

From Colonial Legacies to Promising Futures? Unpacking the *Daniels v. Canada* Decision and
the Future of the Métis

by

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Table of Contents

1. Introduction to the *Daniels* Case, Research Framework, Theoretical Framing, and Methodology

Harry Daniels and the <i>Daniels</i> Case	5
Research Question	8
Field of Research / Subject Positioning	11
Theoretical Framing	12
Methodology	29

2. Blowing Hot and Cold: A Brief Historical Overview of Métis Inclusion and Exclusion in Federal “Indian Policy”

Treaties	33
The Manitoba Act	43
Scrip	49
The Indian Act	55
The Constitution Act, 1867	60
The Constitution Act, 1982	63

3. Too Good to be True? The Problems and Pitfalls of the *Daniels* Decision

Problems with the <i>Daniels</i> Question	75
Problems with the <i>Daniels</i> Decision	86

4. Moving Forward: The Potential Outcomes and Implications of the *Daniels* Decision

Dispelling Myths: What <i>Daniels</i> Does Not Say	111
Seeing the Self: Different Interpretations of <i>Daniels</i>	120
Anticipating the Future: What Will Come from <i>Daniels</i> ?	127

5. Concluding Thoughts, Remarks, and Areas for Further Research

Implications of Research	137
Limitations of Research	138
Areas for Further Research	138
Final Thoughts	139

Chapter 1

Introduction to the *Daniels* Case, Research Framework, Theoretical Framing, and

Methodology

I first learned about the *Daniels* case in 2015 from my Pepère. He had been following developments in the news and told me that the Supreme Court had just agreed to hear the case. From his understanding of the case, this ruling could be pivotal for the Métis and could significantly change the socioeconomic and political landscape of the Métis. I wanted to learn more, as it seemed this case could potentially affect my family and I, as citizens of the Manitoba Métis Nation. At the time, I had been desperately looking for a topic on which to write my undergraduate thesis, and there it had just fallen in my lap. I would figure out what the *Daniels* case was and what it meant for my family and the other Métis in my province and across the Métis homeland.

Perhaps I was a bit over my head as an undergraduate student with no experience reading or interpreting the law whatsoever, but I have been told over the years to stop apologizing for my lack of legal experience. In fact, it is out of this lack of legal experience that my project spun out of control. I was already trained in Indigenous Studies and knew how to think critically of all the history I read and to be critical of persisting colonial influences around me. I started where anyone else would start; by reading the *Daniels* opinion. At this time, only the Federal Court and Federal Court of Appeals opinions had been released. I read through my first entire court decisions from start to finish. I quickly realized that the case was about jurisdiction as it sought to determine what level of government is responsible for the Métis. It specifically dealt with s. 91(24) of the *Constitution Act, 1867* which gives the federal government power over “Indians and Lands reserved for the Indians”. Harry Daniels and his colleagues were attempting to have a

declaration from the Court saying that the Métis are considered to be s. 91(24) Indians and therefore, a federal responsibility. I was eager to find out how the Court came to their conclusion that the Métis were in fact under federal jurisdiction, and to read what they said about the Métis, Métis history, Métis identity, and contemporary Métis life. After reading the two lower court decisions, however, I immediately realized I could not see myself in these decisions. I thought to myself, “where are the Métis in all of this?”. I quickly realized that the perspective from which the courts were operating was very different than my own interpretive lens as a Métis person and as a scholar of Native Studies. I realized I could not determine the impacts of the *Daniels* decision without first unpacking the decision itself.

This chapter will first provide the necessary background on the case, as well as the theoretical framing and methodology from which I conduct my research. First, I will provide a background discussion on the Métis, by attempting to answer who are the Métis. This discussion will also serve as the backbone for the rest of my work, as I point out where the Supreme Court applied an inappropriate understanding of Métis identity and Métis history, as well as the lack of Métis voices and Métis perspectives in *Daniels*. Next, I will provide a brief overview of the *Daniels* case and its timeline through the courts. The rest of this chapter will provide readers with my research question, theoretical positioning as well as methodology and finally provide a road map for the rest of the project.

