Recognition of Metis as an Aboriginal People and Implications for International Law

(Second Term Written Assignment)

Course:	12:510 Northern and Native Studies
Instructors:	G. Rowley V. Valentine
Student:	H. Daniels
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Introduction

A few years ago, when Canada formally included the term "Metis" in the Constitution, a unique and far-reaching situation was created, not only for Canadians, but for Aboriginal people all over the world. That situation is --- to put it mildly --- not well-defined, but it does generate a series of provocative questions for students of aboriginal rights in international law. The answers to those questions will have a profound and critical effect, not only on the Aboriginal peoples of Canada, but on mixed-blood indigenous populations of many countries.

With the declaration of the Canada Act of 1982 Canada formally, and in the highest law of the land, recognized Metis people as one of the three Aboriginal peoples of Canada. The other two being Indians, and Inuit, of course. What the declaration did not do is establish, from among the Aboriginal people of Canada, who would be eligible to identify themselves under the term "Metis". We are still left with no official answer to the question "WHO ARE THE METIS PEOPLE OF CANADA?"

This paper will, at least, approach an answer to that question. But in order to simplify that approach, I intend to concentrate on three aspects of the issue. In the first place I will examine those implications of the question which directly aff4ect Section 35 (2) of the Canada Act. Secondly, I will address the answer to our question in the context of the contrasts established by the disparate views of the Native Council of Canada and the Metis National Council on the term "Metis". Finally, I will explore some of the implications of this issue on the context of international law.

The Canada Act

In terms of the Constitutional orientation, we must focus on a very particular point in time, and on a very specific group of people. The date is January 31, 1981. The place is Ottawa. The people are those involved in negotiations to draft that part of the Constitution which will address the concerns of the Native People of Canada. The chief negotiator for the Federal Government was the Honourable Jean Chretien, and there were three teams representing the national Native organizations. The National Indian Brotherhood represented Status indians --- those people registered under the Indian Act. The Inuit Committee on National Issues represented the Inuit people of the Eastern and Western Arctic. And finally, the Native Council of Canada, who for the previous ten years had represented the largest groupings of Aboriginal people in Canada --- the Metis people and the Non-Status Indian people.

It was getting late in the day that January 31 when the federal Government finally agreed that the Aboriginal people of Canada would be designated in the Constitution by the terms Inuit, Indian and Metis. It is evident that the three terms chosen to cover those people represented by the three national Native organizations which were presumed at the time, to include all of the Aboriginal peoples of Canada.

The concern of the NIB was exclusively with Status Indians. The concern of the ICNI was with the Inuit. All of the remaining Aboriginal peoples of Canada --- the Metis people and the Non-Status Indian people were specifically and exclusively represented by the Native Council of Canada. Certainly, the NIB and the ICNI have little vested interest in the inclusion of the word "Metis" in the Constitution. The Metis National Council, of course, did not exist at that time. The fact that the term "Metis" was included at all was specifically and exclusively at the instigation and insistence of the NCC. That fact is unmistakably clear.

Whatever else might be said of the purposes and intent of the negotiators on that January day, there can be no mistaking the fact that the word "Metis" was mutually agreed to by Jean Chretien and the author, then President of the NCC, as being indicative of the constituency of the Native Council of Canada who identify themselves with the term "Metis". There simlpy were no other criteria on the table for negotiation.

It should be pointed out that there was some discussion as to whether or not the term "Non-Status Indian" should be entrenched in the Constitution as well. The NCC decided that it would be counter-productive to entrench a negative term like "Non-Status" in the Constitution and agreed that the term "Indian" as used in Section 35 (2) would include both Status Indians and the constituency of the Native Council of Canada who identify themselves with the term "Indian".

It is self-evident that the negotiating process that culminated that day in the drafting of Section 34 (now 35) of the Constitution Act was intended by all sides to accomplish three things. It was intended to include the Inuit peoples --- the Constituency of the ICNI --- as an Aboriginal people of Canada. It was intended to include the Indian peoples --- the Constituency of the NIB and the NCC --- as an Aboriginal people of Canada. It was intended to include the Metis --- exclusively represented by the NCC --- as an Aboriginal people of Canada. It is obvious that the present wording of Section 35(2) was specifically and intentionally designed to include, at the very least, the entire constituencies of the three national Aboriginal organizations as Aboriginal people in the Constitution.

The Definition of NCC Constituents

With some understanding of that situation, the question of criteria for identification and definition of Aboriginal people --- at that point of insertion of those terms in the Constitution --- then becomes the fulcrum on which the entire issue pivots. It is clear that the terms "Indian" and "Metis" were adopted to accommodate, at least in part, the constituency of the NCC. The relevant question then becomes --- "How did the NCC's consituency define itself as of January 31, 1981?"

