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Defining Metis People as a People: Moving Beyond the Indian/ Metis Dichotomy

Brenda L. Gunn
University of Manitoba

Brenda L. Gunn*

Defining Métis People as a People: Moving Beyond the Indian/Métis Dichotomy

This article argues that the legal definition that defines Métis people in opposition to Indian detracts from the goal of recognizing the Métis as a distinct people. The article argues that we ought to de-couple the definitions of Métis and Indian to more strongly recognize Métis as a distinct people. This article considers three intertwined concerns that arise from this dichotomous approach to Métis identity. The first concern is about the "hard line" created in the definition between Indian and Métis, forcing one to be either Indian or Métis. The second concern is that changes to the definition of Indian may impact the definition of Métis, making the two identities contingent and inherently connected. The final related concern is that defining Métis as "not Indian" leads to the question of how distinct Métis culture needs to be from Indian culture for recognition. The article argues that we need to re-centre the definition of Métis on being Métis people based on internal characteristics (who Métis are) and move away from the legal definition of Metis being contingent on the legal definition of Indian (who Métis are not).

L'auteure avance que la définition légale utilisée pour décrire les Métis par rapport aux Indiens n'atteint pas l'objectif de reconnaître les Métis comme peuple distinct. Elle allègue que nous devons dissocier les définitions des termes Métis et Indien pour reconnaître sans ambiguïté que les Métis forment un peuple distinct. Dans l'article, elle examine trois questions liées qui découlent de cette approche dichotomique de l'identité des Métis. La première a trait à la ligne dure entre les définitions des termes Indien et Métis, laquelle oblige les gens à être l'un ou l'autre, Indien ou Métis. La deuxième est la possibilité que des modifications à la définition d'Indien aient une incidence sur la définition de Métis, ce qui ferait en sorte que les deux identités dépendraient l'une de l'autre et seraient intrinsèquement liées. Dernière question : si les Métis devaient être définis comme n'étant pas des Indiens, il faudrait déterminer à quel point leur culture doit différer de la culture indienne pour être reconnue. L'auteure affirme que nous devons recentrer la définition de Métis à partir du fait que les Métis sont un peuple en se fondant sur des caractéristiques internes (qui sont les Métis) et nous éloigner de la définition légale de Métis qui dépend de la définition d'Indien (ce que les Métis ne sont pas).

* Métis. Associate Professor, Robson Hall Faculty of Law, University of Manitoba. This research was undertaken with support of the Legal Research Institute, Manitoba. I also thank Rhea Majewski for her research assistance in the early stages of the project.

Introduction

Throughout most of the twentieth century, Métis people were invisible to and ignored by the Canadian state. There was a general lack of recognition of Métis people. Many difficulties arose from this invisibility. The current legal definition of Métis continues to be affected by this history of government regulation of both Indian and Métis as definitions are often affected by "culture, politics, and the particularities of communities' histories."[1] In the legal realm, what developed was a definition of Métis as not (or distinct from) Indian, and that definition developed, in part, to recognize Métis people as distinct Aboriginal people, not derived from (or part) Indian. This article argues that defining Métis in opposition to Indian actually detracts from the goal of recognizing Métis as a distinct people because it causes the two people to remain dependent and contingent upon one another.

This article contributes to the already existing literature on defining indigeneity, and defining Métis in particular. More specifically, it contributes to the larger body of work asserting the recognition and definition of Métis

1. Joyce Green, "The Complexity of Indigenous Identity Formation and Politics in Canada: Self-Determination and Decolonization" (2009) 2:2 Intl J Critical Indigenous Studies 36 at 37, online: IJCIS <www.isrn.qut.edu.au/pdf/ijcis/v2n2_2009/Final_Green.pdf> [Green, "Indigenous Identity Formation"].

as a distinct people.[2] A vast body of scholarship discusses definitions of Métis, including in the fields of history, Aboriginal studies, anthropology, law, and sociology which debate who the Métis recognized in section 35 are, or distinctions between "Métis" and "metis," the origins of the Métis people, and the geographical extent of Métis people.[3] There is a similarly large volume of literature discussing the legal regulation of Indians and the problems associated with the government definitions, including the loss of status when women married non-status men.[4] This article does not recanvass the issues that have already been considered, instead focusing on the problem of the legal definition that defines Métis in relation or opposition to Indian. This article argues that the legal definition, which

2. For example, see: Paul LAH Chartrand & John Giokas, "Defining 'The Métis People': The Hard Case of Canadian Aboriginal Law" in Paul LAH Chartrand, ed, *Who Are Canada's Aboriginal Peoples? Recognition, Definition, and Jurisdiction* (Saskatoon: Purich, 2002) 268; Chris Andersen, *Metis: Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014) [Andersen, *Struggle for Peoplehood*]; Darren O'Toole, "From Entity to Identity to Nation: The Ethnogenesis of the Wiisakodewininiwag (Bois-Brûlé) Reconsidered" in Christopher Adams, Gregg Dahl & Ian Peach, eds, *Métis in Canada: History, Identity, Law and Politics* (Edmonton: University of Alberta Press, 2013) 143.

3. For example, see Catherine Bell, "Who Are the Metis People in Section 35(2)?" (1991) 29:2 Alta L Rev 351; Jacqueline Peterson & Jennifer SH Brown, eds, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985); Brenda MacDougall, *One of the Family: Metis Culture in Nineteenth-Century Northwestern Saskatchewan* (Vancouver: UBC Press, 2010); JE Foster, "The Métis: The People and the Term" (1978) 3:1 Prairie Forum 79; Joe Sawchuk, "Negotiating an Identity: Métis Political Organizations, the Canadian Government, and Competing Concepts of Aboriginality" (2001) 25:1 American Indian Q 73; Larry N Chartrand, "The Definition of Métis Peoples in Section 35(2) of the *Constitution Act, 1982*" (2004) 67:1 Sask L Rev 209; Jean Barman & Mike Evans, "Reflections on Being, and Becoming, Métis in British Columbia" (2009) 161 BC Studies 59; Adams, Dahl & Peach, *supra* note 2; Darcy Belisle, "Finding Home on the Way: Naming the Métis" (2006) 31:1 Prairie Forum 105; Chris Andersen, "'I'm Métis, What's your Excuse?': On the Optics and the Ethics of the Misrecognition of Métis in Canada" (2011) 1:2 Aboriginal Policy Studies 161; Joyce Green, "Don't Tell Us Who We Are (Not): Reflections on Métis Identity" (2011) 1:2 Aboriginal Policy Studies 166 [Green, "Reflections on Métis Identity"]; and John Giokas & Paul LAH 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 P Chartrand, *supra* note 2, 83.

4. See for example Bonita Lawrence, *"Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004); Robert K Groves, "The Curious Instance of the Irregular Band: A Case Study of Canada's Missing Recognition Policy" (2007) 70:1 Sask L Rev 153; John Giokas & Robert K Groves, "Collective and Individual Recognition in Canada: The *Indian Act* Regime" in P Chartrand, *supra* note 2, 41; Sarah E Hamill, "*McIvor v Canada* and the 2010 Amendments to the *Indian Act*: A Half-Hearted Remedy to Historical Injustice" (2011) 19:2 Const Forum Const 75; Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:1 CJLS 113; Sharon Donna McIvor, "Aboriginal Women Unmasked: Using Equality Litigation to Advance Women's Rights" (2004) 16:1 CJWL 106; Kiera L Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13:1 Australian Indigenous L Rev 62; Joyce Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4:4 Const Forum Const 110; Canada, Advisory Council on the Status of Women, *Indian Women and the Law in Canada: Citizens Minus, by Kathleen Jamieson (Ottawa: Supply and Services Canada, 1978);* Janet Silman, ed, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: Women's Press, 1987); and Mary Eberts, "Still Colonizing After All These Years" (2013) 64 UNBLJ 123.

has been taken up by various Métis organizations to define Métis people in opposition to Indian people, actually detracts from the goal of recognizing Métis as a distinct people. We ought to de-couple the definitions of Métis and Indian to more strongly recognize Métis as a distinct people. Métis should be defined by who we are, rather than who we are not.

While some might argue that definitions and identity are always relational, the concern examined in this article is the particular use of defining Métis as "not Indian" because it continues to invoke definitions set by Canadian governments. These definitions of Indian and Métis are troubling because they ground definitions in biology and culture, not factors internal to the Métis people. The article argues that we need to re-centre the definition of Métis on being Métis people based on internal characteristics (who Métis are) and move away from the legal definition of Metis being contingent on the legal definition of Indian (who Métis are not). To illustrate the concern with the Indian/Métis dichotomy by way of analogy, one would not think to define Métis as not Italian because there is no connection between them. By reiterating that Métis are not Indian, the two peoples remain interdependent because it suggests a relevance and connection between Indian and Métis and therefore undermines the independence of the Métis people.

