# Who are Canada's Aboriginal Peoples? Recognition, Definition and Jurisdiction

*by Paul L.A.H. Chartrand, ed.*
*Saskatoon, Purich Publishing, 2002. Pp. 320.*

SIMPLY PUT, "Who Are Canada's Aboriginal Peoples"[1] is a very good book. The "Foreword" is written by Harry W. Daniels, former president of the Native Council of Canada (now known as the Congress of Aboriginal Peoples). In the manner of a honed politician, Daniels tells his exciting tale of his role in the Métis gaining express mention in the *Constitution Act, 1982*.[2] It is a bold segue into the realm of recognition, definition and jurisdiction–the key issues associated with the question of "who are Canada's Aboriginal peoples?"

Paul Chartrand's "Introduction" to the book nicely compliments the "Forward" by delving into the key questions of national significance facing all Aboriginal people (with a focus on Métis) and federal/provincial governments today. Using highlights from the recommendations of the Royal Commission on Aboriginal Peoples (RCAP), Chartrand canvasses the range of issues addressed in the compilation of essays, including who makes up the "Aboriginal peoples of Canada", what is the meaning of self-government in a modern society, what is the interplay between the jurisdiction conferred by section 91(24) of the *Constitution Act, 1867*,[3] and the recognition and affirmation of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*.[4] Chapter One of the book, also by Chartrand, provides further background information, locating the reader in the historical, legal and "...political context from which the questions of recognition, definition and jurisdiction arise...",[5] including the First Ministers' conferences, the constitutional amendments proposed in the Charlottetown Accord in 1992, the RCAP, and

1. Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples: Recognition, Definition and Jurisdiction* (Saskatoon: Purich Publishing Ltd., 2002).
2. Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*] (It should be noted, however, that he tells the story with even more charisma in person than he does in the book. This was evidenced in his speech at the recent conference in Saskatoon, Saskatchewan, June 2003, on "Métis People in the 21st Century". The Hon. W. Yvon Dumont, former Lieutenant Governor of Manitoba and still active in Métis politics described Daniels' stature best in his opening address to the conference. To paraphrase, he said: In the entire history of the Métis people there have only been two individuals who have gotten the Métis into the Canadian Constitution. One is Louis Riel, when he had Métis included in the land rights provisions in the *Manitoba Act, 1870* that was subsequently made part of the *Constitution Act, 1871*. The other is Harry Daniels, when he had Métis included in section 35 of the *Constitution Act, 1982*); See W. Yvon Dumont, "The Métis People in the 21st Century" (Opening Address delivered to the Métis People in the 21st Century Conference at the University of Saskatchewan, June 18-20, 2003), online: Indigenous Bar Association of Canada <http://www.indegenousbar.ca/conferences/saskatchewan_conference_agenda.html> (website contains a description of the Conference's objectives and agenda only).
3. (U.K.), 30 & 31 Vict., c.3, s. 91, reprinted in R.S.C. 1985, App. II, No 5.
4. *Constitution Act, 1982, supra* note 2 at s. 35.
5. Paul L.A.H. Chartrand, "Background" in Chartrand, ed., *supra* note 1 at 27.

*Gathering Strength*, the federal government's policy document response to the RCAP.[6]

### A. RECOGNITION

There are several interesting and informative substantive articles in the compilation on the subject of "recognition." Chapter Two, by John Giokas and Robert K. Groves, provides a compact summary of many of the problems that have been associated with the *Indian Act*.[7] The "Short History of the *Indian Act*," is one of the most concise this author has seen. The Bill C-31[8] and *Indian Act* section 6(1) and 6(2) complexities are clearly articulated. Interestingly, the *Indian Act* is deemed by Giokas and Groves as "Canada's domestic recognition"[9] legislation. However, the *Indian Act* does not appear to have ever been considered collective or individual "recognition" legislation by the drafters of its many versions. Rather, the purpose of the *Indian Act* seems to always have been for the federal government to exercise its legislative jurisdiction under section 91(24) of the *Constitution Act, 1867* over "Indians and lands reserved for Indians". The *Indian Act* provides for many matters that would otherwise be under provincial jurisdiction, such as education, wills, and ownership of property on reserve. It provides for band exercise of limited self-government powers. In stark contrast to the self-government agreements negotiated under the federal government's Inherent Right Policy, the *Indian Act* does not stem from a basis of recognition policy. While the article criticizes the legislation's efforts at "recognition," the *Indian Act* itself may never have set out to accomplish that task.