In terms of public presentation on the issue by NCC, we have --- on December 2, 1980, a submission to the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada. It is in this document that the NCC serves formal notice that:

> (1) For the purposes of this Constitution Act, the phrase "Aboriginal Peoples of Canada" or "Aboriginal Peoples of Canada" or "Aboriginal peoples" means, Metis, Inuit and Indian peoples of Canada."[1]

Although the three terms are not specifically defined in the submission, a subsequent clause in a proposed text of Aboriginal Rights and Freedoms insists that "mutually satisfactory constitutional forms of recognition and protection" be established in relation to:

> d) rights pertaining to the Aboriginal peoples of Canada in relation to the Manitoba Act 1970, the BNA Act 1871, and the Confirmation of those rights in the rest of Canada."[2]

Given that the present Section 35(2) of the Constitution Act is very nearly identical to the phrasing of the NCC, the specific role of NCC is that process cannot be denied. That the presentation reflected the position of the NCC constituency is documented in congratulatory letters to the NCC from Provincial and Territorial Associations, including Ontario, the Yukon, Nova Scotia, New Brunswick and Alberta. It is clear that the NCC was fostering a national application of Aboriginal rights to all three designations of Aboriginal people.

In the previous year, the NCC had formed a Metis and Non-Status Indian Constitutional Review Commission which held hearings in every region of Canada to canvass the concerns, not only of NCC constituents, but of any other Native or non-Native persons who had an interest. These hearings were held both before and after the presentation to the Special Joint Committee and the result was a published report entitled "Native People and the Constitution of Canada." The report dealt with the significance of the identification of Aboriginal peoples and stated as of its recommendations that:

> "Broad, realistic and equitable definitions of Indian, Inuit and Metis should be adopted for the purposes of the Constitution and subsequent legislation in order to avoid the fragmentation of Native collectivities which Has hitherto occurred."

These definitions should include notions of:

i) a descent from common ancestors;
ii) a common and continous history;
iii) a form of social organization rooted in distinctive modes of economic enterprise;
iv) distinctive cultural attributes, values and willingness to identify as part of the Indian, Inuit or Metis collectivity.[3]

Of equal significance is the fact that the report, on page 7 of its first chapter addressed the issue of definition:

> "A definition of who Native peoples are must be flexible and capable of being inclusionary rather than exclusionary. We are opposed to the use of narrow racial criteria to define Native Peoples."[4]

Up to this point I have established three critical factors related to the terms applied to Canada's Aboriginal people in Section 35(2) of the Constitution Act 1982. The first is that the NCC was representing both its Indian and its Metis constituency in the negotiations which developed the inclusion of those terms in Section 35. The second is that all of the participants were agreed that those terms included all of their respective constituents. And finally that the NCC position on identification of those terms was clearly understood to include the necessity for inclusive, rather than exclusive terminology and the application of those terms on a national rather than a regional basis.

NCC Policy and Definition

In case there are some who might think it peculiar that the NCC documents I have examined to date do not contain a specific definition of either Metis or Non-Status Indian people, I can assure you that the omission --- if I may call it that --- was a matter of deliberate policy. That policy evolved out of historic and political realities and was dictated by the very nature of the constituency of the NCC. In order to establish a basis to evaluate the current NCC position on the identification and definition of Aboriginal peoples, I must take a short trip of some 12 years backward in time --- to the birth of the NCC.

Most of us can recall at least something of the "Red Power" movement of the 1960's. A heady mixture of both small and large "L" liberal policies of participatory democracy, combined with a resurgence of Native cultural values and identity, and fuelled both by the "Black Power" movement in the United States, and the failures of DIAND revisions to the Indian Act in 1951, created a potentially explosive situation. RCMP reports of the day labelled the movement as "dangerous". Partly as an attempt to "defuse" this dangerous situation and partly out of the sheer necessity to establish viable mechanisms by which Native people could participate in a dialogue with government, funds were made available for the formation of Native organizations at regional, provincial and national levels.

One effect of this funding in the Native community was to foster development of political organizations designed to improve the socially and economically disadvantaged position of many of the Native people in these communities. That was more or less expected. Another effect was even more surprising --- at least to the non-Native community. As these organizations formed, they exposed several deeply entrenched divisions within the Native community. The wall which created the major division was the Indian Act, and there were Native people who were registered under the Act, and there were Native people who were not registered under the Indian Act.

Partly because of supposed "expertise" in the area, the original funding for these organizations was channelled through the Department of Indian Affairs. Inevitably much of the early funding ended up in the hands of organizers who were known to the Department and, who incidentally, were Status Indians. This initial "incidental" fact soon surfaced as a major factor in the membership of the organizations which were being formed. Within a very short time, some Native people were being expelled or refused membership by the predominantly Status Indian organizers.

All of the Native people who were being excluded from these organizations had at least one thing in common. They were not recognized by, or registered under, the Indian Act. But under the umbrella of that particular commonality, there were distinct differences as well. There were those who lost the Status they or their parents once had by the application of specific sections of the Indian Act. There were those who had never been registered, although they perceived themselves to be, by any other criteria, Indian people.

