had previously created through the *Indian Act*. It has not clarified the inconsistent approaches, unfortunately, and in fact may have engendered new problems.[lxv]

The Australian Model: A Possible Resolution of the Debate

So, where does this leave the debate? It is beyond the scope of this inquiry to resolve the issue once and for all. It is clear that the term `Metis' now encompasses far more people in a much larger geographic area than the original French-speaking and Roman Catholic Metis inhabitants of the Red River area of Manitoba. It also covers the other mixed-blood persons in that region originally referred to as `half-breeds' or `country-born'. It further includes those who took, or were eligible to take, scrip under the *Manitoba Act, 1870* and the *Dominion Lands Acts*. It must also cover the descendants of all these people. It should logically also cover those persons living within the Alberta Metis settlements as Metis whether or not they are descendants of scrip

recipients. And, at the risk of criticism from purists as well as from many western Metis, and because the term's origin essentially means mixed blood, the presumption here will be that the term Metis, as opposed to members of the Metis Nation, can potentially refer to all persons of mixed Aboriginal and non-Aboriginal ancestry across Canada regardless of historical origin. This is the only way, for example, in which some of the Metis in the Northwest Territories, who are widely recognized as Metis and accepted as such in land claims negotiations or agreements recently reached with the government of Canada and the territorial government, can come within the term Metis. In one recent lower court decision that considered the issue, the judge concluded simply that "[i]t appears that today's Metis could be someone of some North American Aboriginal blood who holds himself out as such."[lxvi]

Catherine Bell makes a strong point in emphasizing the importance of collective Metis life, self-identification and acceptance as belonging to that collective life. Perhaps the Australian experience offers a useful point of reference in the definition debate. Although the law and policy respecting Aboriginal rights are less developed in Australia than in Canada and the United States, the need for a definition of `Aboriginal' has long since arisen. Aboriginal people themselves have devised a three-part definition that has gained rapid acceptance among the governments in Australia. To be considered in law an Aboriginal person, an individual must (1) be of Aboriginal ancestry; (2) self-identify as Aboriginal; and (3) be accepted by the Aboriginal community as being Aboriginal.[lxvii] This description has also been used to include the distinct indigenous peoples of the Torres Strait Islands. The Maori of New Zealand have developed a similar approach to describing themselves, which is recognized by the government in all its laws, policies and programs. In neither case does this deny the important role that regional tribes or groups play regarding land and resource rights or culture and language.

It is suggested that a similar test should be employed in Canada regarding which individuals ought to be considered Metis for constitutional purposes. Such a person must be of mixed Indian and non-Indian blood (or Inuit and non-Inuit in the case of southern Labrador), regardless of the historical or geographic origins of that mixing. Such a person must, in addition, self-identify as Metis. Most important, such a person must be accepted by, and must accept to be a member of, a self-identifying Metis community.[lxviii] That community could be urban or rural and anywhere in Canada such that it need not be a part of the modern Metis Nation. It must, however, be the current vehicle of Metis collective identity in Canada in a way that enables it

and its members to call themselves Metis in 1993. It should also be noted that a pan-Canadian approach to the definition of Metis does not mean that all Metis communities would possess the same legal rights or status, any more than the use of the term Indian across the country means that all Indian people have the same Aboriginal, treaty or other rights. Furthermore, this approach would likely result in a distinction between those who affiliate with the Metis Nation born in the prairies and those who have both a different history and a different approach toward the future. In both cases, however, it is ultimately up to the Metis themselves to define who they are and what their aspirations will be.

THE PRE-1982 CONSTITUTIONAL STATUS OF THE METIS

Reducing Constitutional Obligations Toward Indians

In 1867 the federal Parliament was assigned what was widely assumed in Euro-Canadian circles as constituting exclusive legislative authority regarding "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. That assignment of legislative authority is still the subject of considerable uncertainty,[lxix] largely because the precise parameters or scope of this grant of power have never been addressed thoroughly by the courts. The traditional legal view has been to consider section 91(24) as just another head of power similar to the rest of sections 91 and 92 in the sense of extending to Parliament an exclusive sphere of jurisdiction. An alternative approach has been developing in recent years, vigorously advocated by Aboriginal leaders, namely, that the role of section 91(24) is to identify the Crown in right of Canada as the proper party able to negotiate treaties with Aboriginal nations and the primary holder of the fiduciary obligation owed to Aboriginal peoples. Under this approach, the authority to legislate evident in section 91(24) is restrained by factors outside the wording of the *Constitution Act, 1867* so as to be neither exclusive nor fully discretionary. This distinction between responsibility and jurisdiction, as well as the important aspect of fiduciary obligation similar to the duties of a trustee, are examined in greater detail later in this paper.

Parliament has never legislated to the full extent of its apparent authority concerning what territory is encompassed within the "Lands reserved for the Indians" in the broad sense of the *Royal Proclamation of 1763* (as opposed to reserves under the *Indian Act*) or over all those people who potentially fall within the constitutional category of "Indians". It has instead viewed "Lands" narrowly and created two separate groups of "Indians" for administrative purposes:

those recognized as Indians and registered as such under the *Indian Act*, and those not so recognized. Only the former have generally been viewed by the federal government as falling within Parliament's exclusive legislative jurisdiction over "Indians" under section 91(24), even though Parliament has regularly shifted the boundaries between the two groups by altering the definition of Indian under the *Indian Act*.

Parliament's power to differentiate between categories of Indians was addressed in a cursory way in 1974 in *A.G. Canada* v. *Lavell*[lxx] by Ritchie J. and expanded upon by Beetz J. two years later in *A.G. Canada* v. *Canard*,[lxxi] a case concerned with whether the special laws on Indian estates in the *Indian Act* violated the *Canadian Bill Of Rights* as discrimination on the base of race. Beetz J. declared that the classification was essentially racial:[lxxii]

> The *British North America Act*...by using the word `Indians' in s. 91(24) creates a racial classification and refers to a special group for whom it contemplates the possibility of special treatment. It does not define the expression "Indian". This parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values...or of legislative history.

Thus, he noted that jurisdiction over "Indians" under section 91(24) "could not be effectively exercised without the necessarily implied power to define who is and who is not an Indian and how Indian status is acquired or lost." Parliament may, therefore, make use of "such distinctions as could reasonably be regarded to be inspired by a legitimate legislative purpose" so long as the relevant criteria are "within constitutional limits."[lxxiii] He did not elaborate either the legislative purpose or the constitutional limits to which he referred.

Two things should be noted regarding these statements. First, the emphasis on race must mean by blood descent. That is how Mr. Justice Beetz regarded Parliament as gaining jurisdiction under section 91(24) in the first place. The distinctions subsequently adopted on the basis of "marriage and filiation" are considered by Beetz J. as being only for purposes of the effective administration of that original grant of legislative power. Such distinctions, however, cannot control whether original jurisdiction exists, for that is a matter within the exclusive authority of the courts. Beetz J. suggests that this exercise should be based on race, but without considering the alternative view that "Indians" refers to political groupings of separate peoples who are self-determining. In other words, Parliament through the legislative exercise of its constitutional jurisdiction cannot narrow or otherwise detract from its original jurisdiction. It can only decide not to exercise it as fully as it might otherwise do.

The anomaly of two populations of ethnological Indians, one under federal jurisdiction and the other presumably not, was never successfully challenged because of the prevailing view of the nature of parliamentary legislative authority. Parliament is supreme under this view and is therefore under no moral, legal or political obligation to legislate to the full extent of its constitutional authority or jurisdiction in any field. In matters having to do with Indians, it is well known that Parliament has had to be prodded by the courts before it would respond positively even to the clearest demonstrations of the need for remedial legislation or other action under its constitutional authority. Bryan Schwartz notes in this regard that "a head of legislative authority under the *Constitution Act, 1867* is, generally speaking, legal authorization to exercise power; it allows legislatures to do things *to* people, but, does not require them to do things *for* people."[lxxiv]

In *Re Eskimos*,[lxxv] for example, despite the opinion of the lawyers for the federal Crown that Inuit (then referred to as Eskimos) were indeed "Indians" for the purposes of section 91(24), the federal government persisted in opposing Québec's argument to this effect until it was confirmed by the Supreme Court of Canada following several years of preparation.[lxxvi] In the more recent example of *Calder* v. *A.G.B.C.*,[lxxvii] the federal government re-instituted the modern treatymaking process (under the policy to settle comprehensive claims announced in August of 1973) under its exclusive constitutional authority only when reminded by the Supreme Court that Indians did indeed have something over which to treat.[lxxviii] The examples could be multiplied; the point is that the federal government has rarely asserted its jurisdiction over constitutional "Indians" unless pressed to do so by events, court decisions, or a sense of self-interest.

The overall trend over time confirms this, showing a pattern of attempts to restrict the scope of federal obligations respecting Indians. This pattern has shown itself in several ways.[lxxix] The first has been simply to refuse to accept legislative authority over certain groups of Aboriginal persons. As mentioned, Inuit were not accepted as falling within federal jurisdiction until 1939. Even with the decision of the Supreme Court, Parliament has chosen not to enact legislation to advance or protect the rights and interests of the Inuit, although certain special programs and statutory acknowledgements have been extended to them.

The second way has been to reduce the population of section 91(24) "Indians" for whom it would exercise legislative authority. Failing properly to enumerate all the Indians to be registered in all parts of the country (e.g., omitting Indians in Newfoundland and remote parts of several provinces), promoting voluntary and involuntary enfranchisement, precluding Metis who

took scrip under the *Manitoba Act, 1870* and *Dominion Lands Acts*, and defining Indian under the *Indian Act* ever more narrowly have been the major devices employed to effect this reduction in numbers.[lxxx] Not only has this restrained financial expenditures, but it has also served to reduce the pressures for additional land that it might have been necessary to make available to support a growing population on limited reserve land.

Another method has been to ignore or delay the obligation to provide land to those Indians who did have status under federal rules. As mentioned, the legal obligation to settle land claims based on Aboriginal title was ignored for decades until the courts forced action beginning in 1973. The failure to allocate the amount of land agreed upon where land cession treaties were made (to the point where there may now be insufficient unoccupied Crown land fully to satisfy treaty land entitlement claims in southern regions of the prairie provinces) is another example. The refusal to negotiate or otherwise settle specific claims to land until forced by the political pressure exerted in the aftermath of the 1969 white paper is yet another, with the limited success in resolving such claims over the past 24 years simply compounding the problem. Even where treaties or their modern variant, the comprehensive claim, have been negotiated, considerable delay has ensued, in part as a result of the federal insistence that the provinces be involved at all stages.[lxxxi]

The federal government has attempted in addition to shift the burden for the delivery of services from itself to the provinces even with respect to status Indians. For example, when residential schools began to close in the 1960s, there was no initial move by the federal government to reimburse the provinces for the influx of large numbers of status Indian children into the provincial school system. Nor were the provinces reimbursed initially for the additional burden on their child welfare systems. Only when forcibly pressured by the provinces was the federal government willing to enter into cost-sharing agreements for these and other related services. Establishing First Nation-controlled alternatives to both the former federal and the provincial systems were not even considered. The present federal stance is that it has no obligations and that the responsibilities, which it asserts have been assumed by and large voluntarily, end for the most part at the edge of the reserve. As a result, status Indians living off-reserve, as well as non-status Indians, are considered to be primarily a provincial responsibility.

The major attempt of the federal government to reduce its mandate under section 91(24) has been by vacating the field entirely. This would have been the effect of the 1969 white paper

had it been implemented. In effect, status Indians would have joined non-status Indians and Metis as provincial residents for nearly all purposes, with federal responsibility restricted to measures to assist the transition from federal jurisdiction. There would then have been no "Indians" of any kind left over whom to exercise legislative authority under section 91(24). That constitutional power would thereby have become `spent', such that all arguments regarding whether certain categories of persons did or did not fall within federal constitutional jurisdiction would have been merely of academic interest, except of course for the people directly affected.

In short, the actual post-Confederation practice of the federal government has been in the direction of narrowing or avoiding its responsibilities, even where the obligation to meet those responsibilities has been clear. This has not changed following the advent of the *Constitution Act, 1982*. If anything, the desire to restrict transfer payments to the provinces has increased with the growing federal budget deficit. Nor has section 35 of the *Constitution Act, 1982* improved matters. The federal government argues that section 35 has actually restricted its power under section 91(24) of the *Constitution Act, 1867* because it can no longer pass legislation that conflicts in any way with the rights protected in section 35.[lxxxii] Moreover, the emphasis on the necessity of provincial involvement in matters involving Indians has spread to areas other than treaties and land claims. Community-based self-government negotiations within the reserve context, as well as local police and criminal justice initiatives with *Indian Act* First Nations, are generally conducted on a tripartite basis now, at least to some degree. This can effectively provide the provinces with inroads into areas of federal jurisdiction by virtue of the provincial government becoming a formal party to any agreement reached, particularly if the agreement envisages or is followed by provincial legislation.[lxxxiii] This approach reduces federal obligations, at the very least financially, correspondingly to the degree to which the province is acknowledged as having authority or undertakes obligations in its own right (e.g., the 1991 social services agreement in Alberta affecting all status Indians in the province regardless of residence). Interpretations of section 91(24) by the courts have aided in this effective transfer of authority along with the recognition by provincial politicians of the extent of the socio-economic crises that exist on far too many reserves.

In many ways, the post-Confederation federal practice regarding its responsibilities toward Indians is merely a continuation of the policy adopted by colonial authorities in the Province of Canada only a few years before Confederation. At that time, official policy turned

toward limiting obligations to Indians by reducing the number and remaining territory of Indians, thereby freeing Indian land for white settlement. Prior to that, of course, official British policy since the *Royal Proclamation of 1763* had been to view Indian bands essentially as self-governing units that formed part of sovereign "Indian Nations or tribes", allied to the Crown and to be protected in their land base from white squatters and land speculators. The result of this fundamental change in policy was the creation of the reserve system and the various pieces of early colonial legislation intended to protect Indian lands from trespass and seizure for debts while sustaining the Aboriginal title doctrine requirement that land could be sold or given away only to the Crown.[lxxxiv]

In the early 1800s-and with the generally willing assistance of most Indian communities in the southern portion of Upper Canada, who saw their capacity to maintain their traditional economy disappear with the dramatic influx of United Empire Loyalists and new colonists from Europe-the original goal changed somewhat to include the notion of preparing Indians for participation in the western economic system that was emerging as their subsistence base, other than fishing, was being destroyed by settlement. This was the goal of `civilization', of teaching Indians how to cope with Europeans on European terms. Somewhat later, however, this goal was overtaken by other forces that wished to see Indians completely absorbed and assimilated into the larger surrounding non-Indian society. These forces were motivated in part by the pressure for land in those parts of Upper and Lower Canada that were now filled with white settlers and where relatively large tracts were still reserved for exclusive Indian use and occupation under the reserve system.[lxxxv] The primary methods chosen to accomplish assimilation were enfranchisement and individual land allotment.

The enfranchisement provisions in the various acts, beginning in 1857, represent a total change in policy by colonial and later federal authorities regarding the continued existence of self-governing Indian communities possessing their land collectively. Enfranchisement and the parcelling out of individual allotments from the communally held reserve land for enfranchised Indians were deliberate attempts to undermine the values holding Indian bands and communities together as such in order to hasten assimilation. This policy may well have been inspired by similar efforts in the United States, where allotments were used as a method of terminating tribal existence.[lxxxvi]

This new strategy began with the first of the enfranchisement acts in 1857: *An Act for the*

Gradual Civilization of the Indian Tribes of the Canadas.[lxxxvii] The provisions in this Act for voluntary enfranchisement remained virtually unchanged through successive acts and amendments until recently.[lxxxviii] The subsequent version[lxxxix] provided that the land allotted to an enfranchised Indian from within the reserve came with rights of inheritance. Compulsory enfranchisement for any Indian who became a doctor, lawyer, teacher or clergyman was introduced in the *Indian Act* in 1876.[xc] Four years later an amendment removed the involuntary element. In 1884 another amendment removed the right of the band to refuse to consent to enfranchisement or to refuse to allot the required land. Further amendments in 1918 made it possible for Indians living off-reserve to be enfranchised. The most drastic change occurred in 1920, however, when the Act was amended to allow once again compulsory enfranchisement of Indians. This provision was repealed two years later but reintroduced in modified form in 1933 and retained until the major revision of the Act in 1951. Compulsory enfranchisement of Indian women who married non-Indian, Metis or unregistered Indian men was introduced in 1869 and retained consistently until repealed in 1985 by Bill C-31.[xci]

Not even the treaty-making process was free from the emphasis on limiting obligations to Indians. Despite the official view that through the treaty-making process, particularly in the prairies, the Canadian government was honourably continuing the historical British policy of acquiring land held under Indian title in a constitutionally sound manner through treaty land cessions, the actual history of settlement demonstrates that "pressure and fear of resulting violence is what motivated the government to begin the treaty-making process."[xcii] This was to some extent the motivation for the Robinson-Huron and Robinson-Superior treaties[xciii] and more evidently so for the subsequent numbered treaties. The National Policy of Sir John A. Macdonald required making land available in the West for settlement by Europeans and construction of a transcontinental railway. The Indians of the northwest were relatively numerous and militarily significant and had been influenced both by the treaty-making process engaged in by the United States with tribes living south of the 49th parallel and by the Metis experience in Manitoba. They were determined not to part with their land except in exchange for firm guarantees from the new federal authorities, and they forced the federal government to negotiate with them for it.[xciv]

In summary, if actual colonial and later federal policy and practice indicate anything, they demonstrate from the beginning an extreme reluctance on the part of the appropriate level of non-Aboriginal government properly to fulfil its constitutional obligations toward Indians. This

is especially the case with regard to the federal government under section 91(24). This is an important point to make because of the argument put forth that the relative lack of federal legislative and other initiatives with respect to Metis or `half-breeds' as such, the limited nature of those few that were undertaken, and the disclaimers by historical political figures of federal obligations to Indians and mixed-blood persons attest to an absence of federal jurisdiction over Metis as "Indians" under the Constitution.

Legal History: References to Metis and Half-Breeds

Given the historical reluctance of the federal government even to acknowledge, let alone carry out, its obligations toward all of the section 91(24) "Indians" generally, such a shortage of federal legislation and other initiatives should not be surprising. It cannot be forgotten that there were none at all of substance with respect to the Inuit, who were always under federal constitutional jurisdiction, even though the federal government began to resist this view in the twentieth century until the Supreme Court of Canada decision in *Re Eskimos* conclusively settled the matter.[xcv] Likewise, the federal government has continually resisted exercising any authority regarding the Aboriginal peoples residing in Newfoundland and Labrador since that colony entered Confederation in 1949.[xcvi] In fact, in light of overall federal policy at that time in favour of enfranchisement and individual land allotment, it is both legally and historically significant that any references to rights accruing to the Metis or `half-breeds' as such occur at all. Thus, it would seem that the opposite conclusion should be drawn: any federal legislative or other initiative referring to `half-breeds', `mixed-bloods' or `Metis' should be given added weight. Had the Inuit been similarly referred to in any federal legislation or initiative prior to 1939, for instance, surely that would have been a matter to which the Supreme Court in *Re Eskimos* would have attached great significance.

Nor should the weight to be given to such references be diminished by arguments based on the record of political debates, official correspondence or the diary entries of participants in discussions surrounding Metis or half-breed rights at the time of the entry of Manitoba into Confederation. Both Thomas Flanagan[xcvii] and Bryan Schwartz[xcviii] make extensive reference to such sources in attempting to cast doubt on the legal accuracy of terms like "Indian Title" that appear in legislation and orders in council regarding "half-breeds". This approach seeks a level of clarity and precision of purpose that was rarely articulated at that time, as is evident by the

complete lack of record in the debates of the Fathers of Confederation when they drafted section 91(24) of the *British North America Act* of 1867.

It also fails to acknowledge the political, economic and military forces that drove government policy. Since the Inuit, for example, were neither a military threat nor of significant economic import, and since they occupied territory that was neither desired for settlement nor believed to be rich in resources, such that they were not seen to be an obstacle to be overcome in smoothing the way for white Canadians in the nineteenth and early twentieth centuries, there was virtually no attention paid to them by Parliament or by federal officials. The absence of legislation or other initiatives made it more difficult for the Supreme Court to reach a decision in *Re Eskimos*, but this was obviously not determinative.

Arguments of this nature, however, are better seen as illustrations of the differences in methodology between history and law than as indications of the legislative intent behind such provisions. The purpose of legislation and orders in council simply cannot be construed by relying on the statements that Sir John A. Macdonald may have made, for example, in the heat of debate over politically contentious issues in the House of Commons. The intention of the enacting legislature is a question of law that cannot be reduced to the intention of politicians or officials whose reasons for saying and doing what they did under the pressure of events long past may not have been influenced by legal considerations at all.[xcix] The Supreme Court of Canada has noted that there is a distinction to be drawn between the intended meaning of words in the minds of persons who may even have been directly involved in drafting a particular text, and the meaning in law that will be found by reference to broader values and a wider context.[c]

Arguments based on purely historical references have been advanced on both sides of the debate around whether Metis fall within federal constitutional jurisdiction under section 91(24). Clem Chartier[ci] and Bryan Schwartz[cii] have adopted a form of analysis of historical materials referred to in *Re Eskimos* that focuses on extracting from the recorded oral testimony of Hudson's Bay Company officials references to Indians and Metis favourable to the side of the debate each one supports.

In our view, however, it is neither necessary nor fruitful to enter this debate for three reasons. In the first place, the evidence is intrinsically ambiguous and the possible interpretations mutually contradictory, as shown by the opposite conclusions drawn by Chartier and Schwartz and by two judges who have entered the fray.[ciii] As a result, the historical record that was before

the Court at that time is simply not helpful in assisting in reaching a proper legal interpretation as to whether the Metis are constitutionally "Indians" within the meaning of section 91(24).