Harry Daniels and the *Daniels* Case

Prior to stamping his name on to this legal action, Harry Daniels was not new to political and advocacy life. He played an integral role in ensuring that the Métis rights were recognized when Section 35 was created in 1982. This was the very first time the Métis appeared in the

Canadian Constitution. He was described as a very charismatic leader, who embodied the spirit of other Métis leaders before him like Riel, who used his role as a person between two worlds to fight for the Métis. Harry Daniels too, was not afraid to speak the language of colonizers and operate within the parameters of Canadian politics, while staying true to his Métis values (Shanks 1345).

Harry Daniels was involved in the fight to have Métis people taken seriously, as one of Canada's main three Indigenous Peoples. One area where the Métis were left out, or which was contested, was under s. 91(24) of the *Constitution Act, 1867*. Section 91(24) stated that "Indians and Lands Reserved for the Indians" were a federal responsibility. Since the beginning of Canadian confederation, the Métis have been treated in an ad hoc manner by Canada, going in and out of federal jurisdiction based on what fit in with Canada's goals at the time (Chapter 2 will go over this history in greater detail). Seeing a clear need to clarify whose jurisdiction the Métis fell under, federal or provincial, Harry Daniels placed his name on this legal action (*Daniels FC*). He was joined by other Métis and Non-Status Indians (NSI) in this action (*Daniels FC* para. 29-37). The plaintiffs asked for three declarations. First, that the Métis and NSI are "Indians" under s. 91(24) of the *Constitution Act, 1867* (*Daniels FC* para. 3a). Second, that the federal government has a fiduciary duty over the Métis and the NSI (*Daniels FC* para. 3b), and third, that the federal government has a duty to consult the Métis and the NSI (*Daniels FC* para. 3c). In this paper, I will mainly focus on the first declaration, as that is the only declaration the Court handed out (*Daniels SCC* para. 50, 52). I will also focus mainly on the *Daniels* question as it relates to the Métis since the Crown has previously acknowledged that the NSI are s. 91(24) Indians (*Daniels SCC* para. 20).

Considering the vastness of the history that had to be surveyed to answer this question, the trial kept being pushed back (Shanks 1346). The action began in 1999 but it was not until 2013 that the case was first heard, and by then unfortunately Harry Daniels had passed away (*Daniels* para. 6 FC). The Trial judge, Justice Phelan, found that both the NSI and the Métis are in fact s. 91(24) Indians, but he did not grant the second and the third declaration (*Daniels* FC para. 619). Both parties appealed this decision. The plaintiffs appealed on the basis that the Federal Court had not granted the second and third declarations and the Crown appealed on the basis that the Federal Court should not have granted any declaration (*Daniels* FCA para. 2). The case was heard by the Federal Court of Appeal in 2014 (*Daniels* FCA). The Federal Court of Appeal upheld the Federal Court's findings in relation to the Métis, but corrected Justice Phelan's findings in relation to the NSI, saying that the NSI were already understood as "Indians" under s. 91(24), and therefore, a declaration would have no practical utility (*Daniels* FCA para. 5, 75). He also did not grant the second and third declaration (*Daniels* FCA para. 154). Both parties appealed again. The plaintiffs on the basis that the declaration should have also included the NSI, and that the other two declarations should have been granted (*Daniels* SCC opening remarks), the Crown on the basis that no declaration should have been given, even if it was just for the Métis (*Daniels* SCC opening remarks).

The Supreme Court agreed to hear the *Daniels* case. In April 2016, it released its decision. The Supreme Court returned to Justice Phelan's original findings, declaring that both the Métis and NSI are s. 91(24) "Indians" while also refusing to grant the second and third declarations (*Daniels* SCC para. 52-58). The decision was seen as a victory by many for ending the long controversy over which level of government has jurisdiction over the Métis (L Chartrand "Métis Aboriginal Title in Canada" 181). However, perhaps the *Daniels* case would