In Chapter Three, "Who Are the Métis in Section 35?",[10] Giokas and Chartrand survey the broad range of issues associated with this timely question, given the impending Supreme Court of Canada decision in *R. v. Powley*,[11] expected in the Fall of 2003. They begin with a comprehensive look at the historical development of Métis/half-breed/mixed ancestry communities, delving into the murky waters of terminology and definition. They look at several indigenous populations of mixed ancestry in Western Canada and the North that have at various points in history been considered or have considered themselves, Métis, treaty Indians, non-treaty Indians or non-status Indians. They also touch briefly on the subject of mixed ancestry elsewhere in Canada, recognizing that it is difficult to say whether these persons

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6. *Ibid.* at 27, 33.
7. *Indian Act*, R.S.C. 1985, c. I-6 [*Indian Act*]; John Giokas & Robert K. Groves, "Collective and Individual Recognition in Canada: The *Indian Act* Regime" in Chartrand, ed., *supra* note 1 at 41.
8. Bill C-31, *An Act to amend the Indian Act*, 1st Sess., 33rd Parl., 1985.
9. Giokas and Groves, *supra* note 7 at 47.
10. John Giokas & Paul L.A.H. Chartrand, "Who are the Métis in Section 35? A Review of the Law and Policy Relating to Métis and 'Mixed-Blood' People in Canada" in Chartrand, ed., *supra* note 1 at 83.
11. [2003] S.C.C. 43, 203 D.L.R. (4th) 1. (Editor's note: this case has since been decided on September 19, 2003).

established distinct communities or were simply "groupings of frontier families," perhaps without a distinct ethnic identity.[12] Controversially, they theorize that Métis will likely become the largest "Indian" category, and with the potential impact of the *Indian Act* sections 6(1) and 6(2) distinctions, perhaps the proper question to ask "...is not so much 'Who is a Métis?' as 'Who is not a Métis?'"[13]

Ultimately, Giokas and Chartrand find that since Indian legal status cannot be tied easily to blood quantum, kinship or self-identification, there is no logic to trying to use the Indian "boundary" to define Métis as "those who are not Indians" for constitutional purposes.[14] They dismiss the "derivative rights" theory[15] as fundamentally incompatible with section 35 (which recognizes Métis as a distinct Aboriginal "people") and as conceptually antithetical to historic Métis struggles for a distinct identity. It becomes abundantly clear near the end of the paper that the key question the paper proposes to deal with—"Who are the Métis in Section 35?"—will not be answered conclusively. However, the paper gives an excellent account of the complexities of Aboriginal legal identity and advises the judiciary quite wisely: to be cautious "...in dealing with individual claimants to Métis identity [so as to] allow the courts to develop principles [that] recognize the inherent right of 'Indian nations' as well as of 'the Métis people'..."[16] to associate freely.

In Chapter Four, Giokas provides a comparative study of "Domestic Recognition in the United States and Canada."[17] It is the longest chapter in the book and perhaps one of the most difficult to read due to the complexity of his topic. Giokas is nonetheless able to show with success the potential usefulness of lessons drawn from the U.S. experience with self-government policy and practice. He clearly illustrates the issues associated with identifying who constitutes a "people" or a "nation" for the purposes of self-government, and what self-government might translate to in the practical sense.

Chapter Six by Russel Lawrence Barsh entitled "Political Recognition: American Practice" explores the American experience with recognition of Indian tribes.[18] It is most interesting for its discussion on the concept of "community." This is becoming the key issue in Canadian Aboriginal law, particularly as the Supreme Court of Canada wrestles with

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12. Giokas and Chartrand, *supra* note 10 at 100.
13. *Ibid.* at 104.
14. *Ibid.* at 106.
15. *Ibid.* at 107 (Described by the authors as the notion that "...the rights held by the Métis people are held on account of their descent from Indians").
16. *Ibid.* at 111.
17. John Giokas, "Domestic Recognition in the United States and Canada" in Chartrand, ed., *supra* note 1 at 126.
18. Russel Lawrence Barsh, "Political Recognition: An Assessment of American Practice" in Chartrand, ed., *supra* note 1 at 230.