In the second place, the decision that legitimizes the use of these sources, *Re Eskimos*, "was concerned with analyzing historical references to Eskimos, not Metis, and references to the latter are incidental."[civ] There are other sources of information not referred to in that case regarding the treatment afforded to persons of mixed blood, such as the report of Alexander Morris[cv] on treaty negotiations, and pre-Confederation legislation, among other sources, that cast things in a different light. The Hudson's Bay Company testimony and materials cited are in reference mainly to the Red River Metis and half-breeds in any event and do not cover mixed-blood persons living in areas then under direct British or colonial rule.

Third, and more important, this debate carries the historical approach in *Re Eskimos* too far. *Re Eskimos* concerned the question whether Inuit were "Indians" within the meaning of section 91(24). In the absence of any instances of official federal government interest in or exercise of jurisdiction over Inuit, the Supreme Court adopted an historical approach concentrated upon whether "Eskimos" were considered to be "Indians" at the time of drafting the *Constitution Act, 1867* at Confederation. The Court was forced by the absence of federal initiatives to focus extensively on extra-legal and extra-constitutional materials, and the judges came to rely heavily on materials prepared by the Hudson's Bay Company. In particular, the Court relied on a census of Hudson's Bay Company possessions, for purposes of an inquiry by a parliamentary committee in 1856-57. Much was made by the Court of the listing of the "Esquimaux" among the Indian tribes.

That same census is referred to by both Schwartz and Chartier because it lists "half-breeds" with "whites" for purposes of total population figures. Chartier adduces evidence to show that this listing was not definitive, while Schwartz interprets similar evidence to come to the opposite conclusion. But the situation faced by the Supreme Court in 1939 with regard to the Inuit is different from the situation it would face respecting the Metis in 1993. In the case of the Metis, unlike that of the Inuit, there is a relative wealth of pre-Confederation British and post-Confederation federal practice and legislation to refer to, right up until recent times.

Historical practice regarding mixed-blood treaty benefits and residence rights on reserve land is provided by a number of sources already mentioned[cvi] and indicates that mixed-blood persons were viewed by Indian nations or bands and colonial legislators alike as forming part of

the Aboriginal group entitled to continue under Crown protection apart from non-Aboriginal society. Much early colonial legislation is designed specifically to protect the residence rights of mixed-blood persons to reserve land that was otherwise subject to serious encroachment by non-Indian trespassers and settlers.

The most frequently cited example is the 1850 colonial statute, *An Act for the better protection of the lands and property of Indians of Lower Canada*,[cvii] that defined "Indian" for these purposes as follows:

> First-All persons of Indian blood reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants;
>
> Secondly-All persons intermarried with such Indians and residing amongst them, and the descendants of all such persons;
>
> Thirdly-All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such;
>
> Fourthly-All persons adopted in infancy by such Indians, and residing upon the land of such Tribe or Body of Indians, and their descendants;

Although this legislation obviously protects mixed-blood residency rights as equal to those of full-blooded persons, it unfortunately "established the precedent that non-Indians determined who was an Indian and that Indians would have no say in the matter."[cviii] This is important to note, because there was no question at the time that Indians in fact knew who was also an Indian, and they were under no doubt that `mixed-blood' members of their communities were just as much Indian as `full-bloods'.

The 1850 definition was narrowed considerably in 1851, presumably as a response to the evolving policy, already described, of encouraging assimilation. Another and related explanation focuses on the need simply to reduce the number of people who might be entitled to land under the reserve system so as to reduce this land base, thereby enlarging the quantity of land available for use by non-Indians.[cix] Thus, the definition was amended so that non-Indian men who married Indian women would no longer acquire Indian status, no matter where they resided with their spouses or how the Indian community viewed them. The effect of this change was also to impose the European concept of male domination through patrilineality and patrilocality to Indian nations. Subsequent versions of this legislation went back and forth on the question of whether non-Indian men could acquire Indian status through marriage, until 1860, when *An Act Respecting Indians and Indian Lands*[cx] was adopted, defining Indian so as to exclude non-Indian

men and their descendants (if the descendants were not residing in Indian communities under the second part of the definition) from Indian status:

> Firstly. All persons of Indian blood, reputed to belong to the particular tribe or body of Indians interested in such lands or immoveable property, and their descendants;
>
> Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular tribe or body of Indians interested in such lands or immoveable property, and the descendants of all such persons; And
>
> Thirdly. All women lawfully married to any of the persons included in the several classes hereinbefore designated; the children or issue of such marriages, and their descendants.

At approximately the same time, enfranchisement legislation, referred to earlier, was passed encompassing the province of Canada. The 1857 Act[cxi] simply repeated the definition of Indian from the 1850 Lower Canada lands and property act quoted above. The definition was altered in the 1859 version, *An Act Respecting Civilization and Enfranchisement of Certain Indians*,[cxii] although it still included persons of mixed Indian and non-Indian blood:

> 1. In the following enactments, the term "Indian" means only Indians or persons of Indian blood or intermarried with Indians, acknowledged as members of Indian Tribes or Bands residing upon lands which have never been surrendered to the Crown...

Much of the pre-Confederation legislation concerning Indians and how to define an Indian was simply carried forward under the new Dominion after 1867. For example, in the 1868 *Act providing for the organization of the Department of the Secretary of State*[cxiii] the definition from the 1860 Lower Canada Indian lands statute was adopted without alteration. In 1869, *An Act for the gradual enfranchisement of Indians*[cxiv] was passed providing for a minimum Indian blood quantum:

> 4. In the division among the members of the tribe, band or body of Indians, of any annuity money, interest money or rents, no person of less than one-fourth Indian blood, born after the passing of this Act, shall be deemed entitled to share in any annuity etc....

All the various laws regarding Indians were ultimately consolidated in the 1876 *Indian Act*[cxv] which defined Indian as follows:

> First. Any male person of Indian blood reputed to belong to a particular band;
>
> Second. Any child of such person;
>
> Third. Any woman who is or was lawfully married to such person.
>
> (e) Provided also that no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a

> treaty), shall, unless under very special circumstances, to be determined by the Superintendent-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty.
>
> 4. The term "non-treaty Indian" means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even though such person be only a temporary resident in Canada.

It is interesting to note the reference to "half-breeds" in Manitoba and their deliberate exclusion. This was subsequently extended to all Metis who had taken land or money scrip and their descendants. This provision also foreshadows the later exclusion in section 4 of the 1951 version of the Act[cxvi] of "the race of aborigines commonly referred to as Eskimos". The difference, of course, is that in 1951 `Eskimos' had been acknowledged through a Supreme Court decision to be within federal jurisdiction as `Indians'; hence the need to exclude them explicitly. Would the same reasoning apply to Metis? Does their deliberate exclusion in 1876 imply that otherwise they would fall within the *Indian Act*? As will be discussed below, in reference to *R.* v. *Howson*,[cxvii] there is a degree of judicial support for the proposition that they would.

Thus, the legislative record so far seems to confirm for reserve residency and related purposes the historical practice already noted whereby persons with any degree of Indian blood could be included as Indians under treaty. The issue with respect to the *Manitoba Act, 1870*,[cxviii] unlike the legislation discussed so far, is that it does not indicate directly whether the mixed-blood population referred to as "half-breeds" is to be considered "Indian". In section 31 the only connection is the explicit reference to the need to grant land to "half-breed residents" to extinguish "Indian Title":

> 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. [emphasis added]

The reference to "half-breed" land grants as a way of extinguishing Indian title was subsequently carried forward and expanded upon in 1874 in the preamble to *An Act Respecting the Appropriation of Certain Dominion Lands in Manitoba*:[cxix]

> Whereas...it was enacted as expedient towards the extinguishment of the Indian title to the lands of the Province of Manitoba to appropriate...lands for the benefit of the children of the half-breed heads of families residing in the province at the time of the transfer thereof to Canada;
>
> And whereas no provision has been made for extinguishing the Indian title to such lands as respects the said half-breed heads of families residing in the Province at the period named;

Five years later the *Dominion Lands Act*[cxx] was passed, extending these land grants to the North-West Territories, as it was then called. It repeated the language of its two predecessors:

> 125 (e) To satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories outside of the limits of Manitoba, on the fifteenth 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 deemed expedient.

Subsequently, two orders in council followed up in similar terms, referring to the "Indian blood" of the Metis. The first was with regard to Treaty 6:

> ...on the execution of the surrender by the Indians to investigate the claims any Half-breeds that may be found to be residing within the territory thereby surrendered and to be entitled to be dealt with under the...Dominion Lands Act...to issue scrip redeemable in land or receivable in payment for land to such of the above mentioned Half-breeds as may be found entitled thereto in full and final settlement of any claim they have by reason of their Indian blood.[cxxi]

The second refers to Treaty 8 and repeats the language of the first regarding "Half-breed rights" flowing from their Indian blood:

> Whatever rights they have, they have in virtue of their Indian blood; and the first interference with such rights will be when a surrender is effected of the territorial rights of the Indians. It is obvious that while differing in degree Indian and **Half-breed rights** in unceded territory must be co-existent and should properly be extinguished at the same time.[cxxii] [emphasis added]

In 1899, an amendment to the *Dominion Lands Act* removing the original cut-off date of July 15, 1870 repeated the earlier reference to "claims of half-breeds arising out of the extinguishment of the Indian title".[cxxiii]

Academic Commentary on Metis Constitutional Status

As already mentioned, both Clem Chartier (who has been a longstanding Metis leader) and Bryan Schwartz have offered differing interpretations of the documents and testimony of Hudson's Bay Company officials regarding whether Red River Metis were viewed as constitutional Indians. For the reasons already discussed, that debate does not appear to be the most pertinent way of approaching the question.

Thomas Flanagan, after reviewing the historical circumstances surrounding the passage of the *Manitoba Act, 1870* and subsequent `half-breed' scrip legislation, concludes that Metis land rights are merely derivative of Indian title.[cxxiv] He comes to this conclusion primarily, it seems, on the basis of a change in language. Up until 1888, the official reference is exclusively to the "Indian title" of the "Half-breeds",[cxxv] but beginning in 1889, the official tone changes in the two orders in council cited above to an emphasis on the claim to land that the Metis may have by virtue of their "Indian blood".[cxxvi]

As the pre- and post-Confederation legislation regarding Indian reserve land rights and status demonstrates, however, it was mainly if not exclusively by virtue of their Indian blood (in whatever measure), coupled with their collective identity as politically distinct entities or nations that derive this political status from their own pre-existing law rather than from the imported regime, that Indian nations had land rights themselves under British and Canadian law. Their Aboriginal title, in short, was based on two essential elements: their political status and their Indian blood as demonstrating that they are indigenous to this territory, predating the arrival of European colonialism. The latter is the main thing that made them `Indians', to use the erroneous label of the newcomers. The proof is that when legislative attempts were made to exclude certain persons from reserve land and residency rights, it was men who had no Indian blood whatsoever who were singled out. Their mixed-blood descendants actually resident on reserve were acknowledged as Indians (until subsequent amendments forcibly enfranchised them and their Indian mothers).[cxxvii]

Why `half-breed' rights should be distinguishable, being based only on the quantum of Indian blood, seems to be a distinction without a difference. What was different was not the origin of the right or title to land, but how it was dealt with by government. In the case of the mixed-blood descendants of white men marrying into an Indian nation, it was initially to deny them reserve land and residency rights entirely if they were not residing "among such Indians",[cxxviii] while white women who married in would be absorbed as Indians along with their

children. In the case of the Metis, it was by compensating them for their rights to land through the issuance of scrip.

In addition, it is difficult to comprehend how rights to land based on Indian title can be derivative, especially where the legislative references are to "Indian title" as such. Indian or Aboriginal title has been classified in the common law for the last century as a personal right that cannot be held by anyone other than `Indians' as a collectivity. In *St. Catherine's Milling and Lumber Company* v. *The Queen*[cxxix] the Privy Council found that Indian title was a right or an interest in land that could be surrendered only to the Crown, noting that "the tenure of the Indians was a personal and usufructuary right".[cxxx] *Black's Law Dictionary* defines "personal" as "appertaining to the person" and "usufructuary" as "one who has the usufruct or right of enjoying anything in which he has no property".[cxxxi] While recent Canadian decisions have disputed the usefulness of the classification of "personal" and "proprietary" rights in relation to Aboriginal title,[cxxxii] no one has questioned the necessity of possessing a collective identity as a pre-condition to successfully asserting Aboriginal title.

From this, it seems clear that the right of enjoyment (in this case the right to live on and use the resources of the land) can be held only by the persons to whom it appertains. As the title implies, those persons must be `Indians' in its broad sense. Ethnological Indians have Indian title.[cxxxiii] Inuit, as constitutional Indians, have Indian title.[cxxxiv] And the legislative record indicates that `half-breeds' or Metis also have Indian title. If the others who have Indian title are Indians under section 91(24), wouldn't the Metis be as well? This is the conclusion of Douglas Sanders, who notes:

> The exclusion of "Half-Breeds" or "Metis" from the constitutional category of "Indians" would seem contrary to the Manitoba Act, contrary to early practice and disruptive of well-established patterns of Indian policy.[cxxxv]

It is unnecessary in the context of this discussion to pursue the argument that the Metis existing within distinct communities or possessing a self-identity as a nation did not have true Indian title, however, for whatever may have been the views of those drafting the orders in council cited above, they were not reflected in legislation enacted at the same time. The 1899 amendment to the *Dominion Lands Act*, which dispensed with the arbitrary cut-off date of July 15, 1870–the day Manitoba entered Confederation–for purposes of Metis eligibility for scrip, refers not to a separate species of claim due only to "Indian blood", but to the "satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title."[cxxxvi] In fact, what is equally telling is

the decision taken in 1899 to dispense with the 1870 cut-off date for "half-breed" claims. This effectively put those Metis who wished to take scrip in the same position as those persons who took treaty benefits. Eligibility for both would be as of the date of the making of the treaty. Subsequently, new scrip had to be issued to Metis in the organized North-West Territories who had been ineligible for scrip under the old cut-off date. Treaty 11, signed in 1921, also made allowance for "half-breed" scrip on the basis of the treaty signing date.

Bryan Schwartz takes a different tack in his opposition to including Metis within the category of constitutional Indians. He challenges the connection between having Aboriginal title and being Indian,[cxxxvii] focusing on the purpose of section 91(24) of the *Constitution Act, 1867*, which he sees as intending continuing jurisdiction over Indians. He notes that section 31 of the *Manitoba Act, 1870*, while it may contemplate "Indian Title", also-and more importantly-contemplates its immediate extinguishment, with no further indication of federal government intentions to retain jurisdiction over the historical Manitoba Metis or their lands. He goes on to challenge the legal accuracy of the words "Indian Title" in section 31 of the Act in any event, emphasizing that Sir John A. Macdonald's statements on the subject,[cxxxviii] as well as the subsequent legislative history, support the conclusion "that the Métis are not 'Indians' for the purpose of section 91(24), but that persons of mixed or non-Indian ancestry who lived among and as Indians are."[cxxxix]

To a large extent his argument rests on the historical evidence that is also presented by Flanagan. As already mentioned, however, this approach does not necessarily yield the legislative intention. There is, in any event, evidence that Sir John A. Macdonald was not consistent in how he characterized the `half-breed' land grants when speaking in the House of Commons.[cxl] Moreover, Schwartz's reference to the purpose of section 91(24) does not appear to be supported by the reasoning of the judges of the North-West Territories Supreme Court in *R.* v. *Howson*,[cxli] who apparently conclude that the *Indian Act* would have included Metis who had participated in the Manitoba `half-breed' lands distribution but for the provision in the *Indian Act* specifically excluding them. There is no reason in principle why federal responsibility concerning persons of mixed ancestry generally as well as for the members of the Metis Nation cannot continue in any event, since section 91(24) provides legislative jurisdiction over two separate subject matters, "Indians" and "Lands reserved for the Indians", not over Indians *on* lands reserved for Indians.[cxlii] Noel Lyon points out that if Metis fall within section 91(24), this

need not imply their right to Indian status or to reserve land rights or the like, which he describes as "particular devices of Indian law."[cxliii] He suggests that to the extent they choose to follow Metis culture and not to assimilate, they might claim an entitlement to be covered by some federal laws in areas such as property, civil rights and the family, for example.[cxliv]

Schwartz's initial point, however, that the reference to "Indian Title" should be read against the grant of individual land allotments, deserves further consideration. Reading section 31 of the *Manitoba Act, 1870* in that way raises two distinct possibilities. The first is as he suggests, that the reference to "Indian Title" is legally inaccurate, and all that is accomplished is to grant individual allotments in a more dramatic way, fraught with potential for fraud, than was done for white settlers. In short, Sir John A. Macdonald was right: there is nothing to the opening words of the section. They are legally superfluous and even misleading. It is submitted that this is unlikely. Courts are bound to assume that legislative enactments neither speak in vain nor deliberately mislead. If words are used in an enactment, they are there to be given effect. One would reasonably assume this to be especially the case regarding statutory words given constitutional effect, as is the situation with the *Manitoba Act, 1870* by virtue of the *Constitution Act, 1871*.

The second possibility, therefore, is that the opening words actually mean something. Section 31 of the *Manitoba Act* and the similar references in subsequent dominion legislation to "Indian title" for the "half-breeds" would be read as recognizing the Indian title of the Metis Nation in the prairies and parts of the N.W.T. These legislative references to "Indian title" continued in force well after Sir John A. Macdonald's speech (delivered in the year of the so-called Riel Rebellion) when his assertion, if meant for more than political consumption, should presumably have led to a change in the *Dominion Lands Act* and the subsequent orders in council terminology. Logically, since Indians have Indian or Aboriginal title, section 31 by extension seems to recognize that Metis were constitutional Indians by virtue of their possession of that title. Section 31 also provides the mechanism for extinguishment of that title. In essence, this amounts to a form of involuntary enfranchisement for Metis who chose not to identify with an Indian nation but who, instead, insisted on being Metis. The price for that insistence is a form of enfranchisement with the extinguishment of their Aboriginal title, although replaced by a form of treaty right encompassed within federal legislation, in just the same way as occurred with regard to members of Indian nations under the enfranchisement legislation already described.[cxlv]

From this perspective, all persons of mixed ancestry would initially have been viewed as falling under federal legislative jurisdiction under section 91(24). Some would have taken treaty as members of Indian nations, with the Red River Metis, and others subsequently under the *Dominion Lands Act*, being offered Hobson's choice under the *Manitoba Act, 1870*‑taking the individual land grant and henceforth being considered as outside federal legislative (but not constitutional) jurisdiction. The provisions in the *Indian Act* allowing treaty "halfbreeds" to leave treaty and take scrip would have been mere extensions of the original policy and totally in keeping with the tenor of the times, which favoured restricting access to Indian status in order to minimize long-term federal financial obligations. Whether that strategy has been successful is another story, however.

The treaty-making and legislative history already referred to would support this interpretation. Persons of mixed ancestry were treaty beneficiaries under the Robinson and subsequent numbered treaties, and in at least one instance they entered an Indian treaty by way of adhesion as a separate group designated as "half-breed". Their right to reside on land reserved for Indian use and occupation in the pre-Confederation Canadas and the post-Confederation Dominion of Canada was acknowledged by legislation. The statutes and orders in council enacted to deal with the Metis in the West referred to their right as flowing from "Indian Title" or by virtue of their "Indian blood". The extinguishment of Aboriginal title was accomplished through the issuance of "half-breed" scrip at precisely the same time and place as treaty signatories were enumerated and often as part of the same process. Later, treaty beneficiaries were encouraged to leave treaty in exchange for scrip in the same way as other Indians were encouraged to become enfranchised and to leave reserves in exchange for a similar right to live on allotted land free of federal regulation and restrictions on alienability.

Moreover, and to jump ahead a number of decades, subsequent federal practice has been to recognize that persons of mixed ancestry may participate in modern land claims settlements such as the James Bay and Northern Quebec Agreement, the Gwich'in Land Claim Settlement and those currently under negotiation or awaiting legislative confirmation in the two northern territories,[cxlvi] without distinction as to benefits. In fact, many of the Metis persons covered by some of the northern comprehensive claims settlements are descendants of persons who received scrip under Treaties 8 or 11. If anything, then, it would seem as if a conclusion opposite to that of Schwartz might reasonably be drawn: federal policy, practice and legislative intent show that

mixed-blood persons generally and the Metis Nation of the West have always been dealt with in the final analysis as possessing `Indian title' on the basis that they were `Indians' in a constitutional sense and in the sense of being indigenous people rather than Europeans.

Both Flanagan and Schwartz level another argument against the view that Metis are constitutional Indians. They distinguish the Red River Metis from those Metis living as members of Indian nations. The former are viewed by them as being somehow less `Indian', because many of them lived and worked around the Hudson's Bay Company more or less as the Europeans did and because their buffalo hunting was for profit, not for subsistence. Their comments are supported by some of the historical materials to which Lussier[cxlvii] refers. Observers in the nineteenth century noted that many among the Red River Metis were extremely well educated and that their customs and manners often bore more resemblance to those of Europeans than to those of the surrounding Indian nations. By any standard, for example, Cuthbert Grant and Louis Riel were both well educated and well travelled men for those times.