And then there were those who considered themselves to be "Breeds" or "Metis" depending on their particular background. Some of these people had been included in Treaty and some had not. Some had been recognized under the Indian Act and some had not. Many of these variations took place within a single family.

What was being witnessed at that time were the effects of the ethnocidal policies of the colonial and Canadian governments coming home to roost. The vagaries and ambiguities of the multifarious revisions to the definition of Indian under the Indian Act were being revisited or nervously responsive modern governments. The response, finally, was to fund separate organizations in those regions and provinces where they surfaced most vociferously. But at the national level, that response generated a new problem.

How were these regional and provincial organizations going to be heard at the national level? Would it be necessary to have a national body for non-treaty Indians? And another for enfranchised Indians? And another for half-breed Indians? And another for Western Metis? And another for Ontario Metis? The solution, whether bred from economic or logistic necessity, was to group them all under a single national umbrella organization --- the Native Council of Canada. For better or for worse, the NCC was born.

It may not be possible to draw any definitive line between rhetoric and government policy when it comes to programs designed for regional or national minorities. Whichever was the chicken, and whoever laid the egg, it was clear from the very beginning that there was a marked disparity between Native and Government perceptions of the function of national Native organizations. Governments perceived the organizations as bureaucratic extensions of themselves into Native communities for the purpose of deliverying programs and services. Most of the leadership of the native organizations perceived themselves to be a spearhead of Aboriginal rights plunged into the heart of neo-colonial government policies and ethno-European bureaucracies.

Just as Native people themselves could no longer be perceived as some kind of half-savage wards of a benevolent civilized state, so native organizations quickly surpassed their role as bureaucratic handmaidens for government special programs and began to establish a marked profile as political activists in the more volatile area of Aboriginal rights and claims.

Initiated by a negative --- but very split --- decision of the Supreme Court of Canada on the issue of the existence of Aboriginal rights, a crack appeared in the dyke of federal resistance to such claims. Always quick to seize a viable opportunity, Native organizations --- including the NCC --- clamoured for government redress of their historical land claims. Equally as anxious to deflect their growing impetus, the Federal Government ladled out sufficient grease to absorb the native organizations in a land claims research process for several years. The research produced a virtual torrent of documented validation of current claims aginst both federal and provincial governments.

Bowing to the more obvious claims above the 60th parallel, and to a few specific treaty-related claims elsewhere, the Federal Government did its best to ignore the fact that the box boys they thought they had hired to deliver the goods were about to take over the store.

In the context of the growth and development of the NCC, the land claims process had many profound --- and not all positive --- effects. As long as the organization was dealing with the bread-and-butter issues of housing, education and poverty, you couldn't have drawn a line between the various elements of the NCC constituency with a laser. In terms of the lack of government and public recognition of their existence as a Native people, most NCC members were virtually identical. There was absolutely no question that the various groups within the NCC shared many common problems. But the land claims research process uncovered the necessity for very different solutions to many of those problems. It was in the context of these differences that a pragmatic need --- at least on the part of Governments --- was generated for come kind of differentiation as to what parts of the NCC constituency were associated with what claims.

It was evident, for example, that one part of the NCC non-Status Indian constituency had a rightful claim for repatriation to their bands. It was just as evident that others within the NCC who identified themselves as Indians had no possibility --- and often no wish --- to return to reserves. There were still others who never had any band or reserve association.

There was an enormous volume of evidence gathered that demonstrated beyond any doubt that the Metis of Manitoba had their share of "Indian Title" recognized under the Manitoba Act and that they were deprived of the benefits of that right. By the same token that research uncovered unmistakable proof that other NCC Metis constituents and their predecessors had suffered a similar fate decades and even centuries before Red River erupted. There was a common desire for redress of those claims --- but there was a growing conviction that very different mechanisms and processes would be required to satisfy these respective claims.[5]

Perhaps the policy of the NCC at the time best reflected the interests of that large group of constituents who would readily identify with both Indian and Metis heritage. Whether by intermarriage or historical circumstances, much of the NCC membership could document genetic relationship both to treaty association, and to distinct indigenous Metis communities. In the case of the Halfbreed Adhesion to Treaty Three in 1875, for example, the two groups would be virtually identical. For those reasons alone, it was obviously in the NCC's best interests to keep all of their options open and to esist any government attempts to establish narrow criteria for the identification and definition of Aboriginal peoples.

For reasons of their own, governments seemed equally willing to let the sleeping dog of definition snooze on. With pedantic consistency the phraseology used by governments cast Native peoples either into the multi-cultural mould, or into the ever-ready pigeonhole of socially and economically disadvantaged people.

To summarize this particular aspect of this issue, several elements should now be apparent. It is clear that the NCC played a major role in negotiating the wording of Section 35(2). It is clear that the characteristics of the NCC constituency played a major role in determining those characteristics --- inclusionary and nation-wide --- which the definition of Aboriginal people should have. Finally, and for very different reasons, both governments and Aboriginal groups were reluctant to face the issue of definition head on.

