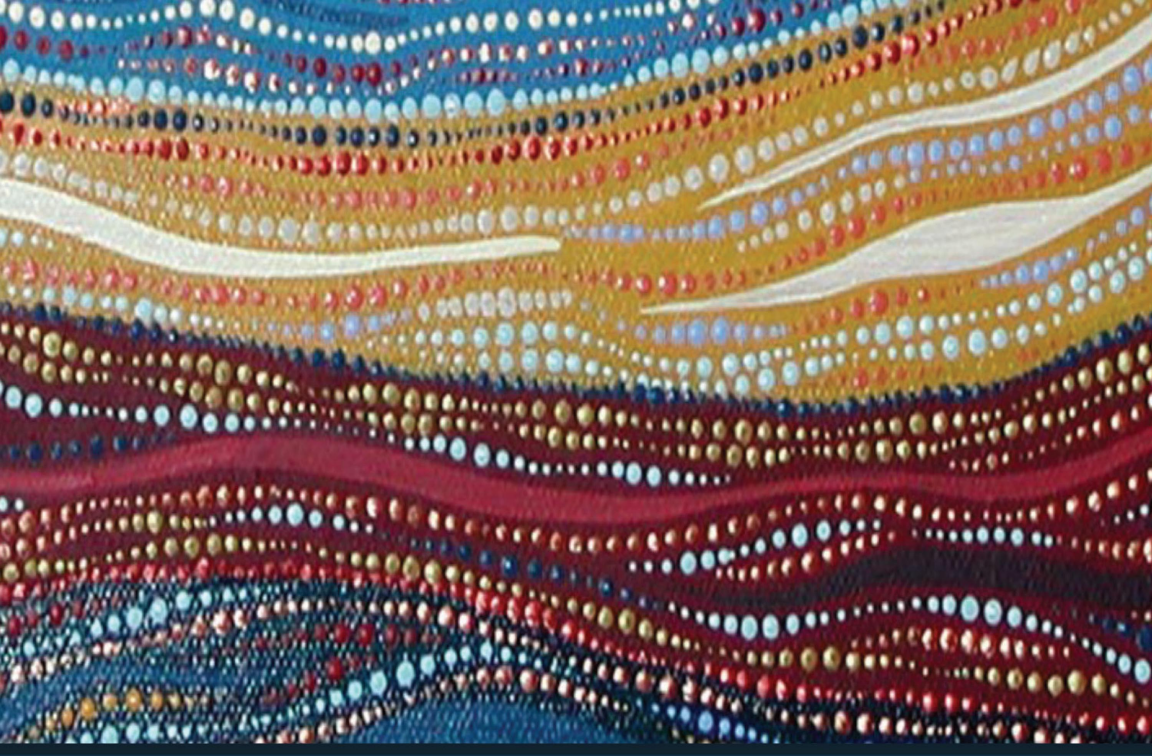

DANIELS v. CANADA

IN AND BEYOND THE COURTS

EDITED BY NATHALIE KERMOAL
AND CHRIS ANDERSEN

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Introduction

NATHALIE KERMOAL AND CHRIS ANDERSEN

Of all the groups in Canada, the Métis have clearly suffered the most from an inflexible federalism that emphasizes provincial boundaries at the expense of nation-wide interests which transcend those boundaries. Because the federal government precludes any special status for national minorities and avoids the kind of legal responsibility for Métis that it jealously guards in relation to Indians, the onus for improving the socio-economic condition of hundreds of thousands of Métis has fallen to provincial governments. The individual provincial governments, however, have amply demonstrated they lack the will—to say nothing of the lack of administrative machinery and constitutional powers—to tackle the problems of the Métis which have been, and are, national in scope. . . . The basic problem, the fundamental issue at stake for Canada's Métis, is the unwillingness, inability, or incapacity of the federal government to deal with the Métis as an indigenous people, a national minority with a century-old claim to Aboriginal Rights.[1]

Over the past twenty years, the Supreme Court of Canada (SCC) has played a major role in defining Métis rights. Though the Métis were recognized in the Constitution Act of 1982 as one of the Aboriginal peoples of Canada, the federal government continued to exclude them from the kinds of social programs and negotiation processes that First Nations had long been engaged with. For example, lawyer Joseph Magnet and his team discovered a number of government documents indicating that the federal government was very much aware of the fact that the Métis were "far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens."[2] This seems to corroborate findings reported in other government documents around housing needs for the Métis.[3] As early as 1969, for example, the Hellyer report on housing and urban renewal had noted the dire conditions in which Métis were living: "Indeed some of the housing conditions witnessed by the Task Force in Métis areas around Winnipeg ranked with the very worst one could encounter anywhere in Canada. These people require special assistance and should receive it."[4] Yet even though the government admitted in the 1980s to "possessing the power to legislate theoretically in all domains in respect of Métis and Non-Status Indians under Section 91(24) of the British North America Act,"[5] it consciously refused to do so.