not bring the level of change it was expected to. By then, it was too late because many legal and policy leaders, as well as the media outlets, had declared this decision a big victory for the Métis (Gaudry and Andersen 22). Many legal scholars are beginning to unpack the SCC's decision and are realizing that it may not usher in as much change as it may have promised. For example, Leroux and Vowel have stated that the "[*Daniels*] decision is quite narrow, and simply clarifies which level of government non-status Indians and Métis must turn to when seeking legislative action. Asserting Aboriginal rights remains as difficult as always" (33). Larry Chartrand too has said that just because the government now possesses the jurisdiction to act, it does not necessarily mean it will act (L Chartrand "The Failure of the Daniels Case" 182). Some scholars have also said that perhaps this case is not all it is hyped up to be as, at the very least it is simply an acknowledgement of the fact that the Métis were in a "jurisdictional wasteland". As Daum Shanks points out, this decision in itself may not be worth celebrating, as she says her interpretation of the case is that she was finally and simply be told that she was no longer in a jurisdictional wasteland, which in itself is not worth much (Shanks 1344). She continues to caution that, the case might actually have more negatives than positives, and as such, I aim to explore the decision in depth before even beginning to consider its possibilities for improving the lives of Métis people.

Research Question

My overarching research question is to determine in what ways the *Daniels* decision will impact the Métis nation, namely in what ways it may be useful for the Métis and in what ways it could be detrimental or misinterpreted. In order to determine this, I will split up my thesis in two separate questions. First, relying on a decolonizing framework which I will explain later, I will

ask whether the Supreme Court came to an appropriate conclusion in its *Daniels* opinion. To address this first question, I will look at the decisions of all three courts involved in the *Daniels* proceedings (Federal Court, Federal Court of Appeal, and Supreme Court). I will be specifically paying attention to the courts' method of interpretation, the documents that were presented in the case, how the parties involved interpreted such documents, how they chose what aspects of Métis history to consider and how they interpreted such history, as well as their reasoning to conclude that the Métis are in fact s. 91(24) "Indians". I will show that the Court approached these legal questions from a Western-colonial perspective due to its originalist interpretation of the *Daniels* question, and thus, many key moments in Métis history and early Métis-Canada relations were misinterpreted, which leads to a racialized understanding of Métis identity as mixed.

The second half of my thesis will explore the potential implications of this decision for the Métis. Again, approaching this from a decolonizing framework, I will seek to find in what ways this decision can contribute to Métis resurgence and self-determination. While it is too early to know of all the repercussions from this decision as large rulings like these take years to unpack, some scholars have already begun to study the potential outcomes of this decision. For instance, Anderson and Gaudry (2016) have argued that, because the courts have said that "Métis' can ... be used as a general term for anyone with mixed European and Aboriginal heritage" this decision allows for many more Canadians to adopt a Métis identity, which is in fact happening today. Still, many more questions have yet to be answered. More specifically, I will look at how this decision can create or alter federal policies concerning the Métis, further clarify Métis' s. 35 rights, improve Métis-Canada relations, promote reconciliation between the government and the Métis, and promote Métis self-determination. I will also explore how people

have reacted to this decision, sometimes inaccurately and with racist assumptions. I also hope to unpack and document Métis peoples' diverse reactions to this decision.

I anticipate finding that this decision will require Canada, not legally but morally, to establish a mechanism whereby it can negotiate with the Métis on a nation-to-nation basis regarding key concerns for the Métis –concerns which have been ignored for far too long due to the jurisdictional battle over the Métis. Relying on other scholars and leaders' analysis and critiques of the *Daniels* case as well as my own primary research, I will attempt to paint a portrait of the post-*Daniels* landscape for the Métis. In order to do this, I will be relying on data from a variety of sources including other case law, court documents, law reviews, policy journals, newspaper articles, and books.

Although scholars have written legal reviews of the *Daniels* decision, this will be the first comprehensive study of the aftermath of the *Daniels* case from a Métis and decolonizing framework. Bringing attention to this topic will inform Métis individuals and Métis leaders as well as federal policy makers and legal players on how this decision should be used to further Métis rights and interests. My thesis will also serve as a model for others on how to conduct legal research from the field of Native Studies, as well as how to incorporate a Métis and decolonizing research framework for legal research.