This view of Indianness is what Sally Weaver refers to as "the hydraulic Indian"-the Indian as a cylinder filled with pure Indian culture but that empties over time through accommodation to non-Indian values until there is not enough left to justify being considered `Indian'.[cxlviii] Catherine Bell deals with the arguments of Flanagan and Schwartz as follows:

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

The "hydraulic Indian" view of Indianness fails to account for the phenomenon of adaptation by Indian nations to the presence of non-Indian society around them. Catherine Bell cites the example of the Cherokee Nation of Georgia (and later Oklahoma), which developed governmental and judicial institutions closely resembling those of the United States, an alphabet and an economy based on agriculture rather than their traditional hunting and gathering. The Cherokee nonetheless remained and remain to this day `Indian', despite these and subsequent

cultural accretions.[cl] In fact, both American and Canadian Aboriginal law recognize that Indian culture is not required to remain frozen in time in order to be considered legitimately `Indian'. No one can argue that Indian tribes in the United States historically had taxation statutes per se (although wealth was redistributed), for example, as many do now, or that they had corporate business entities or governing institutions based on the doctrine of the separation of powers. Yet these modern developments have not made American tribal nations less Indian‑any more than the fundamental influence of aspects of the Six Nations Confederacy governmental system upon American thinkers, including Benjamin Franklin, and the development of the United States have made the latter *more* Indian. In short, Aboriginal peoples have the right to change without giving up their identity.[cli]

This general proposition is directly applicable to the Metis of the prairies, who developed a separate and distinctive culture that was adapted in part from both Indian and European inspirations but was different from both and contained unique elements all its own. The "hydraulic Indian" concept likewise fails to address the fact that the Metis were culturally distinct, with their own perception of themselves as neither Indian nor white but Metis.

In *Sparrow* v. *The Queen* the Supreme Court of Canada gave a strong indication that Aboriginal and treaty rights under the Constitution will be free to change and evolve.[clii] Presumably, the people who exercise these unique rights will similarly be free to change and evolve.

Judicial Commentary on the Debate

There is to date no higher court decision dealing directly with whether Metis are Indians within the meaning of section 91(24). One 1981 lower court decision from Saskatchewan, *R.* v. *Genereaux*,[cliii] discussed below, touches on the issue in an unconvincing way. A number of decisions dealing with who is an Indian in the context of the *Indian Act* rather than section 91(24) are also generally relevant because of the light they shed on the overall issue, and they will be discussed first.

One line of cases is in reference to the former prohibition in various versions of the *Indian Act*, in force until repealed in 1985, against selling liquor to Indians. In *R.* v. *Howson*,[cliv] an 1894 decision of the North-West Territories Supreme Court sitting *en banc*, the only question submitted to the Court was whether a band member of mixed ancestry to whom liquor was sold

was an Indian for purposes of the liquor prohibition in the 1886 *Indian Act*.[clv] For the Court, Mr. Justice Wetmore held that such a band member was indeed an Indian. In holding that the reference in the definition section to "any person of Indian blood" must "mean any person with Indian blood in his veins, and whether that blood is obtained from the father or mother",[clvi] Wetmore J. entered into a lengthy discussion of the question whether "half-breeds" were generally included within the *Indian Act* definition. On the one hand, he viewed Parliament's intention in enacting the *Indian Act* in a manner that confirmed the interpretation that, in order to be considered to be Indian, mixed-blood persons must be members of an Indian nation or band:

> It is intended to apply to a body of men who are the descendants of the aboriginal inhabitants of the country, who are banded together in tribes or bands, some of whom live on reserves and receive monies from the Government, some of whom do not. It is notorious that there are persons in those bands who are not full blooded Indians, who are possessed of Caucasian blood, in many of whom the Caucasian blood very largely predominates, but whose associations, habits, modes of life, and surroundings generally are essentially Indian, and the intention of the Legislature is to bring such persons within the provisions and object of the Act, and the definition is given to the word "Indian" as aforesaid with that object.[clvii]

However, Wetmore J. also appears to include other mixed-blood persons as such, noting that "possibly the Act goes farther than I stated, and in some of its provisions applies to half-breeds...".[clviii] He refers to section 111 of the Act, which makes it an offence to incite "Indians, non-treaty Indians or half-breeds", concluding that the reference is necessary to capture those persons of mixed ancestry who would not be caught by the definition of Indian or non-treaty Indian but who must also be included within the ambit of the Act. These would be persons of mixed ancestry who are not "reputed to belong to a particular band" or who do not "belong to an irregular band" or who do not follow the "Indian mode of life" under the various *Indian Act* definitions.

Thus, for Parliament to enact a provision under the *Indian Act* that "applies to half-breeds", such persons must fall under the same head of authority under which the Act itself has been passed, unless the jurisdiction to do so could be grounded in some other head of power. None other than section 91(24) of the *Constitution Act, 1867* seems to be suitable.[clix] In this same vein, Wetmore J. goes on to note that the reference to half-breeds in Manitoba who have received land under the *Manitoba Act, 1870* must also fall within the *Indian Act*, for otherwise there would be no need to exclude them:

> So by section 13 of the Act, "no half-breed in Manitoba who has shared in the distribution

> of half-breed lands shall be accounted an Indian." Nor under the same section shall the half-breed head of family anywhere with certain specified exceptions under certain specified circumstances be considered an Indian. The very provisions of this section which I have mentioned show it was the intention of the Legislature that there are half-breeds who must be considered Indians within the meaning of the Act; because if the word "of Indian blood" in paragraph (h) of section 2 meant "of full Indian blood," then these provisions in section 13 were entirely unnecessary.[clx]

Howson was followed by *R.* v. *Mellon*,[clxi] where a similar issue arose regarding a man known to be a `half-breed', fluent in English, well dressed in the manner of `white men', and employed outside any Aboriginal community. He was nonetheless held to be an Indian within the meaning of the *Indian Act* on the basis that he had taken treaty some fifteen years earlier. In other words, despite not adhering to a traditional `Indian' lifestyle, a person of mixed Indian and white ancestry, having once been viewed as an Indian within the meaning of the Act, remained one. In *R.* v. *Verdi*[clxii] the same issue arose with respect to a person of mixed ancestry who, having been raised on a Micmac reserve, subsequently received no moneys from the band and had lived and worked in a non-Indian community for two years. He, too, was held to be an Indian under the Act for purposes of the liquor prohibition.

A more restrictive approach to defining the term Indian has been taken in a line of cases dealing with the treaty-guaranteed hunting rights of Indians in Alberta, Saskatchewan and Manitoba. These rights were consolidated and merged by the Natural Resources Transfer Agreement of 1930.[clxiii] The wording in the implementing federal legislation for Saskatchewan, for example, reads as follows:

> 12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided however, that the said Indians shall have the right, which the province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which said Indians may have a right of access.[clxiv]

The wording in the other implementing acts is similar and provides at least a partial exemption for Indians from restrictions under the appropriate provincial game or wildlife act.

The first case of interest is *R.* v. *Pritchard*,[clxv] a Saskatchewan Magistrate's Court decision in which a non-status Indian charged with hunting without a provincial licence sought the benefit of the exemption for Indians in the provincial *Game Act*.[clxvi] The father of the accused "gave

evidence that he was a Cree Indian, his wife was a Cree Indian, his parents were Cree Indians, his son, the accused was born on an Indian reserve and that he and his family had always been known as Indians."[clxvii] Upon reviewing *Re Eskimos*, Policha J., focusing on the issue from the perspective of who was viewed as an Indian in 1867, rejected the *Indian Act* definition and found the accused not guilty because he was an Indian within the meaning of section 91(24).

> The *Indian Act*, for administrative purposes and to exercise control over a certain group of people restricts the definition of the term "Indian" for that purpose.
>
> In my opinion this restrictive definition does not apply to all persons and their descendants of the race and class of people known as "Indians" at the time of the *British North America Act*.[clxviii]

Upon appeal, the Saskatchewan District Court indicated that the *Indian Act* definition must be controlling but affirmed the acquittal because it believed that the accused was entitled to be registered under the Act and was therefore an Indian in law.[clxix]

In *R.* v. *Laprise*[clxx] the Saskatchewan Court of Appeal was called upon to decide whether the accused, "a native of Chipewyan origin [who] lives in a predominantly Chipewyan community"[clxxi] (not a reserve) could benefit from the same exemption for Indians in the provincial game act. The accused was a non-status Indian, being neither registered nor registrable as an Indian under the *Indian Act*. For the Court, Woods J.A. stated that the intention of the drafters of the Natural Resources Transfer Agreement was that the term Indian meant the term as defined in the version of the *Indian Act*[clxxii] of the time, and that "[t]his interpretation would exclude persons not entitled to be registered as Indians."[clxxiii] This is an unusual finding, because the version of the *Indian Act* at the time of the signing of the Natural Resources Transfer Agreement contained a definition of Indian that made no reference to registration. Furthermore, this interpretation results in a definition of a constitutional term being set by Parliament, which the courts generally retain as within their own jurisdiction and beyond the authority of Parliament to do, and freezes the meaning of this constitutional language as the *Indian Act* stood in 1927, despite the prevailing jurisprudence that the Constitution is always to be given a modern interpretation. Although justifiably criticized, this decision has been followed in Saskatchewan.[clxxiv]

The same issue arose in *R.* v. *Genereaux*[clxxv] with respect to a person of mixed blood whose "family were half-breeds but had lived on the reserve and adhered to the same lifestyle as the treaty Indians resident there for three generations."[clxxvi] The accused was not entitled to be

registered under the *Indian Act* and was referred to by the judge as "Metis". The case contains an involved (and sometimes confused) discussion of the meaning of the word Indian. One defence raised appears to have been that Parliament cannot detract from its full jurisdiction under section 91(24) of the *Constitution Act, 1867* by defining Indian in the *Indian Act* in a way that narrows the scope of the term for purposes of the exemption from hunting regulations under the Saskatchewan legislation implementing the Natural Resources Transfer Agreement.

Ferris J. of the Saskatchewan Provincial Court thus addressed his mind to whether the Metis were included in 1867 within the term Indian as used in section 91(24). He refers to the Hudson's Bay materials discussed in *Re Eskimos* as well as to Chartier's article[clxxvii] and to the 1868 federal legislation described above,[clxxviii] concluding that "the word `Indian' in the *B.N.A. Act, 1867*, in all probability means pure blooded aborigines or the descendants thereof."[clxxix] (Presumably, then, all the "descendants thereof" must also be "pure-blooded aborigines" to use the phraseology of Judge Ferris.) The reasoning is somewhat difficult to follow but appears to boil down to the proposition that Parliament made a policy decision unrelated to its jurisdiction under section 91(24) to vest certain persons of mixed ancestry with special rights. The constitutional source of such authority is undescribed. The following passage gives the flavour of the reasoning:

> In any event it is clear that even as far back as 1868 the federal government in its own statutes distinguished between "Indians" and others whom it chose to vest with certain rights, in that case to land....It is clear that even in 1868 the federal government felt it necessary to spell out that certain persons, who presumably would not otherwise be seen to be "Indians" were to be treated as such. That does not make the beneficiaries of that policy "Indians" within the meaning of the *B.N.A. Act, 1867*, any more than do subsequent definitions over the years in the *Indian Act*.[clxxx]

A policy to include non-Indians within a legislative scheme available only for Indians must find its authority somewhere. If Parliament has jurisdiction only over "pure blooded aborigines" in 1867, as Ferris J. concludes, then the question naturally arises as to how it was able to bring mixed-blood persons within the *Indian Act* in the "subsequent definitions over the years" to which he refers. The better view seems to be that if Parliament has chosen to view persons of mixed blood as Indians under federal Indian legislation, it must have brought them within federal jurisdiction using its authority under section 91(24) over "Indians", for otherwise it would have no constitutional power to declare those persons to be Indians. By the same reasoning, absent a power based on blood quantum (and, by extension, affiliation to blood quantum through

adoption or marriage in the case of white women marrying Indian men), Parliament would not be able to do what it has done through the years in the various versions of the *Indian Act* unless, perhaps, through the application of the necessarily incidental doctrine. The only alternative explanation would be that Parliament acquired its jurisdiction to so legislate through another head of power, such as the royal prerogative or its authority to advance peace, order and good government. In any event, if pure blood is the criterion, then a large number of current status Indians would be outside the legislative jurisdiction of Parliament, and the amendments in Bill C-85 would probably be unconstitutional, as would much of the former regime for determining eligibility for registration.

A fishing case in the Northwest Territories addressed a similar issue. In *R.* v. *Rocher*[clxxxi] the federal *Fisheries Act*[clxxxii] Regulations providing an exemption from licensing for an "Indian, Inuk or person of mixed blood"[clxxxiii] were challenged on the basis they offended the *Canadian Bill of Rights* for discrimination on account of race. In upholding the regulation, Ayotte J. of the Territorial Court considered the basis upon which Parliament had passed the regulation, ultimately deciding that the exemption was an attempt to preserve certain special historical rights accruing to Aboriginal people. He found the basis to be the power in section 91(24) over "Indians". The facts relied upon by Chartier in his article analyzing the Hudson's Bay materials convinced Ayotte J. that "half-breeds" were indeed considered "Indians" in 1867 and were therefore susceptible to special treatment by the federal government on that basis along with ethnological Indians and Inuit.[clxxxiv]

Another recent consideration of this issue is by the Ontario District Court. In *The Queen* v. *Thomas Chevrier*[clxxxv] a non-status Indian descendant of a signatory of the Robinson-Superior Treaty sought to exempt himself from provincial hunting regulations under the treaty-protected hunting right guaranteed to his ancestors. The accused was a member of an Indian community, the unregistered Blackwater Band, and was not registered under the *Indian Act*. It is not stated whether he was registrable under the Act. He was acquitted by Wright J. on the basis that the province had no power to interfere with treaty rights originally guaranteed by the Crown to Indians. It is not entirely clear whether the judge considered Chevrier himself to be an Indian as well, although, but for the closing words of the passage below, that would certainly be the logical inference to be drawn from the decision:

This accused has inherited the right to hunt granted to his ancestors.

> Whether the accused is an "Indian" within section 91(24) of the *Constitution Act, 1867* I need not say. The accused claims a birthright granted by the Crown in exercise of its jurisdiction over Indians, and the province, having no jurisdiction over Indians as such, has no power to take away a right originally granted to Indians even though the present holder of that right may not be an Indian.[clxxxvi]

It may be that Wright J. used the term Indian the last time in the sense of not being registered or registrable under the *Indian Act*.

There is also the recent decision of the Manitoba Provincial Court in *R.* v. *McPherson*[clxxxvii] dealing with whether Metis hunters have an Aboriginal hunting right protected as such under section 35 of the *Constitution Act, 1982*:

> Both of the accused have Aboriginal blood coursing through their veins but are not and nor are they eligible for treaty Indian status. They call themselves Metis and allege that because of that ancestry they have a common law Aboriginal right to hunt. They further allege that the provisions of the *Wildlife Act*, R.S.M. 1987, c. W130 in question are not applicable to them.[clxxxviii]

The evidence showed the two accused to be in a similar situation to that of status Indians living under treaty in the same part of Manitoba. Gregoire J. characterized them as "fringe Metis, i.e., people of mixed blood who live in areas adjacent to remote Indian reserves and who in large measure have retained a traditional lifestyle close to the land...".[clxxxix] They both spoke Cree as their first language and had been raised around treaty Indians, and one had received what formal education he had in school with treaty Indian children. They were shown to be reliant "to a significant extent upon their hunting, fishing and gathering skills or those of their extended family for their survival."[cxc]

After reviewing evidence about the origins of the Metis, the judge concluded that "today's Metis could be someone with some North American Aboriginal blood who holds himself out as such".[cxci] He noted the discretionary practice of conservation officers to treat Metis hunting rights in fact similarly to those of treaty Indians. Although the Metis could not fully satisfy the criteria for establishing Aboriginal rights to which the court referred[cxcii] in Judge Gregoire's view, he was nonetheless prepared to find the existence of Metis Aboriginal rights largely, it seems, because of the Indian lifestyle and Indian ancestors of today's Metis. Throughout his analysis he refers to a "lifestyle very similar to that of the treaty Indian next door",[cxciii] to the "conventions adopted whereby clearly certain Metis people hunted in certain areas to the exclusion of the treaty Indian population,"[cxciv] to their "joint possession of the land with other Aboriginal groups,"[cxcv] and to the fact "that some of their antecedents, that being the Indian ancestors, in fact, had occupied some

of the territories in question from time immemorial."[cxcvi] Thus, Gregoire J. concluded as follows:

> I am prepared to hold that the accused persons in fact did have an Aboriginal right not withstanding the deficiencies which appear apparent in the classical analysis of their Aboriginal rights. I arrive at this conclusion on the basis that there was at least a minimal degree of compliance with the old criteria, and that the rights claimed in this case are the minimal usufructuary rights. I find that in such circumstances, if the Metis defendants can establish an unbroken chain of such use of the land by their ancestors for a reasonable period of time then that is sufficient for the right to exist.[cxcvii]

Finally, there are the recent decisions of the Alberta Provincial Court in *Ferguson*[cxcviii] and the New Brunswick Provincial Court in *Fowler*.[cxcix] The former involved a charge against a Metis for hunting for food without a licence and unlawful possession of wildlife (moose) contrary to the *Wildlife Act*,[cc] while Mr. Fowler was a non-status Indian charged with possession of a firearm in a wildlife area without a provincial hunting licence. Interestingly, the latter was accompanied by two status Indians who were partaking in the same activity but who were not charged, even though the province had previously been resisting the general assertion of Aboriginal and treaty rights by Maliseet Indians.

Judge Goodson in *Ferguson* concluded that the primary issue before the Court was whether the accused was entitled to the defence available to "Indians" under section 12 of the Natural Resources Transfer Agreement (NRTA). Although Mr. Ferguson spoke only Cree until attending school, lived in a Cree-speaking community in northern Alberta, and regarded himself as a "Cree Indian",[cci] he was not eligible for registration under the current *Indian Act* or the 1951 version, as his paternal great-grandparents were Metis who had accepted scrip while his maternal grandparents were treaty Indians who later took scrip. The question became, then, whether the NRTA confirmed harvesting rights solely for registered Indians, or whether the term used therein should be given a more expansive interpretation so as to include Metis and "non-treaty Indians", by which the Court meant both non-registered Indians today and the term that existed in the *Indian Act* at the time the NRTA came into force until the Act was revised in 1951. Judge Goodson expressly rejected the conclusions of the Saskatchewan courts on this matter reached in the 1970s as being wrongly decided.[ccii] Instead, he determined that the NRTA must have meant to use the term Indians as including both treaty and non-treaty Indians who are harvesting for food within the boundaries of the province. After quoting from *Sparrow* at some length, Judge Goodson emphasized the Supreme Court's view that section 35(1) holds "the Crown to a substantive promise".[cciii] He then concluded by asking what this "substantive promise" might

mean in the case of the Metis and stating that

> It is difficult to imagine a more basic Aboriginal right than the right to avoid starvation by feeding oneself by the traditional methods of the community.[cciv]

Although decided one month earlier and reported later, Judge Clendening in *R.* v. *Fowler* faced a somewhat similar set of circumstances but without the application of the NRTA. The judge also had to determine whether a person who was not eligible for registration as an Indian but who self-defined and was recognized by others as such was entitled to exercise harvesting rights on the same terms as registered Indians. Judge Clendening examined *Re Eskimos* and determined that the courts should be fair and liberal in interpreting treaty rights and not impose an impossible burden upon an Aboriginal person to prove his or her aboriginality. The Court was satisfied from the extensive documentary and oral evidence that the defendant was a descendant of and had a substantial connection to the Maliseet Nation, who were beneficiaries of pre-Confederation treaties containing the right to hunt. Clendening J. concluded that subsection 35(1) of the *Constitution Act, 1982* affords constitutional protection against the restrictive exercise of legislative powers to all Aboriginal peoples and not merely status Indians. The issue of floodgates was addressed, but the Court concluded in light of *Chevrier*[ccv] that this would not be a problem, as any person who can "prove a substantial connection to a signatory of the treaty in question"[ccvi] is entitled to the benefit of the rights contained in that treaty.

From the foregoing cases it can easily be seen that the courts have themselves had no small amount of difficulty grappling with the question of when and under what circumstances Metis Nation members and other mixed-blood persons are to be considered `Indians' within the narrow meaning of the *Indian Act* or for constitutional purposes. It should be noted in this regard that the courts have primarily been attempting to fit people of mixed ancestry into the category of Indians so as to apply the existing body of law that has been settled concerning registered Indians.

If there is one common element in the judicial consideration of these issues, it is the ambiguity apparent in the analyses. Sometimes and for some purposes Metis persons will be considered Indians if there is some actual connection with an Indian nation, band or treaty signatory. For other purposes no amount of connection, apart from falling within the strict legal definition, will do. One thing, however, does seem clear: wherever mixed Indian and non-Indian blood is present, the courts have doubted neither the validity of beginning their analysis on that

basis nor the constitutional competence of Parliament to assert jurisdiction in relation to such persons. The argument, if it arises at all, which it does not in some cases, has instead usually been about the extent to which that jurisdiction has been reflected in particular pieces of legislation, such as the *Indian Act*.

It must also be said that the Canadian courts have yet to confront directly the issues of Aboriginal and treaty rights, including rights to land, natural resources and self-determination, that arise within the context of Metis people and their unique legal rights.

THE CONSTITUTION ACT, 1982 AND BEYOND

Federal Policy: Metis Come To The Table

With the distribution of Metis land under the *Manitoba Act* and the *Dominion Lands Act*, and with the ever more restrictive definition of `Indian' that appeared in successive versions of the *Indian Act*, the position of the federal government over time became that both non-status Indians and Metis were a provincial and not a federal responsibility. The erosion of that position began in the 1970s in the aftermath of the disastrous 1969 white paper[ccvii] when the federal government undertook to provide core funding for the main national status Indian organization, the National Indian Brotherhood (NIB). Soon that funding was extended to the organization representing non-status Indians and Metis, the Native Council of Canada (NCC). Additional federal funding was subsequently provided to the NCC for housing and land claims research, and from 1978 to 1980 the NCC was part of a joint NCC/federal cabinet committee structure modeled to some extent on the joint NIB/federal cabinet committee that was operative between 1974 and 1978. As mentioned, non-status Indians and Metis persons participated as beneficiaries in the land claims settlement in the James Bay and Northern Quebec Agreement in 1975 and have more recently been distinct participants in the negotiation of land claims settlements in the Yukon and in the Mackenzie Valley region of the Northwest Territories in conjunction with First Nations.