With the failed Charlottetown Accord in 1992, the Métis lost (through no fault of their own) a chance to gain political traction through negotiation with the federal and provincial governments. Indeed, the proposed amendment package to the Canadian constitution would have enshrined an Aboriginal right to self-government for the Métis people, as outlined in the draft Métis Nation Accord. Access to programs and funding was central to the accord. In the section on the Métis, the 1996 report of the Royal Commission on Aboriginal Peoples (RCAP) emphasized that "Aboriginal collectivities claiming to be nations of Métis people should be recognized under the same recognition policy and using the same criteria as applied to all Aboriginal peoples."[6] The RCAP further recommended that "the government of Canada either (a) acknowledge that section 91(24) of the Constitution Act, 1867 applies to Métis people and base its legislation, policies and programs on that recognition; or (b) collaborate with appropriate provincial governments and with Métis representatives in the formulation

and enactment of a constitutional amendment specifying that section 91(24) applies to Métis people. If it is unwilling to take either of these steps, the government of Canada make a constitutional reference to the Supreme Court of Canada, asking that court to decide whether section 91(24) of the Constitution Act, 1867 applies to Métis people."[7] Following their setback with the Charlottetown Accord, the Métis turned to the courts and more specifically to the SCC to advance their rights.

In 2003, *R. v. Powley* became the first major judicial breakthrough for the Métis people—this was perhaps especially notable given that First Nations and Inuit had been making use of the courts for the previous three decades. Hailed as a victory by Métis organizations, the *Powley* decision defined Métis rights as they relate to subsistence hunting. Through the "Powley test," the SCC clarified the boundaries and contours of Métis rights. Two subsequent SCC decisions involving Métis litigants followed: the Manitoba Metis Federation (MMF) case in 2013 and the *Daniels* decision in 2016. As Métis scholar Adam Gaudry explains, "In *MMF v. Canada* the court found that the federal government had failed in its constitutional obligation to protect Métis interests in the 1870s allocation of Manitoba lands. In effect, the court identified a duty to reconcile Métis interests in Manitoba lands and necessitated movement towards a bilateral relationship between the MMF and the Government of Canada."[8] In *Daniels v. Canada* the court determined that Métis and non–Status Indians were "Indians" under s. 91(24) of the Constitution Act, 1867. After years of federal government neglect, the SCC confirmed what the Métis had known all along: that the federal government possessed jurisdictional responsibilities vis-à-vis the Métis. The court ruled that the term "Indians" needed to be understood broadly and that Métis and non–Status Indians "are all 'Indians' under s. 91(24) by virtue of the fact that they are all Aboriginal peoples."[9]

On 14 April 2016, the SCC "put an end to a 17 year odyssey that began in 1999."[10] For Joseph Magnet, the *Daniels* decision is among the "most transformative indigenous constitutional cases, if not the most transformative case, of this generation."[11] The plaintiffs sought three declarations:

> (1) that Métis and Non-Status Indians (MNSI) are "Indians" as defined in s. 91(24) of the Constitution Act, 1867;

> (2) that the Crown owes a fiduciary duty to Métis and Non-Status Indians as Aboriginal peoples; and
>
> (3) that Métis and Non-Status Indians have the right to be consulted and negotiated with by the federal government as to their rights, interests, and needs as Aboriginal peoples.[12]

The court granted only the first declaration, arguing that the other two had already been covered by previous jurisprudence.

At least formally, the *Daniels* decision puts an end to the federal government's politics of avoidance that have left the Métis in jurisdictional limbo. The signing of recent framework agreements by Métis organizations in Western Canada show how s. 91(24) has opened the door for the Métis Nation to forge a new relationship with Canada based on a "nation-to-nation," "government-to-government" dialogue, a foundation and accommodation that heralds the end of the political and administrative isolation of the Métis Nation.[13]

However, like all court decisions, *Daniels* is imperfect, particularly with respect to the SCC's comments on the nature of Métis identity. By dismissing a nationhood-based definition of "Métis," the court positioned the term in a racial "Métis-as-mixed" logic. This characterization has been seized by individuals as well as organizations as a means of validating their particular understanding of Métis history and Métis identity, a move that is deeply troubling for Métis people who see themselves not as a mixture of races but as distinctive political and cultural communities.[14]

An example of the broad cultural power law possesses in Canadian society, *Daniels* demonstrates the use of court decisions by people and organizations that look to them for validation of their identity. As Métis scholar Chris Andersen argued at the "*Daniels*: In and Beyond the Law" conference, held at the University of Alberta in 2017, courts can be "roadmaps to nowhere." At their best, they provide logics that help produce policy, guidelines to be used in the context of future litigation strategies and decision making in associated policies.[15] For example, the *Powley* decision not only affected subsequent court cases but also shaped the ways in which political relationships have developed between Métis organizations and provincial and federal governments. While SCC decisions can serve to clarify Aboriginal rights and establish legal tests to determine their scope and content, they

are never just about the logics of the court cases themselves. Decisions—like those produced by the SCC—nearly always hold broader political and social ramifications. Some of these ramifications are good, while some are not so good. As Andersen explains, "Court decisions—especially those written by the Supreme Court of Canada . . . are beginnings as much as they are endings. That is to say, court decisions must be understood as imparting important—if sometimes necessarily vague and often maddeningly contradictory—policy principles that have the power to enormously impact the dynamics of future policy relationships."[16] Court rulings can thus open a Pandora's box that further complicates matters. For many social actors, court decisions are important not for what they say but for what people *think* they say, and for what people *wish* them to say. Likewise, court decisions can also be important for certain actions they seem to encourage or discourage, and social actors often draw from a particular court decision the rationale to take those actions. People like to think that the logic of a SCC decision is clearly laid out and will effectively "settle things once and for all," but that is rarely the case. Groups of people and governments isolate the sentences or paragraphs that fit their understanding of a given ruling. In this way, court decisions can hold different meanings for different people (we will return to this in the volume's conclusion).