Constitutional Repatriation

Just when it seemed inevitable that NC claims process was going to simmer down, a new source of heat --- the constitutional repatriation process --- brought a different aspect of the whole exercise to a raging boil. Whether by design, serendipity, or destiny, the process of constitutional reform forced the current political aspect --- as opposed to the social, economic or historical aspect, of the Native question into a glaring spotlight.

Anxious to generate as few waves as possible in the international community in general and in English Parliament in particular, and to preserve the fragile agreement between federal and provincial governments, the Parliament of Canada paid the ransom the three national Native organizations were demanding. They "recognized and affirmed" aboriginal rights, and they designated "Indian, Inuit and Metis" as Aboriginal people.[6] The war was over with the suddenness of a thunderclap. The seemingly futile process of rooting a land claims process into federal legislation had blossomed into virtual entrenched legal status in the highest law of the land.

The NCC and the MNC

To understand the dynamics involved in the process of identification and definition of Aboriginal peoples in the context of Constitutional conferences, we must be aware of a few functional characteristics of the conference delegations in general, and the Aboriginal delegations in particular. As national organizations, the Aboriginal representatives share the same characteristics as the governments involved ---that is, that they represent a conglomeration of regional concepts which are more or less congealed into a national position.

In the same sense that provincial Premiers represent those in their province who voted against them in the last election, the Aboriginal delegations represent a broad range of views among their constituency --- some of which may be diametrically opposed to a specific position on a specific agenda item. Among the Inuit, for example, there are widely differing views as to whether forms of self-government should be public or ethnically based. Among the AFN there are groups who are diametrically opposed to the presence of provincial governments in the process and, in fact, have boycotted the conference process. Within the NCC marked the differences arose in the context of representation of Western Metis peoples.

Without pretending to any marked degree of objectivity, it should be established, however briefly, that the emergence of a fourth Aboriginal organization to represent western Metis was much more the result of personality and political in-fighting than it was the matter of fundamental differences in position. At the time the federal Government chose to establish a separate seating for the western splinter group, there were only two lines in a seven-page position paper on which differences focussed.[7]

Against the objections of the western group the NCC added the issue of Aboriginal Title and the issue of Pre-Confederation treaties to a paper which, for all intents and purposes was drafted by the western group.

The Metis National Council has since re-asserted its association with Aboriginal Title, but maintains a disinterest in pre-Confederation treaties. As an indicator of how fine the line between Metis and Non-Status Indians can be, it might be pointed out that the leader of the western splinter group in 1983 is now seeking to form a separate Non-status Indian organization in his home province of Saskatchewan. Whatever the motivations of the group involved, the emergence of a distinct western Metis representation increased the pressures governments were already generating for specific definition of the Aboriginal peoples designated in the Constitution. The number of status Indians was easily identifiable by registration under the Indian Act. The number of Inuit have also been more or less determined administratively. The two remaining question marks were attached to the number of Non-Status Indians and to the number of Metis. Estimates for these groups ranged wildly from 175,000 to 1,000,000.

Identity, Membership and Definition

As we have demonstrated, it was very much to the NCC's advantage to ensure as broad and open a definition of Indian and Metis as possible. It was only under the considerable pressure of the conference process that a specific definition was tabled by the NCC for discussion. In a document tabled in Ottawa in November of 1982, the NCC (with the agreement of the Metis Constitutional Committee of the NCC who had not yet split off) tabled the following terse items:

1. "Indian" to be defined by concerned Indians groups"; and
2. "A Metis is any person of Aboriginal ancestry who declares himself/herself to be a Metis."[8]

Although exceptionally brief, the two items touched on two critical factors in the identification and definition process. The minimum basis for identification was to be aboriginal ancestry and self-declaration and, secondly, the process of definition was to be developed by the Aboriginal groups themselves. Definition and identification were not priority items in the first round of talks. In fact, the issue did not surface specifically until the senate Committee on Constitutional Affairs began its review of the 1983 Constitutional Accord.

The issue of Metis identity was addressed as follows:

"If we were to apply the characteristics of our Metis constituency to the process of developing a legally binding definition of Metis, we could contribute to a discussion on that issue by saying that we could not accept a definition which:

1. restricted definition of Metis to mixed bloods of French descent, or to descendants of those Prairie Metis who received scrip;

2. was based on a maximum or minimum blood quantum;

3. was structured to provide a recognition to a diminishing number of people over a number of generations; and

4. was developed without the participation of Metis from all parts of Canada."[9]

The statement then goes on to establish the requirements necessary for the definition of Metis: - that is, that the definition be developed by all Metis: be inclusive of self-identifying Metis; take community considerations into account; and guarantee the continuity of Metis as distinct Aboriginal people.