The view that the Metis were entitled to some kind of equivalency with those clearly included as section 91(24) `Indians' who were represented by ethnological Indians and Inuit was reflected in the 1979 report of the Pepin-Robarts Task Force on Canadian Unity, *A Future Together*. It called for the involvement of Aboriginal people in the process of constitutional renewal: "provincial and federal authorities should pursue direct discussions with representatives of Canada's Indians, Inuit and Metis with a view to arriving at mutually acceptable constitutional

provisions that would secure the rightful place of native people in Canadian society."[ccviii]

The three national Aboriginal political organizations of the day (NIB for status Indians, NCC for non-status Indians and Metis, and the Inuit Committee on National Issues (ICNI) representing the Inuit) were invited by the federal government to attend two first ministers' meetings as observers in October 1978 and February 1979. They pressed for more direct involvement with some success, as in 1979 and again in 1980 the NIB was promised a full and equal role in the process of constitutional reform on issues affecting their constituency of status Indians. All three national political parties endorsed these promises, and the federal government subsequently extended it to include the Inuit, non-status Indians and the Metis. The three organizations were then at the table in four first ministers' conferences in 1983, 1984, 1985 and 1987, as well as literally dozens of meetings at the ministerial and senior officials level to deal with the many outstanding Aboriginal issues that had arisen during the protracted constitutional renewal process.

Prior to the 1983 conference, the Metis National Council was formed as a result of the withdrawal of the three prairie province affiliates from the NCC (new groups were later formed in western Ontario and British Columbia) to form a separate vehicle that drew its inspiration from the Red River Metis to represent prairie Metis interests.[ccix] At the first ministers' meetings, Metis were therefore represented by two organizations, the NCC and the MNC, divided along geographical lines. There was, however, a fundamental difference in the philosophy of the MNC and the NCC that went beyond geography. The MNC asserted that the Metis in the Red River were not merely people of mixed ancestry who had developed a separate identity but that they had become a distinct people who formed the Metis Nation, with their own independent entitlement to land and self-determination unconnected to their Indian ancestry.

Following this first meeting, the major unresolved issue was self-government. The subsequent first ministers' conferences in 1984, 1985 and 1987 failed to produce agreement on this issue, and it remains unresolved in both a political and constitutional context.

The Meech Lake Accord did not directly refer to Aboriginal issues except through a notwithstanding clause (despite Aboriginal demands over three years for substantive constitutional amendments). Its failure in 1990 has been attributed at least in part to the belief of Aboriginal people that their expectations with respect to participation in constitutional conferences had not been met.[ccx] The 1990 joint proposal from three of the four major national

Aboriginal political organizations (AFN, NCC and Inuit Tapirisat of Canada (ITC)) to the Special Committee of the House of Commons on the Proposed Companion Resolution to the 1987 Constitutional Accord (the Charest Committee) clearly demanded a full, ongoing role in future constitutional discussions as of right and on the same footing as the provinces. This submission also made it clear that these national Aboriginal organizations viewed all constitutional amendments as important to Aboriginal people, not solely amendments that specifically mention Aboriginal people, as any amendment could affect their economic interests, legal rights or political influence. The MNC did not participate in this submission as it chose to endorse the Meech Lake Accord on the basis of a commitment from Prime Minister Mulroney that he would address Aboriginal constitutional reform as soon as this Accord was proclaimed and would also respond seriously to the Metis Nation demand for land and self-government. The MNC was, of course, supportive of the general thrust of the position taken by the other organizations in the sense of also wanting full participation in all future constitutional negotiations along with seeking significant changes to the Constitution of Canada.

As is now well known, following intense lobbying by AFN, ITC, MNC and NCC, these four organizations were ultimately invited to participate on an equal basis with the federal and provincial governments during the Charlottetown Accord process as of March 12, 1992. The Native Women's Association of Canada sought similar involvement, but this was denied by the federal government, resulting in several court cases in which they obtained a declaration that they had been discriminated against by their exclusion,[ccxi] although this judicial victory was achieved after the negotiation process had been concluded.

The draft Political Accord accompanying the legal text of the official Charlottetown Accord provided for the continuation of the section 37.1 requirement that Aboriginal peoples participate in constitutional discussions on items affecting them (Part 5, 5.1); the establishment of a Ministers/Leaders Forum involving the leadership of the four Aboriginal organizations to work over the subsequent months to develop a negotiating framework (Part 9, 9.1-9.4); and a system for dispute resolution as an alternative to the courts.

The `best efforts' legal draft of the actual Accord would have created a Canada clause that recognized the Metis as one of the first peoples: "the Aboriginal peoples of Canada, being the first peoples to govern this land..." (cl. 1). In addition, subsection 35(2) would have been

repealed and re-enacted (with `Aboriginal' capitalized), thereby reconfirming the separate listing of the "Indian, Inuit and Métis peoples" (cl. 28(2)). In addition, the Accord would have recognized the inherent right of self-government of the Metis along with the Indian and Inuit peoples (cl. 29). Most important for this paper, the Accord would have added an amendment (as *Constitution Act, 1867*, s. 91A) for greater certainty regarding section 91(24) to confirm that it applies to "all the Aboriginal peoples of Canada" (cl. 8).

In addition, the Metis National Council negotiated a further document as part of this process called the Metis Nation Accord. This latter Accord was proposed as a formal agreement between the Metis Nation of Canada, as represented by the MNC and its affiliates, and the Queen in right of Canada as well as in right of the five western-most provinces along with the government of the Northwest Territories. The purpose of the Accord was to supplement the provisions agreed to by all first ministers and Aboriginal leaders in the package of constitutional amendments and political commitments reached with a focus directly upon the wishes of the Metis Nation. The Accord contained commitments of resources to permit the enumeration of the Metis Nation and to develop a registry under its control. It also required the parties to negotiate tripartite self-government agreements that would include issues regarding "jurisdiction" and "economic and fiscal arrangements" (cl. 3(a)). The government parties also agreed, "where appropriate, to provide access to land and resources" (cl. 4(a)) as well as transfer payments to Metis self-governing institutions (cl. 9).

The Accord was intended to be a legally binding agreement among its parties and to be ratified through enabling legislation to be passed by Parliament and the respective legislatures once the Constitution had been amended in accordance with the agreements contained in the Charlottetown Accord. Although the latter was rejected in a referendum, the MNC has continued to request that the governments involved in the negotiation of the Metis Nation Accord formally sign it and take action to implement all those of its provisions that were not dependent upon the proposed constitutional reform package being accepted. At the time of writing this paper, it appears that the government parties are continuing to refuse to accede to this request; however, Premier John Savage of Nova Scotia, in his capacity as chair of the annual premiers' conference, promised the MNC on August 26, 1993 that he would write to the governments concerned urging them to respond to the MNC on this matter.

The inherent right of self-government of the Aboriginal peoples has been discussed both

within and outside the Charlottetown process. While a constitutional amendment was sought by the four national Aboriginal political organizations in order to remove any uncertainty that may exist as to the inclusion of the inherent right within the phrase "existing aboriginal and treaty rights" within section 35(1), they have consistently argued since 1982 that the right is nevertheless "recognized and affirmed" by this constitutional provision. This position has been accepted by a number of provincial governments and endorsed by the Royal Commission on Aboriginal Peoples,[ccxii] although the British Columbia Court of Appeal has reached a different conclusion in the *Delgamuukw* case.[ccxiii]

It is important to realize that the assertion of an **inherent** right of self-government‑as opposed to a mere right of self-government‑means that the right exists "as a permanent attribute or quality" that is "an essential element" or "intrinsic".[ccxiv] In other words, the right has been inherited from previous generations who also possessed this right. It "inheres" as a result of the extra-constitutional status of a people whose self-governing powers derive from their existence as a social organization structured as a distinct sovereign polity. In this case, the right is pre-constitutional in the sense that it is derived from a source that arose before Confederation in 1867 rather than being created by the Canadian Constitution. The concept of the inherent right of self-government, therefore, speaks to a particular category of self-government in that its ultimate origin is described as being separate and apart from positive law. In this regard, the Aboriginal position can be contrasted with the position of `peoples' generally who, in international law, have a right of self-determination,[ccxv] which is not articulated as dependent upon the presence of inherency.

If the inherent right is recognized in the Metis, it could only be because they too were organized outside of and prior to the Canadian Constitution. The preamble of the Metis Nation Accord implies this position, stating that "in the Northwest of Canada the Metis Nation emerged as a unique Nation with its own language, culture and forms of self-government". More generally, the emphasis by the MNC on the Metis Nation as being born in the Red River Valley prior to 1867 demonstrates a distinct social and political existence that pre-dates the Canadian Constitution. Metis in eastern and central Canada have tended instead to underline their Indian ancestry and their subsequent existence as distinct communities, since ethnological Indian and Inuit political entities clearly share the characteristic of possessing an inherent right.

All Metis are, of course, constitutional Indians under section 91(24). Logically, it

becomes difficult to argue that the recognition of Metis inherent rights is different than the recognition of the same right in the other two groups, when the only difference is a federal policy, developed at some point after Confederation and prior to 1982, of refusing to accord them the same constitutional status. Perhaps that is why the federal government was prepared finally in 1992 to accede to this logic and to amend section 91(24) to include all the Aboriginal peoples. The federal government has apparently redefined its position after the public's rejection of the Charlottetown Accord, as it has on the Metis Nation Accord, by indicating that its willingness to move on these matters was integrally tied to action on the constitutional reform package, such that the defeat of this package means it has returned to its prior position of denying recognition to the Metis as coming within s. 91(24) and the inherent right as already being protected by s. 35(1).

The particular issue concerning the constitutional status of the Metis did not disappear with the rejection of the Charlottetown Accord on October 26, 1992. The MNC has continued to seek adoption of its Metis Nation Accord while also pursuing the alternative strategy of a constitutional reference on their inclusion in section 91(24). The MNC has in addition drafted its own Constitution for the Government and People of the Metis Nation, which is currently under internal consideration.

So what can be made of the political developments and agreements reached in 1992? Do they represent a mere policy decision by the federal government to treat Metis as equivalent to constitutional Indians because of a non-binding and non-legally induced desire to appear to be fair? Was this simply part of the price that Prime Minister Mulroney and his cabinet colleagues were prepared to pay in order to obtain Aboriginal support for constitutional reform that included other issues of importance to the federal government? Or can they be taken to show that there is at least a vestigial recognition by the federal government that, for constitutional purposes, there is really no difference between Metis and the two groups representing the already formally recognized constitutional Indians? That debate cannot be resolved here. It can only be observed that it would be quite strange after all this if the federal government were to declare that Metis are constitutionally unlike ethnological Indians and Inuit concerning section 91(24) when for the vitally important constitutional purpose of establishing a third order of Aboriginal government within the Canadian federation it has treated all three Aboriginal peoples on an equal footing.

Subsection 35(2): The Indian, Inuit and Métis Peoples

On April 17, 1982 section 35 was enacted, reading as follows:

> RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA
> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

This section was amended in 1984 as a result of the agreement reached at the 1983 first ministers' conference to add subsections (3) regarding land claims agreements and (4) concerning equality between the sexes with respect to subsection (1) aboriginal and treaty rights. As mentioned above, the federal government was prepared to repeal and then immediately to re-enact section 35 (capitalizing the A in aboriginal). Significantly, the inclusion of the Métis as such in subsection (2) remains the first national legal usage of this term.[ccxvi]

The *Constitution Act, 1982* does not exist in a political and social vacuum. It is isolated neither from the events that brought it into being nor from the other constitutional instruments with which it makes up the Constitution of Canada. One such instrument is evidently the *Constitution Act, 1867*. Although neither the political nor constitutional antecedents can be determinative of the interpretation to be placed on particular provisions, neither can they be ignored.

Thus, it seems as if logically there are three possible approaches to the interpretation of subsection 35(2) and its reference to the "Indian, Inuit and Métis peoples of Canada":

1. It has no necessary connection with its constitutional predecessors and should be understood only in respect of the political forces that led to its adoption;
2. While connected to its constitutional predecessors, it refers to different categories of people entirely from those referred to in section 91(24) as "Indians"; or
3. It simply elaborates the categories of people contained in the section 91(24) reference to "Indians" using more modern, precise and respectful language.

Given our closeness in time to the events that led to the advent of the *Constitution Act, 1982* and the continuing political fall-out from those events, it is somewhat appealing to read section 35 entirely separately from the other instruments making up the Constitution. There is no shortage of books and articles by journalists, historians and political scientists explaining the trading of "fish for rights", to use former prime minister Pierre Trudeau's famous expression, and

why the trading is still going on. Given the disappointment at the failure of the Charlottetown Accord among the 17 parties involved in the negotiations and by those who supported the amendments, many might find this approach all the more appealing. In our submission, however, this is a cynical view of constitutional law and would serve only to erode further the confidence of Canadians in the integrity and independence of the law from political influence.

Moreover, such an approach would also serve to blur the distinction between legal and socio-historical methods. The Canadian Constitution, although made up of separate documents drafted at different times, is nonetheless a single legal framework against which the national life is measured. It is a fabric and not a tangle of separate threads. Section 52, after all, refers to the "Constitution of Canada" in the singular. To go outside the corners of the Constitution to place great weight on evidence in the debates, meetings and public consultations of legislative intent is to reduce constitutional law to social science. This is particularly inappropriate when a constitution is drafted intentionally to be a durable and living document capable of speaking to a changing present. The socio-historical approach would require judges to concentrate on the political events reflected in such a body of material at the point in time at which these events occurred. This would freeze a certain view of things. Just as there are no frozen rights, there can be no frozen interpretations of constitutional provisions. This approach might also require judges to respond in the way that a legislature would-to second-guess the legislature in effect-by asking what the politically correct or expedient interpretation ought to be in the political and historical circumstances in which the events occurred.

A political approach leads logically to reading the categories of "Indian, Inuit and Métis peoples" purely in terms of the national Aboriginal political organizations that forced the entrenchment of these categories. `Indian', for example, could be seen as merely responding to the NIB, such that the term could refer only to the NIB constituency of status Indians. Thus the category `Métis' would be seen as merely responding to the NCC constituency. That constituency also included non-status Indians. Does `Métis' thus mean what we knew as two separate categories-non-status Indians and Metis-prior to 1982? In other words, are non-status Indians now Metis for purposes of Aboriginal and treaty rights? If, on the other hand, `Métis' means only persons of mixed ancestry formerly known as `half-breeds', then what happens to non-status Indians? Since they were not represented politically by the NIB, does this mean that they do not fall within any category? Are they dependent, then, on amendments such as those in Bill C-31 of

1985 in order to avail themselves of constitutionally protected rights? If so, then the purely political approach leads to the alteration (and amendment, in effect) of constitutional categories by mere legislative amendments. For this and the other reasons mentioned, it is submitted that the political approach is legally inappropriate and unacceptable.

Assuming then that subsection 35(2) is part of the broader constitutional fabric that includes section 91(24), does it introduce a new legal category unrelated to the category of Indians in section 91(24)? This view finds some support in the different purposes of the two enactments. The latter deals with the division of legislative powers between the two branches of the Crown, centralizing power concerning the pursuit of relations with a racial[ccxvii] and political group in one branch. The former deals with constitutionally protected unique rights. Rights under the Constitution can be held by a broad range of categories of people. It could be argued that those of Aboriginal descent represent merely a sub-group of rights holders, albeit one with a long history and a different constitutional status because of that history.

This argument, however, raises more questions than it answers. In the first place, the distinction between the different purposes of the enactments does not necessarily hold up. Section 91(24) gives power regarding a distinct group of people on what are both racial and political grounds. That group is and was largely defined through having Indian blood in some measure. In other words, Indians were Indians only because of their blood descent from persons whose political and economic organization predated the advent of the political and economic organization represented by the British Crown. At least one of the primary reasons for conferring power upon the federal rather than the provincial level of government regarding this racial group was for the purposes of protection and control, as their original political and economic forms of organization were consciously being displaced or destroyed by the emerging new forms under the aegis of the British Crown. The pre-Confederation legislation of the colonial governments clearly reflected the desire to protect Indian reserve lands from the ravages of white trespassers while at the same time encouraging the development of small Indian farming communities so as to maximize the land available for non-Aboriginal settlement. In the same way, the purpose of section 35 is more or less permanently to protect (through constitutional means) from further erosion the remaining vestiges of political and economic organization still qualifying as "existing aboriginal and treaty rights" by those mentioned in subsection 35(2). These persons are described as "aboriginal peoples" whose political and economic forms of organization not only existed

prior to the arrival of the British Crown but in many cases developed thousands of years before the Crown was established. The only category of persons fitting that description are referred to as "Indians" constitutionally when it comes to section 91(24).

Another argument in favour of the proposition that sections 35(2) and 91(24) should be read separately focuses on the use of the term Métis. As mentioned previously, the 1982 amendments reflect the first use of `Métis' in a part of the Constitution. From this perspective, the argument follows that the historically familiar and legislatively recognized term `half-breed', which was used in a constitutional context in the *Manitoba Act, 1870*, should have been used if it was intended to read 35(2) with 91(24). In other words, if the intention were simply to break out the categories of peoples subsumed within the category `Indians' in section 91(24) and separate them from the other Aboriginal peoples not in section 91(24), the well known terminology would have been employed in the interests of clarity-even though this label had acquired unacceptably racist overtones, was not the description of choice of the people concerned (any more than the Inuit in Canada had selected `Eskimo' to describe themselves), and had largely disappeared from public and governmental language. The problem with this argument is that subsection 35(2) also breaks out Inuit, who are already constitutional Indians under section 91(24). They are not a new category, nor is their historically familiar and legislatively recognized appellation of `Eskimos' used. If that is the case, would it not also be the case that `Métis' was substituted for `half-breed' in the interests of modern usage? It is worthy of note that Parliament amended subsection 4(1) of the *Indian Act* to change the exclusion from "Eskimos" to "Inuit" in order to be more culturally and politically sensitive.

It is suggested that it makes more sense to read subsection 35(2) as referring to the same categories of people formerly subsumed within the term "Indians" in section 91(24). The language used-"Indian, Inuit and Métis peoples"-is simply a more respectful way of referring to Aboriginal peoples using the language they employ to describe themselves rather than the sometimes derogatory terms used by others to identify them. Moreover, the listing of the "aboriginal peoples of Canada" is for the purpose of the Aboriginal and treaty rights referred to in subsection 35(1). Historically, only constitutional Indians possessed land on which to exercise the activities now referred to as Aboriginal rights. And only section 91(24) Indians could presumably enter into treaties with the Crown. If Metis are not Indians in this sense, then how would they have acquired the Aboriginal or treaty rights that their listing in subsection 35(2) was

supposed to guarantee to them? The reference to these rights in section 35 cannot be empty, because "the courts...are bound to assume that enactments, especially constitutional enactments, do not speak in vain."[ccxviii] The alternative explanation would have to become that section 91(24) is unconnected to federal treaty-making authority and its obligations in relation to Aboriginal title, such that the Metis and the Crown in right of Canada can enter into treaties and land claims settlements, as they have done from time to time since Confederation, even though the Metis are not within the scope of federal jurisdiction concerning constitutional Indians. This is a far less likely or logical interpretation for any Canadian court to make.

IF THE METIS ARE "INDIANS" WHAT ARE THE RAMIFICATIONS?

Are the Metis "Indians" Within Section 91(24)?

Even more than 125 years after Confederation, the answer to the question as to whether Metis come within the sphere of jurisdiction allocated expressly to the federal government under section 91(24) rather than to the provinces remains unanswered. There is no shortage of indications, however, that the Metis are clearly included within the category of constitutional Indians in this subsection. In the first place, there is the evidence of the inclusion of the Metis in the treaty-making process throughout Canadian history. The approach of including Aboriginal people who are neither Inuit or registered Indians in treaties and recognizing that they do have land rights continues up to modern times in the form of comprehensive land claims agreements in northern Quebec and the two territories (which may be followed in the relatively near future in British Columbia and Labrador, where Metis organizations are insisting upon recognition of their distinct rights to territory). The Metis are also expressly included as Metis in the two recent settlements in the Mackenzie Valley.

Some would argue, however, that this is not in itself proof that mixed ancestry was the determining criterion for Indian status under the treaty-making process; rather, it was adherence to an `Indian' tribe or band as such and following the `Indian' lifestyle. The response to this is to point to the adhesion to Treaty 3 by "half-breeds", the promise of treaty rights to the Moose Factory Metis in Ontario and the issue of "half-breed" scrip under the *Manitoba Act, 1870* and later under several of the *Dominion Lands Acts*. Scrip was clearly issued by the Crown "towards the extinguishment of the Indian Title",[ccxix] the scrip commissioners in the North-West Territories travelled with the treaty commissioners, and the date of scrip eligibility was the same as for

treaty benefits. The difference, of course, was that scrip was a method of individual allotment of lands in fee simple as opposed to the communal reservation of lands under the treaties. Even communal and treaty-protected land, however, could be allotted in fee simple under the enfranchisement provisions applying to Indian tribes and bands as such. In addition, Treaty 8 also contained an option for individual allotments for Indian beneficiaries as opposed to the pooling of entitlements to form reserves.