At the heart of the question is the constitutive power of law. Andersen positions courts as a specific and generative form of juridical power that hold a particular forum of power in Canadian society. Indeed, they shape "the production of logics not only irreducible to the dynamics of other social fields but potentially resistant to them."[17] Courts are a generative form of juridical power, since they "produce a form of 'juridical capital' that rather than directly constituting social relations or (re)producing a 'grand hegemony,' generates particular depictions and problematizations of social issues and classifications that can potentially shape the parameters within which subsequent political strategies and struggles ensue."[18] For Andersen, ordinations of "Métis" take a distinctively juridical form: "they refract, rather than reflect, broader forms of racialization according to logics that remain largely insulated from critique."[19]

Following Andersen, the authors in this volume pay close attention to the ways in which the *Daniels* decision affects the Métis people on questions of history, law, genomics, genealogy, and identity.[20] This book thus provides

different perspectives, including on the legal outcomes of the case (good or bad), its policy ramifications, and its multiple interpretations by Métis and by Canadian society at large.

Overview of the Book

The first two chapters in the volume focus on history. Both pay tribute to the Métis politicians, including Harry Daniels, who fought the hard battles that set the stage for the recognition of Métis rights evidenced in *Daniels*. Up until 1982, there was no provision in Canada's constitution that recognized and affirmed the existing Aboriginal and treaty rights of Aboriginal peoples, no provision stating who the Aboriginal peoples of Canada are, no Equality Clause prohibiting discrimination on the basis of sex, and no SCC decisions confirming the existence of any Métis rights. Thus it is recent history that provides the contextualization crucial to understanding the importance of the *Daniels* decision for Métis communities.

In the post–Second World War period, poverty, shanty housing, and lack of education had become endemic among Métis and non–Status Indian populations. The federal government took the position that it only had jurisdictional responsibility for Status Indians registered under the Indian Act and largely refused responsibility for providing programs or services to Métis people. Any process to address Métis land claims was also denied. In response, Métis and non–Status Indian organizations formed the Native Council of Canada (NCC) in 1971. The NCC maintained that their constituents were "Indians" within the meaning of s. 91(24) of the British North America Act (now known as the Constitution Act, 1867). In Chapter 1, Tony Belcourt, one of the actors of the time, clearly expresses what was sought, what was achieved, and the consequences for Métis people today. His personal account provides a snapshot on the environment and the history that led to the *Daniels* decision.

With Chapter 2, Nathalie Kermoal adds to Belcourt's narrative by examining the social and political circumstances of the 1970s and '80s that put Métis leader Harry Daniels on the judicial path to contesting the federal government's narrow definition of s. 91(24) of the British North America Act. Her historical analysis gives voice to Daniels and identifies the intellectuals and political movements that influenced him in formulating a counter-narrative

to Pierre Elliott Trudeau's concept of a "just society." This contextualization provides the necessary background to analyze the rhetoric Daniels used to position Métis people as one of the founding nations of Canada. The Métis rejected being seen as just another disadvantaged minority group, arguing that they were not an ethnic group but rather a historical national minority—just as Québécois nationalists had claimed in the 1960s and '70s—and consequently deserving of more recognition than the Trudeau government was willing to give them.

Harry Daniels, along with other leaders such as Tony Belcourt and Jim Sinclair, thus played a significant role in breaking through the conventional boundaries of Canadian politics and society by dedicating much of his political life to the advancement of his people's rights. The pressure that the Métis and other Indigenous groups (First Nations and Inuit) exerted on Trudeau's agenda eventually bore fruit, and they were included in the Constitution Act of 1982. The rhetoric that positioned the Métis as a "collectivity" or Nation rather than "ordinary citizens" helped reinforce the notion that they should have access to programs available to First Nations (Status Indians). Section 91(24) became the political avenue for making those indispensable social and political advances.

Following this consideration of the historical background to the 2016 *Daniels* decision 2016, Chapters 3 through 7 provide legal analyses of the SCC decision itself, highlighting what the court said and, more importantly, what it should have said but did not.

In Chapter 3, Jason Madden analyzes the *Daniels* decision from a Métis Nation perspective. Providing an overview of the purpose and evolution of the case, the various decisions of the courts in *Daniels* as well as the case's role in the development of Métis law as a part of Aboriginal law in Canada, the author argues that *Daniels* joins the SCC's judgements in *R. v. Powley*[21] and *Manitoba Metis Federation v. Canada*[22] to form a trifecta of Métis law. Together, these decisions have led to recent developments in Crown–Métis Nation negotiations and agreements related to Métis rights and self-government. While *Daniels v. Canada* was a unanimous decision, it is arguably one of the most confusing and misunderstood recent decisions from the court in the area of Aboriginal law. This has led to much erroneous media coverage, commentary, and analysis in relation to *Daniels*. Introducing ideas developed later in this volume by Darryl Leroux and Brenda Macdougall, Madden

argues that *Daniels* does not create a new category of "Métis" who are owed any form of reconciliation from federal, provincial, or territorial governments, outside those already recognized within the meaning of s. 35 of the Constitution Act, 1982.