such questions as whether Métis have Aboriginal rights. In Canada, Aboriginal rights are collectively held, yet Métis communities are not easily identified. Barsh highlights American (Branch of Acknowledgement and Research (BAR), Bureau of Indian Affairs Office of Tribal Services) policy and regulatory efforts aimed at restoring Indian tribes "terminated" by Congress in the 1950s and 60s. Barsh explains that in dealing with "[t]he problem of landless, terminated, and unrecognized tribes...",[19] the Americans developed certain criteria for those tribes to meet in order to receive recognition, one of which was "the continuous existence of 'a distinct community.'"[20] Similarly, in Canada, "do Métis communities exist?" or "what constitutes a Métis community" have become the key questions of the day. Barsh highlights some of the weaknesses of the BAR office, focusing on its presumptions around what constitutes a legitimate indicator of social cohesion and its preoccupation with blood quantum at the expense of more important or indicative sociological factors. Barsh's section on lessons for Canada could have been a bit more comprehensive given the detail he included in his paper on the American situation. However, the paper is an interesting exploration of the American situation and may prove to be a useful reference for Canadian policy makers.

### B. DEFINITION

Definition is a central issue that arises in every article of this book in some fashion. It is mainly dealt with in the book in relation to Métis and non-status people. It is dealt with most directly in Chapter Eight in Giokas and Chartrand's exploration of the definition of "the Métis people."[21] Theorizing that section 35 affirms a right of Aboriginal self-government, they resolve that:

> An inquiry into the definition of "the Métis people" in section 35 leads to the conclusion already reached by historians, namely, that in Canadian history there has been only one ancestral "Métis nation" that was self-governing, and whose recognized historical existence reveals the long and difficult struggle for the protection of the rights that are now affirmed by section 35, according to the Court's view of the purpose of section 35. This historic nation is "Riel's people" of western Canada, whose history includes negotiations that led to the birth of Manitoba, and military encounters with both Indians and colonial and Canadian authorities, which crystallized their distinct identity as a unique people.[22]

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19. *Ibid.* at 237.
20. *Ibid.*
21. Paul L.A.H. Chartrand & John Giokas, "Defining 'The Métis People': The Hard Case of Canadian Aboriginal Law" in Chartrand, ed., *supra* note 1 at 268.
22. *Ibid.* at 294.

The authors further theorize that a distinct Métis identity:

> ...means abandoning not only the conceptual boundary of Indian definition, but also the idea that Métis rights are derived from the rights of Indians. In particular, Métis persons have no claim to participation in the benefits of Indian treaties. The idea that Métis persons can claim treaty benefits only arises if the erroneous assumption that "Métis" means "mixed blood" is adopted. The true construction of the term "the Métis people" following accepted judicial analysis, recognizes the evolution of the Métis people as an exceptional phenomenon that responded to a unique set of social, political and economic stimuli in western Canada during the nineteenth century.[23]

The authors go on to explain that "[t]he 'pan-Aboriginal' approach to Métis identity [which] emphasizes a 'mixed blood' ancestry linked to any Indian family anywhere in Canada"[24] dilutes Indian nations and does not respect international commitments regarding self-determination.

It may indeed make sense to move away from what the authors call the "boundary of Indian definition"[25] in determining who is a Métis, and move towards "the positive core of Métis ancestral identity."[26] But, why does Métis ancestral identity have to be frozen in time and place to only the Red River Métis? Why are only the Red River Métis deserving of the term "Métis peoples"? I am not so much arguing for recognition of a larger group of Métis, as I am querying whether these questions have been carefully considered and answered by the authors. Earlier articles in the book draw the reader's attention to the importance of applying the concept of community in a broad and all-encompassing sense. Yet, according to the theories in this paper, mixed-blood Aboriginal people not descended from the historic Métis nation, but who consider themselves Métis and who may indeed satisfy some unknown threshold of what constitutes a Métis community, are to be left out of being considered a "Métis people." I suppose my point is that the authors make a strong case for why the Red River descendants *are* a people; perhaps they need to strengthen their case for why other Métis *are not* a people.

### C. JURISDICTION

In Chapter Five on the issue of jurisdiction, Bradford Morse and Robert Groves look at strategies for determining the nature and scope of section 91(24) jurisdiction, and whether it entails positive obligations on the federal government to Métis and non-status Indians.[27] They explore a broad range of arguments that could be advanced by Métis and non-status Indian repre-

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23. *Ibid.* at 295.
24. *Ibid.*
25. *Ibid.*
26. *Ibid.*
27. Bradford W. Morse & Robert K. Groves, "Métis and Non-Status Indians and Section 91(24) of the *Constitution Act, 1867*" in Chartrand, ed., *supra* note 1 at 191.