This article considers three intertwined concerns that arise from this dichotomous approach to Métis identity. The first concern is about the "hard line" created in the definition between Indian and Métis, forcing one to be either Indian or Métis, a problem that arose in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*.[5] This article argues that any definition of Métis should emphasize who Métis people are, rather than who they are not. The second concern regarding the use of the dichotomy is that changes to the definition of Indian may impact the definition of Métis, making the two identities contingent and inherently connected. Further, if Métis and Indian are dichotomous, and Indian is defined based on biology, then the other half of the dichotomy must necessarily be similarly biologically defined. This is particularly problematic as the federal government continuously redefines "Indian." An oppositional definition can also reinforce biological definitions of Métis that highlight Métis as "half-breeds." The final related concern is that defining Métis as "not Indian" leads to the question of how distinct Métis culture needs to be from Indian culture for recognition. This oppositional approach leads to culturally-based definitions and inquiries into distinctions between the

5. *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] 2 SCR 670 [*Cunningham*].

cultures; similarities may undermine Métis uniqueness. If Métis identity continues to be connected (through an oppositional definition) with Indian, it also keeps the two intertwined, and detracts from recognition of Métis as independent people. Shifting away from the dichotomy (which engages biological and cultural definitions) toward a political definition of Métis connotes that Métis people are "to be negotiated with collectively to redistribute political power."[6]

While this article argues that caution must be exercised when defining boundaries between Indian and Métis which are dichotomous, I recognize that defining who is Métis and who is Indian (or broader questions of defining Aboriginality) may be necessary to determine eligibility for various Canadian government sponsored benefits and other programs.[7] Entitlement for either program may in fact limit access, so that one can only access "Métis" or "Indian" rights. However, the question of eligibility for government sponsored benefits should be a different question than who is Métis and who is Indian, particularly because Métis and Indians are regulated differently in Canadian law and have unique rights recognized in the Constitution.[8]

This article begins with an overview of *Cunningham* to exemplify many of the concerns with the legal definition of Métis. Next, it discusses the ways in which Métis identity and Indian identity have been regulated by the Canadian state, including legislatures and courts. This article engages a theoretical framework that problematizes the use of binaries in determining identity, including grounding legal definitions simply in biology or in culture. This discussion demonstrates that the dichotomous approach to defining Métis was created by law and is not reflective of historical, cultural or biological differences between Indian and Métis. In fact, there has also been movement between the two categories. Then it considers how the Canadian definitions seem to be internalized by Métis organizations. Finally, the article proposes that the legal definition of Métis should not be determined in opposition to Indian, but argues that the legal definition of Métis should focus on their peoplehood—political entities whose citizens demonstrate loyalty (and not just biological or cultural connections). The article draws on general principles of international human rights law which provide protections for individuals against

6. Darren O'Toole, *The Red River Resistance of 1869–1870: The Machiavellian Moment of the Métis of Manitoba* (PhD Thesis, University of Ottawa Department of Political Science, 2010) [unpublished] at 31 [emphasis removed].

7. Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich, 2011) at 138.

8. *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

government (including Indigenous government) actions while maintaining Indigenous peoples' right to self-define.

I. *Overview of* Cunningham

In the recent *Cunningham* case, the Supreme Court of Canada considered the membership provisions of the Alberta Métis Settlements as set out in the *Métis Settlement Act (MSA)*, and upheld the provisions revoking settlement membership if status is obtained under the *Indian Act*.[9] This decision highlights the Court's dichotomous approach to defining Métis as not Indian when it held that one cannot simultaneously be a Métis under the *MSA* and an Indian under the *Indian Act*. While *Cunningham* arose in the particular context of the definition of Métis under the *MSA*, the Court's analysis demonstrates how Indian and Métis are thought to be dichotomous in Canadian law. This section provides a brief overview of *Cunningham*, and the details and outcome of the case demonstrate the need to rethink the definition of Métis. The critique below is not directed at the section 15 *Charter* analysis, but focuses instead on how the Court defined Métis people and the consequences for membership.

In this case, the Cunningham family were long-standing and active members of the Peavine Métis settlement, who obtained status under the *Indian Act* to access medical benefits when Bill C-31 changed eligibility requirements.[10] The *MSA* precludes settlement members from voluntary registration under the *Indian Act*.[11] When members of the Cunningham family gained status under the *Indian Act*, the settlement revoked their membership under the *MSA*.[12] However, other members of the settlement who gained status were allowed to keep their membership; only the Cunningham family had theirs revoked.[13] As a consequence, the Cunningham family may have been able to continue residing on the settlement, but "they would have no say in settlement governance or the right to vote."[14] In response, members of the Cunningham family sought to have the provisions revoking their membership declared contrary to section 15 of the *Charter*. One concern with the *MSA* membership provision refusing dual registration was that there was no evidence that the Cunningham family's cultural or political allegiance or connection to the settlement had changed.

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9. *Cunningham*, *supra* note 5; *Metis Settlements Act*, RSA 2000, c M-14 [*MSA*]; *Indian Act*, RSC 1985, c I-5.
10. *Cunningham*, *supra* note 5.
11. *MSA*, *supra* note 9, s 90.
12. *Cunningham*, *supra* note 5 at para 25.
13. *Ibid* at para 26.
14. *Ibid* at para 27.

The *MSA* defines Métis as "a person of aboriginal ancestry who identifies with Metis history and culture."[15] However, in considering Métis identity, the Supreme Court's analysis emphasizes a distinction between Indian and Métis. The Court determined that the "object of the *MSA* program is…establishing a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province."[16] To achieve this object, "the legislature has excluded Métis who are also status Indians from membership in the settlement for purposes of establishing a Métis land base."[17] Highlighting the distinction between Indian and Métis led the Court to conclude "the exclusion from membership in any Métis settlement…of Métis who are also status Indians…corresponds to the historic and social distinction between the Métis and Indians…and respects the role of the Métis in defining themselves as a people."[18] While the decision is grounded in specific legislation, it engages the dichotomy that one can only be Indian or Métis. The Court did not explain why recognizing the historical distinction between Indian and Métis requires a mutually exclusive definition. The Court simply held that to protect Métis people, one must be either Indian or Métis. Even though this decision was specifically analyzing a statute, underlying it is a presupposition that one cannot be both "Indian" and "Métis"—that the two categories are dichotomous.

In their pleadings, "[t]he claimants argue that people—particularly Aboriginal people—may, for historical reasons, have multiple identities and that the law should respect those identities in all their complexity."[19] However, the Court rejected this argument because "[i]n order to preserve the unique Métis culture and identity and to assure effective self-governance through a dedicated Métis land base, some line drawing will be required."[20] While the sentiment that boundaries may need to be drawn to promote and recognize the distinction between Indian and Métis has a certain air of truth, the approach of relying on a dichotomous definition between Indian and Métis fails to actually recognize the independence of the two peoples. In this decision the Court appears to believe that Indians are a threat to Métis people—that Indians may undermine or overtake them. However, if the concern relates to the invisibility or lack of accepted

15. *MSA*, *supra* note 9, s 1(j).
16. *Cunningham*, *supra* note 5 at para 62.
17. *Ibid* at para 72.
18. *Ibid* at para 83.
19. *Ibid* at para 85.
20. *Ibid* at para 86.

definition of Métis, creating an oppositional definition of Indian and Métis does not actually protect Métis as a distinct people precisely because it reiterates the connection and interdependency between the two. This paper argues that the definition of Métis needs to move away from a simple "not Indian" to focus on internal factors defining Métis as "a people," relying less on external factors such as non-Indianness as defined by the Canadian state.

Cunningham highlights the many issues that follow from the dichotomous approach to defining Indian and Métis. Setting a hard line between Indian and Métis creates an artificial distinction that, for many, would force people to choose an identity even when one could potentially have one Indian and one Métis parent, and have biological, cultural and political allegiance to both. This case demonstrated another problem: definitions based on dichotomies mean that if one side changes (for example, the legal definition of Indian) it affects the definition of the other side. This interdependent approach detracts from the desire of Métis to be recognized as an independent people if the definition of Métis is continuously reliant on the definition of Indian. This dichotomous approach is particularly problematic because the Canadian state has long regulated "Indians" based on biological factors, such as blood quantum.

While one solution might suggest that Métis people need to define themselves, Métis people were involved in negotiating the *MSA*, including the provision prohibiting members from gaining Indian status. Thus, a concern remains regarding the way in which Métis people themselves have taken up the dichotomous approach to defining themselves, in part to reassert their distinction as a unique Aboriginal people in Canada. Relying on the dichotomous approach has caused some Métis communities and organizations to limit the right of members to identify and be recognized as both Métis and Indian.[21]

To better understand the problem created by a definition of Métis as dichotomous with Indian, the next section explains the problematic approaches Canada has used to regulate Indian and Métis. These approaches are problematic because they focus on biological and cultural definitions, not on political definitions of a people.

21. Anecdotes are arising that the Manitoba Métis Federation is relying on *Cunningham* to remove people from the MMF membership list if they are registered as Indians under the *Indian Act* (Sharon Parenteau, Presentation delivered during Indigenous Awareness Week: Treaties, Traditional Knowledge, and Elders at the University of Manitoba, 19 March 2015 [unpublished]).

II. *Historical definition and regulation of Indian and Métis*

The Canadian government has long forced people to fit into specific silos of Indian, Inuit or Métis.[22] The narrative that Indians got treaty and Métis got scrip is discussed here because it is often invoked today to support modern dichotomous definitions of Indian and Métis. This section highlights some key legislative and regulatory regimes the Canadian government has developed to regulate Indian and Métis. The overview will focus on three regimes: treaty negotiations, scrip process, and the development of the Indian status provisions of the *Indian Act*. The aim is not to retell this already well-documented history, but rather to destabilize the normalized idea that Canadian regulation has always drawn a clear oppositional line between Indian and Métis. At a general policy level, the narrative that Indians got treaty and Métis got scrip is accurate; in practice, it was not this simple. In fact, there were many exceptions and much fluidity between the categories.