This statement places the three main elements of the issue squarely in the centre of the table, and they are:

1. Aboriginal identity;

2. Membership in Aboriginal community; and

3. The question of who determines the criteria for definition.

In a presentation to the same Senate Committee, the MNC made the following declarations:

> "...being Metis is not just a matter of being mixed-blood:...The Metis Nation is a historic national minority conceived and developed on the soil of western Canada...Every nation must have a starting point and for us that point was the Red River Settlement in the early nineteenth century."
>
> "Following the First Ministers Conference, we proposed a tripartite process, involving the Government of Canada, the three Prairie Provincial Governments, and the Metis National Council, to identify and define the rights of the Metis. Today we wish to renew that invitation."[10]

The issues for the MNC were also being solidified. The criteria for definition were to be regional, specific as to time and place, and determined exclusively by the Metis National Council, and four governments. Although MNC spokespersons admitted "a slight overlap in the membership"[11] of the two organizations, they maintained the right to accept or refuse membership in the Metis nation. Any doubt about this position was resolved with their presentation at the FMC in March of this year. In a proposal for an Accord with the federal and provincial governments the MNC asserted:

1. That the term "Metis" in Section 35(2) of the Canada Act, 1982 is identified as follows:

   Firstly, all persons who are descendants of those Metis who received land grants and/or Script under the provisions of the Manitoba Act, 1870 or the Dominion Lands Act, 1979.

2. A Metis community is any group of Metis people who can trace their ancestry to those Metis who were legally identified and dealt with as Metis under the two Acts referred to in subsection 2 above."[12]

A simple comparison of the two sets of statements makes it apparent that the NCC criteria would certainly include those peoples referred to by the MNC, so the criteria are not contradictory in the sense of being mutually exclusive. Certainly the Metis of Red River have achieved a profile in Canadian history that has been denied other indigenous mixed-blood populations. Although not as well known or available to the general public, there is a growing body of documentation which establishes, beyond any question, that the Riel uprisings were just two in a series of similar events that predate the Red River events by as much as 100 years.[13] To understand the context in which the varying points of view of the NCC and the MNC have developed we must be at least minimally aware of when, where and how these peoples emerged during the interaction of Indian and immigrant populations in North America.

In the context of this presentation we can only outline the skeleton of the body of evidence that conclusively established the existence of mixed-blood populations of people who maintained an indigenous relationship, distinct from both Indian and white, to their environment and their community. Our contention is that these groups, and their modern-day descendants are Metis within the meaning of section 35(2) of

the Constitution Act. They are the ancestors, not only of the NCC Metis constituency but of the Red River Metis as well. The chronology and references which are attached to this presentation will list supporting documentation with some specificity, but for our purposes it will be sufficient to describe the conditions under which distinct indigenous mixed-blood communities evolved in Canada.

In contradiction to the wry assumption that the first Metis was born nine months after the first white man landed in Canada, the initial and sporadic contacts between Indians and explorers did not generate a definably distinct population. Whatever children may have resulted from whatever sexual contact, were simply adsorbed into the tribal group. It would be rare that the father would even know a child had been born.

When contact between specific individuals became consistent, as it did with wintering traders or trappers who spent most of the year with specific tribal families, the resulting children would be much more likely to be associated with their fathers. In that context there were three possibilities. The children would be absorbed into the tribal group --- which happened most often, particularly in matrilineal Indian cultures. The children would be isolated within or excluded from the tribal group, which happened more frequently in patrilineal groups. Or, both the mother and children would return with the father to his point of origin in one of the colonial settlements or outposts.

But it was in the context of permanent contact --- with the establishment of forts and trading posts --- that distinct indigenous mixed-blood communities evolved. The presence of at least semi-permanent personnel began to produce some form of marriage between particular individuals. Occasionally women would leave the tribal group to live at the fort or post --- an obvious solution for halfbreed women born in first phases of contact. Separation and/or exclusion from patriarchal tribal groups became more common as these alternatives became more available.

More significantly, interaction and marriage between halfbreeds becomes an increasing factor both within and outside of the tribal groups. And marriages between halfbreeds and Indians had options other than tribal associations readily available to them. Inter-marriage on all three levels steadily increased both as a corollary of and a stimulus to the expansion of trade and military alliance between the races.

The result was the growing phenomena of communities of middlemen.[14] This aspect has been well documented in recent years at the institutional and academic level --- but only too often this interaction is treated as an appendage to or a spin-off of a growing colonial frontier. Too often it is described in the socio-Darwinist concept of the frontier thesis --- static, primitve society melting before the inevitable superiority of European civilization. This thesis can now be rejected outright --- not only because of its evident underpinnings of ethno-centric racism, but because of an overwhelming volume of documentation which clearly establishes that perspective as historically inaccurate.

It is difficult to capsulize the characteristics of these communities without running the risk of oversimplifying their significance. They developed quite independently of each other in different places at different times, and certainly each had their unique characteristics. But in broad terms, it can be safely said that:

1. They were physically distinct from both Indian and immigrant communities and were identified as such both internally and externally.