Another argument in favour of federal jurisdiction concentrates its attention upon the legislative history beginning in 1850 and continuing through until fairly recent times under the various versions of the *Indian Act* whereby persons of "Indian blood" associated with Indian tribes or bands have been included on membership lists as Indians. Only some of those persons‑ those born of a non-Indian father and an Indian mother after 1868 and even then only if the parents were married under provincial law‑were automatically excluded from Indian status and reserve benefits. Even this rule has been amended under Bill C-31, and tens of thousands of formerly excluded persons of mixed Indian and non-Indian ancestry have now been restored to Indian status, although not necessarily to band membership. Thus, the legislative practice would seem to indicate that the presence of Indian or Inuit ancestry is the determining criterion for the assertion of federal jurisdiction under section 91(24). Some will argue, and with a fair degree of justification, that this merely shows once again that people of mixed ancestry must be associated with a nation or band of `Indians' in order to benefit from federal jurisdiction. The answer, of course, is that federal jurisdiction must be based primarily on ancestry, for otherwise Bill C-31 would be unconstitutional. Many of those restored to status under the *Indian Act*, including some who have rights to band membership, have never been associated with an Indian nation or band during their lives, nor do they intend to be so associated in the future. The scope of the *Indian Act* has not, thus, been limited solely to collectivities with whom the federal government has had a political relationship.

The wording of the *Manitoba Act*, the *Dominion Lands Act*, and the other legislation and orders in council implementing the land grant scheme provides a third argument in favour of federal jurisdiction in relation to the Metis. For the most part, these instruments refer to the extinguishment of Indian title. Two of them, however, do not, as they refer instead to "Indian blood". Since Indian title is held by "Indians", and since "Indians" are persons of "Indian blood", this seems to be less a diminution of the argument than a strengthening of it.

There are those, however, who oppose the notion that Indian title equates with being an Indian and find some degree of support in the historical record of political debates and meetings from the relevant period in Canadian history. The response to this is that if the attitudes of politicians and officials to constitutional responsibilities were determinative, there would be no numbered treaties in the western portion of Canada, no recognition of Aboriginal title or the modern land claims agreements, and, if one group of politicians had been able to have their way in 1969, there would no longer be any `Indians' at all in Canadian law.

Yet another reason for inclusion of Metis as constitutional Indians under section 91(24) lies in the modern federal practice of treating the Metis as equivalent in constitutional status to the other Aboriginal peoples. Although there is nothing definitive or unambiguous in this, the recognition of that equivalency in section 35 of the *Constitution Act, 1982*‑with its reference to Metis as one of the "aboriginal peoples of Canada" whose aboriginal and treaty rights are recognized and affirmed‑reinforces the federal practice. It could be argued that the practice of three successive prime ministers in inviting Aboriginal representatives to participate formally in constitutional amendment discussions since 1982, with even earlier involvement dating back to the Clark government in 1979, has crystallized into a constitutional convention. To the rejoinder that federal practice does not make law, there is really only one response: it may not make law per se, but it provides another body of evidence that, along with the historical and legislative references, leads one closer to the conclusion that federal constitutional jurisdiction is far more likely than not to be endorsed by Canadian courts.

In 1867 the federal Parliament was given jurisdiction regarding the race of "aborigines", to use the wording of the Supreme Court of Canada in *Re Eskimos*, designated by the term `Indians'. Parliament has asserted that jurisdiction on the basis of race and pursued a political relationship with a population that possesses a unique political status in what is now called Canada, with race defined primarily by the possession of some degree of `Indian' blood through descent from the indigenous inhabitants of this land. Some persons without Indian blood have also been subject to parliamentary jurisdiction, but in their case it has been through the act of marrying into or being adopted by registered Indians into an existing Indian bloodline with a connection to an historical Indian nation. As Bill C-31 shows, federal jurisdiction continues to be grounded on the basis of some degree of Indian blood. This is so even if the persons over whom such jurisdiction is asserted call themselves Indians, Metis or use the name of their original

nation or current local community to describe themselves. Catherine Bell expresses this point well in the context of cultural adaptation by Aboriginal groups in these words:

> Given the diversity among historical aboriginal groups and the inevitability of the co-mingling of the aboriginal and colonizing cultures, it is difficult to identify a single common factor linking all the aborigines together as a group other than one: the ability to trace the descendency of the core of the group to indigenous inhabitants of Canada through maternal or paternal lines.[ccxx]

In the final analysis, the job of the courts will be to give a sensible interpretation to the tangled and sometimes unpleasant history of relations between the Crown and the Aboriginal peoples. It is submitted that in light of the facts presented here it is more logical, sensible and efficacious to consider persons of mixed ancestry of all kinds to be within section 91(24) jurisdiction. It is also more feasible for the federal Crown to exercise the treaty-making power and to discharge constitutional obligations to the Metis, as it is this level of government that has such power under current constitutional arrangements. On a balance of historical probabilities, practical convenience, and legal and constitutional logic, and in order to maintain the honour of the Crown, it is submitted that the only reasonable conclusion to draw is that in section 91(24), "Indians" refers to persons of mixed ancestry, whether defined for other purposes as `Indian', `Inuit' or `Métis'. Such a position is also in keeping with the continually stated views of the Metis, whether as represented by the MNC or by the NCC at a national level. This is not to say, however, that the Metis wish to be included within the *Indian Act* or to have the federal government regulate their lives and their rights under separate federal legislation akin to that Act. It is clear, instead, that the Metis wish to define themselves and to obtain recognition for the authority of their own governments, whether within the context of an overall Metis Nation as advanced by the MNC or through more local autonomous forms. The role of the Canadian courts in this regard is not to define the Metis as a people, but to interpret the Constitution of Canada in such a way as to confirm primary federal responsibility and authority to advance the interests of all Aboriginal peoples as reflected in subsections 35(2) and 91(24).

The Ramifications in 1993 of Section 91(24) Jurisdiction

In light of the foregoing conclusion that the Metis are included within section 91(24), it becomes necessary to examine the ramifications if such a conclusion were also to be adopted by the

Canadian courts or the federal government.

The first and obvious point is that this legal conclusion clearly affirms the constitutional jurisdiction of Parliament to enact legislation in relation to the Metis alone or in conjunction with part or all of the other two primary groupings of Aboriginal peoples. Metis-specific legislation could no more be challenged as exceeding Parliament's sovereign authority than could the *Indian Act* today. In other words, Parliament has exclusive jurisdiction, vis-à-vis provincial legislatures, to enact laws that would in effect apply to "Metis, and Lands reserved for the Metis". The constitutional amendment proposed in the Charlottetown Accord would have brought about this result in another way by confirming that section 91(24) applied to all Aboriginal peoples. Thus, section 91(24) would have been read in the comprehensive sense of stating "Aboriginal peoples, and Lands reserved for the Aboriginal peoples".

While the precise outer parameters of section 91(24) are beyond the scope of this paper and have yet to be determined definitively by the Canadian courts in any event,[ccxxi] it would mean without question that Parliament could legislate regarding the Metis. Furthermore, it would confirm the authority of the representatives of the Crown in right of Canada to treat with the Metis as collectivities and to conclude land claims settlements with them, rather than having to rely upon the uncertain jurisdiction to do so that may be contained within the peace, order and good government clause or the general federal executive authority to negotiate treaties. It would also naturally encompass the negotiation of other sectoral agreements, such as fisheries agreements within the scope of the federal *Fisheries Act*.[ccxxii]

These comments on the scope of federal authority under section 91(24) should not be misconstrued into suggestions that Parliament's authority is unlimited in this sphere, or that provincial legislatures have no jurisdiction whatsoever. Suffice it to say for current purposes that any federal legislation would still be required to conform to the balance of the "Constitution of Canada" within the meaning of section 52 of the *Constitution Act, 1982*. This includes, of course, the *Canadian Charter of Rights and Freedoms* and subsection 35(1), both of which are applicable here. Their presence serves to restrain any Diceyan notion of unadulterated parliamentary supremacy. Furthermore, Parliament can legislate under section 91(24) only when it is actually doing so; that is, it cannot merely assert this head of authority as justifying legislation that has nothing to do with the substance of this head of power.

Likewise, the provinces do possess a significant level of legislative jurisdiction

concerning the Metis (as they do at present regarding other section 91(24) Indians along with *Indian Act* Indians). Such authority, however, is not only subject to the Charter and section 35, but also to parliamentary override under the paramountcy doctrine. The extent of potential and current provincial legislation will be examined briefly in the next few pages, but first it is appropriate to consider further the federal domain.

A further impact of adopting the legal view asserted here would be felt immediately by the Department of Indian Affairs and Northern Development (DIAND). It would lose one of its primary excuses for refraining from dealing with the Metis, namely, that they are outside its constitutionally inspired mandate. This might not in and of itself mean that DIAND would suddenly engage in extensive dealings with the Metis. At present DIAND declines to deal directly with off-reserve Indians and the Inuit to any significant degree, except for those residing within the Yukon and the N.W.T. (and in these cases it is relying upon its general authority in the territories, which it extends to some degree to the Metis residing within this region in any event, rather than its mandate for Indian affairs). Nevertheless, it would naturally be harder for DIAND to resist all overtures from the Metis to initiate a relationship. This would be all the more so given that the NCC has had some minimal success over the past few years in receiving funding and embarking upon negotiations on a restricted range of matters, although DIAND has rationalized this based solely upon the presence of status Indians within NCC's constituency. Neither MNC nor NCC has been able to forge a relationship with DIAND on Metis issues, as DIAND views these matters as the responsibility of the provinces and the federal minister appointed by the prime minister as the Interlocutor for Metis and Non-Status Indians and his officials in the Privy Council Office (PCO). There also might be a suggestion from some quarters that subsection 4(1) of the *Indian Act* should be amended to add the Metis to the reference excluding Inuit from the legislative category of Indians under that Act.

Another less important note regarding the federal machinery of government concerns the federal minister assigned the added responsibility in cabinet as the Federal Interlocutor for Metis and Non-Status Indians. This position, if it can truly be designated as such, was created in 1985 by Prime Minister Mulroney in response to complaints from the MNC and the NCC that their interests were being ignored by DIAND and its minister. There simply was no member of cabinet at the time who had an express mandate in reference to them and their constituents. This was in contrast to the position of the AFN and the ITC vis-à-vis the minister of Indian affairs and despite

the existence of constitutional negotiations involving all four organizations and the 11 senior governments plus both territories. Initially, the mandate of interlocutor was assigned to John Crosbie, who was then the minister of justice and played a central role in the constitutional talks of that time. Because of perceptions that a conflict of interest existed between the role of justice minister and attorney general[ccxxiii] on the one hand and addressing the concerns of the Metis and non-status Indians on the other, the role was reassigned in May 1992 to Jake Epp, then the minister of energy, mines and resources. This move was intended to eliminate that apparent conflict of interest as well as to put the mandate into the hands of a senior cabinet member who was anxious to devote a significant degree of energy to the assignment, with continuing administrative and logistical support from the Federal-Provincial Relations Office (FPRO) before it was abolished earlier this year and the assignment given generally to the PCO. Mr. Epp was replaced upon his retirement from cabinet by Jim Edwards. Although it would be readily possible to conceive of this role remaining with a separate minister and the PCO, one can also envision efficiency imperatives favouring the collapsing of it into a renamed DIAND with a new Minister of Aboriginal Affairs.

A far more important issue, at least from a legal perspective, is the question of whether inclusion within section 91(24) means that Parliament has not only the capacity, but also an obligation to legislate so as to advance the interests of the people referred to therein. This is a question to which federal government lawyers would likely provide a clear and firm `no', relying upon traditional views of Dicey and others on the doctrine of parliamentary sovereignty and the historical reluctance of the courts to order the Crown or Parliament to do or refrain from doing anything. Since an obligation to legislate, derived from the fiduciary relationship or otherwise, is as applicable to the Inuit and off-reserve registered Indians as it is to the Metis and unrecognized Indians, this is an issue that to some degree transcends the scope of this paper. The presence of such an obligation has also been mooted by First Nations when they have encountered bureaucratic or political resistance from the federal government to their proposals to advance their interests through an act of Parliament (e.g., national legislation in relation to child welfare and education).

This issue is also a highly complex matter that warrants detailed attention in its own right.[ccxxiv] Nevertheless, it can at least be suggested that this question can no longer be discarded as easily as it once was. A reasonably strong argument can be made that the law- and along with

it our concept of the division of powers in the *Constitution Act, 1867* through sections 91 and 92 and the discretionary nature of law making by those two sovereign orders of government in Canada-has already changed fundamentally, at least in reference to the relationship between Aboriginal peoples and the Crown. This change in law and in our perception of the division of powers is derived from two basic sources.[ccxxv] The first is the effect of constitutional entrenchment of Aboriginal and treaty rights in subsection 35(1) in 1982. The second is the judicial articulation in 1984 in *Guerin* v. *The Queen*[ccxxvi] of the Crown fiduciary obligation.

This obligation has subsequently been clarified in the constitutional context and, arguably, expanded by the Supreme Court of Canada in its decision in *Sparrow* v. *The Queen*[ccxxvii] in 1990. In the unanimous judgement delivered jointly by Chief Justice Dickson and Mr. Justice La Forest, the Court made clear that not only does the fiduciary obligation exist to the benefit of "Aboriginal peoples" (as opposed solely to Indians registered under the *Indian Act*), but that this obligation forms part of the rights that have been "recognized and affirmed" within subsection 35(1). The Court set out a test for dealing with the infringement of Aboriginal and treaty rights that contains components of particular relevance to this fiduciary obligation, including the emphasis upon honourable dealings, adequate consultation, avoidance of conflicts of interest, and the giving of appropriate priority to Aboriginal interests before considering those of others. Giving a broad but not unrealistic interpretation to this judgement would lead to the view that there is a positive duty upon the Crown in its fiduciary capacity to exercise the authority it possesses to initiate legislation designed to advance the interests of the beneficiaries of this relationship. Analogies with the private law of trusts, which the Supreme Court of Canada has condoned, albeit with admonitions of care given the *sui generis* nature of the Crown-Aboriginal relationship, lead to the conclusion that there is a positive duty to promote the well-being of the beneficiaries, even at the expense of the fiduciary's own best interests. Not only must conflicts of interest be avoided while putting the beneficiaries' interests ahead of the fiduciary's own, but private trustees have been held obligated to use their own finances when the trust property is insufficient to meet the essential needs of the beneficiaries. This approach could be extended to the rather different context of Crown-Aboriginal relations to suggest that the federal government is breaching its fiduciary obligations if it refuses to initiate legislation needed to acknowledge the existence of certain Aboriginal peoples or to meet basic economic or social needs.

It must be admitted, however, that it is one thing for the courts to suggest that the

executive branch is in breach of a legally recognized duty and quite another for the courts to declare that the absence of legislation constitutes a breach, let alone grant an order declaring that the breach should be rectified by initiating a statute. The latter would represent a significant departure from precedent to say the least. A further vital distinction is between the federal government and Parliament. It is unlikely indeed that Canadian courts would order Parliament to use its sovereign law-making authority to pass a particular act. It is somewhat more conceivable, however, that the judiciary might declare that the executive, as the tangible representative of the Crown in right of Canada, should fulfil its obligations and to suggest that the way to meet its obligation in a particular case would be to initiate legislation. Judicial scrutiny of such an argument might become more sympathetic if emphasis is placed upon Charter requirements concerning equality of treatment and equal access in light of the existence of federal laws that do advance the interests of only a portion of the Aboriginal population. Whether the government would introduce a statute to meet this purpose, and whether the House of Commons and the Senate would pass such legislation, would almost certainly be left within the full authority of Parliament itself.

The more directly relevant issue for this essay is the impact upon provincial legislative authority of once and for all including the Metis within section 91(24). In practical terms, there are two aspects to this issue. The first is the general impact of federal section 91(24) jurisdiction as such upon provincial legislative jurisdiction under the Constitution. This is an issue that has been present since 1867 and that continues to be relevant today in reference to all section 91(24) Indians. In other words, the impact of a federal head of power regarding persons who are also provincial residents is not unique to the Metis. The second aspect of the issue of including Metis within section 91(24) relates to the Alberta legislation concerning the Metis settlements (or "colonies", as they were once so ironically termed). This legislation has existed in various forms since 1938 and resulted from the recommendations of the Ewing Commission, established in 1934 to examine the social and economic problems of the Metis in the province. In short, the second aspect is the question of provincial Metis-specific legislation.

The first aspect, the impact of section 91(24) in general on provincial legislative authority, gives rise to a constitutional quagmire where few judicially provided guidelines exist to assist in pulling oneself out of the muck. The question has rarely been examined judicially in

its pure form. Section 88 of the *Indian Act* has been decisive in many cases, and its mere existence has been highly influential in others-even where unwarranted. When the cases that have turned on section 88 are removed, little in the way of judicial guidance remains concerning the extent to which section 91(24) precludes provincial legislation that is not in direct conflict with federal Indian legislation. In other words, there is little to indicate the extent to which the classic paramountcy doctrine would justify federal inroads into what has been viewed traditionally as provincial jurisdiction. Perhaps the best commentary, although far from complete or clear, emanates from the *Natural Parents* case,[ccxxviii] in which the Supreme Court of Canada declared that no provincial legislation could impair the very status of Indians registered under the *Indian Act*. The Court also went further than necessary by indicating that a provision inserted by way of amendment from the legislature of British Columbia, intended to confirm that adoption under the provincial statute could not determine or affect Indian status, was itself invalid.

It is our belief that the better view of *Natural Parents* and the overall state of the law is that provincial legislation cannot impair the rights or interests of Aboriginal peoples expressly. General legislation may be applicable when it is not explicitly or implicitly intended to affect Aboriginal peoples negatively and does not contradict other recognized rights, including those in subsection 35(1). The key to the application of provincial legislation is the issue of impairment of rights or status that flow from Aboriginal ancestry or membership in an Aboriginal collectivity or nation. We would submit that provincial enactments cannot bring about such impairment either directly or indirectly.[ccxxix]

On the other hand, legislation of a positive nature may be perfectly valid when it is not related solely or even primarily to matters that would normally come within section 91(24). A wealth of provincial statutes enacted over the past two decades make some reference to "Indians", "Natives", or "Aboriginal peoples". One ready example is child and family services legislation in a number of provinces. These references are usually intended to acknowledge the different interests of Aboriginal peoples and to give some supportive attention to their needs for involvement in certain processes (e.g., school board representation or court proceedings), to demonstrate respect for their values (e.g., the importance of cultural continuity or the valuable role of the extended family in child welfare matters), or to describe the limits of the application of otherwise constitutionally valid laws (e.g., the *Charter of the French Language* contains within it a declaration that it does not apply generally on reserves along with a special regime for

the Cree and Inuit communities as a result of negotiations and the James Bay and Northern Quebec Agreement). It is hard to imagine that the courts would strike down such an array of provisions across the country that have been so well received by, and often developed in conjunction with, the Aboriginal peoples concerned.

It should also be noted that there has been a long history of provinces passing laws that are complementary to federal ones designed to implement federal-provincial agreements relating to Aboriginal peoples in some way.[ccxxx] More recently this has been expanded from dealing with Indian reserve lands to ratifying land claims settlements. There is presumably little doubt about the constitutionality of the provincial legislative component of such complementary arrangements.

With respect to the Metis-specific Alberta legislation vis-à-vis section 91(24), the following question arises. If the basic test is, does the provincial statute discriminate negatively against or impair the unique legal rights and position of Aboriginal peoples, then what is the outcome when it is applied to the Alberta legislative package concerning the Metis settlements?[ccxxxi] We would suggest that a proper response to this question would contain two components. First, that the test is inapplicable when it comes to the Alberta Metis settlements legislation; and second, that the legislation would likely fail the test if it did apply.

The reason for concluding that the test does not apply is that the compendium of statutes that now forms the made-in-Alberta arrangement is unique in Canada. Not only is it the sole example of Aboriginal-specific legislation enacted by a province, it is also the only statute in Canada regarding the Metis. While its breadth is now analogous to the *Indian Act*, both its initial rationale in 1938 and the reason for its complete overhaul in 1990 stem from very different sources. Its current format was enacted pursuant to an agreement to resolve the outstanding litigation between the Metis settlements and the province over entitlement to subsurface royalty rights while providing freehold title to the individual settlements and an enhanced level of local, delegated powers of government. The Alberta Metis legislation represents the single example of a provincial legislature enacting a law that is directed exclusively to Aboriginal peoples generally, or a segment thereof, that is not part of a complementary effort pursued in conjunction with the Parliament of Canada or not authorized directly by a land claim settlement.[ccxxxii]

It is hard to imagine a clearer case of an explicit invasion of what is declared by the opening language of section 91 of the *Constitution Act, 1867* to be an exclusive head of federal

power. It is impossible to argue that this is a matter that is merely necessarily incidental to another head of provincial law-making authority, even if one could characterize the nature of this legislative package, or its predecessor in the form of the *Metis Betterment Act*, which can trace its roots back to 1938, as properly falling within "Property and Civil Rights in the Province" under section 92(13). Likewise, any assertion that the package of agreements between the Alberta Federated Metis Settlements Association (AFMSA) and the province, as well as the subsequent implementing legislation, constitute a treaty would still leave the same constitutional challenges.

The only viable way to characterize this collection of legislation is that their pith and substance relate directly to the "Metis, and Lands reserved for the Metis". So long as the Metis are within the purview of Parliament and the federal Crown under section 91(24), it appears impossible to visualize this particular arrangement as being within the jurisdiction of the province of Alberta. This is not meant to imply that a province is restricted from setting aside lands for the exclusive use of Aboriginal people, or from transferring full ownership to them. It may even be that a provincial government could impose fetters upon the province's own legal rights that would normally not exist. The critical issue here is that the Alberta legislature has not done so in any private law sense. Instead, it has invoked its constitutional authority to legislate to alter the otherwise prevailing state of the law and to go beyond the common law so as to create a special governmental regime under local Metis control to regulate the administration of these lands.