By highlighting the regulation of Indian and Métis, this section demonstrates how Canadian law created the dichotomy of either Indian or Métis in part for administrative ease and to reduce people from accessing both "benefits" of treaty and scrip. Grounding my critique of the dichotomy in this complicated history lends supports to the argument that continued reliance on a definition of Métis grounded in the dichotomy between Indian and Métis detracts from Métis people's attempts to gain recognition as a distinct people. When Métis people rely on the dichotomy, it can lend legitimacy to the government-imposed definitions created for administrative ease (which in part rely on imposed ideas of culture and race), rather than shifting the focus to internal conditions leading to the creation of the distinct Métis people.

The Canadian state has long been engaged in the process of defining Indian and Métis, which is problematic because "the nation-state often creates or defines aboriginal identities for its own use" and motivations.[23] Identity definitions are often relational and are formed in binary opposition. A major critique of identity definitions through binaries is the way in which structural power is reinforced and definitions are created by external forces. As the feminist philosopher Simone de Beauvoir once explained, "no group ever sets itself up as the One without at once setting up the Other over against itself....[I]t is not the Other who, in defining himself as the Other, establishes the One. The Other is posed as such by the One

22. Andersen, *Struggle for Peoplehood*, *supra* note 2 at 16.
23. Sawchuk, *supra* note 3 at 73.

in defining himself as the One."[24] The problem highlighted here is the lack of self-definition: the group being defined as not-something, rather than being defined *as* something. In the case of Métis, the dichotomous approach is more problematic because it is the settler state that defines who is Indian and thus continues to control the definition of Métis. Joe Sawchuk discusses a similar difficulty in identity discussions for Aboriginal people: "[t]he very process of declaring oneself to be 'Métis' (or 'Indian' or 'Inuit') means taking on aspects of identity and otherness that have been defined by the dominant society."[25] The use of this binary approach to defining Métis and Indian also means that one can only be Métis or Indian; there is no room to be both.

The need to identify as Indian or Métis was not necessary until such a distinction was "fostered by governments, census takers, employers, and others"[26] with the creation of the treaty and scrip regimes. Government policy was "that the 'half-breed' scrip claimants were intentionally excluded from benefits received by Indian peoples pursuant to the *Indian Act*."[27] While Crown policy dictated that scrip was for Métis and treaty was for Indians, the process of identifying who was Métis and who was Indian for the purposes of scrip and treaty was not straightforward. In 1880, Alexander Morris indicated that there were essentially three different types of half-breeds: those with "farms and homes; ...those who are entirely identified with the Indians, living with them, and speaking their language; ...those who do not farm, but live after the habits of the Indians, by the pursuit of the buffalo and the chase."[28] Different legal consequences were proposed for these different groups.[29] Morris suggested that the first group should be recognized as possessors of the soil to continue making their living by farming and trading; the second group was just to be recognized as Indians and brought within existing bands.[30] At this time, Morris recommended that the third group of half-breeds, the Métis, should be brought under treaties.[31] In his proposals, Morris started with a basic biological approach (Métis as half-breeds), but then considered cultural

24. Simone de Beauvoir, "'Introduction' to *The Second Sex*" in Linda Nicholson, ed, *The Second Wave: A Reader in Feminist Theory* (New York: Routledge, 1997) 11 at 14.
25. Sawchuk, *supra* note 3 at 73.
26. Jennifer SH Brown, "Cores and Boundaries: Metis Historiography Across a Generation" (2008) 17:2 Native Studies Rev 1 at 11.
27. Bell, *supra* note 3 at 377.
28. Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co, 1991) at 294.
29. *Ibid* at 294-295.
30. *Ibid.*
31. *Ibid* at 295.

and economic factors to determine the appropriate legal regime. However, he recommended that the Métis get treaty, not scrip.

Métis and Indian communities often lived side by side and shared similar lifestyles until they were forced to access different funding and were, as a result, forced to diverge.[32] Joe Sawchuk notes that even after the treaty and scrip regimes were initiated "the status of Métis and Indian was often interchangeable."[33] At various points, people moved from one category to the other; thus the categories were related and relative, not oppositional.

Even the government background research reports on the treaties show the complications in the application of the treaty and scrip regimes. In many instances, the decision to grant scrip or treaty was decided on a case-by-case basis, as in the case of Treaty 3 and later treaties.[34] Treaty 3 provides the most oft-cited example of half-breeds (Métis) adhering to treaty.

During negotiations of Treaty 8, Métis began distinguishing between themselves and the Indians. Half-breeds that the treaty commissioners deemed to be living "the Indian mode of life" were extended the option to take treaty, but began to demand scrip instead—refusing to be associated with the "stigma of inferiority" arising from the *Indian Act, 1876*.[35] In Treaty 11, the commissioners noted the distinction between Indian and Métis, but it was often a "matter of choice" or "of chance."[36] Many Treaty Indians were biologically of "mixed racial heritage" and could also be "culturally identical to many Metis."[37] The history of scrip indicates that many were forced to take it either because of financial strain or because they were convinced of its benefits without actually understanding its repercussions.[38] These examples indicate that the dichotomy of Indian or Métis identity is connected to the Canadian government's desire to place people under one regime or another.

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32. Brown, *supra* note 26 at 5-6.
33. Sawchuk, *supra* note 3 at 74.
34. Indian and Northern Affairs Canada, *Treaty Research Report: Treaty Three*, by Wayne E Daugherty (Ottawa: Indian and Northern Affairs Canada, 1986), online: Aboriginal Affairs and Northern Development Canada <www.aadnc-aandc.gc.ca/eng/1100100028671>.
35. Indian and Northern Affairs Canada, Treaty Research Report: Treaty Eight (1899), by Dennis FK Madill, (Ottawa: Indian and Northern Affairs Canada, 1986) at 30, online: Aboriginal Affairs and Northern Development Canada <www.aadnc-aandc.gc.ca/eng/1100100028805>; *Indian Act*, SC 1876, c 18 [*Indian Act, 1876*].
36. Indian and Northern Affairs Canada, *Treaty Research Report: Treaty No. 11 (1921)*, by Kenneth S Coates & William R Morrison (Ottawa: Indian and Northern Affairs Canada, 1986), online: Aboriginal Affairs and Northern Development Canada <www.aadnc-aandc.gc.ca/eng/1100100028912>.
37. *Ibid.*
38. *Ibid.*

There are also examples of people taking treaty, but then opting to take scrip, demonstrating the fluidity between these categories. For example, *Papaschase Indian Band (Descendants of) v Canada (Attorney General)* was about a band that adhered to Treaty 6 in August 1877.[39] Then in 1886, members of the band withdrew from the Treaty and took scrip.[40] After the Papaschase withdrew from the Treaty, the *Indian Act* was amended to require the Indian Commissioner's consent to withdraw.[41]

These examples highlight that sometimes the line between Indian and Métis was imposed for administrative reasons and there was fluidity and movement between the legal categories. The dichotomy does not represent internal understandings or self-definition of Métis people. In this way, it is too simple to say Métis got scrip and Indians got treaty, so people must always be either Indian or Métis. A more peoples-based approach would emphasize that Métis people exercised their political power to engage in negotiations with the Canadian state, which led to creating a scrip system. Relying on the dichotomy becomes even more problematic because of the shifting legal definition of "Indian" under the *Indian Act*.

Britain took steps to legislatively define "Indian" as early as 1850,[42] and Canada continues to do so today under the *Indian Act*.[43] In contrast, Parliament has never legislated a definition of Métis.[44] The *Indian Act* created a definition of "Indian," which from the beginning focused on patrilineal descent: "[a]ny male person of Indian blood reputed to belong to a particular band...[a]ny child of such person...[and] [a]ny woman who is or was lawfully married to such person."[45] From the beginning, the *Indian Act* definition was grounded in biological definitions of Indian. The focus on blood quantum in the definition of Indian may force the definition of Métis to be similarly grounded in biology if the two continue to be defined as oppositional.

Joyce Green argues that the definition of Indian under the *Indian Act* aimed to limit financial and political liability of the colonial state and did not reflect political entities, or biological or cultural distinctions.[46] In

39. *Papaschase Indian Band (Descendants of) v Canada (AG)*, 2004 ABQB 655 at para 12, [2005] 8 WWR 442.
40. *Ibid* at para 23.
41. *An Act further to amend "The Indian Act,"* SC 1888, c 22, s 1.
42. *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, S Prov C 1850 (13 & 14 Vict), c 42.
43. The *Indian Act* was first enacted in 1876 (*Indian Act, 1876, supra* note 35) and continues in force (*Indian Act, supra* note 9).
44. Sawchuk, *supra* note 3 at 75.
45. *Indian Act, 1876, supra* note 35, s 3(3).
46. Green, "Reflections on Metis Identity," *supra* note 3 at 166.

addition to taking a biological approach to defining Indian, early definitions explicitly excluded people who took scrip from obtaining status under the *Indian Act*:

> No half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and 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, which shall be determined by the Superintendent General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty; *and any half-breed who has been admitted into a treaty shall be allowed to withdraw therefrom on signifying in writing his desire so to do*,— which signification in writing shall be signed by him in the presence of two witnesses, who shall certify the same on oath before some person authorized by law to administer the same.[47]

Early on in the process of setting legal definitions for Indian and Métis, the government invoked an either-or approach by prohibiting anyone who took scrip from registering as an Indian.