Field of Research / Subject Positioning

The field of Métis law is still a fairly recent, albeit growing field of research. Beginning in the 1970s, many Métis leaders demanded a place at the table in the growing movement of Aboriginal rights and vowed to represent Métis interests in the movement. Exploring all avenues of having their rights articulated, upheld, and reaffirmed, the Métis have increasingly been taking

up matters and concerns within the Canadian court system. The field of Métis law has been growing since the 1990s as the volume of Métis case law has increased (see Teillet *Métis Law in Canada*). The 2000s saw the Supreme Court rule on key issues for the Métis and produce pivotal rulings on as harvesting rights (*R. v. Powley*) and land claims (Manitoba Métis Federation Inc. v. Canada). As these decisions are still relatively new, their consequences and impacts are still unfolding before us. Indigenous and non-Indigenous policy makers and lawmakers are still piecing together these decisions, determining how they interact with one another to create the current, yet ever-shifting stage of Métis rights.

Alongside having more Métis case law, Métis scholars have been critiquing and unpacking these decisions. The work of these scholars engages and speaks to the western legal discipline, but often originates from the field of Native Studies or Indigenous Studies and the values, perspective, and ethics of decolonial academic work. Similarly, I will bring forth the tenets of scholarship in Native Studies to critique, unpack, and theorize on a decision achieved in a colonial institution. Many scholars before me have begun to apply their Indigenous critiques and understandings to laws and policies produced within a western legal context, as I will show in the following section.

As a scholar, I am well-positioned to undertake this type of research. My background is in Indigenous Studies. I hold a Bachelor of Arts in American Indian and Indigenous Studies and am currently completing my Masters in Native Studies. I have completed the required coursework for my Masters in Native Studies, which included a course on Indigenous research methodologies, a course on Métis law, and a course on critical theory in Native Studies. While some may view my lack of formal training in the legal field as a shortcoming in this work, I view my lack of training in the western legal traditions as more of an asset to my graduate work. That

is because I have yet to be trained by a western legal institution on how to read and interpret the law, and instead, I rely on my training and formation in Native Studies as well as my own epistemological positioning as a Métis woman in conducting this legal research. This will allow me to position myself between these two fields in a way that I can produce ethical and useful scholarship for the Métis on this pivotal court decision.

I see myself occupying a unique position, operating where the western legal field and the field of Native Studies meet, at the intersection where Indigenous knowledges, perspectives, and ways of knowing can infiltrate the Western legal traditions. This space may be defined through the theory of the “ethical space”, a term coined by Willie Ermine used to describe the space which forms when two societies with different worldviews confront each other (193). The ethical space he says, understands that there is “no god’s eye view to be claimed by any society of people”, there is therefore a neutral center, or a “meeting place”, where both worldviews can meet to engage in productive dialogue (Ermine 202). As such, the meeting place between Indigenous knowledge, perspectives, and ways of knowing, and Western legal traditions is where I find an “ethical space” to conduct my research and produce my scholarship.

Theoretical Framing

Who are the Métis?

When I chose to work on a Métis topic, I wanted to avoid answering this question at all cost, as I have come to realize it is much more difficult and controversial than it seems. Although, moving forward in my work it is crucial for me to identify a specific understanding of “Métis” as unfortunately, there are many different definitions out there about who is Métis. I will

provide the understanding of Métis I will use to guide my research as I examine the historical evidence and modern-day realities of Métis people.

Before getting into contemporary definitions of Métis identity, first I will go over the ethnogenesis of the Métis nation. Generally accepted is the fact that the Métis were born out of interactions between First Nations and Europeans, who lived near and interacted due to the Canadian fur trade (Shore 24-28). The children of such interactions later came to form the Métis nation, though a nation does not form overnight, or even over one generation. Fred Shore notes that the formation of a new nation anywhere on earth is quite rare, and by nation he means “a group of people who have a common culture, language, and historical experience” and “is not necessarily the same as a ‘country’ or ‘state’” (Shore 12). From the perspective of the Europeans, any offspring of an Indigenous woman and a European man was considered “mixed blood” (Shore 12). Unfortunately, as Fred shore notes, this racial identity was rooted in the idea of racial superiority, and much of the earliest records of the Métis referred to them as such (and as I will later show, this belief has survived to this day) (Shore 19). To define the Métis nation in non-biological terms, Shore says we must look at “historical experience, language, traditions, economic ventures and political activities”, and while the creation of these aspects is rare, the Métis eventually positioned themselves as a new culture, which was intrinsically tied to the fur-trade, as they held unique positions (Shore 20). As the fur trading expanded into the Great Lakes, fur-trading depots were created, and French fur traders often spent winters, or even stayed for good, and it was in these depots were the Métis origins can be traced (Shore 24):