Arend J.A. Hoekstra and Thomas Isaac contend in Chapter 4 that the *Daniels* decision acts as a prominent signpost in the SCC's journey of evolving judicial language. It introduced the noun "Indigenous" at a time when Canada was engaged in fundamental conversations regarding its history and its relationship with Indigenous peoples, following the inquiry into Indian residential schools. Through *Daniels*, the court introduced a novel framework for s. 91(24) of the Constitution Act, 1867 that contrasts with the well-defined s. 35 framework of the Constitution Act, 1982. Whereas s. 35 focuses on the prospective protection of Aboriginal communities through the constraint of the Crown, s. 91(24) focuses on the retrospective redress of harms to individuals that have resulted from Crown actions targeted at Indigenous peoples. In relying on a broad categorization of "Indigenous," this new framework encompasses not only those people with a shared culture and ancestry but also, potentially, those persons who are "Indigenous" by race or ancestry alone.

In Chapter 5, Catherine Bell focuses on the last two declarations of the *Daniels* decision. As previously mentioned, the plaintiffs in *Daniels* had asked for three judicial declarations, but only the first was granted.[23] Bell argues that the court's reasoning in refusing the second and third declarations creates potential confusion about duties flowing from honour of the Crown in two key ways: (1) the apparent conflation of the "fiduciary relationship" between the Crown and Indigenous peoples with fiduciary duties that flow from that relationship; and (2) the apparent conflation of the Crown's "context-specific duty to negotiate" with the duty to negotiate identification and definition of rights claims and fulfill constitutionalized promises aimed at reconciliation of Indigenous interests. This chapter also considers some of the challenges faced by Métis people seeking to negotiate through representatives of their choice, given the nature of contemporary Métis political organization.

Even without the challenges identified by Catherine Bell, D'Arcy Vermette argues in Chapter 6 that the *Daniels* case is not without its drawbacks. For Vermette, *Daniels* is not out of place among older and more obviously racist case law from both Canada and the United States. While the *Daniels* decision

ushered in constitutional clarity by placing the Métis within federal jurisdiction as "Indians," Vermette's comparison of *Daniels* with an older case law, *Tronson* (a lower-level case in which Indian identity sat at the core of the legal dispute), demonstrates that the SCC's determinations of Métis identity are functionally racist, since they define Métis identity in ways that undermine the very peoplehood of the Métis, which in turn diminishes their role as constitutional actors.

Brenda L. Gunn, in Chapter 7, discusses the *Daniels* decision in light of the rights of Indigenous peoples recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Gunn begins by reviewing the court decision and issues that have arisen as a result. For example, there has been an increase in self-proclaimed "Métis" groups who seek to exploit and appropriate what it means to be Indigenous (Métis) in Canada, while maintaining their white privilege (see also Darryl Leroux, Chapter 9 in this volume). International human rights have evolved over the past thirty years, including and especially with respect to the rights of Indigenous peoples. The chapter then considers how international human rights law, including UNDRIP, alleviates some of the concerns that have been raised, including through the potential expansion of the definition of Métis people. Gunn concludes with a brief description of the types of rights that could flow from the resolution of the jurisdictional issues, which it is hoped will encourage the federal government to engage in self-government negotiations with the Métis people.

The remaining four chapters examine some of the broader societal implications of the Daniels decision. The *Daniels* decision was meant to provide clarification on the meaning of s. 91(24) of the British North America Act of 1867. Only time will tell whether the SCC's decision will achieve that goal. Still, the decision itself makes for an excellent starting point for thinking about the sometimes vast gulf between what jurisprudential scholars think about the merits of a given decision and how that decision gets put to use by a wide variety of social and political actors outside the comparatively narrow confines of the jurisprudential arena. In Chapter 8, Chris Andersen begins by exploring several core streams of logic contained within the court decision, then investigates the manner in which Indigenous political organizations in particular have claimed victory—despite their different and even oppositional understandings of terminology used in the decision—with an

eye to understanding both the power of juridical discourse in contemporary Canadian society and the limitations of judicial interpretations of the decision's meaning(s).

As an example of the power of juridical discourse—and one that gives ammunition to different groups to claim Métis identity—Darryl Leroux explores in Chapter 9 the claims to Métis identity that have flourished in the Eastern provinces of Canada over the past decade as well as since *Daniels*, including through the emergence in the post-*Powley* period of nearly thirty separate organizations representing self-identified "métis" individuals. Alongside this remarkable political mobilization, a new historiography promoted primarily by French-language historians and anthropologists has emerged to challenge the land- and kinship-based terms for Métis peoplehood. Leroux analyzes two of the most common claims of this revisionist history: first, the argument for Eastern ethnogenesis, or the idea that Red River Métis ethnogenesis took place in seventeenth-century New France; and second, the idea, based on the normative French-English political cleavage in Canadian society, that the Métis are oppressing their French-speaking Eastern peers. Leroux carefully examines both these claims in relation to the countervailing understandings of Métis identity and belonging developed by Métis scholars themselves.

This revisionist history often bases its claims on DNA and genealogy. As Sisseton Wahpeton Oyate scholar Kim TallBear emphasized during the Daniels conference, "In the 21st century, new technological developments meet the old social technology of playing Indian. DNA ancestry testing conditioned by settler state racial formations has emerged to capitalize on actualized citizen consumers of DNA tests."[24] Many of the "métis" claims in Eastern Canada analyzed by Leroux illustrate settler colonial efforts to define Indigeneity in ways that rely too heavily on linear, biological descent and attend too lightly to Indigenous people's definitions of peoplehood.