Despite several amendments to the status provisions of the *Indian Act*, it continues to use a biological approach to defining Indian, based on paternal lineage. The 1951 amendments made the status provisions stricter, introducing the "double mother" rule, which held that "a child lost Indian status at age 21 if his or her mother and grandmother had obtained their own status only through marriage" to a man with Indian status.[48] The amendments also strengthened the marrying-out provisions: "an Indian woman who married out would not only lose Indian status, she could also be enfranchised against her will as of the date of her marriage."[49] The marrying-out provisions did not apply to Indian men.[50] These amendments to the *Indian Act* limited the people whom the government could legally recognize as Indians. As Métis are defined in opposition to Indian, when the government changes who is legally an Indian, it affects who can legally be recognized as Métis. Using the dichotomous approach to defining Métis makes the definition of Métis susceptible to the Canadian government's power to change the definition. Forcing the definition of Métis to rely on the definition of Indian only weakens the ability of Métis to determine their own identity.

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47. *Indian Act*, RSC 1886, c 43, s 13(1) [emphasis added].
48. *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 312 [*RCAP Report*], citing *Indian Act*, SC 1951, c 29, s 12(1)(a)(iv) [*Indian Act, 1951*].
49. *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol 4 (Ottawa: Supply and Services Canada, 1996) at 30, citing *Indian Act, 1951*, *supra* note 48, s 12(1)(b).
50. *RCAP Report*, vol 4, *supra* note 49 at 31, citing *Indian Act, 1951*, *supra* note 48, s 12(1)(b).

The loss of status created many hardships for women and their children. They could no longer stay in their community, hold property on reserve, or receive a buy-out of treaty money (twenty years) plus a share of the band's capital held in trust.[51] Without status, Indian women were no longer eligible for social services that may be offered to band members. As "Métis" was not legally defined, many non-status women and their children joined Métis organizations. Some organizations were specifically Métis and non-status organizations. The changing definition of Indian, based on biology, has affected who may subsequently define as Métis. Defining Métis in opposition to Indian can also suggest that Métis are "half-breeds" by placing them in contrast to Indian (full blood). Or perhaps, as Chris Andersen suggests, it risks making "Métis" mean "Indigenous-but-not-First-Nation-or-Inuit."[52]

Parliament has amended the legal definition of "Indian" several times, and this continues to impact definitions of Métis. In 1982, Parliament amended the *Indian Act* again, changing the status provisions. Bill C-31 removed the "marrying-out" provisions, reinstated women who had lost their status through these provisions and extended status to their children.[53] The result of Bill C-31 was that many families who had begun to think of themselves as Métis could now register as Indian. One problem with defining Métis in opposition to Indian is that the definition of Métis can change if and when the definition of Indian changes. This was the situation in *Cunningham*. Bonita Lawrence argues that the *Indian Act* created arbitrary distinctions that forced many "half-breeds" to claim they were Metis because they could no longer merge back into their original communities.[54] She states that the term "Métis" would have belonged only to the Red River Valley Mixed-Bloods if not for the *Indian Act*, which externalized so many others from their communities.[55] A further concern is that the Canadian government has used a blood quantum approach to determine who is Indian. Many communities have internalized this approach and continue to use it in defining their own membership.[56] While this brief overview of government regulation of Indian and Métis demonstrates the interconnectedness of Indian and Métis regulation, the next section reviews in more detail the legal definition of Métis.

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51. *Indian Act, 1951, supra* note 48, s 15(1).
52. Andersen, *Struggle for Peoplehood, supra* note 2 at 24.
53. Bill C-31, *An Act to amend the Indian Act*, 1st Sess, 33rd Parl, 1985, cl 7 (assented to 28 April 1985), RSC 1985, c I-5.
54. Lawrence, *supra* note 4 at 84.
55. *Ibid.*
56. Palmater, *supra* note 7 at 220.

III. *Legal definitions of Métis*

Other than Alberta's *Métis Settlement Act*, there is no statutory definition of Métis. Without such a definition, Canadian courts have taken an active role in creating a legal definition of Métis. In recent years, Canadian courts have had several opportunities to define who is Métis. These opportunities have arisen in part due to the inclusion of "Métis" within the definition of Aboriginal people in section 35(2) of the *Constitution Act, 1982*.[57] In search of a legal definition of Métis, the courts have most recently said that Métis are not just "part Indian." Rather, courts define Métis emphatically as *not* Indian or as *distinct* from Indians.

This section reviews the Supreme Court of Canada's decisions defining Métis to demonstrate the Court's role in perpetuating the dichotomy between Métis and Indian. By focusing on this distinction, the Court connects the definition of Métis to the biological definition of Indian used by the Canadian government and emphasizes cultural differences between the two peoples. These approaches are problematic because they undermine recognition of Métis as a people—a complex and evolving political entity. The Court's definitions also highlight additional questions related to who oversees, adjudicates and enforces legal identities, reinforcing the importance of Métis people self-defining their citizenship or membership.

When determining a legal definition of Métis, the Supreme Court used as a starting point the Royal Commission on Aboriginal People (RCAP) description of the origins of Métis:

> Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. Economics played a major role in this process. The special qualities and skills of the Métis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures.[58]

This explanation highlights the "ethnogenesis" of Métis, a new people emerging from their First Nations and European roots. The Supreme Court continues to define Métis people, quoting the RCAP report: "the Métis developed separate and distinct identities, not reducible to the mere fact

57. *Constitution Act, 1982, supra* note 8, s 35(2).

58. *RCAP Report*, vol 4, *supra* note 49 at 199, cited in *R v Powley*, 2003 SCC 43 at para 10, [2003] 2 SCR 207 [*Powley*].

of their mixed ancestry: '[w]hat distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis.'"[59] This definition recognizes that Métis are an Aboriginal *people* with their own inherent Métis rights, culture, political structures and economic systems. They are not just "half Indian." The RCAP definition attempts to shift consciousness from notions of Métis as "half-breeds" or "mixed-bloods" to Métis as a distinct people. The courts engage the RCAP definition when setting a legal definition of Métis people.

R v Powley was the first case of Métis rights under section 35(1) to be heard by the Supreme Court of Canada.[60] There were two main aspects to the *Powley* decision: first, it defined the Métis whose rights are protected by section 35(1); second, it modified the *Van der Peet* test for proving Aboriginal rights to accommodate the Métis reality.[61] While these are separate issues, the scope of Métis rights and how they are defined indicates how the courts understand who the Métis are.

In *Powley*, the Supreme Court of Canada began its decision by citing the above description and definition from the RCAP.[62] Building on the idea that Métis are not simply "half-breeds," the Court explained that "[t]he term 'Métis' in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears."[63] Andersen criticizes *Powley* because "[t]o continue to understand the Métis in terms of some apparently innate mixedness ...emphasizes narrowly construed strands of pre- or early-contact origins rooted in biology rather than more formal political relationships (such as treaties), and it reduces the complexity of that indigeneity to these biologically based origins."[64] The Court's first definition of Métis under section 35(2) does highlight that Métis people are separate from Indian ancestors. However, in attempting to emphasize Métis as distinct, they juxtapose Métis against First Nations, highlighting who Métis people are not instead of focusing on who Métis people are. Based on this definition of Métis people, the Court then set out the legal test to determine Métis people: "self-identification, ancestral connection, and community

59. *Powley*, *supra* note 58 at para 10, quoting RCAP *Report*, vol 4, *supra* note 49 at 202.
60. *Powley*, *supra* note 58.
61. *Ibid* at para 16; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289.
62. *Powley, supra* note 58 at para 10.
63. *Ibid.*
64. Andersen, *Struggle for Peoplehood, supra* note 2 at 11.

acceptance."[65] Andersen criticizes this test for failing to ground it in the "political self-consciousness and attachment to the Métis people."[66]

This definition of Métis has been regarded as a significant step because it recognized that Métis are a distinct people, not simply a mix of Europeans and Indians.[67] This shift is significant because previous courts, when identifying Métis rights, used a derivative rights approach (a biological approach emphasizing genealogical descent from an Indian). This approach focused on "the extent to which Métis claimants were like First Nations people (or 'followed an Indian mode of life')."[68] The protection of Métis rights depended on a flawed understanding of Métis people. It is this derivative approach that Métis people and subsequent courts are pushing back against when trying to articulate a distinction between Métis and Indians. The derivative rights approach which failed to recognize Métis as a distinct people is problematic because "Métis were treated as 'less Aboriginal' than First Nations people" and because it failed to recognize that Métis people are a unique Aboriginal people in Canada, whose rights do not depend on tracing roots back to Indian ancestors.[69] *Powley* is seen as a positive step because the definition moves away from a biological definition of Métis as half-Indian, to recognize Métis as a distinct people.

Yet the legal definition of Métis has been set in part through a binary opposition with Indian, which means "the internal characteristics of the person thus identified are not denoted so much as the external context within which that person is situated."[70] This external binary opposition approach to defining Métis is particularly problematic because identity is then "relative to a constantly shifting context, to a situation that includes a network of elements involving others, the objective economic conditions, cultural and political institutions and ideologies, and so on."[71] In the binary opposition definition of Métis as not Indian, it means that if the definition of Indian changes, it may affect the definition of Métis.