2. The basis for most social and economic interaction in the community was some form of indigenous resource.

3. A distinct dialect or language was developed which combined one or more of whatever Indian and European tongues existed in the area.

4. The structure of the community was a physically permanent village where families remained on a quasi-farm site while the men responded to either the seasonal or migratory availability of indigenous resources.

5. They had forms of communal decision-making, i.e., governments that were distinct from both Indian and colonial communities.

At the risk of raising a few eyebrows and probably a few hackles, I present the names of some of the communities that are now in the process of being documented as "Metis" --- in the broad sense of the term. Certainly La Héve and Isle de Royale --- if not the whole of Acadia.[15] In fact, the Acadians had already been expelled and were just working their way back to their homeland at this point. If not the whole of Upper Great Lakes country, then certainly Sault Ste-Marie, Green Bay, Michilimackinac, Detroit and Chicago.[16] For the time being I will leave Montreal, Quebec and Trois-Rivières to their Francophone preferences (but I keep in mind that there were never more than 10,000 French colonialists who travelled to the new world).

There were literally dozens of smaller communities scattered along the trade routes of the Great Lakes ad steadily trickling westward toward Lake Nipissing which had at least one thing in common with the larger centres --- a majority of mixed-blood permanent or semi-permanent residents who maintained their basic lifestyle regardless of which European flag theoretically flew over their heads. Often referred to as the "People in Between"[17] Indian and white cultures, these people were often the only permanent population in the area as French and English --- and their equivalent Indian allies --- advanced and

retreated in and out of these communities in step with the vagaries of European politics.

Among others, it is the descendants of these people who are the Metis constituency of the NCC today. Tracing their heritage back to generations before Red River ever heard a French accent --- much less an English one --- they claim that heritage and the rcognition of their genetic association to that heritage under the term Metis in Section 35(2) of the Constitution Act.

International Law

With that bit of historical background in mind, I turn to a more global perspective. From the point of view of international law, I can only hope to achieve a perspective which will bring our domestic issue more sharply into focus.

Since Canada has, in fact and law, recognized Metis people --- whoever they might be --- as an Aboriginal people, the Metis --- as a people --- have an obvious right and opportunity to take their place in the international community of Aboriginal and indigenous peoples. And, in the context of that community, they are entitled to whatever form of recognition and rights are applicable to an Aboriginal and indigenous people. To begin with, we should familiarize ourselves with the criteria for identification of Aboriginal peoples and their rights that have been developed in the international community.

Without exhaustively describing the process by which Aboriginal people became a subject of international law, we can briefly outline the conceptual development of that process. While conquistadors were busy annihilating entire North American populations, the theorists and Popes of Europe were slowly coming to the conclusion that Indians were indeed men.[18] Since it took almost a century to figure out that basic fact, it is hardly surprising by the time the sovereignty and Aboriginal title of Indigenous peoples became a topic of international attention via the United Nations, there was very

little Aboriginal land and not that many more Aboriginal people to be concerned about in Canada --- at least as far as the government was concerned.

The Canada Act may well be the hammer which irretrievably shatters that complacency. There could be up to three million people covered under the terms of section 35(2) and given the fact the Canada is a signatore to the UN convention which recognizes that all people have a right to self-determination[19] the implications become truly engrossing. It is true that the position of indigenous and Aboriginal peoples is somewhat ambiguous in the international community.

It is almost more by implication and association with the related conventions dealing with minority groups and racial discrimination that Aboriginal peoples have been able to enter the arena of international law.[20] Only in recent years has it been possible for indigenous peoples to develop fora[21] specifically designed to address their particular issues of Aboriginal title and sovereignty --- the basis of any real mechanisms for self-determination.

Tentative as it may be today, the recognition of Canada's Aboriginal people in the Canada Act cannot help but strengthen their position in existing and future international associations of indigenous and Aboriginal peoples. Even existing conventions in the international law community hold much promise for the struggle of Canadian Aboriginal peoples toward self-determination. The most unique aspect of this promise lies in its implications for indigenous mixed-blood peoples --- in Canada's case, the Metis, and, from a slightly different perspective, Non-Status indians.

Status Indians, for example, would have little trouble meeting the basic criteria for statehood as expressed in the Montevideo Convention of 1933 in which a state is said to possess the following qualifications:

a) a permanent population;

b) a defined territory;

c) government; and

d) capacity to enter into relations with other states.[22]

In at least vestigal form, Status Indian bands would meet most if not all of these criteria.

But what happens to Non-Status Indians, who are now constitutionally recognized by the Canada Act, but who have been deprived or dispossessed of recognition and benefit of band lands or reserves or government? And what of the Metis who have been entirely dispossessed of their traditional lands, and who, immediately after 1885 were forbidden by law to converse in groups of three or more? If national recognition of a people is to mean anything at all, it becomes obvious that we must seek new criteria as a basis ofr self-determination and/or evolve a fresh terminology which will allow the pouring of new wine into old bottles.