In Chapter 10, Rick W.A. Smith, Lauren Springs, Austin W. Reynolds, and Deborah A. Bolnick present an overview of both conventional and emerging genomic ancestry technologies and map their limitations for defining Indigenous belonging. Genomics has emerged as a powerful but often problematic framework for producing notions of identity and belonging, and the ways that DNA is used to constitute certain relations are often set against the interests of Indigenous peoples' sovereignty and self-determination. In

the context of the *Daniels* decision, which codifies long-standing misconceptions about Métis as a mixed-race category, non-Indigenous people are increasingly turning to commercial genetic ancestry tests for evidence of their Indigenous and European ancestry in order to claim Métis belonging. These genetic claims are frequently disengaged from Métis people and therefore lack recognition from the communities to which consumers of genetic ancestry tests seek entry, casting doubt on the legitimacy of DNA as an arbiter of belonging. Drawing upon publicly available genome data and interviews with consumers of genetic ancestry tests, the authors of this chapter further disrupt notions of Indigeneity as a genetically coherent category and support an understanding of Indigenous belonging that is produced in and through lived relations.

Brenda Macdougall addresses the limitations of genealogical research in Chapter 11, which arise—much like the limitations of DNA tests—from a focus on the individual rather than family or community. As demonstrated by Darryl Leroux, many new "métis" will rely on "an Indigenous ancestor born in the 1600s as the sole basis for their claim to indigeneity," but such a claim of a "long-ago Indigenous ancestry simply does not suffice as evidence of a distinct Métis community today."[25] At best, genealogical research is used to support a person's desire to explore their lineage; at worst, it encourages the individual to imagine that an ancestral reality equals their contemporary identity.

Macdougall points out that tracing family history as a primary methodological approach is not new to Métis scholarship. There has been a long-standing recognition of the conceptual importance of the family within the socio-economic history of the Métis. As such, when built for a community rather than an individual, genealogies become a reflection of social organization over time. By using genealogical reconstruction as a methodological tool in community, regional, and national studies, and then contextualizing that data with qualitative archival records (such as trade, mission, governmental, newspapers), insights into economic, social, and religious behaviours of Métis communities in specific spatial and temporal geographies are possible. If used dynamically, then, genealogical reconstructions are an important methodological tool to organize, interpret, and analyze wahkootowin—a kinscape of people's relatedness, framed within a specific socio-cultural world view.

Daniels v. Canada is indeed a multifaceted decision whose outcome has not yet been fully understood and whose effects will continue to reverberate

across a wide variety of social, political, economic, and geographical contexts. By focusing on various impacts of the *Daniels* Supreme Court decision, this collection of essays makes a distinctive contribution to understanding the continued power of the courts in Canadian society and the manner in which Canada's colonial legacy continues to bedevil our attempts to come to terms with a peoplehood-based understanding of not just Métis identity but Indigenous identities more generally.

NOTES

1 Harry Daniels, *We Are the New Nation/Nous sommes la nouvelle nation* (Ottawa: Native Council of Canada, 1979), 6.

2 Joseph Magnet, "*Daniels v. Canada*: Origins, Intentions, Futures," *aboriginal policy studies* 6, no. 2 (2017): 28.

3 See Nathalie Kermoal, "Navigating Troubled Political Waters for Better Housing : The Canative Example," in *Métis Rising*, ed. Larry Chartrand and Yvonne Boyer (Vancouver: UBC Press, forthcoming).

4 Canada Mortgage and Housing Corporation, *Report of the Federal Task Force on Housing and Urban Development* (Ottawa: Task Force on Housing and Urban Development, 1969), 58. See also Evelyn Peters, Matthew Stock, and Adrian Werner, *Rooster Town: The History of an Urban Métis Community, 1901–1961* (Winnipeg: University of Manitoba Press, 2019).

5 Magnet, "*Daniels v. Canada*," 28–29.

6 Royal Commission on Aboriginal Peoples, *Perspectives and Realities*, vol. 4 of *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Libraxus, 1996), 187.

7 Ibid., 196.

8 Adam Gaudry, "Better Late Than Never? Canada's Reluctant Recognition of Métis Rights and Self-Government," *Yellowhead Institute*, Policy Brief Issue 10 (2018): 2.

9 Magnet, "*Daniels v. Canada*," 27.

10 Ibid., 26.

11 Ibid.

12 *Daniels v. Canada* (Indian Affairs and Northern Development), 2016 SCC 12.

13 For more information, see Janique Dubois, "The Emerging Policy Relationship between Canada and the Métis Nation," Institute for Research of Public Policy, https://on-irpp.org/2L-JOPgf; Gaudry, "Better Late Than Never?"; and "Métis Nation of Alberta–Canada Framework Agreement for Advancing Reconciliation," Métis Nation of Alberta, 16 November 2017, http://albertametis.com/wp-content/uploads/2017/02/MNA-GOC-Framework-Advancing-Reconciliation_SIGNED.pdf.