When discussing Métis identity, biology (or ancestral connection as it is described in *Powley*) can be particularly problematic because defining identity based on biology leads to the creation of the notion of "half-

65. *Powley, supra* note 58 at para 30.
66. Andersen, *Struggle for Peoplehood, supra* note 2 at 9-10.
67. Ian Peach, "The Long, Slow Road to Recognizing Métis Rights: Métis Aboriginal Rights Jurisprudence in Canada" in Adams, Dahl & Peach, *supra* note 2, 279 at 280.
68. *Ibid* at 281.
69. *Ibid* at 281, 285.
70. Linda Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory" in Nicholson, *supra* note 24, 330 at 349.
71. *Ibid.*

breeds" and supports assumptions that "half-breeds" are half-civilized based on the idea that biology is the vehicle to transmit culture.[72] Biology-based definitions support searches for "pure" bloods—who would be the "real Indians"—and suggests that the watering down of the blood diminishes government responsibility.[73] Biological definitions based on blood quantum are generally used to limit who qualifies, leading to technical or statistical extermination to reduce government obligations.[74] Eva Marie Garroutte warns against "embracing a definition of identity that encourages the fiction of race"[75]—that we can determine whether one is Indian by looking at the amount of "Indian blood" in one's body. A biological definition based on blood quantum creates artificial distinctions of who qualifies and who does not.

After defining who the Métis are, the Court then considered the scope of the rights at issue based on their understanding of these rights. Building from *Van der Peet*, the Court defined Métis rights on a cultural basis. While the scope of the rights is a separate issue from the definition of the Métis, the scope of Métis rights is affected by the Court's understanding of who Métis are, and thus is considered here. Jeremy Patzer criticizes the Court's approach to defining Métis rights because the rights are grounded in culture. He also criticizes the "cultural rights approach" currently used by the courts, which focuses on identifying "authentic" Aboriginal practices and "mobilizes a cunning politics of difference in which claimants are apt to be cast as too distant from their own Aboriginality to merit the recognition of their rights."[76] Patzer argues that Aboriginal (including Métis) rights are political, not cultural rights.[77] In order for such a shift to happen, people must be defined as people, not using an understanding based on race, biology, or culture. Grounding identity in culture freezes that culture as one searches for the authentic Métis culture.

Yet the scope of the right has an impact on the Court's understanding of the people. The relationship between the definition of the people and the definition of the right is seen in the legal test for Aboriginal rights. The Court protects cultural rights because of the understanding that Aboriginal people are cultural groups, not political peoples.

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72. Eva Marie Garroutte, *Real Indians: Identity and the Survival of Native America* (Berkeley: University of California Press, 2003) at 42.
73. *Ibid.*
74. *Ibid* at 57.
75. *Ibid* at 60.
76. Jeremy Patzer, "Even When We're Winning, Are We Losing? Métis Rights in Canadian Courts" in Adams, Dahl & Peach, *supra* note 2, 307 at 309.
77. *Ibid* at 316.

Using a cultural approach to defining Métis and Indian rights is problematic because it freezes the cultures in the past:

> By placing Aboriginal identifiers in the historical past rather than the present or recent past, the Court denies that Aboriginal people act in the world. They merely *were* rather than *are*. Aboriginal people are denied the luxury of adaptation and change that the oppressor society takes for granted....Aboriginal peoples and cultures of the historical past are speculated upon, defined, and judged in contemplation of the present.[78]

Defining rights through a cultural approach freezes the understanding of who Métis people are. Defining Métis people requires a look back in time. Grounding rights and legal definitions in culture fails to recognize that Aboriginal people are *people*. Under the cultural definitional approach, Métis are no longer self-determining and evolving people, but are reducible to quintessential notions of Métis culture.

When looking at definitions of Métis, the cultural identification often has people looking back to the 1800s when the métissage occurred, and grounding definitions in this timeframe when a "distinct Métis culture" emerged. Grounding legal definitions in culture freezes cultures at an arbitrary time.[79] The current definition of Métis requires a "look back" to when Métis culture became distinct from Indian. Definitions based on culture may be grounded in stereotypes[80] or may "impose a misleading and timeless homogeneity."[81] Grounding identity in culture "eventually undermines a group's collective growth and vitality."[82]

A cultural definition also opens up Métis culture to be judged by non-Métis to determine authenticity.[83] Moreover, basing identity on culture ignores the impacts of the colonial agenda which set out to destroy Indigenous cultures, thereby increasing feelings of shame and isolation for those group members who may not speak their ancestral language(s) or practice certain cultural activities.[84] The dichotomous approach also confirms, and potentially legitimizes, colonially-imposed definitions because if the definition is connected to culture, then if one became disconnected from their culture due to colonial interference, one may no longer be recognized as Métis. Garroutte concludes "[t]his is not to say

78. D'Arcy Vermette, "Colonialism and the Process of Defining Aboriginal People" (2008) 31:1 Dal LJ 211 at 244 [emphasis in original].
79. Palmater, *supra* note 7 at 193.
80. Garroutte, *supra* note 72 at 66.
81. *Ibid* at 67.
82. *Ibid* at 78.
83. *Ibid* at 70, 78.
84. *Ibid* at 78-79.

that Indian communities should abandon culture as a standard of identity. But perhaps they would do well to remember their histories—and their futures—as they think about how they use culture to define the boundaries of their communities in the present."[85]

In *Powley*, the Supreme Court emphasized that the purpose of protecting Métis rights under section 35(1) was to protect Métis distinct culture. By emphasizing Métis distinct culture, the Court extends the dichotomous approach to defining Métis rights in contrast to Indian: "[t]he inclusion of the Métis in s. 35 is based on a commitment to recognizing the Métis and enhancing their survival as distinctive communities."[86] This dichotomous approach also means that individuals can only be Métis or Indian—it assumes that Indian culture opposes or is adverse to Métis culture.

Part of the Court's motivation for the dichotomy of either Indian or Métis is to protect Métis culture from being taken over by Indian culture.[87] This concern further suggests that the legal definition of Métis is grounded, in part, in a cultural approach. Cultural definitions of identity are problematic in part because they are "conceptually fuzzy."[88] Basing identity in culture leads to questions about how distinct the culture must be to be recognized as distinct.[89] In the case of Métis people, it may also lead to questions of how distinct Métis culture must be from Indian culture to be recognized. Any perceived cultural overlaps can then be used to undermine Métis distinctiveness.

R v. Blais was delivered contemporaneously with *Powley*.[90] In *Blais,* the Court was asked whether Métis had rights to hunt under the Natural Resource Transfer Agreements (NRTA) which recognized the right of Indians to continue hunting. The Court began its decision by indicating "Mr. Blais is a 'Métis', a member of a distinctive community descended from unions between Europeans and Indians or Inuit."[91] In reaching their decision that Métis were not Indians for the purpose of the hunting rights recognized in the NRTA, the Court cited the definition of Métis in *Powley*.[92] Here, the dichotomous definition of Indian and Métis inhibited the Court's ability to interpret a 1930s provision using the term "Indian" to include Métis. The Court relied on the legal categories it created, which

85. *Ibid* at 81.
86. Powley, *supra* note 58 at para 13.
87. This was most explicitly articulated in *Cunningham, supra* note 5 at para 35.
88. Garroutte, *supra* note 72 at 63.
89. *Ibid.*
90. *R v Blais*, 2003 SCC 44 at para 1, [2003] 2 SCR 236 [*Blais*].
91. *Ibid* at para 7.
92. *Ibid* at para 9.

place Métis in opposition to Indian, in order to legitimize limiting the recognition of Métis rights. In this case, it seemed obvious to the Court that Métis would not have hunting rights recognized under the NRTA because Métis and Indians are distinct and always have been recognized and treated differently. Here, the Court relied on the mistaken assumption that Métis have always been treated differently in law to legitimize the impossibility of being recognized as Métis and Indian. As discussed above, the historical regulation of the Métis was more fluid and complex than the simple Métis or Indian dichotomy.

The Court in *Cunningham* reiterated the understanding of Métis identity evolving from Indian and European into a new people, distinct from Indian:

> The Métis were originally the descendants of eighteenth-century unions between European men—explorers, fur traders and pioneers—and Indian women, mainly on the Canadian plains, which now form part of Manitoba, Saskatchewan and Alberta. Within a few generations the descendants of these unions developed a culture distinct from their European and Indian forebears.[93]

To reiterate the critiques raised above, a definition of Métis which emphasizes the distinction (and evolution) from Indian was used to support the Court's conclusion that the *MSA* provisions prohibited one from being a Métis settlement member and a status Indian concurrently.[94] In fact, the Court held that the restriction was an ameliorative program (and therefore it was not contrary to the *Charter*'s equality guarantees)—that the membership requirement limiting Métis settlement members from also being registered Indians under the *Indian Act* was necessary in order to preserve the Métis peoples' distinctive identity.[95] Here we see the Court placing Métis and Indian culture in opposition to one another, seeing dual membership as a conflict.