Furthermore, the province has done far more than create a special landholding regime for these sizeable blocks of land. It has also attempted to define who are the Metis for the purposes of being able to benefit from or reside upon these lands. It is hard to conceive of anything touching `Indianness' more directly than defining who is included and who is excluded from this constitutionally recognized group. The legislation further regulates the lives of the Metis on the settlements by establishing local governments, setting out their minimal law-making jurisdiction, authorizing extensive control over daily affairs by the appropriate minister of the day, delimiting the harvesting rights of the Metis, and defining the nature of the relationship between the Crown in right of Alberta and these Metis settlements, among other matters.

It seems clear, therefore, that the Alberta Metis legislation is readily subject to constitutional challenge. In large part for this reason, AFMSA and the provincial government have

been attempting for several years to obtain active federal involvement in protecting this package of legislation and the collateral agreements. The Legislature passed a constitutional resolution in 1990 designed to amend the *Alberta Act*[ccxxxiii] so as to entrench the title of the Metis in the settlement lands and confirm that the total statutory package is a valid exercise of provincial legislative power.[ccxxxiv] The federal government has refused to table the resolution in Parliament for its consideration on the basis that this can be proceeded with only by way of the amending formula under section 38 of the *Constitution Act, 1982* as a general amendment rather than through section 43 as a matter affecting only Alberta. The federal Department of Justice view relies upon giving a narrow interpretation to the wording in the latter amending formula provision, so as to restrict it solely to the items identified therein (i.e., "any alteration to boundaries between provinces" and "the use of the English or the French language"). While this view is open to challenge by the alternative view held by Alberta that section 43 is more than sufficient for this purpose, especially given the use of section 43 to achieve an amendment on denominational schools for Newfoundland, it is worth noting that the federal cabinet has resisted requesting six other provinces containing over 50 per cent of the population when added to Albertans to pass the same resolution so as to remove any doubt. The failed Charlottetown Accord would have resolved this latter issue by including the *Alberta Act* amendments as part of the overall collection of amendments to be passed by all 10 provincial legislatures and Parliament.

The Charlottetown Accord also responded directly to the issue of clarifying the position of Metis as falling within the scope of section 91(24). As previously mentioned, it was proposed to add a `for greater certainty' amendment as section 91A to make it explicit that 91(24) includes all Aboriginal peoples. As a result of this provision in particular, Alberta and AFMSA both felt that it was absolutely essential to obtain a further amendment clarifying that the government and the Alberta legislature would have a level of constitutionally recognized authority in reference to the Metis. They argued that this was necessary to reflect the unique history in that province of an active relationship between the two for well over 50 years. More immediately, they wished to ensure that the made-in-Alberta package of 1990 would endure for the foreseeable future. The modality for which they opted was to allow the province of Alberta alone the equivalent authority to Parliament, subject to resolving any conflicting legislation through the normal doctrine of federal paramountcy. The mere fact that it was believed vital to include such a

provision demonstrates the collective view among lawyers for most if not all 17 parties to the Charlottetown negotiations that the Alberta legislation either was in serious jeopardy or could not be sustained in the face of federal authority concerning the Metis under 91(24).

CONCLUSIONS

In this research paper we have attempted to review the existing literature and jurisprudence as well as to concentrate upon some of the historical and political motivations that underlay the remarkable and tragic relationship between the Metis or `mixed-blood' peoples and the other two sovereign orders of government in what is now known as Canada.

The Metis have spent the better part of the last century largely overlooked by the society in which they lived. After being manipulated during the scrip process, resulting in neither a land base nor an economic base on which to build a new future to replace the trading and buffalo hunting lifestyle that disappeared in almost a blink of an eye, the Metis found themselves pushed to the margins of Canadian society. They came to be referred to in many places in the prairies as the road allowance people, for the only land on which they often could live was alongside rural highways on the land reserved by the Crown as road allowances in case of future expansion. They became, in effect, squatters within their own territory.

Only the Alberta government, during the depths of the Great Depression, responded to their social and economic plight by appointing a royal commission to investigate the extent of the problem and propose concrete solutions. Influenced by excellent Metis leaders,[ccxxxv] the Commission recommended and the government relatively quickly implemented the creation of Metis `colonies' similar to reserves and the *Indian Act* regime through the *Metis Population Betterment Act* of 1938.[ccxxxvi]

All other provinces at that time turned a blind eye to the deprivation experienced by Metis within their borders, while at the same time completely ignoring any entitlement that the Metis may have had to Aboriginal or treaty rights within that territory. The federal government pursued a similar approach, pleading that, since Metis were outside section 91(24), it had no jurisdiction to intervene to assist them. The federal government seemed conveniently to forget its role in the distribution of scrip. Provinces other than Alberta took the reverse position and pointed their collective political fingers toward Ottawa for action.

This game of passing the buck has continued up to the present and is as alive and well as

ever following the rejection of the Charlottetown Accord. It can only be hoped that the federal government will adhere to the spirit of this Accord and adopt the legal conclusion that we have reached, namely, that the Metis are already encompassed within section 91(24) such that the federal government, therefore, has the jurisdiction to intervene legislatively or under its administrative authority if it so desires. As the latest census data from Statistics Canada indicate, the Metis continue to remain both disadvantaged and dispossessed in almost all parts of this wealthy land such that concrete and substantial action is desperately needed.

We have also concluded that the Metis are included within the fiduciary relationship owed by the Crown to Aboriginal peoples. The Supreme Court of Canada has to date articulated only certain aspects of this relationship, and only in the context of the Crown in right of Canada. It is also to be noted that the Court has not indicated that the fiduciary obligation is limited solely to the federal sphere.[ccxxxvii] The Chief Justice of British Columbia has, in fact, declared that this relationship does extend to the provincial Crown as well.[ccxxxviii]

Concluding that the Metis can benefit from this fiduciary relationship does not provide any clarity as to the precise ramifications and applications of any particular duties. Due to the lack of judicial guidance to date, it is simply not yet possible to conclude whether the general Crown obligation has crystallized into any specific duties. This is especially relevant regarding the Metis, since there is no property currently held by the Crown on their behalf, as there is in reference to First Nations in the form of reserve lands and trust accounts. The Alberta government was in this situation prior to the Accord of 1990 but is no longer, as freehold title to the Metis settlement lands has now been conveyed directly to the Metis communities.

We have further concluded that the provinces cannot enact restrictive or negative legislation concerning the Metis specifically. General provincial legislation would, however, still apply subject to any constitutional limitations, including subsection 35(1) and any inherent right of self-government if protected by that provision. One aspect of this conclusion is that the Alberta legislation regarding the Metis settlements is likely unconstitutional. Although arguments could be made based upon viewing the Accord and the legislation as a treaty, or that the provincial legislation should be sustained for being a positive initiative rather than a negative intrusion into federal jurisdiction under section 91(24), these assertions face an uncertain future at best. As a result, we would urge that immediate action be taken by the federal government to enact enabling legislation to sustain the Alberta statutes or to pursue a constitutional amendment

to validate this provincial legislation, as was proposed in the Charlottetown Accord for inclusion in the *Constitution Act, 1867* in section 95.

We have also raised the issue, without reaching a firm and final conclusion, that there may be a positive duty on the Crown as a result of its fiduciary obligation to advance the interests of the Metis through appropriate means, including the passage of special legislation if so desired by any significant groups of Metis people. We anticipate that this point will be explored in the near future in litigation such that a clear articulation of the law may well be developed. Our preliminary opinion on this point is that there is a positive duty on the Crown to act so as to ameliorate the severe disadvantages that confront the Metis people.

We have not examined for the purposes of this paper the question of whether the Metis possess Aboriginal title in general or other Aboriginal and treaty rights. The information examined for the particular purpose of determining federal and provincial jurisdiction and responsibility, however, does lead us to believe that the Metis can make a very convincing claim where the evidence meets the normal test under the doctrine of Aboriginal title and there has been no valid surrender or extinguishment of their interests in land. The latest cases dealing with Metis and non-status Indians, such as the *Ferguson* and *Fowler* cases, demonstrate that the courts are following a very different and more sympathetic path concerning Aboriginal and treaty rights when advocated by these people today than was the case in the past.

Let us conclude with a few comments regarding directions for further research. We firmly believe that it is unnecessary to devote further energy to the issue of constitutional jurisdiction and responsibility. This matter has now been thoroughly examined and warrants no additional research. This question is realistically in the hands of the federal cabinet to decide whether it will honour its authority. Alternatively, there is little reason for further delay in pursuing litigation to obtain a clear declaration from the courts confirming that the Metis are in fact Indians within the meaning of section 91(24). The MNC has regularly raised the issue of seeking a constitutional reference on this question. It is to be hoped that the federal government will take the initiative and declare that it possesses jurisdiction under section 91(24) to address Metis issues. Failing this, it is at the very least necessary for such a reference to be launched by the federal government to the Supreme Court of Canada, or by a province to its court of appeal, to settle the matter once and for all so as to remove this obstacle to progress. It is clear that any prospect for significant achievements in tripartite self-government negotiations or to finalize the Metis Nation

Accord are dependent upon resolving this jurisdictional issue first, as well as the financial implications that will flow from the substance of its resolution.

The more important issue that does deserve additional attention and research by the Royal Commission on Aboriginal Peoples is the matter of establishing definitional parameters to the term `Metis' within both subsections 91(24) and 35(2). One of the practical matters that has discouraged federal acceptance of authority has been a lack of understanding as to what the outer limits to this mandate and the potential cost implications might be. The rather ridiculous suggestions by unnamed officials in DIAND in the spring of 1992 during the constitutional negotiations-that the inclusion of the Metis within section 91(24) would result in an additional federal expenditure of $5 billion per year[ccxxxix]-has had certain influence because of the absence of any serious analysis whatsoever on this subject. While merely doubling the current budget of DIAND is a ludicrous approach, it is important to come to grips with the fear that underlies these allegations. Attempting to develop suitable parameters for program initiatives need not necessarily and likely should not be used to attempt to develop rigid boundaries for all purposes. There is little attraction to creating new categories of status and non-status Metis after the experience with the *Indian Act*. At the same time, significant federal initiatives with potentially considerable financial implications are thoroughly unlikely without a sufficient data base to permit reasonably realistic projections to be generated, so that the government can assess the viability of such programs before launching them. In addition, one would anticipate that the federal government would seek, if not insist upon, provincial partnership and that these governments would also demand solid data and convincing cost projections.

Further research would also be useful on the capacity of the Canadian courts under prevailing jurisprudence to go beyond merely granting a declaration that the Metis are within section 91(24) if litigation does become necessary. Related issues worthy of consideration include judicial relief in the form of an order to the government to take specific action of a positive nature or to refrain from pursuing certain actions. Our courts have not demonstrated any inclination along this line, as it entails the courts imposing their views on the sovereign, which has always possessed full immunity from what are its own courts except when expressly waived through legislation. Nevertheless, the bounds of what courts can do have been stretched quite dramatically in the United States over the last three decades, particularly through the development of the structural injunction, while Canadian courts have expressed some willingness

at least to review a broader range of governmental actions than in the past.[ccxl]

On the basic subject covered in this paper, however, there is no need for further research. The time is long since past for the federal government to declare that it will recognize that its authority and responsibility extend to the Metis. Such a bold move in and of itself will not lead to a single job, house or better standard of living for Metis people. It will, however, remove what has become a major obstacle to progress--whether through the tripartite self-government negotiations process involving the Metis and off-reserve Indians that has existed since 1985, but with few concrete signs of achievements, or in developing new programs to advance the interests of Metis people and their communities. One can only hope that in future the Metis will never again be known primarily as the forgotten, the dispossessed or the road allowance people.

RECOMMENDATIONS

As is apparent from the preceding section, we have reached a few specific recommendations for the further consideration of Commissioners as well as several subjects deserving further research. The particular recommendations we have offered are as follows:

1. That the Royal Commission on Aboriginal Peoples formally conclude that the Metis are included within the expression "Indians" within section 91(24) such that the federal government has the mandate and the capacity to enter into treaties and other relations with the Metis Nation and other Metis groups in Canada.
2. That Commissioners recommend to the government of Canada that it renew efforts at constitutional reform to build upon and improve the Aboriginal provisions contained in the Charlottetown Accord. This would mean confirming clearly and without hesitation that section 91(24) applies to all Aboriginal peoples. More importantly, it would also involve recognizing and affirming the inherent right of self-government for the Indian, Inuit and Metis peoples.
3. That the Royal Commission conclude that the Metis are beneficiaries of the fiduciary relationship with the Crown. Further, it should recommend to the federal government that it respect its fiduciary obligation such that it immediately enter into comprehensive negotiations with representatives of the Metis people.
4. That Commissioners recommend to the federal government that it take immediate action to implement the amendments to the *Alberta Act* sought by the Alberta government

and the Alberta Federated Metis Settlements Association. Not only will this provide tangible constitutional protection to the land rights of the Metis settlements, but it will also address concerns about the invalidity of the provincial legislation.

NOTES

[i]The spelling of the word `Metis' is somewhat problematic because of the political connotations involved. In this paper the unaccented but capitalized version will be used because it is the one that seems to have the greatest degree of general acceptance among the persons most affected in Canada. The term is generally used without an accent by both the Metis National Council and the Native Council of Canada. It should not be taken, therefore, as a statement by the authors of adherence to any particular political interpretation. Likewise, the term `mixed blood' will often be used as a more general and comprehensive label, although with some discomfort, as the concept of mixed and pure blood, along with the term half-breed, has often been used in a derogatory fashion in Canadian history.

[ii]The Labrador Metis Association also uses the term Metis to encompass persons whose ancestry may be part Inuit who have affiliated themselves with other Metis of Indian and non-Indian ancestry.

[iii]R.S.C. 1985, c. I-5. The Act for many years expressly disentitled anyone who had taken land scrip or their descendants from being registered, while not otherwise excluding children of mixed marriages so long as the father was a registered Indian and the parents were married. This disentitlement was removed in the Bill C-31 amendments of 1985, along with much of the prior discrimination on the basis of sex. As a result, many Metis people are not entitled to obtain status and an unknown number are now status Indians.

[iv]Antoine Lussier, "The Question of Identity and the Constitution: The Metis of Canada in 1984", *Aspects of Canadian Metis History* (Ottawa: Indian and Northern Affairs Canada, 1985), 1 at 1.

[v]*Ibid.*, at 1-2. The definitions are:

(a) A person of mixed blood, Indian and European;
(b) One who considers himself Métis;
(c) An enfranchised Indian;
(d) One who received land scrip during the 1870s and '80s;
(e) One who is identified with a group that identifies itself as Métis;
(f) A Native person who is not a registered Indian;
(g) In some Manitoba Métis Federation locals, a non-Native can belong to the Manitoba Metis Federation provided he/she is married to a Métis. For purposes of the administrative records of the organization, that person is counted as Métis.

[vi]L'Union Nationale Métisse de St. Joseph du Manitoba, *ibid.*, at 2-3.

[vii]*Ibid.* Professor Lussier gave expert testimony in a recent Metis Aboriginal hunting rights case in Manitoba, *R.* v. *McPherson* [1992] 4 C.N.L.R. 144, noting that in the 1982 census 93,000 people in western Canada self-identified as Metis. He estimated the real number was around 300,000 people. He is reported (at 150) to have testified that "We cannot come to an agreement as to who is or is not a Metis."

[viii]See Native Council of Canada, "A Statement of Claim Based on Aboriginal Title of Metis and Non-Status Indians" (Ottawa: NCC, 1979), at 1-8. Reference is made to Metis claims running from Quebec to British Columbia and including both territories.

[ix]Bryan Schwartz discusses the breakaway of the prairies Metis organizations in *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: The Institute for Research on Public Policy, 1986), at 91-93. He adverts to the definition question at p. 92, noting that "many Métis in western Canada adopt a nationalistic rather than a racial definition..." that focuses on the historical Metis Nation that arose in western Canada in the nineteenth century.

Antoine Lussier also discusses this event in "The Metis and the Non-Status Indians, 1967-1984" and "The Metis and the Indians, 1960-1984", in *Aspects of Canadian Metis History*, *supra*, note 4 at 54. He notes that the leaders of the Metis National Council also belonged to their former provincial parent bodies which at that time still represented non-status Indians. Thus the national body, the Native Council of Canada, was split on an issue that had not yet been resolved by the affiliated provincial bodies.

[x]Donald Purich, *The Metis* (Toronto: James Lorimer and Co., 1988), at 13.

[xi]Metis Nation Accord, October 6, 1992, section 1.

[xii]"Draft Constitution of the Government and People of the Metis Nation", Part I, section 6, Constitutional Session Briefing Book, February 1, 1993, discussed during the MNC General Assembly, February 5-7, 1993, Vancouver.

[xiii]Lussier, *supra*, note 4, at 4.

[xiv]Alexander Morris, *The Treaties of Canada With the Indians of Manitoba and the Northwest Territories* (Toronto: Belsford Clarke and Co. 1880; Coles reprint, 1979). The author refers to the earlier Robinson-Superior and Robinson-Huron treaties in this regard at 16-21.

[xv]*Indian Treaties and Surrenders from 1680 to 1890 in Two Volumes* (Ottawa: Queen's Printer, 1891, reprinted 1905), vol. 1 at 308.

[xvi]David McNab, "Métis and The Treaty-Making Process in Ontario", Unpublished Paper for the Metis Symposium, University of Saskatchewan, May 5, 1984. A variation of this paper was subsequently published as "Metis Participation in the Treaty-Making Process in Ontario: A Reconnaissance", *Native Studies Review* 1/2 (1985).

[xvii]*Ibid.* McNab describes the negotiations and surrounding circumstances regarding Treaty 3 in "Hearty Co-operation and Efficient Aid, the Metis and Treaty #3", *Can. J. Native Studies* 3 (1983), 131.

[xviii]Morris, *supra*, note 14, at 294-95.

[xix]This is described in Olive Patricia Dickason, *Canada's First Peoples* (Toronto: McLelland and Stewart, 1992), at 316-19.

[xx]*Ibid.*, at 317-18.

[xxi]Richard Daniel, *A History of Native Claims Processes in Canada 1867-1979* (Ottawa: Indian and Northern Affairs Canada, 1980), at 25.

[xxii]The history of the Ewing Commission is set out in Dickason, *supra*, note 19 at 359-365, and in Fred Martin, "Federal and Provincial Responsibility in the

Metis Settlements of Alberta", in *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles*, ed. D. Hawkes (Ottawa: Carleton University Press, 1989), at 258-263.

[xxiii] Martin, *ibid.*, at 260.

[xxiv] S.A. 1938, c.6, s. 2(a).

[xxv] S.A. 1940, c.6.

[xxvi] T. Pocklington, "Our Land Our Culture Our Future: The Government and Politics of Alberta Metis Settlements", unpublished manuscript, University of Alberta, 1988, at 11, reported in Martin, *supra*, note 18, at 260-61. A version of this paper has now been published as *The Government and Politics of the Alberta Metis Settlements* (Regina: Canadian Plains Research Centre, University of Regina, 1991).

[xxvii] *Le Petit Robert 1, Dictionnaire alphabétique et analogique de la Langue Française* (Paris: Le Robert, 1983), at 1192.

[xxviii] *Harrap's Shorter Dictionnaire Anglais-Français French-English Dictionary* (London: Harrap Ltd., 1982), at 471.

[xxix] A short survey of descriptions of the people referred to by the terms `Metis' and `half-breed' is provided by Lussier, *supra*, note 4, at 6-12. These descriptions, emanating primarily from the colonizers, are not always flattering.

[xxx] See Lussier, *ibid.* See also Alan D. McMillan, *Native Peoples and Cultures of Canada* (Toronto: Douglas and McIntyre, 1988), at 273, and J.R. Miller, *Skyscrapers Hide the Heavens* (Toronto: University of Toronto Press, 1989), at 126. All three authors note the distinction between the Metis and the country-born or half-breed, but go on to remark that the former now encompasses the latter in modern usage. This is exemplified by Purich, *supra*, note 10, and Catherine Bell, "Who Are the Metis People in Section 35(2)?" *Alta. L. Rev.* 29 (1991), 351. The latter two authors both discuss the Metis in a relatively comprehensive way without adverting to the original distinction between French-speaking `Métis' and English-speaking `half-breeds'.

[xxxi] Purich, *supra*, note 10, states in this regard (at 15), "The growth of a mixed-blood population is by no means unique to Canada. In many South and Central American countries the mixed-blood people form a significant part of the population. In Ecuador, 45 per cent of the country's 8 million people and its largest racial group is Mestizo, the Spanish-American term for mixed-blood people. What makes the mixed blood population of Canada unique is that they developed a distinct cultural and political identity. They did not seek to be Indians nor, as in many South American countries, did they aspire to become white." Separate mixed-blood populations developed in many regions where white exploration and colonization occurred in Africa and Asia as well. The term `Eurasian', for instance, attests to this phenomenon regarding intermarriage between Europeans and Asians.In this regard, see also Bradford W. Morse and Robert K. Groves, "Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Non-Status Indians", *Law & Anthropology* 2 (1987), 139.

[xxxii] Many historically significant tribal chiefs were not full-blooded ethnological Indians, e.g., William McIntosh of the Creeks, John Ross of the

Cherokees, Osceola of the Seminoles, Quanah Parker of the Comanches, etc. Muriel H. Wright, in *A Guide to the Indian Tribes of Oklahoma* (Norman: University of Oklahoma Press, 1986), discusses (at 61-62) the fact that many influential members of the Cherokee Nation were of mixed blood:

> The remarkable advancement of the Cherokee as a people came about largely through the influence of the mixed-blood families of Irish, German, English, Welsh or Scottish descent whose ancestors settled and married in the nation during the eighteenth century. Among them were such names as Adair, Vann, Chisholm, Ward, Hicks, Reese, Wickett, Fields, Ross, Lowry, and Rogers, all well-known tribal families whose descendants were prominent in Cherokee history. Many of them were planters and traders, owners of substantial residences, Negro slaves, and large tracts of cattle by 1800.