sentatives or by the provinces in support of federal jurisdiction for Métis. They further point out that section 91(24) will be looked at in relation to section 35 of the *Constitution Act, 1982*. The manner in which the section 91(24) question is addressed (*e.g.* in a definitional fashion, as a consequence of a section 35 rights assertion, or in relation to a particular arena of responsibility) may impact on its ultimate determined scope. The paper is extremely thorough in its treatment of the issues, even considering the potential impacts of a ruling on section 91(24) for Métis and non-status Indians by region, and canvassing possible litigation strategies for clarifying section 91(24). Ultimately, the paper proposes that while the "cleanest" option for clarifying the section 91(24) question might be a reference case framed jointly by "a senior level government" and Aboriginal regional and national organizations, a well-funded trial action would allow for "greater control of the wider political climate" by Aboriginal organizations.[28] It is of note that this paper was written in 1999 for the Congress of Aboriginal Peoples, likely prior to the December 1999 filing of the *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*[29] Statement of Claim against the federal government that seeks, *inter alia*, a declaration that Métis fall within section 91(24).

In Chapter 7, Dale Gibson looks at federal jurisdiction under section 91(24) and theorizes that it does not matter whether Métis fall within federal jurisdiction under that section or not, as section 35 accomplishes what section 91(24) would anyway.[30] It is simply not clear how he arrives at this conclusion, since section 91(24) is a constitutional provision granting the federal government legislative jurisdiction over a particular "subject matter", and section 35 is a constitutional provision recognizing and affirming the existence Aboriginal and treaty rights. Section 91(24) allows for the development of federal regulatory schemes in relation to any aspect of "Indians or lands reserved for Indians" and section 35 requires non-interference with constitutionally protected rights.

All-in-all, "Who Are Canada's Aboriginal Peoples?" is a solid introduction to the key legal and policy issues facing Aboriginal politicians, individuals and communities, and federal and provincial governments. The issues raised are still pertinent to the times, even though many of the articles were apparently written in 1998. The book is heavily weighted on Métis and non-status Indian issues, offering a comprehensive review of the related threshold issues yet to be determined by courts, Aboriginal groups or federal and provincial governments. At times, it offers some interesting lessons and comparative explorations for policy developers and community leaders

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28. *Ibid.* at 224.
29. [2002] 4 F.C. 550, 220 F.T.R. 41 (T.D.).
30. Dale Gibson, "When Is a Métis an Indian? Some Consequences of Federal Constitutional Jurisdiction over Métis" in Chartrand, ed., *supra* note 1 at 258.

alike, and even provides some suggestions for government (although many of those are not so much new and innovative, as they are a reflection or restatement of RCAP recommendations that the authors may feel have been ignored). For the most part, the authors write with skill and clarity, aiming to capture all the prisms of an issue, to the reader's benefit.

Nevertheless, a general question or "point of criticism" is unavoidable at this point in the review. Where are the women's voices in this book? Not one female author contributed to this compilation, although there are several (academics in particular) who would have had much to share. This point strikes home most clearly when reading Giokas and Groves' discussion about residual discrimination in the *Indian Act* in Chapter Two. They mention the American case of *Martinez v. Santa Clara Pueblo,*[31] a case about a tribal membership ordinance that denied membership to the children of women, but not to the children of men who married outside of the tribe. Giokas and Groves note that the U.S. Supreme Court refused to interfere in the tribe's decision because the "sovereign immunity of tribes as extra-constitutional self-governing entities meant that such issues were for the tribal, not the federal courts to decide."[32] Giokas and Groves claim that the Martinez case "...offers at least a hint about how Canadian courts may choose to deal with band or Indian First Nation sex discrimination issues should they arise in an approximately similar context."[33] Aside from a brief mention of this type of resolution not being one that Aboriginal women in Canada would appreciate, this is the only assessment they offer of a very pressing gender issue at the heart of self-government processes. In this particular article, deeper consideration of the issue could have included discussion on the interplay between self-government powers and the *Canadian Charter of Rights and Freedoms,*[34] sections 15 and 25. Generally, some consideration of the gender issues associated with many of the fundamental Aboriginal law issues raised in this book may have made for a more thorough compilation.

Anyway, the book is a most worthy read. While it does not answer all of the questions, it poses the right ones and stimulates the reader's desire to learn more on the issue.

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31. 436 U.S. 49, 540 F.2d 1039 (1978).
32. *Ibid.* at 66, 67.
33. *Ibid.* at 67.
34. Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

* The opinions expressed in this book review are entirely those of the author and not her employer, the Government of Canada.