In all these decisions, the Court ties Métis identity to Indian identity. This dichotomy of Indian and Métis identity leads to the impossibility of legally holding membership or citizenship in both categories. *Cunningham* demonstrates the problem with the oppositional approach to defining Métis because when the legal definition of "Indian" changed under the *Indian Act* (as occurred with Bill C-31) and when people modify their legal identity, the courts assume that this will negatively affect Métis cultural identity. As the Canadian government continues to dictate "Indian" (at least under

93. *Cunningham*, *supra* note 5 at para 5.
94. *Ibid.*
95. *Ibid.*

the terms of the *Indian Act*), "Métis" also becomes dependent upon the Canadian government. A dichotomous definition of Indian and Métis thus perpetuates colonial power and weakens Métis peoples' self-determination, including the rights to self-definition and self-identification.[96]

The Court's decisions in these cases emphasize the distinction between Métis and Indians and assume that there has always been a clear distinction between the regulation of Métis and Indian. This issue has come to a head again in *Canada (Indian Affairs) v Daniels*, where the Supreme Court is considering whether Métis are Indians under section 91(24) of the *Constitution Act, 1867*.[97] In answering this question initially, Justice Phelan of the Federal Court defined Métis as "a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status. Their 'Indianness' was based on self-identification and group recognition."[98] The Federal Court of Appeal clarified this definition: "by using the phrase 'Indian heritage' the Judge meant to refer to indigenousness or Aboriginal heritage; broader concepts than First Nations heritage."[99] The definitional approach that emphasizes the distinction between Métis and Indian has now made it difficult to find that Métis are under federal jurisdiction over "Indians, and Lands reserved for the Indians."[100] Hence, the Federal Court's challenge was to formulate a definition of "Métis" that moves beyond the Métis/Indian dichotomy. Since leave to appeal has been granted, the question remains whether the Supreme Court of Canada will be able to overcome this conceptual hurdle that plagued them in *Blais*.

This section has demonstrated the problems with judicial definitions of Métis which have emphasized a dichotomy between Indian and Métis. These problems include: the impacts that changing the legal definition of Indian has on the definition of Métis; the inability to simultaneously hold both Indian and Métis legal status regardless of one's political or cultural connections; the implicit connection of identity to biology; and grounding legal definitions in culture, which leads to searching for an authentic culture frozen at a certain point in time. This section has also

96. Alcoff, *supra* note 70 at 338, writing about Foucault's critique of constructions of oppositional subjects.

97. *Canada (Indian Affairs) v Daniels*, 2014 FCA 101, 371 DLR (4th) 725 [*Daniels, FCA*], leave to appeal to SCC granted, [2014] 3 SCR vi.

98. *Daniels v Canada*, 2013 FC 6 at para 117, 357 DLR (4th) 47. At para 130, Phelan J held "it is those persons described in paragraph 117 who are the Métis for purposes of the declaration which the Plaintiffs seek."

99. *Daniels, FCA, supra* note 97 at para 91.

100. *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5.

demonstrated the problems with relying singularly on culture or biology to determine identity. To address the shortcomings of the biological and cultural approaches, a more robust and flexible approach, grounded in recognizing the peoplehood of Métis, is necessary.

Given the problems that have arisen with the Canadian legislative and judicial definitions of Métis, a solution which recognizes Métis peoplehood suggests that Métis self-definition is the answer. However, in order to fully address the scope of the problem of dichotomous definitions of Métis, it is important to understand how Métis organizations have internalized the dichotomous approach. The next section describes the definitions of Métis used by Métis organizations.

IV. *Métis organizations' definitions of Métis*

Given the problematic approach with Canadian definitions of Métis, one might simply suggest that Métis people should be self-defining. However, Métis organizations also struggle to define Métis in a way that does not invoke the Indian/Métis dichotomy. Métis organizations invoke this dichotomy as part of a strategy to push back against notions of Métis being derived from Indian and against the general lack of recognition in law. This section provides an overview of the various definitions and requirements for membership or citizenship in Métis organizations. The overview demonstrates the ways in which Métis organizations follow contemporary Canadian legal definitions which emphasize the distinction between Indian and Métis: a continuation of the definition of Métis as not Indian. This brief description demonstrates the pervasiveness of the dichotomous definition of Métis before the final section reiterates claims made by scholars that Métis need to be recognized as people through emphasizing internal qualities of who the Métis are, not on external factors of who the Métis are not.

Métis people created political alliances with non-status people in the 1960s and 1970s.[101] These alliances were formed in part because of the failure of First Nations organizations, largely representing *Indian Act* reserve populations, to include Métis and non-status people's issues within their mandates. Both Métis and non-status people were invisible in Canadian law. The alliances between Métis and non-status people affected the definition of Métis. Initially, the definition of Métis was quite broad, simply referring to mixed Indian and non-Indian, often welcoming non-status Indians, in response to the negative impacts of limited *Indian*

101. Sawchuk, *supra* note 3 at 77.

Act definitions of Indian.[102] At that time, Métis people had virtually no legally recognized rights; thus the organizations' definitions had little legal consequence. However, after Métis rights were recognized by section 35, the Métis National Council (MNC) formed, representing six provincial affiliates: Métis Nation of Ontario, Métis Nation of Saskatchewan, Métis Provincial Council of British Columbia, Manitoba Métis Federation, and Métis Nation of Alberta.[103] With Métis rights recognized by the Constitution, "[a]ll of the prairie organizations subsequently changed their definitions to either eliminate or at least no longer specifically recognize non-Status Indians as potential members."[104] Definitions of Métis now emphasize a distinction between Métis and Indian, in part to compensate for the overly broad definitions that were used out of necessity when political alliances with non-status Indians were made. While the aim of the dichotomous definition is to create a separate identity from Indians, the approach keeps the two intimately connected and dependent. The use of "Métis not Indian" reiterates that one cannot know who is Métis without knowing who is Indian.

Today, the Métis National Council defines Métis as "a person who self-identifies as Métis, is distinct from other Aboriginal peoples, is of historic Métis Nation Ancestry and who is accepted by the Métis Nation."[105] While this definition uses the term Métis Nation, making the definition of Métis contingent on the definition of Indian weakens the push for recognition of a distinct Métis Nation. That is, even the Métis National Council emphasizes the distinction from other Aboriginal peoples (Indian and Inuit). Métis organizations also continue to emphasize the distinction from Indians to differentiate themselves from other mixed Indian and European people who do not share their common culture and language. Larry Chartrand notes that "[m]any non-status Indians, who are ethnically and culturally Indian, have for one reason or another, joined the Métis associations of various provinces."[106] Part of the motivation behind these definitions, which emphasize a distinction from Indian, is to remove people who joined Métis organizations when they lost Indian status. In trying to distinguish Métis from Indian, Métis organizations have in fact reiterated the interconnection between them.

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102. *Ibid.*
103. Larry Chartrand, "Métis Identity and Citizenship" (2001) 12 Windsor Rev Legal Soc Issues 5 at 14 [L Chartrand, "Identity & Citizenship"].
104. Sawchuk, *supra* note 3 at 78.
105. Métis National Council, "Citizenship," online: MNC <www.metisnation.ca/index.php/who-are-the-metis/citizenship>.
106. L Chartrand, "Identity & Citizenship," *supra* note 103 at 48.

The dichotomous approach is not seen only at the national level—it infiltrates the provincial level as well. All the MNC-affiliated organizations draw on the same dichotomy, which demonstrates the pervasiveness of this approach. The definition of Métis in the constitutions of the Manitoba Métis Federation and the Métis Nation of Saskatchewan elaborate on the MNC definition, emphasizing the distinction of Métis people from other Aboriginal people, namely Indians:

a. "Métis" means a person who self-identifies as Métis, is of historic Métis Nation Ancestry, is distinct from other Aboriginal Peoples and is accepted by the Métis Nation;

b. "Historic Métis Nation" means the Aboriginal people then known as Métis or Half-Breeds who resided in the Historic Métis Nation Homeland;

c. "Historic Métis Nation Homeland" means the area of land in west central North America used and occupied as the traditional territory of the Métis or Half-Breeds as they were then known;

d. "Métis Nation" means the Aboriginal people descended from the Historic Métis Nation, which is now comprised of all Métis Nation citizens and is one of the "aboriginal peoples of Canada" within s.35 of the Constitution Act of 1982;

e. "Distinct from other Aboriginal Peoples" means distinct for cultural and nationhood purposes.[107]

A positive aspect of the definition is the requirement (stemming from *Powley*) that individuals self-identify as Métis and be accepted by the Métis community, as these requirements emphasize the political dimension of Métis people. This definition also emphasizes that Métis people are those people who connect to the Métis nation, who share a specific history and culture.

However, by grounding the definition of Métis in the unique Métis culture, these definitions also attempt to differentiate Métis from many groups who have begun to use the term "Métis" to describe themselves after section 35(2) recognized the rights of Métis people.[108] These groups often are not connected to historic Métis communities that arose in the

107. Manitoba Metis Federation, "Constitution," (Manitoba: Manitoba Metis Federation, 29 September 2013), art 3(1), online: Manitoba Metis Federation <www.mmf.mb.ca/docs/constitution_rev2013_3.pdf>. See also Métis Nation–Saskatchewan, "Constitution", (Saskatchewan: Métis Nation-Saskatchewan, 9 September 2008), art 10(1)(e), online: Métis Nation-Saskatchewan <www.mn-s.ca/ckfinder/userfiles/files/Constitution%20of%20the%20M%C3%A9tis%20Nation-Saskatchewan.pdf>.

108. One potential example would be the Eastern Woodland Métis Nation Nova Scotia, online: EWMNNS <easternwoodlandmetisnation.ca/main.htm>.