“Each depot was an isolated community of French men with their First Nations female partners and their children. The French in these depots lived in a way that was partly European, but which was dependent on First Nations ways for

survival. The First Nations women, who lived in the depots year-round, were isolated from their own communities and, while they taught many of their ways to the French, they also picked up many French ideas from their partners. Over time, a unique set of traditions evolved, and, in effect, a new culture emerged in the depots.” (Shore 25).

Over the space of one hundred years, beginning in the 1700s, by the 1800s, the Métis nation was distinctly recognizable, eventually developing connections around the Red River and its connecting rivers¹ (Shore 20, 26). Furthermore, St-Onge and Podruchny also suggest that the key steps were needed to create the Métis nation. First, a male needed to winter in an Indigenous community and marry an Indigenous woman, and second, they had to become a “freeman”, meaning they had left the fur trade and did not live near a fur trade post or an Indian Band (St-Onge et. al 74).

The topic of Métis identity, though most often misunderstood simplistically as “mixed”, has been recently garnering more controversy. What was perhaps an easy question for Métis people, scholars, and historians, has now become a controversial and complex topic. Growing up, I never thought this was complicated. I knew my family was Métis. Growing up in Manitoba, I never really had to justify or explain what it meant. It wasn’t until I left Manitoba to go to school in the United States that my identity as an Indigenous person was called into question. People were confused at how a seemingly white person could be considered to be Indigenous. I never encountered this at home as a lot of Métis people were white-passing like me. However, many of my friends’ tribes in the United States placed a large emphasis on blood quantum in

¹ The French and English Métis involved in the fur trade were different, according to Fred Shore. See his graph on p. 19. He suggests that “Half-breed” was the term referred to English fur traders and that these people were not necessarily Métis.

their definition of who constitutes an enrolled “Indian”, some as high as ½! Once I started having to explain what Métis was, I actually found myself giving the description of “half European half Native”, feeling like I needed to justify why I looked so white. I cringe at this now because I have come to realize the detriment this causes for Métis people.

One of my most pivotal readings in my academic career was Chris Anderson’s book, *Métis: Race, Recognition, and the Struggle for Indigenous Peoplehood*. Andersen’s explanation of Métis and his deep analysis of the history and detriment of the definition of Métis as mixed has changed the way I explain my identity to others. In this project, it has also made me very critical of ways in which government officials have and continue to understand the Métis through racial classifications, as mixed or part Indigenous and the other part white. Andersen explains the detriment of the use of race and blood in thinking about Indigenous identity, especially for the Métis. First, he reminds us of the power and history of race when it is in the hand of the colonizers (Andersen 32). In his work, he begins by showing how, from the very beginning of their arrival to Canada, newcomers relied on race to make sense of the differences that existed between themselves and the Indigenous Peoples they observed (Andersen 29-30). Then, as Linda Smith asserts, “the racialization of the human subject and the social order enabled comparisons to be made between the 'us' of the West and the 'them' of the Other (32)”. Colonizers soon realized they could rely on race to create social classifications where Euro-Canadians were viewed to be more superior than Indigenous Peoples, therefore justifying the atrocities that would follow as a result of colonization (Andersen 30). Over the years, race became the primary way to neatly organize society into groupings. Eventually, the idea of racial classifications became permanently ingrained in the minds of Canadian officials, citizens, and even in the minds of Indigenous Peoples themselves (Andersen 36-44). These official classifications became so

pervasive that today, Canadians can easily forget that they were originally used as a form of power. Most Canadians still believe that racial classifications are “just the way things are,” rather than being a social construct that has been used to discriminate against certain people (Andersen 32-34).