14 See the following for analyses of the Daniels decision: Chris Andersen and Adam Gaudry, "*Daniels v. Canada*: Racialized Legacies, Settler Self-Indigenization and the Denial of Indigenous Peoplehood," *TOPIA* 36 (2016): 19–30; Brenda Macdougall, "The Power of Legal and Historical Fiction(s): The *Daniels* Decision and the Enduring Influence of Colonial Ideology," *International*

Indigenous Policy Journal 7, no. 3 (2016): 1–6; Chelsea Vowel and Darryl Leroux, "White Settler Antipathy and the *Daniels* Decision," *TOPIA* 36 (2016): 30–42; Adam Gaudry and Darryl Leroux, "White Settler Revisionism and Making Métis Everywhere: The Evocation of Métissage in Quebec and Nova Scotia," *Critical Ethnic Studies* 3, no. 1 (2017): 116–42; Adam Gaudry, "Communing with the Dead: The 'New Métis,' Métis Identity Appropriation, and the Displacement of Living Métis Culture," *American Indian Quarterly* 42, no. 2 (2018): 162–90.

15 See Chris Andersen, "The Supreme Court Ruling on Métis: A Roadmap to Nowhere," *Globe and Mail*, 14 April 2016, https://www.theglobeandmail.com/opinion/the-supreme-court-ruling-on-metis-a-roadmap-to-nowhere/article29636204/.

16 Ibid.

17 Chris Andersen, "*Métis": Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014), 63.

18 Ibid.

19 Ibid.

20 This book focuses on the ramifications of the *Daniels* decision as it pertains to Métis people and does not examine its implications for non–Status Indian rights.

21 *R. v. Powley*, 2003 SCC 43.

22 *Manitoba Metis Federation Inc. v. Canada* (Attorney General), 2013 SCC 14.

23 *Daniels v. Canada* (Indian Affairs and Northern Development), 2016 SCC 12, 3.

24 "*Daniels*: In and Beyond the Law," Rupertsland Centre for Métis Research, University of Alberta, Edmonton, 26–28 January 2017, unpublished conference notes, 7.

25 Darryl Leroux, "Self-Made Métis," *Maisonneuve Magazine* (Fall 2018): 37.

Daniels in Context[1]

TONY BELCOURT

I see the *Daniels* decision through the lens of a Métis person who grew up in what is known as the historic Métis community of Lac Ste. Anne, Alberta. I see it through the lens of someone who was active in the Métis Association of Alberta (MAA) in the late 1960s and became its vice-president in 1970. I see it through the lens of having moved to Ottawa as the founding president of the Native Council of Canada (NCC), now called the Congress of Aboriginal Peoples (CAP). I also see *Daniels* through the lens of a time before the Constitution Act, 1982 recognized the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, including the Métis people.

The fact is that I do not remember us using the term Métis very much when I was growing up in Lac Ste. Anne, Alberta, although the term was common in other areas, particularly in the "Métis settlements."[2] Many of us referred to ourselves as Nêhiyaw, which means "the people" in Cree. The Indians (as we referred to them then) thought of us as their "poor relatives, the Awp-ee-tow-Koosons,"[3] which in Cree means "half-people." Indians also referred to us as tipeyimisiwak, which means "the free people" or "their own boss." The

federal government referred to us as half-breeds.[4] In Lac Ste. Anne and in other places throughout the West we adopted these names for ourselves.

Racism and discrimination were prevalent. So was poverty. In a personal letter to me dated 12 January 1989, my mother wrote about the time when I was growing up as a child: "And dad & I barely survived. he tried to get the old farm going[.] he trapped in the winter fish done odd jobs [*sic*]. I tell you it was hard. We were so poor at one point if it wasn't for Bill Solberg giving us fat to render for our bread we wouldn't have had anything."[5]

The goal of my parents was to get out of poverty and get a better life for their children. In 1951, when I was eight, we moved to Edmonton, where at one point my father worked three jobs from morning till night in order to put food on the table and pay the rent. My mom also worked full-time as a labourer at a glass company. I got my Grade 12 certificate, held various jobs, and eventually got involved in the MAA, first at the community level, and in 1969 as provincial vice-president. That is when I first met Harry Daniels, whom we hired as a fieldworker to organize our people at the community level.

I started doing a lot of research on our historic relationship with Canada. I saw that we were denied participation in the treaty process in 1885, when Métis representatives were told that commissioners were there for the full-bloods and that there would be commissioners who would come for the half-breeds. Instead of a treaty, the Métis were given scrip[6] that could be traded for land or money. I saw that the federal government had responsibility for "Indians and lands reserved for Indians,"[7] and that in the 1939 case of *Reference Re Eskimo,"*[8] the Supreme Court determined that the federal government also had responsibility for the Inuit.

At Lac Ste. Anne, when people came from all over to attend pilgrimage every year,[9] talk around the campfires at night would be about Batoche. People would talk about the loss of our lands. Some lands had been set aside for Métis in what we called the "colonies" back then and are now called the Métis settlements. Not everyone wanted to, or could, move to them. I know that my dad and everyone of his age wondered what had happened to the lands that they thought were to be set aside for seven generations.

I knew we would never be able to address our issue of land unless we dealt with Ottawa.

On 7 November 1970, we decided to set up a presence in Ottawa. The leaders from the Manitoba Metis Federation, the Métis Society of Saskatchewan, the Métis Association of Alberta, and the British Columbia

Association of Métis and Non–Status Indians met in a small hotel room in Victoria: Angus Spence from Manitoba, Jim Sinclair and Howard Adams from Saskatchewan, Stan Daniels and me from Alberta, and Butch Smitheram and Harry Lavallee from British Columbia.[10]

In those days our organizations also had members who identified as non–Status Indian. When we formed the Native Council of Canada, we decided to build an organization that would lobby both for the rights of the Métis and for those who wanted to regain their Indian status.