1800s around the Northwest where Métis nationalism arose.[109] These groups have often resorted to the label Métis because they do not fit the definition of Indian, but still want to assert Aboriginal rights under section 35(1). Thus, the definitions of the MNC-affiliated organizations may be an attempt to differentiate "Métis" from others who invoke the term based on mere mixed blood.[110]

The Métis Nation of Alberta is still working toward a Constitution and currently they rely on the legal definitions of Métis (found in *Powley*), which again grounds Métis identity in contrast to Indian.[111] The Métis Nation of Ontario reiterates that Métis are not just "half-Indian" or "mixed-bloods":

> The Métis are a distinct Aboriginal people with a unique history, culture, language and territory....The Métis Nation is comprised of descendants of people born of relations between Indian women and European men. The initial offspring of these unions were of mixed ancestry. The genesis of a new Aboriginal people called the Métis resulted from the subsequent intermarriage of these mixed ancestry individuals.[112]

These definitions repeat the narrative that Métis are more than a mix of European and Indian and that Métis developed their own unique culture. These various definitions of Métis attempt to move past the biological approach of Métis as "half-Indian" or "mixed-bloods," but still ground Métis definitions in cultural opposition to Indians. By defining Métis in contrast to Indian, Métis and Indian remain connected. So, rather than distancing and separating Métis culture from Indian culture, the dichotomous approach to defining Métis connects the two.

The concern with these definitions is the way in which Métis organizations self-define by invoking the dichotomy of Indian and Métis. Chris Andersen discusses the power, and what he calls the "symbolic violence," of constitutional categories like Inuit, Métis, and Indian that are then internalized to become self-definitions.[113] Jennifer S.H. Brown likewise argues that many of the efforts to define Métis, which rely on the dichotomy of Indian and Métis, focus on drawing boundaries

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109. Jacqueline Peterson, "Many Roads to Red River: Metis Genesis in the Great Lakes Region 1680–1815" in Peterson & Brown, *supra* note 3, 37 at 37.

110. Chris Andersen, "Mixed Ancestry or Metis?" in Brendan Hokowhitu et al, eds, *Indigenous Identity and Resistance: Researching the Diversity of Knowledge* (Dunedin, New Zealand: Otago University Press, 2010) 23 at 24 [Andersen, "Mixed Ancestry or Metis?"].

111. Métis Nation of Alberta, "Who is Métis?," (Alberta: Métis Nation of Alberta), online: MNA <www.albertametis.com/MetisRights/metisRights-WhoIsMetis.aspx>.

112. Métis Nation of Ontario, "Registry," (Ontario: Métis Nation of Ontario), online: MNO <www.metisnation.org/registry>.

113. Andersen, "Mixed Ancestry or Metis?," *supra* note 110 at 24.

"between them and others, and emphasize edges and exclusions rather than centres."[114] The reliance on the dichotomy again emphasizes who Métis are not, making the legal definition of Métis contingent on Canada's definition of Indian.

The definitions of Métis used by Métis political organizations attempt to recognize Métis as people, but still ground the definition in culture and biology through the dichotomy with Indian. Indeed, Métis have a unique culture, separate from their Indian and European ancestors. However, continued emphasis on Métis culture in opposition to Indian culture limits understanding Métis as a people because the gaze is not turned inward. A focus on the people emphasizes the individual's connection to a self-determining political entity. Definitions of Métis should not focus solely on culture or biology, but should focus on protecting and realizing the rights of people based on a political understanding of self-determining Métis people.

V. *Moving beyond the dichotomy: Defining Métis people as people*

Previous sections have explained various definitions of Métis, including those used by legislatures, courts and Métis organizations. These definitions rely on a dichotomy that limits individuals' abilities to be recognized as simultaneously Indian and Métis. When developing group definitions, concerns exist regarding how and by whom the power of self-definition is exercised. As seen in *Cunningham*, self-definition should not give Métis people unfettered discretionary power. Rather, definitional powers ought to be exercised in accordance with international human rights standards, such as those found in the UN *Declaration on the Rights of Indigenous Peoples*.[115] This section describes the scope of Indigenous peoples' right to define their own membership. It suggests that Métis people should develop definitions that emphasize Métis are people (not merely races or cultures) and these definitions should be developed in accordance with international human rights standards.

Engaging in discussions around legal definitions of Métis identity requires moving from one's understanding of their own personal identity toward a collective notion of identity, though one's personal identity is connected to the group identity. Joyce Green describes personal identity as dependent upon how one is positioned in a community through inclusion or exclusion.[116] A legal self-definition would require individual Métis

114. Brown, *supra* note 26 at 1.

115. *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UN *Declaration*].

116. Green, "Indigenous Identity Formation," *supra* note 1 at 40.

people to self-identify as Métis. However, self-identification is not enough. Collective identity, which is "derived from historical, cultural and political experience," also must be addressed.[117] Collective identity can then be codified into citizenship requirements of the political entity (or people). David Elkins defines citizenship as signifying "rights and privileges, duties and responsibilities in a *political community*...citizenship goes beyond membership because it involves a sense of commitment, of being engaged by the actions related to that community. It is a concept that takes us beyond individualism, self-interest, and self-centredness, and thus it is inherently related to concepts of community."[118] As Métis people continue to redefine themselves, the political definition approach ought to be robust and consider factors beyond mere biology or culture.

John Borrows has rejected ideas of Aboriginal citizenship being grounded in blood quantum, explaining that "[s]cientifically, there is nothing about blood or descent alone that makes an Aboriginal person substantially different from any other person....[E]xclusion from citizenship on the basis of blood or ancestry can lead to racism and more subtle forms of discrimination that destroy human dignity."[119] A biological definition "encourages...a dismissive attitude" toward Indigenous peoples as peoples.[120] The biological approach which considers blood quantum (or ancestral connection) as the sole method of determining citizenship dismisses the power of Indigenous peoples to determine their own citizenship based on broader considerations. The Royal Commission on Aboriginal Peoples also specifically rejected the blood quantum and racial identity approaches, and advocated for citizenship to be based on political and cultural groups.[121]

A political approach to defining Métis that moves beyond the dichotomy of Indian and Métis focuses on who Métis are. As useful starting points, Paul Chartrand and John Giokas's definition of Métis people emphasizes the "historic nation that had political relations with the Crown."[122] Chris Andersen provides an example of defining Métis people,

117. *Ibid* at 37.
118. David Elkins, "Aboriginal Citizenship and Federalism: Exploring Non-Territorial Models" (1994), Report prepared for the Royal Commission on Aboriginal Peoples at 4-5, cited in L Chartrand, "Identity & Citizenship," *supra* note 103 at 37 [emphasis in original].
119. John Borrows, "'Landed' Citizenship: Narratives of Aboriginal Political Participation" in Will Kymlicka & Wayne Norman, *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 326 at 339-340 [Borrows, "Aboriginal Political Participation"].
120. Garroutte, *supra* note 72 at 57.
121. *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 237-239.
122. Chartrand & Giokas, *supra* note 2 at 277.

moving away from biological/cultural notions of mixedness, to focus on the "'national core' historically located in Red River and in the shared memories of the territory, leaders, events, and culture that sustain the Métis people today."[123] Andersen argues political definition is important because it "demands political and policy conversations that position us as political partners to be engaged with rather than as social problems to be ameliorated."[124]

A response to the problematic definitions of Métis identity, and the resulting definitions of membership or citizenship, is that Métis people themselves need the power to determine their own identity and membership. The UN *Declaration* clearly sets out this right.[125] Pamela Palmater aptly notes that simply moving from Canadian government definitions to self-definition does not fully address the concerns outlined in previous sections, as it does not resolve the questions of who is making these definitional decisions and on what basis.[126] Self-definition will not resolve the problem of the way in which Indigenous peoples, including Métis people, have internalized biological and cultural approaches to definition "at the cost of displacing their own models of citizenship."[127] Therefore, self-definition must be tempered through the various human rights protections afforded to individuals by the UN *Declaration*. Additionally, Métis people need to re-centre "Métis" in the definition of Métis. In advocating for a definition of Métis without reference to Indian, this section provides some consideration to guide self-definition to move beyond exclusive biological or cultural approaches. However, this section does not present a new definition of Métis. Rather, the aim is to present alternative considerations for Métis political organizations to reconsider their definitions through a process which engages people in looking internally to identify the factors that make Métis who they are today, and use those as the basis of their definitions of Métis.

The UN *Declaration* provides several points of guidance on the issue of Métis peoples' right to determine their own membership, in accordance with international human rights standards. As a starting point, the UN *Declaration* recognizes that Indigenous peoples have a right to self-determination, including their political status,[128] which must be exercised

123. Andersen, *Struggle for Peoplehood, supra* note 2 at 13.
124. *Ibid* at 19.
125. UN *Declaration*, *supra* note 115, art 33.
126. Palmater, *supra* note 7 at 176.
127. Val Napoleon, "Aboriginal Self Determination: Individual Self and Collective Selves" (2005) 29:2 Atlantis 31 at 35 [Napoleon, "Aboriginal Self Determination"].
128. UN *Declaration*, *supra* note 115, art 3.

in accordance with international law.[129] The right to self-determination must be exercised in accordance with the other rights recognized in the UN *Declaration*, including the rights to equality and non-discrimination.[130] As part of self-determination and the right to determine political status, "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live."[131] Article 34 provides that "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."[132] Shin Imai and Kate Buttery explain that "[t]here are three distinct matters covered in [article 33]: the right to determine membership; the right to citizenship in the state; and the right to decide the structure and membership in the indigenous peoples' institutions."[133] While Indigenous peoples' have the right to determine their own membership, these rights are not absolute—they are bound by non-discrimination and gender equality provisions.[134] Holding Métis people to these standards when they define themselves provides a level of protection against arbitrary or discriminatory decisions to refuse citizenship.