The International Commission of Jurists, it seems, have already taken a step in this direction by proposing the following criteria for the definition of a people:

1) a common history;

2) racial or ethnic ties;

3) cultural or linguistic ties;

4) religious or ideological ties;

5) a common territory or geographical location;

6) a common economic base; and

7) a sufficient number of people.[23]

Aboriginal peoples themselves have proposed in Article two of their Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere that:

> Indigenous groups not meeting the requirements of nationhood are hereby declared to be subjects of international law and are entitled to the protection of this Declaration, provided they are identifiable groups having bonds of language, heritage, tradition, or other common identity.[24]

Should some form of this proposal be generally adopted, there is no question that both Non-status Indians and Metis could readily become subjects of international law. It would then still remain, however, to determine to what extent these peoples could then manifest the right to self-determination. There is no question but that future governments in Canada --- with or without the leverage of international law --- are going to have to accommodate and provide for the development of some form of self-determination for indigenous and Aboriginal populations in the context of the dominant --- and predominantly immigrant --- state.

A Native State

Most Canadians would be surprised to learn that this is not the first time the question of self-rule has surfaced in Canada. In fact the issue has existed much longer than Canada itself. Most of us are probably familiar with the fact that the Proclamation of 1763 recognized most of North America as Indian lands and recognized the right of tribes or nations of Indian people to govern themselves on those lands.[25] But many here might not

be aware of the fact that there were at least two attempts in colonial times to have the Upper Great Lakes country declared a province.

This, in effect, would have given the Metis of the area legal dominion over a territory in which they, at the time, exercised de facto control.[26]
Following the American Declaration of Independence, and in the context of the War of 1812, both British and American officials were promoting the creation of a kind of Native buffer state between the remaining British Colonies and the united States.[27] Certainly the Native peoples who fought with Brock in the War of 1812 --- and who are exclusively responsible for the fact that Southern Ontario is not part of New-York State --- expected to be rewarded with the designation of territory as a Native state.[28] The fact that the treaties which resolved the British/American difference virtually ignored the Aboriginal people --- Indian and Metis alike --- exposed the simple fact that the immigrant populations --- on either side of the border --- had no intention of recognizing any form of Aboriginal self-determination.

From a white perspective, the issue of Native sovereignty simply faded into insignificance in the 1820's. Decimated by disease, dispirited by war, fragmented by treaties and borders, and no longer necessary in the immigrant wars, the Indian population were no longer a threat to major settlement --- and certainly in no position to press claim of sovereignty. With a few variations, the same scenario was played out with mixed-blood people over the next century.

Although often snobbishly belittled by the aristocratic commissioned officers and European army regulars, mixed blooeds held the balance of military power for decades in colonial conflicts. They fought Sioux and Iroquois to a standstill. Allied with the French, they defeated the English; allied with the English they defeated the French and Americans; and allied with the Indians, they scored victories over English

and Americans. Often fighting in coherent units, or as leaders of Indian units, they were a decisive factor in every major military engagement of the century.

A proud and powerful, resourceful and skillful people, they had every expectation of taking their rightful place in the new nations that were forming in the "new" world. As the lifeblood of the frontier economy, the muscle of the colonial military and the diplomats of White/Indian statesmanship, they played a critical role in the evolution of North America up to 1800. The result of two centuries of adaptation, a new race was preparing to take its place on the world stage.

Perhaps the experience with the Acadians in the Maritimes and the Metis of the Upper Great Lakes had lulled the colonialists into a sense of false security. Perhaps they felt they had only to give the order and the normally peaceful indigenous mixed-blood population would bow to colonial control or move on to literally greener pastures as they had often done in the past. In 1816, the Metis of White Horse Plains brought that theory to a bloody end at the Battle of Seven Oaks. In 1849 the Metis of Mica Bay in the Sault area used cannon to force the closure of a copper mine in their territory and in Red River, Louis Riel, Sr. brought the trade monopoly of the Hudsons's Bay Company to an end.

Evidence of the assertion of sovereignty and at the very least, self-determination was a common factor of most Metis collectivities, wherever they existed in time and place. The familiar uprisings of 1870 and 1885 in Red River and Batoche were just two episodes in a continuous struggle of an indigenous people for self-determination.

To summarize what has already been a rather long story, the waves of immigration that flowed to Canada in the following decades, combined with a deliberate government policy to ignore Halfbreed and Metis claims[29] while, at the same time, shrinking the definition of Indian[30] to exclude more people than

it included, very nearly submerged Canada's Aboriginal people in a sea of indifference. But, as we have seen, the dunking was temporary. Aboriginal people in Canada once again have their heads above water and, it would seem, have some realistic expectation of a bit of land to stand on. By way of concluding our expedition into the nearly uncharted realms of Aboriginal peoples and their prospects for self-determination, I will try to tie the domestic aspects of these issues into the possibilities being generated in international law, with at least some expectation of approaching an answer to our orignial question.