Although our overarching goal was to get a process whereby we could address our land claims, our initial focus in those days was first and foremost dealing with the ravages of poverty, discrimination, and poor or inadequate housing. Our people were living on road allowances[11] or in the bush, many times in shacks with no insulation and oil barrels cut in half to use as stoves to heat their place in the bitter cold of winter. Often, we would hear about families being burned because the stoves blew up from overheating. Many of our people were moving into the cities to try to get work and to make a living. But often as not, if they had a brown face and the smoky sounds of Cree in their voice, landlords would turn them away.

We wanted to get Ottawa to pay attention to these needs and to provide programs and services that we desperately needed for health, housing, and education. The avenue we saw was through section 91(24) of the Constitution Act, 1867—the source of federal power to legislate for "Indians and lands reserved for Indians." We took the position that we were "Indians" for purposes of that federal authority and lobbied the federal government on that basis.

It's important to look back on those days and reflect on the fact that up to that point, we had absolutely no profile at the national level. Métis were regarded as having been done away with by the hanging of Louis Riel. We weren't even a blip on the radar of the national media. There was some awareness of "Indians" because the government of Prime Minister Pierre Trudeau had issued a White Paper,[12] outlining a policy of assimilation that was loudly denounced by the chiefs.

My primary job then was to lobby for desperately needed programs and services to deal with housing, health, welfare, and economic opportunity.[13] But first we needed to create the awareness about who we were and what we were seeking. It meant spending countless hours with national journalists who scoffed at us, bureaucrats who stiff-armed us and told us to go see the provinces, and federal ministers who had never given any thought to the issues we faced.

Thanks to the Honourable Bob Stanbury, Federal Minister for Citizenship, we were able to get core funding shortly after I moved to Ottawa in 1971. We set about to organize Métis and non–Status Indians in the rest of the provinces and the two northern territories. We produced some brochures and started a tabloid called *The Forgotten People*. In time I was able to meet with ministers, including the Honourable Jean Chrétien, who was Minister of the Department of Indian and Northern Affairs (DIAND), as well as Prime Minister Pierre Elliot Trudeau. We submitted briefs, made some noises, and eventually members of the media started to show up at our press conferences.

Again, without yet having the benefit of the Aboriginal Rights clause in the patriated constitution of 1982, we saw that our only way forward was to position ourselves as "Indians" for the purposes of the constitution at that time and to argue that therefore the federal government had a responsibility to us.

That was the theme of our first major written brief to the Honourable Gérard Pelletier, Secretary of State, on 6 June 1972.[14] Our opening paragraph reads in part as follows: "We speak to you Mr. Minister as the representatives of the non-status Indian and Métis people of Canada who number in excess of 400,000 Canadians, all of whom are of Indian ancestry. In the eyes of the dominant society we are Indians because for the most part we look like Indians, think like Indians, live like Indians and have a value system that is characteristic of the Indian way of life. . . . We are desperately poor with levels of ill-health, inadequate housing, unemployment and poverty that are a disgrace in the western world."[15] In our brief to the minister we sought to explain who we were and our circumstances: "Historically we have a greater claim to this country than does anyone in the dominant society because our ancestry can be traced, at least on one side, to pre-history."[16] We went on to say,

> When this country was put together more than one hundred years ago there were no artificial, legalistic definitions as to who was native and who was not. The first parliament of Canada in 1868 recognized the existence of "Indian people" which included all those persons of Indian ancestry, who were living an Indian way of life, who chose to remain such and all their descendants. Our people understood, accepted and supported that approach. Since then, however, both legislatively and administratively, successive federal governments have divided and dispersed our people. As

> a result, at the present time, the vast majority of Canada's native people are shut out of special programs and services.[17]

We went on to describe how confusion and divisions were being sown by the federal government because of our position that the federal government had a responsibility to us through s. 91(24) of the British North America Act, 1867:

> You are well aware that for administrative convenience DIAND has consistently used a very narrow and legalistic definition of the term "Indian." As a result, the bulk of Canada's native people are not eligible for the special kind of help they need and want. . . .
>
> It is not our purpose to defend or destroy that department but only to indicate to you that the net effect of federal expenditures for native people through them has been to create division and disruption not only between the dominant society and the native people on the one hand but with the native groups themselves—some of whom are eligible for special services and others [who] have been told their Indianness cannot be recognized and they should seek help elsewhere. We are upset by this development because our registered Indian brother organizations are being led to believe that any help given to Métis and non-status Indians must necessarily result in loss of funds they would other otherwise get from DIAND. Their fears even go further to the point where they may suspect us of seeking to come under the umbrella of DIAND and to occupy Indian lands. This misunderstanding is one in which DIAND has done nothing to dispel but we think may even tacitly encourage and is serving to drive another wedge between us. . . .
>
> Regrettably there is a larger, more damaging side effect which is this: the public-at-large, the voluntary agencies, private industry and the majority of our political leaders, including some federal cabinet ministers, are unaware that the majority of native people are not receiving services.[18]

I think these quotes from our brief give a sense of what we were facing in the early 1970s and the tack we were taking to deal with them. In short, programs and services were desperately needed, the federal government was a source for them, and we were "Indians" and therefore they had an obligation to deal with us.