In the United States the issue of `half-bloods' as a category apart from tribal units has not arisen as it has in Canada. This is because tribes are separate political entities, regarded at law as "domestic dependent nations", with a right to control their own membership. Tribal codes do not necessarily reflect a uniform standard, but there is generally always a blood quantum or kinship requirement. The feature that counts is tribal acceptance of someone as a member, whether or not that person is formally registered on the tribal roll and whether or not that person is a full-blood ethnological Indian. A person who would probably be classified as Metis or non-status Indian in Canada will often be accepted as a tribal member in the United States.

For most federal services through the Bureau of Indian Affairs an `Indian' is someone of at least one-quarter Indian blood, a member of a federally recognized tribe and living on or near a reservation. Other federal legislation may simply defer to tribal practice, follow BIA practice, impose a higher or lower blood quantum requirement, or, as below, even impose a charter group requirement. The 1934 *Indian Reorganization Act* [25 U.S.C., s. 479] defines Indian in a manner that calls upon tribal practice, membership in a charter group of Indians as at a certain date, and simple blood quantum: "19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For purposes of this Act, Eskimos and other Aboriginal peoples of Alaska shall be considered "Indians"." Programs offered to Indians by some states generally use a one-quarter Indian blood rule eligibility criterion, but this is a matter within the control of the state concerned.

[xxxiii] Alvin Kienetz, "The Rise and Decline of Hybrid (Métis) Societies on the Frontier of Western Canada and Southern Africa", *Can. J. Native Studies* 3 (1983), 3.

[xxxiv] S.C. 1870, c. 3. For an excellent and exhaustive review of this legislation, its background and the disastrous way in which it was implemented, replete with continual breaches, see Paul L.A.H. Chartrand, *Manitoba's Metis*

Settlement Scheme of 1870 (Saskatoon: Native Law Centre, University of Saskatchewan, 1991).

[xxxv]S.C. 1879, c. 31.

[xxxvi]For example, Duke Redbird, *We Are Metis* (Toronto: Ontario Metis and Non-Status Indian Organization, 1980), notes in this regard (at 1): "People of mixed heritage had existed from at least the mid-sixteen hundreds or nine months from the time the first white man set foot in North America."

[xxxvii]Nicholas Denys, *The Description and Natural History of the Coasts of North America (Acadia).* The translation referred to was produced in 1908 by the Champlain Society. The last chapter of the translation is reproduced in H.F. McGee, ed., *The Native Peoples of Atlantic Canada* (Ottawa: Carleton University Press, 1983), at 38-44. The author notes (at 43) that the children produced by the union of the French and the Indian women were taken into the family of a Micmac man who would marry her once she was no longer involved with the white man.

[xxxviii]R.E. Gaffney, G.P. Gould, A.J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (Fredericton: New Brunswick Association of Metis and Non-Status Indians, 1984), at 62.

[xxxix]Morris, *supra*, note 14.

[xl]Purich, *supra*, note 10, at 9-11.

[xli]Thomas Flanagan, "The Case Against Metis Aboriginal Rights", *Canadian Public Policy* IX/3 (1983), 314. In a later article, however, he expands on his earlier views, acknowledging certain rights to land accruing to Metis as derivative of Indian title but apparently not equal to it. See Thomas Flanagan, "The History of Metis Aboriginal Rights: Politics, Principle, and Policy", *Can. J. Law & Soc.* 5 (1990), 71.

[xlii]Schwartz, *supra*, note 9.

[xliii]R.S.A. 1970, c. 233, (revised 1982, c.26) s. 2. This statute has since been repealed as part of a 1990 package of Metis legislation known collectively as the "Alberta Metis Settlements Accord". See note 56, *infra*.

[xliv]Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in *Canada and the New Constitution: The Unfinished Agenda*, ed. S.M. Beck and I. Bernier, vol.1 (Montreal: Institute for Research on Public Policy, 1983), 227 at 254.

[xlv]William Pentney, *The Aboriginal Provisions in the Constitution Act, 1982* (Saskatoon: University of Saskatchewan, 1987), at 100.

[xlvi]Bell, *supra*, note 30, at 352. Her listing of the various terms for Aboriginal people includes Indians, status Indians, non-status Indians, treaty Indians, non-treaty Indians, Inuit, Metis, half-breeds, Metis nation, registered Indians, non-registered Indians, and urban Indians.

[xlvii]*Ibid.*, at 376.

[xlviii]*Ibid.*, at 379.

[xlix]Lussier, *supra*, note 4, at 12. In this regard he notes: "If Stanley is correct, then the bonds should have kept the many Métis cultural groups united against adversity. The events of 1870 and 1885 proved this to be wrong. Many Métis and half-breeds did not side with Riel in both insurrections. In 1870, the Métis of White Horse Plains, St. Laurent and the half-breeds of

Kildonan did not support Riel. Regarding 1885, Fr. Morice argues that the Métis were coerced to fight or meet immediate death at the hands of Riel's soldiers." Parliamentary and court testimony associated with the Red River troubles of 1812-1819 lend support to both sides of the debate about whether the historical Metis thought of themselves as a distinct entity. The testimony of three such commentators is briefly referred to in Jennifer Brown, "Woman as Centre and Symbol in the Emergence of Metis Communities", *Can. J. Native Studies* 3 (1983), 39 at 43. See also her "Introduction", co-written with Jacqueline Peterson, to the book they edited, *The New Peoples, Being and Becoming Metis in North America* (Winnipeg: University of Manitoba Press, 1985).

[l]Sanders, *supra*, note 44, at 255.

[li]The prime example is *R.* v. *Laprise*, [1978] 6 W.W.R. 85 (Sask. C.A.), which was followed in *R.* v. *Budd*; *R.* v. *Crane*, [1979] 6 W.W.R. 450 (Sask. Q.B.).

[lii]A good example is *The Queen* v. *Thomas Chevrier*, [1989] 1 C.N.L.R. 128 (Ont. Dist. Ct.).

[liii]*Supra*, note 43.

[liv]S.A. 1990, c. M-14.3.

[lv]*Ibid.*, s. 1(j).

[lvi]The *Metis Settlements Act* provides the framework for comprehensive but delegated powers of self-government for the Metis settlements. It is part of a package of legislation intended to address a number of long-standing problems. The other statutes are the *Metis Settlements Land Protection Act*, S.A. 1990, c. M-14.8; the *Metis Settlements Accord Implementation Act*, S.A. 1990, c. M-14.5; and the *Constitution of Alberta Amendment Act*, 1990, S.A. 1990, c. C-22.2. The latter will not be proclaimed until the Parliament of Canada passes a parallel resolution in order to implement the constitutional change.

[lvii]Some of these approaches are set out briefly in Bradford W. Morse, "The Aboriginal Peoples in Canada", in *Aboriginal Peoples and The Law: Indian, Metis and Inuit Rights in Canada*, ed. B. Morse, revised edition (Ottawa: Carleton University Press, 1989), at 3. Brian Slattery discusses the question in "Understanding Aboriginal Rights", *Can. B. Rev.* 66 (1987), 727 at 757: "In determining whether or not a certain group of people qualifies as "native", regard should be had to a variety of factors, such as: (a) the self-identity of its members, as shown in their actions and statements; (b) the culture and way of life of the group; (c) the existence of group norms or customs similar to those of other aboriginal peoples; and (d) the genetic composition of the group."

[lviii]See note 32, *supra*.

[lix]S.C. 1869, c. 6, s. 4 (31-32 Vict.).

[lx]S.C. 1876, c. 18.

[lxi]R.S.C. 1970, c. I-16, s. 12.

[lxii]Morris, *supra*, note 14.

[lxiii]S.C. 1951, c. 29, s. 11.

[lxiv]Dickason, *supra*, note 19.

[lxv]The federal government's own report documents some of the problems: Indian and Northern Affairs Canada, *Lands, Revenues and Trusts Review: Phase II Report* (Ottawa: Ministry of Supply and Services, 1990), at 134-35:

Many communities visited point out that Bill C-31 has not been altogether successful in eliminating discrimination from the *Indian Act*. In fact, a number of discriminatory provisions remain in the Act or were created as a result of Bill C-31.

Under the revised Act, the children of reinstated Indian women must marry or have a child by a status Indian in order to pass on status to their own children. This is not true for Indian men, even if they have married a non-Indian woman. The children of these marriages can pass on status regardless of who they marry.

Moreover, the illegitimate male and female offspring of male status Indians are treated differently under the Act. Illegitimate males can pass on status to their children from a marriage to a non-status woman, but illegitimate women cannot pass on status if they marry or have a child by a non-status man. Some Indian communities have maintained that as a result of this provision, non-Indian children adopted by status Indians may have greater rights than children of Indian ancestry reinstated or registered under Bill C-31.

[lxvi] *R.* v. *McPherson*, *supra*, note 7, at 149, per Gregoire J.

[lxvii] For a more detailed discussion see Bradford W. Morse, *Aboriginal Self-Government in Australia and Canada* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985).

[lxviii] Such an approach would also correspond to the basic policy adopted in the United States regarding who will be considered to be an Indian in law. "Recognizing the diversity included in the definition of Indian, there is nonetheless some practical value for legal purposes in a definition of Indian as a person meeting two qualifications: (a) that some of the individual's ancestors lived in what is now the United States before its discovery by Europeans, and (b) that the individual is recognized as an Indian by his or her tribe or community." (Rennard Strickland et al., ed., *Felix Cohen's Handbook of Federal Indian Law* (Charlottesville: The Michie Company Law Publishers, 1982), at 20.)

[lxix] William Pentney notes the difficulties in this regard: "The characterization of legislation for purposes of division of powers purposes is a notoriously difficult task. The concurrent and occasionally overlapping federal and provincial legislative jurisdictions which underpin the federal system create a complex framework, whose contours evolve and adapt over time. In relation to s. 91(24) these problems are compounded by confusion over the dual aspects of head 24-"Indians" and "Lands reserved for the Indians"-the evolving make-up and distribution of the group involved, and the relevance for this head of power of the pre-existing relationship between aboriginal peoples and the British Crown." ("Aboriginal Peoples and Section 91(24) of the Constitution Act, 1867", unpublished background paper prepared for the Canadian Bar Association Special Committee on Native Justice, April 1988, at 19-20.)

[lxx] [1974] S.C.R. 1349, at 1359: "In my opinion, the exclusive legislative authority vested in Parliament could not have been effectively exercised without enacting laws establishing the qualifications required to entitle

persons to status as Indians and to the use and benefit of Crown `lands reserved for the Indians'."

[lxxi][1976] 1 S.C.R. 170.

[lxxii]*Ibid.*, at 207.

[lxxiii]*Ibid.*, at 206-07.

[lxxiv]Schwartz, *supra*, note 9, at 177.

[lxxv]*In the Matter of a Reference as to Whether the Term "Indians" in Head 24 of section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province Of Québec*, [1939] S.C.R. 104, commonly referred to as Re *Eskimos*.

[lxxvi]The case is discussed by Richard Diubaldo, "The Absurd Little Mouse: When Eskimos Became Indians", *J. Can. Studies* 16 (1981), 34. The author informs us (at 36) that the Justice Department, and especially its external counsel, were of the opinion that the federal case was not a strong one and that it did not seem wise to incur the expense of bringing it before the Supreme Court.

[lxxvii][1973] S.C.R. 313.

[lxxviii]The *Calder* appeal was ultimately dismissed, but on procedural grounds. Six judges of the Supreme Court agreed that Aboriginal title was alive and well as a concept in Canadian law. Where they disagreed was regarding its origins and whether pre-Confederation legislation in British Columbia had extinguished it. Subsequently, in *Guerin* v. *The Queen* [1984] 2 S.C.R. 335, seven Supreme Court justices recognized it as a legal right. Former Chief Justice Dickson was quite explicit in this connection, stating (at 376) that in *Calder* "this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands." Significantly, the Canadian government reversed its previous policy position denying the existence of Aboriginal rights immediately following *Calder* and reinstituted the treaty-making process under the term `comprehensive claims'.

[lxxix]The pattern of federal reluctance to assume its constitutional obligations regarding Indians is outlined in greater detail in Bradford W. Morse, "Governmental Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*", in *Aboriginal Peoples and Government Responsibility*, ed. D. Hawkes, *supra*, note 22, at 59-91.

[lxxx]A more detailed description of these methods is outlined in Linda Rayner, "The Creation of a `Non-Status' Indian Population by Federal Government Policy and Administration", unpublished research paper prepared for the Native Council of Canada, 1978.

[lxxxi]The comprehensive claims process inaugurated in 1973 did not demand provincial participation in the actual negotiation process. However, the federal government argued that since most unoccupied Crown land is owned by the Crown in right of the province under section 109 of the *Constitution Act, 1867*, the *Constitution Act, 1930*, or specific terms of union, provincial co-operation was required from the outset. The argument was bolstered by the advent of subsection 35(3) of the *Constitution Act, 1982*, the effect of which was to give these land settlements constitutional force. This buttressed the

requirement in the eyes of the federal government that the provinces must participate in negotiation and ratification.

[lxxxii]At least the federal government now acknowledges the existence of actual `rights' covered by section 35. Immediately following the entrenchment of section 35, the federal government apparently believed that there was essentially nothing in section 35 to be affirmed and recognized. In short, it was an `empty box'. Douglas Sanders captures the essence of the early federal position in the following anecdote: "Ian Binnie, then the leading figure in the federal Department of Justice, was asked what rights he thought were protected by section 35. The question was put at a Ministerial level meeting held in preparation for one of the First Ministers' Conferences on aboriginal constitutional matters. Binnie gave one example, Indians had the right to surrender land. His statement was greeted with laughter, it was so absurd. The federal government had an "empty box" theory. A box of rights had been protected by section 35, but unfortunately the box was empty." ("The Supreme Court of Canada and the `Legal and Political Struggle' Over Indigenous Rights", *Can. Ethnic Studies* XXII/3 (1990), 122 at 125.

[lxxxiii]See, for example, the *Sechelt Indian Government District Enabling Act*, S.B.C. 1987, c.16.

[lxxxiv]These various pieces of legislation are described in J. Leslie and R. Maguire ed., *The Historical Development of the Indian Act*, 2nd ed. (Ottawa: Indian and Northern Affairs Canada, 1978), at 13-50.

[lxxxv]These developments are outlined in John Tobias, "Protection, Assimilation, Civilization: An Outline History of Canada's Indian Policy", in *Sweet Promises: A Reader on Indian-White relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991), 127.

[lxxxvi]The editors of *The Historical Development of the Indian Act*, *supra*, note 84, hint at this (at 30) where they state: "As a result of the Manitoulin experiment and similar projects in the United States, separation of Indians from `white' society, as an end in itself, was not viewed as a desirable policy." They note (at 28) that in the first of the enfranchisement acts fee simple title to up to fifty acres of allotted land plus a relatively large sum of money were used as inducements to coax voluntary enfranchisement.

The editors of *Felix Cohen's Handbook*, *supra*, note 68, describe allotment (at 128) as one of the elements in the policy of assimilation adopted in the United States as a way of teaching Indians the value of private property and of freeing `surplus' Indian land for non-Indian settlement. Allotment in that country had a long and tragic history that was presumably familiar to Canadian policy makers. That history is briefly described (at 129-30) as follows: "The allotment concept was not new; Indian lands had been allotted as early as 1633, and the allotment concept had been developing and gaining popularity for some time... Later, allotments were used as a method of terminating tribal existence. Allottees surrendered their interest in the tribal estate and became citizens subject to state and federal jurisdiction. During the 1850s this break-up of tribal lands and tribal existence assumed a standard pattern. Such experiments in allotment served as models for later legislation."

The major attempt to destroy the basis of separate tribal existence in the United States occurred in 1887 with the passage of the *General Allotment Act* (25 U.S.C. ss. 331-34, 339, 341, 342, 349, 354, 381), known as the Dawes Act. It provided for compulsory allotment of communally held tribal lands. The editors of *Felix Cohen's Handbook* state (at 132) that "Eastern philanthropists wanted to civilize the Indian; western settlers wanted Indian land." The allotment policy and process are described in Janet A. McDonnell, *The Dispossession of the American Indian 1887-1934* (Bloomington: Indiana University Press, 1991).

[lxxxvii]S.C. 1857, c. 26 (20 Vict.). According to John S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change", in *Sweet Promises*, *supra*, note 85, 145, at 147-48, the passage of the Act had three negative consequences:

- it created a constitutional inconsistency by allowing a portion of the communally held and Imperially protected Indian land to be carved out following enfranchisement without following the procedures set out in the *Royal Proclamation of 1763*;
- it marked the passage from protection of Indian communal life to assimilation of Indians on a piecemeal basis and the breaking up of the communal land base; and
- it caused a crisis in the relationship between tribal leaders and colonial authorities due to the breakdown of the generally progressive partnership in development that had existed since the 1830s involving the agents of the department, missionaries and tribal councils.

[lxxxviii]A male Indian over 21, of good morals, sober and literate, could become enfranchised upon being examined and pronounced fit by three commissioners. Such a person would receive a portion of the band lands within the reserve and his share of band moneys. The right to actually exercise the franchise depended upon meeting the requirements of the day in federal and provincial legislation in terms of property ownership. Thus, there was no automatic right to vote. A wife and any unmarried, minor children would automatically be enfranchised as a result of the male's application.

[lxxxix]*Supra*, note 59.

[xc]*Supra*, note 60.

[xci]The developments up until 1951 are described in Rayner, *supra*, note 80, at 19-36.

[xcii]John Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885", in *Sweet Promises*, *supra*, note 85, supports this contention (at 213) as follows:

> Those who propagate the myth would have us believe that Canada began to negotiate treaties with the Indians of the west in 1871 as part of an overall plan to develop the agricultural potential of the west, open the land for railway construction, and bind the prairies to Canada in a network of commercial and economic ties. Although there is an element of truth to these statements, the fact remains that in 1871 Canada had no plan to deal with the Indians and the negotiation of treaties was not at the initiative of the Canadian government but at the

insistence of the Ojibwa Indians of the North-West Angle and the Saulteaux of the tiny province of Manitoba. What is ignored by the traditional interpretation is that Yellow Quill's band of Saulteaux turned back settlers who tried to go west of Portage la Prairie, and after other Saulteaux leaders insisted on the enforcement of the Selkirk Treaty or, more often, insisted upon making a new treaty. Also ignored is the fact that the Ojibwa of the North-West Angle demanded rents and created the fear of violence against prospective settlers who crossed their territory or made use of the territory if Ojibwa rights to their lands were not recognized. This pressure and fear of resulting violence is what motivated the government to begin the treaty-making process.

It is worth noting that the same argument could be made regarding the Metis of Manitoba, as the federal government negotiated the creation of a new province only because of pressure from the Provisional Government.

[xciii]This is attested to in the accounts provided by Alexander Morris, *supra*, note 14.

[xciv]That the pressure came from the Indians is supported by Dickason, *supra*, note 15, at 275; by John Taylor, "Canada's North-West Indian Policy in the 1870s: Traditional Promises and Necessary Innovations", in *Sweet Promises*, *supra*, note 80, at 207; and in Peter A. Cumming and Neil H. Mickenberg, ed., *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing Co. Ltd., 1972), at 120-21.

[xcv]*Supra*, note 75.

[xcvi]For a recent review of this matter as it has related to the Innu see Donald MacRae, Report to the Canadian Human Rights Commission on the complaint of the Innu Nation, August 18, 1993.

[xcvii]This is especially the case with regard to Flanagan in his later article on Metis, "The History of Metis Aboriginal Rights", *supra*, note 41.

[xcviii]*Supra*, note 9.

[xcix]Purich, *supra*, note 10, makes a similar point (at 62): "The argument against Flanagan is that no matter what Macdonald's intentions were, he did in fact recognize Metis rights by the very act of entering into a land settlement with them. In contract law, motive is seldom relevant. The effect of a contract is determined by its wording, not by the motives of the parties signing it. Similarly, the effect of legislation (like the Manitoba Act) is determined by its wording, not by the motives of the legislators. Only if there is considerable confusion in the wording will the courts try to determine the effect by looking to see what the government intended."

[c]*Reference re Section 94(2) of the Motor Vehicle Act R.S.B.C. 1979, c. 288, as amending the Motor Vehicle Amendment Act, 1982, 1982 (BC), c. 36.* [1985] 2 S.C.R. 486. The Supreme Court rejected the procedural interpretation placed on section 7 of the Charter by senior officials of the federal Department of Justice who had been involved in its drafting.

[ci]Clem Chartier, "`Indian': An Analysis of the Term Indian as Used in section 91(24) of the *British North America Act, 1867*", *Sask. L. Rev.* 43 (1978-79), 37.

[cii]Schwartz, *supra*, note 9.

[ciii]The historical material referred to by Chartier was addressed in two cases. Ferris J. from the Saskatchewan Provincial Court comes to conclusions opposite to those of Chartier, concluding that mixed-blood persons were not section 91(24) Indians in 1867 in *R.* v. *Genereaux*, [1982] 3 C.N.L.R. 95. Ayotte J. of the Territorial Court of the Northwest Territories supports Chartier's conclusions in *R.* v. *Rocher*, [1982] 3 C.N.L.R. 122.

[civ]*R.* v. *Genereaux*, *ibid.*, at 104.

[cv]*Supra*, note 14.

[cvi]See sources cited at notes 14-17, *supra*.

[cvii]S.C. 1850, c. 42 (13-14 Vict.).