While Indigenous peoples have the right to determine their own membership, Métis peoples' self-definitions should define themselves as a people, and move away from racial, biological, and cultural definitions. Focusing on peoplehood moves beyond the problems with biological and cultural definitions because "[a] people can grow and expand and incorporate people from other nations and still have a connection to a common history, ancestors, and traditional territories."[135]

There is no set definition of "people" in international law, but an oft-cited set of characteristics suggests that a people may have "some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e)

129. *Ibid*, preambulatory para 17.
130. *Ibid*, arts 1, 2.
131. *Ibid*, art 33(1).
132. *Ibid*, art 34.
133. Shin Imai & Kate Buttery, "Indigenous Belonging: A Commentary on Membership and Identity in the United Nations Declaration on the Rights of Indigenous Peoples" (2013) Osgoode Hall Law School of York University Working Paper No 49 at 9, online: Osgoode Digital Commons <digitalcommons.osgoode.yorku.ca/all_papers/49>.
134. *Ibid* at 15.
135. Palmater, *supra* note 7 at 190.

religious or ideological affinity; (f) territorial connection; (g) common economic life."[136] The description continues to explain that "the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State" and that "the group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness."[137] While this description of people includes biological and cultural aspects, the definition is broader and encompasses other considerations. Palmater suggests that key features in defining a people—which is flexible and reflects modern realities—would include demonstrating ancestral connection; commitment to the nation; and commitment to the language, culture, traditions, customs, and practices of the people.[138] James Anaya suggests that the term "people" includes various "associational and cultural patterns actually found in the human experience."[139] These approaches provide a more complex approach which moves beyond simple biological connection or cultural practices as the basis for inclusion. Audra Simpson identifies engaging in treaties, diplomacy, procedures and political structures as indicia of Indigenous nations, or people.[140]

As part of defining Métis as a people, it may be helpful to consider Garroutte's approach, which is grounded in kinship as found in Indigenous peoples' own traditional values focusing on two aspects: relationship to ancestry and responsibility to reciprocity.[141] The first aspect highlights the importance of genealogical relatedness to many Indigenous peoples, and not identifying racial biological differences.[142] The second aspect emphasizes the importance of not just being a relative, but also acting like one.[143] In rejecting biological and cultural definitions of identity, Garroutte advocates for considering identity: "individuals belong to those communities because they carry the essential nature that binds them to The People *and* because they are willing to behave in ways that the communities

136. *Final Report and Recommendations: International Meeting of Experts on further study of the concept of the rights of peoples*, UNESCOR, 1990, UN Doc SHS-89/Conf.602/7 at 7-8.
137. *Ibid* at 8.
138. Palmater, *supra* note 7 at 200.
139. S James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 78.
140. Audra Simpson, "Paths toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake" in Duncan Ivison, Paul Patton & Will Sanders, eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 113 at 116.
141. Garroutte, *supra* note 72 at 118.
142. *Ibid* at 127.
143. *Ibid* at 134.

define as responsible."[144] This approach emphasizes the collective in defining the people, while still honouring a person's connections to his or her ancestors.[145] It also provides for the continued commitment to traditional values, and respects the individual-focused self-identification insofar as it allows individuals to come to know and be accepted by the group.[146] This approach emphasizes connection (or political allegiance) to a people beyond mere biological relations (ancestral or blood) or engaging in cultural practices. These definitional approaches focus inward on the people, defining who they are. Through this approach, the definition of Métis people would revolve around characteristics connected to Métis nationalism.

Borrows also argues for a kin-based approach grounded in the "social, political, legal, economic, and spiritual ideologies and institutions that are transmitted through their cultural systems."[147] This requires citizenship to address "concerns about social stability, political unity and civil peace"[148] which "expands citizenship from an individual level to a collective, political level."[149] Métis organizations will need to lead the work to develop and elaborate on a definition of Metis that does not rely on the Indian/ Métis dichotomy. However, some general comments can be made here. Applying this approach to Métis people would have Métis people looking inward to define themselves, not contingent on the definition of Indian. It would "lodge Aboriginal identity within its source: that is, within ancestry, history, location, and the abiding ties of loyalty and affinity that these connections generate, since the source lends to Aboriginal community identity a more permanent foundation."[150]

In developing new definitions of Metis, Garroutte's approach highlights a need for flexibility "because flexibility allows for the embrace of those who truly belong to the community, even if they do not satisfy certain technical criteria of membership."[151] Flexibility is also important

144. *Ibid* [emphasis in original].
145. *Ibid* at 135.
146. *Ibid.*
147. Borrows, "Aboriginal Political Participation," *supra* note 119 at 340.
148. John Borrows, "Measuring a Work in Progress: Canada, Constitutionalism, Citizenship and Aboriginal Peoples" in Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003), cited in Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland, OR: Hart, 2009) 233 at 252.
149. Napoleon, "Aboriginal Self Determination," *supra* note 127 at 39.
150. Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-Government* (Vancouver: UBC Press, 2003) at 120.
151. Garroutte, *supra* note 72 at 115.

to recognize "the ongoing struggles faced by Indigenous peoples in maintaining their cultures and traditions in the face of assimilatory laws and policies."[152] In the case of *Cunningham*, flexibility would help avoid the concern that acquiring status under the *Indian Act* undermines the protection of Métis as a distinct culture. Instead, it would look at the broader context influencing the decision and consider whether the individual's allegiances have changed.

In addition to flexibility, a definition should be inclusive because as Napoleon argues, "pre-contact aboriginal societies practised forms of nationhood that were deliberately inclusive in order to build strong nations with extensive international ties."[153] States have invoked biological blood quantum approaches to defining "Indigenous" in order to reduce their responsibilities, and so Indigenous peoples should exercise caution when using similar approaches.[154] In response to concerns about defining Métis in opposition to Indian, which automatically limits one's ability to be recognized as belonging to both groups simultaneously, Larry Chartrand suggests that "the Métis Nation might want to consider that such individuals [who have Indian status] are not automatically excluded from citizenship but that they could lose citizenship if they do not maintain a genuine connection to the Métis Nation."[155] This flexibility requires considering broader factors and not simply relying on the biology- or culture-based boundaries set by Canadian governments. It may allow one to be recognized as both Indian and Métis, if doing so does not undermine or threaten Métis people or nationhood. This process allows for a more inclusive definition and centres Métis people. In defining a people, it should not matter how much "Métis blood" one has, or if one still practices a specific aspect of the culture; the focus should be on identifying the underlying political, economic, social, and cultural values to guide the definition. Such an approach may also allow for people whose family has long identified as Métis because they have lost Indian status and have been long connected with the Métis community to continue their membership, provided they continue to pay allegiance to the Métis people. While this may be a controversial suggestion, the point is to emphasize that moving beyond biology to other factors may allow continued membership (or citizenship) where certain criteria are met.

152. Palmater, *supra* note 7 at 201.
153. Napoleon, "Aboriginal Self Determination," *supra* note 127 at 38.
154. Garroutte, *supra* note 72 at 57.
155. L Chartrand, "Identity & Citizenship," *supra* note 103 at 49-50.

Conclusion

The Supreme Court of Canada's decision in *Cunningham*, which confirmed the membership provisions of the *Métis Settlements Act* that prohibited members from gaining status under the *Indian Act* as a necessary step to protect Métis culture, inspired this article to critically analyze the legal boundary created between Indians and Métis. This article demonstrated the problems with current definitions of Métis used by Canadian governments, courts and Métis organizations, all of which are based in a dichotomous definition with Indian. The concerns that arise from a dichotomous approach to Métis identity are interconnected. Connecting Métis identity to Indian identity creates a hard line between Indian and Métis, forcing a person to be one or the other.[156] Defining Métis in relation to Indian means that changing the definition of Indian also changes the definition of Métis. This is particularly problematic as Canada continues to change the necessary blood quantum required to be an Indian, which can connect definitions of Métis to mix-bloodedness. Finally, defining Métis as distinct from Indian and emphasizing culture may limit the evolution of Métis culture and force a focus on identifying distinguishing features. If Métis identity continues to be connected through an oppositional definition with Indian, it keeps the two intertwined and undercuts independent Métis nationhood.

Rather than basing definitions of Métis, and the resultant membership and citizenship definitions, on culture or biology, this article argues that Métis people need to be recognized as people. Definitions should be flexible and consider multiple factors such as kinship connections and broader commitment (or allegiance and loyalty) to the Métis people.

With leave granted to appeal the Federal Court of Appeal's decision in *Daniels*, the Supreme Court of Canada is again being asked to look at the interconnection between Indian and Métis. This decision provides an opportunity for the court to look past the artificially constructed binary between Indian and Métis and realize that the historic regulation and contemporary identity of these two groups is far more complicated than a simple contrast.

156. *Cunningham, supra* note 5.