Although the federal government did not accept that the Métis came under its jurisdiction, we were nevertheless quite successful in accessing funds for various programs. In 1971, the federal government's Core Funding Program was changed to include funding for Métis and non–Status Indians. We lobbied for funding for native friendship centres, a court worker program and special ARDA (Agricultural and Rural Development) agreements in the Prairie provinces for Aboriginal economic development. Our greatest achievement in the early '70s was getting a commitment to build 50,000 new homes in five years through a Rural and Native Housing Policy we negotiated with Canada Mortgage and Housing.

The federal government never did accept any legal or legislative responsibility for us—not during my time nor during that of my successors, including the late Harry Daniels. Not even after we were included in the Constitution Act, 1982. We continued to be excluded from any process that would address Métis land entitlements.

Harry Daniels eventually succeeded me as president of the NCC in 1976. He served in that role from 1976 to 1981 and again from 1997 to 1999.

Daniels was flamboyant, charismatic, clever, and smart. In 1981, during the consultations on the patriation of Canada's constitution, he knew that unless the Métis were specifically mentioned in the proposed Aboriginal rights clause, the federal position would be that we were not included. The provision read: "The Aboriginal and Treaty rights of the Aboriginal peoples are hereby recognized and affirmed."[19] Daniels insisted that a sub-clause be added to identify who the Aboriginal peoples are. As a result of his deft manoeuvring, the prime minister finally agreed to add the following clause: "The Aboriginal peoples of Canada are the Indians, the Inuit and the Métis peoples."[20]

When the Honourable Jean Chrétien, then Minister of Justice, wrote a letter to the NCC to state categorically that the federal government had no responsibility for the Métis, and at the end of the round of the failed constitutional talks to elaborate the rights of the Aboriginal peoples in the constitution, Daniels in the 1980s had no choice but to take the federal government to court.

Did we succeed? Did we get what we want?

Not yet.

But the opportunity is now there, because we are finally recognized as "Indians" for the purposes of section 91(24) of the Constitution Act, 1867.

NOTES

1 Presented at "*Daniels*: In and Beyond the Law, conference," Rupertsland Centre for Métis Research, 26–28 January 2017.

2 The eight Alberta Métis settlements are the only recognized Métis land base in Canada. They were created in 1938 through the Métis Population Betterment Act.

3 Maria Campbell, *Halfbreed* (Lincoln: University of Nebraska Press, 1982).

4 See Library and Archives Canada, "Use of the Term 'Half Breed,'" updated 27 November 2013, http://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/metis/metis-scrip-records/Pages/term-half-breed.aspx.

5 Matilda (L'Hirondelle) Belcourt, letter to author, 12 January 1989.

6 Library and Archives Canada, "Métis Scrip Records," updated 1 March 2012, https://www.collectionscanada.gc.ca/metis-scrip/005005-3200-e.html.

7 British North America Act, 1867, s. 91(24).

8 Reference as to whether "Indians" in s. 91(24) of the BNA Act includes Eskimo inhabitants of the Province of Quebec, [1939] SCR 104.

9 "Lac Ste. Anne Pilgrimage," Wikipedia, https://en.wikipedia.org/wiki/Lac_Ste._Anne_(Alberta)#Lac_Ste._Anne_Pilgrimage (accessed 22 January 2020).

10 Meeting of Provincial Presidents and Representatives, Box 51, File 851, Métis Association of Alberta Fonds, Glenbow Library and Archives, Calgary, AB.

11 Stefan Dollinger and Margery Fee, eds., "Road Allowance People," in *DCHIP-2: A Dictionary of Canadianisms on Historical Principles*, 2nd ed., with the assistance of Baillie Ford, Alexandra Gaylie, and Gabrielle Lim (Vancouver: University of British Columbia, 2017), https://www.dchp.ca/dchp2/entries/view/Road%252520Allowance%252520People.

12 Indigenous and Northern Affairs Canada, Statement of the Government of Canada on Indian Policy (White Paper, 1969), updated 15 August 2010, https://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191.

13 Minutes Emergency Meeting of NCC Executive Council, Box 72, File 861.3, Métis Association of Alberta Fonds, Glenbow Library and Archives, Calgary, AB.

14 Box 74, File 877, Métis Association of Alberta Fonds. Glenbow Library and Archives, Calgary, AB.

15 Native Council of Canada, Brief presented to the Honourable Gérard Pelletier, Secretary of State, by Native Council of Canada and its member associations, 6 June 1972 (Ottawa: Native Council of Canada, 1972), AMICUS No. 56078.

16 Ibid.

17 Ibid.

18 Ibid.

19 Constitution Act, 1982, s. 35(1).

20 Ibid., s. 35(2).

Harry Daniels and Section 91 (24) of the British North America Act: A Blueprint for the Future

NATHALIE KERMOAL[1]

On 14 April 2016, the Supreme Court of Canada declared in the *Daniels* decision that Métis and non–Status Indians are "Indians" under section 91(24) of the Constitution Act, 1867 (formerly known as the British North America [BNA] Act), affirming federal responsibility for all Indigenous peoples in Canada. While section 35(1) of the Constitution Act, 1982, recognizes the "existing aboriginal and treaty rights" of "Indians, Inuit, and Métis peoples," it does not define them. As the court acknowledged, "both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences."[2] Calling their decision a "chapter in the pursuit of reconciliation and redress," the Supreme Court affirmed that "reading section 91(24) of the Constitution Act, 1867, as applicable to all Aboriginal peoples made sense in light of section 35 of the Constitution Act, 1982."[3]

In effect, the *Daniels* decision recognizes what the Métis have always asserted: they are a distinct Indigenous people with a special relationship