[cviii]Tobias, *Sweet Promises*, *supra*, note 85, at 129.

[cix]Dickason, *supra*, note 19, states (at 250): "With so much property at stake, it became important to define the term `Indian'. The 1850 Act for Lower Canada undertook the task without consulting Amerindians...It was quickly decided that this [definition] was too inclusive."

[cx]S.C. 1861 c. 14, s. 11 (23 Vict.).

[cxi]*An Act for the Gradual Civilization of the Indian Tribes of the Canadas*, *supra*, note 87.

[cxii]1859, c. 9 (22 Vict.).

[cxiii]S.C. 1868, c. 42 (31 Vict.).

[cxiv]*Supra*, note 59. The Act also provided in section 6 that Indian women marrying "any other than an Indian" would lose Indian status, as would their descendants. Although they would lose residency rights and status, they would nonetheless still be allowed to share in band moneys, and their treaty rights were unaffected.

[cxv]*Supra*, note 60.

[cxvi]*Supra*, note 63.

[cxvii](1894) 1 Terr. L. R. 492 (NWTSC en banc) is the primary support for this proposition, although the decision is not without some ambiguity in this respect.

[cxviii]*Supra*, note 34.

[cxix]S.C., 1874, c. 20.

[cxx]*Supra*, note 35.

[cxxi]Order in Council, December 14, 1888, reproduced in Flanagan, "The History of Metis Aboriginal Rights", *supra*, note 41.

[cxxii]Order in Council, May 6, 1899, reproduced in Flanagan, *ibid.*

[cxxiii]S.C. 1899, c. 16, s.4.

[cxxiv]Flanagan,"The History of Metis Aboriginal Rights", *supra*, note 41, at 84: "The derivative nature of Metis rights meant that they could not be extinguished independently but only after the extinguishment of the Indian title in the same region."

[cxxv]As in the 1888 letter from the Deputy Minister of the Interior reproduced in Flanagan, *ibid.*, at 80: "I may further say, however, that when and so soon as the Government shall make arrangements to treat with the Indians for the cession of the territories in question the Minister will take the necessary steps to extinguish at the same time the Indian title of the Half Breeds who were living within the territories on the 15th of July, 1870."

[cxxvi]This change in language is attributed to J.A.J. McKenna, personal secretary to the Minister of the Interior, who states in an official letter in 1899 (Flanagan, *ibid.*, at 82): "It is, therefore, clear that whatever rights the halfbreeds have, they have in virtue of their Indian blood. Indian and halfbreed rights differ in degree, but they are obviously coexistent. Halfbreed rights must exist until the Indian title is extinguished, and they should properly be extinguished at the same time. The principle underlying the Government's policy respecting Indians, as embodied in various treaties, may thus be stated:- when changing conditions incident to advancing settlement interfere with their mode of life and ordinary means of livelihood it is politic and equitable - apart altogether from any title they may have in the land - to offer them some degree of compensation. The same principle is, and should be, the basis of its halfbreed policy. When the Indian rights in a certain territory are extinguished the halfbreed rights should be extinguished; and if the Government fails as it has failed in the past to pursue such a policy then the halfbreed right should be held to exist up until the date at which it is extinguished."

[cxxvii]This began with *An Act for the gradual enfranchisement of Indians*, *supra*, note 59. The 1985 *Indian Act* amendments in Bill C-31 were a partial attempt to correct this injustice.

[cxxviii]*An Act respecting Indians and Indian Lands*, *supra*, note 110.

[cxxix](1888) 14 App. Cas. 46 (PC).

[cxxx]*Ibid.*, at 54.

[cxxxi]4th ed. (St. Paul: West Publishing Company, 1968), at 1300 and 1713 respectively.

[cxxxii]See, for example, *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 and *Delgamuukw et al.* v. *A.G.B.C.*, [1993] 5 W.W.R. 97 (B.C. Court of Appeal).

[cxxxiii]See *Calder*, *supra*, note 77.

[cxxxiv]*Baker Lake* v. *Minister of Indian and Northern Affairs*, [1980] 1 F.C. 518.

[cxxxv]Douglas Sanders, "Aboriginal peoples and the Constitution", *Alta. L. Rev.* (1981), 410 at 421.

[cxxxvi]*Supra*, note 123. For a discussion of the extensive and dishonourable, if not fraudulent, dealings with scrip by speculators and both the federal and Manitoba governments see the excellent historical research of Doug Sprague generally, including "Government Lawlessness in the Administration of Manitoba Land Claims, 1870 -1887", *Man. L. J.* 10 (1979), 415, and Chartrand, *supra*, note 34.

[cxxxvii]"Having `Indian Title', however, is not necessarily the same thing as being an Indian." Schwartz, *supra*, note 7, at 243.

[cxxxviii]In a speech in the House of Commons in 1885, Sir John A. Macdonald is reported as saying the following: "Whether they [the Metis] had any right to

those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of the Province...1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of the Indian title. That phrase was an incorrect one, for the half-breeds did not allow themselves to be Indians [nor of course did the Metis generally consider themselves to be Indians]." (House of Commons, *Debates*, July 6, 1885, quoted in Flanagan, "The History of Metis Aboriginal Rights", *supra*, note 37, at 74.)

[cxxxix]Schwartz, *supra*, note 9, at 245.

[cxl]In the House of Commons, 15 years before the speech cited by Flanagan, "The History of Metis Aboriginal Rights", *supra*, note 41, it is reported that Sir John A. Macdonald made the following reference to the "half-breed" grants just two months before Manitoba's entry into Confederation: "Those half-breeds had a strong claim to the lands, in consequence of their extraction, as well as from being settlers. The Government therefore proposed for the purpose of settling those claims, this reserve of 1,400,000 acres....No land would be reserved for the benefit of white speculators, the land being given only for the actual purpose of settlement. The conditions had to be made in the Parliament who would show that care and anxiety for the interest of those tribes which would prevent that liberal and just appropriation from being abused." (House of Commons, *Debates*, May 4, 1870, quoted in Native Council of Canada, *A Statement of Claim*, *supra*, note 8, at 26.)

[cxli]*Supra*, note 117.

[cxlii]This is now accepted in Canadian law, the point having been made by Kenneth Lysyk (now Mr. Justice Lysyk), in "The Unique Constitutional Position of the Canadian Indian", *Can. B. Rev.* 45 (1967), 513 at 515: "...there is nothing in head 24 to suggest that legislative authority over Indians, as such, hinges on whether or not the statute in question is sought to be applied to an Indian on Indian lands as opposed to an Indian who is not on such lands."

[cxliii]Noel Lyon, "Constitutional Issues in Native Law", in *Aboriginal Peoples And The Law*, ed. B. Morse, *supra*, note 57, 408 at 429.

[cxliv]*Ibid.*

[cxlv]This would to some extent make the exclusion of half-breeds in section 3 (e) of the 1876 *Indian Act* (*supra*, note 60) equivalent to section 88 of that version of the Act whereby enfranchised Indians, upon receiving the letters patent to their portion of the reserve lands allotted to them in fee simple, "shall no longer be deemed Indians within the meaning of the laws relating to Indians" (except for certain purposes related primarily to band moneys and treaty annuities). Enfranchised Indians did not at that time lose their right to participate in band councils, however.

[cxlvi]In *R.* v. *Rocher*, *supra*, note 103, Ayotte J. refers to the hunting and fishing rights afforded in the Northwest Territories to Metis, noting (at 133): "It may be that the approach taken by the present government to their [Metis] land claim negotiation, at least in the western Northwest Territories, is an implied recognition of that right."

[cxlvii] *Supra*, note 4.

[cxlviii] Sally Weaver, "Federal Difficulties with Aboriginal Rights Demands", in *The Quest For Justice*, ed. M. Boldt, J.A. Long, and L. Littlebear (Toronto: University of Toronto Press, 1985), 139 at 146.

Vine Deloria Jr., a Sioux Indian, describes the same phenomenon more trenchantly in *Custer Died For Your Sins: An Indian Manifesto* (New York: Avon Books, 1970), noting (at 10): "The more we try to be ourselves the more we are forced to defend what we have never been. The American public feels most comfortable with the mythical Indians of stereo-type land who were always THERE. These Indians are fierce, they wear feathers and grunt. Most of us don't fit this idealized figure since we grunt only when overeating, which is seldom."

In the 1942 edition of *Felix Cohen's Handbook of Federal Indian Law* (Washington: U.S. Government Printing Office, 1942), Nathan Margold puts the issue of traditional `Indianness' and adaptation to settler societies in historical perspective as follows in the Introduction (at xxvii): "...As I have elsewhere observed, the groups of human beings with whom Federal Indian Law is immediately concerned have undergone, in the century and a half of our national existence, changes in living habits, institutions, needs and aspirations far greater than the changes that separate from our own age the ages for which Hammurabi, Moses, Lycurgus, or Justinian legislated. Telescoped into a century and a half, one may find changes in social, political and property relations which stretch over more than thirty centuries of European civilization."

[cxlix] *Supra*, note 30, at 368.

[cl] Bell, *ibid.*, at 368-69. The United States Supreme Court for a brief time entertained a similar notion regarding what constitutes an `Indian' lifestyle, ruling in *United States* v. *Joseph* 94 U.S. 614 (1877) that the Pueblo Indians of New Mexico were not really `Indians' in the legal sense for purposes of federal trust protection of their lands. The fact that the Pueblos held their land in fee simple and followed a more `civilized' lifestyle than their semi-nomadic Apache and Navajo neighbours weighed heavily in the Court's analysis. The Court reversed itself following New Mexico's admission to statehood in 1912 in the landmark case of *United States* v. *Sandoval* 231 U.S. 28 (1913), holding (at 39) that the Pueblos were "Indians in race, customs, and domestic government". As Indians in the legal sense Pueblo lands fell within federal trust protection, despite the long Pueblo history of fee simple ownership (and despite the fact they were U.S. citizens, unlike most other Indians within the territorial limits of the United States at that time).

[cli] The right of tribes to change under American Indian law is dealt with by Charles Wilkinson, *American Indians, Time, and the Law* (New Haven: Yale University Press, 1987), at 68-75. He notes in particular (at 69): "The modern cases have elaborated upon the promise of a right to change in a wide variety of contexts. The recognition of Indian tribes as living, expanding, and adaptive societies amounts to one of the leading developments of the modern era because of its rejuvenating effect on tribalism."

[cliii][1990] 1 S.C.R. 1075, at 1093 per Dickson, C.J. and La Forest J.:

> Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression...the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

[cliii]*Supra*, note 103.

[cliv]*Supra*, note 117.

[clv]R.S.C. 1886, c. 43. The definition of Indian in that Act was the same as that in the 1876 version (see text at note 115, *supra*). The Court described the mixed-blood person as follows (*supra*, note 117 at 493): "The person goes by the name of Henry Bear. The evidence shows that he is a half-breed, his father having been a Frenchman and his mother an Indian, that he belongs to and is a member of Mus-cow-e-quan's Band of Indians and lives on his reserve and has taken treaty money for a number of years past...".

[clvi]*Supra*, note 117, at 494.

[clvii]*Ibid.*

[clviii]*Ibid.*

[clix]It should also be noted, however, that the 1892 version of the *Criminal Code* (S.C. 1892, c. 29) contained a similar provision in s. 98 against inciting Indians or "half-breeds". By the 1906 revision, the *Indian Act* (R.S.C. 1906, c. 81) no longer contained this prohibition.

[clx]*Supra*, note 117, at 495.

[clxi](1900) 5 Terr. L. R. 580 (N-WTSC).

[clxii](1914) 23 C.C.C. 47 (NS Co.Ct.).

[clxiii]Confirmed in the *Constitution Act, 1930*.

[clxiv]*Saskatchewan Natural Resources Transfer Act*, S.C. 1930, c. 41.

[clxv]Unreported, Saskatchewan Magistrate's Court, October 1, 1971. It is reproduced in B. Slattery and S. Stelck, *Canadian Native Law Cases* 7 (Saskatoon: University of Saskatchewan Native Law Centre, 1988), 391.

[clxvi]S.S. 1967, c. 78.

[clxvii]Slattery and Stelck, *supra*, note 165, at 392.

[clxviii]*Ibid.*, at 396.

[clxix](1972) 32 D.L.R. (3d) 617, at 622.

[clxx]*Supra*, note 51.

[clxxi]*Ibid.*, at 85.

[clxxii]R.S.C. 1927, c. 98.

[clxxiii]*Supra*, note 47, at 88.

[clxxiv]*R.* v. *Budd*; *R.* v. *Crane* [1979] 6 W.W.R. 450 (Sask. QB). Jack Woodward, *Native Law* (Toronto: Carswell, 1989) notes as follows (at 9): "The reasoning in the *Laprise* decision is questionable on two fronts: on the first because the 1927 Indian Act did not deal with registration, and, on the second, because it does not acknowledge that there are many different

meanings for the word `Indian', including a constitutional sense. It is beyond Parliament's jurisdiction to define the terms used in the Constitution, including the term `Indian'." For a discussion of this issue see A.J. Jordan, "Who is an Indian?" *C.N.L.B.* 1 (1977), 22.

[clxxv] *Supra*, note 103.

[clxxvi] *Ibid.*, at 103.

[clxxvii] *Supra*, note 101.

[clxxviii] *Supra*, note 113.

[clxxix] *Supra*, note 103, at 107.

[clxxx] *Ibid.*, at 105.

[clxxxi] *Supra*, note 103.

[clxxxii] R.S.C. 1970, c. F-14.

[clxxxiii] *Supra*, note 103, at 124.

[clxxxiv] *Ibid.*, at 131.

[clxxxv] *Supra*, note 52.

[clxxxvi] *Ibid.*, at 130.

[clxxxvii] *Supra*, note 7.

[clxxxviii] *Ibid.*, at 145, per Gregoire J.

[clxxxix] *Ibid.*, at 146.

[cxc] *Ibid.*, at 147.

[cxci] *Ibid.*, at 150.

[cxcii] Gregoire J. took them from an article written by Professor Slattery to which the Supreme Court of Canada had referred in *R.* v. *Sparrow*, *supra*, note 152, in which Professor Slattery sets out the following criteria (derived largely from the *Baker Lake* case, *supra*, note 134):

(1) The parties asserting aboriginal title must constitute an organized group of native people;

(2) The group must possess the lands claimed;

(3) The group must have possessed the lands for a substantial period;

(4) The lands must form part of the Indian Territories. (Slattery, *supra*, note 57, at 756-61.)

[cxciii] *Supra*, note 7, at 152.

[cxciv] *Ibid.*

[cxcv] *Ibid.*, at 153.

[cxcvi] *Ibid.*

[cxcvii] *Ibid.*, at 154.

[cxcviii] *R.* v. *Ferguson*, [1993] 2 C.N.L.R. 148 (Alta. Prov. Ct. (Crim. Div.)).

[cxcix] *R.* v. *Fowler*, [1993] 3 C.N.L.R. 178 (N.B. Prov. Ct.).

[cc] S.A. 1984, c. W-9.1.

[cci] *Supra*, note 198, at 152-153.

[ccii] *R.* v. *Laprise*, *supra*, note 51, and *R.* v. *Budd*; *R.* v. *Crane*, *supra*, note 51.

[cciii] *Supra*, note 198, at 156, quoting from *R.* v. *Sparrow*, [1990] 3 C.N.L.R. at 181.

[cciv] *Ibid.*

[ccv] *Supra*, note 52.

[ccvi] *Supra*, note 199, at 181.

[ccvii]Canada, *Statement of the Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969). For an excellent discussion of the white paper and its aftermath, see Sally Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981) and Roger Gibbins and Rick Ponting, *Out of Irrelevance: A Social and Political Introduction to Indian Affairs in Canada* (Toronto: Butterworths, 1980).

[ccviii]Ottawa: Ministry of Supply and Services, 1979, at 16.

[ccix]The events leading up to the patriation of the Constitution from the Aboriginal perspective are outlined by Douglas Sanders, "The Indian Lobby and the Canadian Constitution, 1978-82", in *And No One Cheered: Federalism, Democracy and the Constitution Act*, ed. K. Banting and R. Simeon (Toronto: Methuen, 1983), 301. For further information regarding the NCC involvement and the MNC separation, see Bradford W. Morse and Robert K. Groves, "Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Non-Status Indians" *Law & Anthropology* 2 (1987), 139 at 154-56.

[ccx]Although the official stance of the federal government was to focus attention on the actions of the government of Newfoundland, it was the dramatic refusal of Indian MLA Elijah Harper to alter the procedural rules of the Manitoba legislature and the strong public support for his gesture that actually scuttled whatever chance the deal had of being ratified.

[ccxi]*Native Women's Association of Canada* v. *The Queen*, [1992] 4 C.N.L.R. 71 (F.C.A.), affirming [1992] 4 C. N.L.R. 59 (F.C.T.D.). Leave to appeal was granted by the Supreme Court of Canada on March 4, 1993.

[ccxii]Royal Commission on Aboriginal Peoples, *Partners in Confederation. Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993).

[ccxiii]*Supra*, note 132.

[ccxiv]*Oxford Universal Dictionary on Historical Principles*, 3rd ed. (London: Clarendon Press, 1955), at 1006.

[ccxv]See, for example, Article 1(2) of the *International Covenant on Civil and Political Rights* and Article 1(2) of the *International Covenant on Economic, Social and Cultural Rights*.

[ccxvi]Bell, *supra*, note 30, at 352.

[ccxvii]*A.G. Canada* v. *Lavell*, *supra*, note 70.

[ccxviii]Woodward, *supra*, note 174, at 56. Schwartz, *supra*, note 9, disagrees, stating (at 247) that "the section confers no rights on Métis....It may be that on April 17, 1982 the Métis had no aboriginal or treaty rights." This issue will likely be resolved when and if the plaintiffs in *Dumont et al.* v. *Attorney General of Canada and Attorney General of Manitoba* ever obtain a decision on the merits, as opposed to the series of judgements on federally initiated procedural matters that have consumed a number of years.

[ccxix]This is the wording from section 31 of the *Manitoba Act*, S.C. 1870, c. 3.

[ccxx]Bell, *supra*, note 30, at 369.

[ccxxi]For further analysis and argument on this point see Morse, *supra*, note 79, and Alan Pratt, "Federalism in the Era of Aboriginal Self-Government" in

Aboriginal Peoples and Government Responsibility, ed. D. Hawkes, *supra*, note 22, at 19.

[ccxxii]R.S.C. 1985, c. F-7. It would also encompass the Aboriginal Fisheries Agreement Regulation, at least once it is amended so as not to be limited to recognized bands under the *Indian Act* and tribal councils.

[ccxxiii]This ministerial assignment passed on to successive ministers of justice until the prime minister once again responded to complaints from MNC and NCC that the position of justice minister inevitably caused a conflict of interest with the role of interlocutor since the justice minister as attorney general for Canada was the defendant in all litigation affecting the federal Crown. As such, the overarching obligation to protect the Crown's legal interests was continually intruding in the role of advancing the interests of these distinct peoples.

[ccxxiv]For an initial effort see Morse, *supra*, note 79.

[ccxxv]It should also be noted that recent developments in international law provide additional arguments, as does the argument based on the inclusion within Canadian common law of the inherent right to Aboriginal self-government. This latter argument, however, inevitably leads back to the arguments raised in the text, since common law recognition of inherent self-government would lead to the addition of self-government to the other rights recognized and affirmed in section 35 of the *Constitution Act, 1982*.

[ccxxvi]*Supra*, note 78.

[ccxxvii]*Supra*, note 152.

[ccxxviii]*Natural Parents* v. *Superintendent of Child Welfare*, [1976] 2 S.C.R. 751.

[ccxxix]For further discussion on this point see, Pratt, *supra*, note 221.

[ccxxx]The earliest one known to the authors that was entirely related to Aboriginal issues is *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, 1891, 54-55 Vic., Cap. 5 (Canada) and 54-55 Vic., Cap. 3 (Ontario). This was later followed by the 1924 Indian Lands Agreement Act passed by the legislature of Ontario and the federal Parliament to implement an agreement dealing with the sale of reserve lands after surrender to the Crown in right of Canada so as to avoid problems created by the Privy Council's decision in the *St. Catherine's Milling & Lumber Co.* case, *supra,* note 129. The thrust of this Act is now contained in the 1986 Indian Lands Agreement finally passed by Ontario in 1989. The most recent such initiative relates to the Sechelt First Nation which obtained general enabling legislation from Parliament to move out from under the *Indian Act* while subsequently receiving added authority as a public, district government under British Columbia law through the *Sechelt Indian Band Self-Government Act* S.C. 1986, c. 27, and the *Sechelt Indian Government District Enabling Act* S.B.C. 1987, c.16, respectively.

[ccxxxi]For the full array of the Alberta Metis legislation, see note 56, *supra*.

[ccxxxii]This is at least arguably the case with a long list of statutes that have been passed by the Quebec National Assembly to implement or advance elements of the James Bay and Northern Quebec Agreement.

[ccxxxiii]4-5 Edward VII, c. 3 (Can).

[ccxxxiv]See note 56, *supra*.
[ccxxxv]For further information on these leaders, see Murray Dobbin, *The One-and-A-Half-Men: The Story of Jim Brady and Malcolm Norris, Metis Patriots of the 20th Century* (Vancouver: North Star Books, 1981).
[ccxxxvi]*Supra*, note 24.
[ccxxxvii]Alan Pratt makes an interesting argument on this issue prior to the Supreme Court of Canada's ruling in the *Sparrow* case, *supra*, note 79.
[ccxxxviii]*Delgamuukw* v. *The Queen*, [1991] 8 W.W.R. 97 (B.C.S.C.).
[ccxxxix]As related by the Rt. Hon. Joe Clark in May of 1992.
[ccxl]See, for example, *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441.