Domestic Initiatives

As even the most cursory examination of the volumes of paper being generated by the First Ministers Conference process clearly demonstrates, the issue of self-government is high on the priority list of the Aboriginal participants. Although the concepts, forms and mechanisms to manifest self-government might vary in content from delegation to delegation, the necessity for accommodation of Aboriginal people on this issue is unanimous.

If the rhetoric of opening statements by Prime Minister Mulroney and former Prime Minister Trudeau and many provincial Premiers are to be believed, there is a growing political will to negotiate some form of self-government for at least some groups of Aboriginal people.[31] Certainly the Penner Commission on Self-Government has recommended substantive changes in the governing powers of Status Indian bands.[32] And we were told legislation to bind government to the implementation of at least some of those recommendations is already in the works. Accommodation for Non-Status Indian peoples and for Metis peoples is proving more problematic, but discussions on the possibilities continue. The Inuit, by the way, have opted --- with some apprehension --- to adopt a public form of government in the North. It would seem that both levels of Government, and the Canadian people themselves [33]

support some form of self-government for Aboriginal people in Canada.

Another aspect of self-determination, the criteria for membership in a given Aboriginal collectivity, still presents more problems than solutions. But the process is being worked on in s thorough and deliberate way. Again, the concept of self-identification in general, and the definition of Aboriginal peoples in particular, are unanimously reserved to the Aboriginal peoples most concerned (with admitted differences in content which remains to be worked out).

The most contentious issue in the area of self-determination --- that of a land base --- has been given a better reception than most might expect. The Inuit, who are the majority in the territory they occupy, are getting the most positive response to their demand for possession and control of their traditional lands. The Status Indians, with their entrenched relationship to reserve lands and with some possibility of positive response to claims for traditional lands, are in the process of negotiation in many areas.

The issue of land in relation to the patently landless Aboriginal peoples --- the non-Status Indian and the Metis presents the most bewildering and most challenging range of possibilities. There are those who currently occupy, but have no legal right, to land. There are those who have been unilaterally dispossessed of their traditional lands and forced into community ghettos. There are still others who have integrated successfully into urban areas with no significant loss of traditional identity. Accommodation for these people is considerably more difficult but has not, as yet, been rejected out of hand at the conference table.

Access to International Law

Should the domestic avenues of resolution exhaust themselves in unsatisfactory results --- then the possibility of resolution via

international law and vehicles associated with the United Nations are the last hope of success. Should any of the Aboriginal groups fail to achieve their major goals at the conference table, then adjudication in international fora becomes at least a tactical possibility. A final glance at the sources of international law available in this context almost assures a formal hearing.

Article 38.1 of the Statute of International Court of Justice states that the Court shall apply the following criteria to decide disputes:

1. International conventions...expressly recognized by the contesting states.

2. International custom, as evidence of a general practice accepted as law.

3. The general principles of law recognized by civilized nations.

4. ...judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[34]

Under these criteria both Metis and Non-Status Indians could present a viable case. Certainly both of the "contesting states" have recognized these people as Aboriginal peoples. Within the context of international custom and the added dimension of modern ethnic liberation movements, the struggle of these indigenous persons could easily be established. Under the general principles of law --- even within the borders of Canada --- it is obvious that parallel Aboriginal groups, such as Status Indians and Inuit, are being legally accommodated. The growing body of work being amassed under the sponsorship of international groupings of indigenous peoples assures sufficient

rhetorical support for the concept of self-determination being expressed by the NCC at the conference table.

In short, it becomes evident that Metis peoples and Non-Status Indian peoples have justifiable and valid claims to self-determination on both domestic and international fronts. Which of these fora prove to be the most viable will be determined in the next few years.

Conclusions

Considering the complexity of issues I have interwoven in this presentation, my conclusions may seem disarmingly simple.

There is no question but that the Aboriginal people of Canada are recognized as a distinct people in the Constitution Act of 1982.

There is no question that persons who identify themselves today as Metis or Indian (Status or otherwise) have a right to recognition under one or perhaps both peoples designated by the term "Metis" and by the term "Indian".

There is no question that all of these groups, in a domestic context are claiming the right to self-determination (including land-base, self-government, and exclusive jurisdiction over definition) in the domestic forum of the First Ministers Conferences. And, with markedly varying degrees of enthusiasm, these demands are being responded to by both federal and provincial governments.

There may well be some question in the context of international law, as to what principles might be applied to accommodate the unique circumstances created by a landless and widely dispersed population, such as Metis and Non-Status Indians. But there is no doubt whatever that a fertile ground exists for the consideration of such claims and very little doubt, in my mind at least, that international law would eventually compel

the development of adequate mechanisms to ensure the self-determination of the Metis and Non-Status Indian people that the NCC currently represents.

FOOTNOTES

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