Andersen pushes back against these strict racial classifications, as he argues they have historically confined Indigenous Peoples to a certain space, and they continue to do so today. He explains how, according to these classifications, Indigenous Peoples are expected to look according to the racial expectations of their Indigenous identities (Andersen 33). Moreover, as racialization is a complex practice that can involve classification not only along physical differences, but also along cultural differences, such as language, food, religion and lifestyle, Indigenous Peoples are expected to not only look like an Indian, but to also act and live like an Indian (Andersen 35).

Andersen is especially useful in this framework for demonstrating the detriment that exists in projecting racial understandings of Indigeneity on the Métis. Under these racialized definitions of Indigeneity, the only logical way the Métis can be understood as Indigenous is by talking about the Métis as a “mixed” or “hybrid” people whose Indigenous half gains them consideration as Indigenous (Andersen 35-36). Under this racial definition, the Métis are inevitably seen as less Indigenous than other Indigenous groups. This is because this racial understanding of Indigeneity views the Métis as mixed, meaning that the Métis are only one-part Indian, and one-part white (Andersen 39). In other words, only the Métis’ Indian part is what allows them to find comfort in this racial definition of Indigeneity. Therefore, the Métis appear to be a lot less Indigenous than other Indians who are not viewed as mixed (Andersen 7). By being classified as hybrid, the Métis come to be denied what they seek the most, which is “an

acknowledgement of our political legitimacy and authenticity as an Indigenous People” (Andersen 38).

This framework seeks to be decolonial in nature and therefore pushes back on incorrect understandings of Métis as mixed, as mentioned above. Much like what the court argued in *Powley*, I take the position that Métis can only mean “Métis” as in the descendants of historical Métis communities who have come to form Indigenous nations who share a certain socio-cultural and political background (*R v. Powley*). Simply finding an Indigenous ancestor is not enough, as it racializes Métis identity. It reduces Métis identity to nothing more than being “mixed” while completely disregarding any shared history, culture, language, or political status, all of which are essential aspects of Indigenous nationhood. Many scholars too, have taken the position that Métis should not mean anyone with mixed ancestry (Gaudry and Andersen; Teillet and Teillet). Jean and Carly Teillet found that there is little evidence to show that there are any other Métis, stating that “there appears to be only one Métis polity in Canada: The Métis Nation of the Northwest” (11). In fact, new “Métis” groups who attempt to prove their Métis rights in court fail to produce any evidence demonstrating their unique position as a historic Métis rights bearing community and instead, can only prove a racial connection to an Indian ancestor (Teillet and Teillet 11).

While I do believe Métis identity must be rooted in a larger place, an important facet of Métis identity is mobility, and rootedness in place and mobility are not mutually exclusive. Nicole St-Onge and Carolyn Podruchny suggest that Métis ethnogenesis is strongly rooted in kinship ties and mobility. They use the analogy of the spider web to show connectedness to many other communities, both Indigenous and European (St-Onge et. al 62-63). These kinship networks were created through marriage, Catholicism (serving as someone’s godfather or

godmother), and obviously through fur trade activities (St-Onge et al 71). They further explain how migration came from three kinds of mobility; seasonal migration to follow resources such as the buffalo, and westward migration in search of new opportunities, and thirdly, the mobility of individuals moving in and out of different categories of identifications and lifestyles (St-Onge et al 70). St-Onge and Podruchny demonstrate how Métis people manipulated their connections, and moved along freely, chasing new economic opportunities and running away from social persecution.

In 2006, the Supreme Court identified a 10-point test for the Métis wishing to exercise their s. 35 rights (*R v. Powley*). The *Powley* decision supports not only a definition of Métis that is in line with the ethnogenesis outlined above, but also requires a connection to a contemporary Métis community. While Métis communities sprung up historically on the fringes of the fur trade, today there are many contemporary Métis communities throughout the prairies, Ontario, and the Northwest-Territories. While this would be determined on a case-by-case basis, it appears the courts may be flexible in their interpretation of a contemporary rights bearing community, as they did in the *Powley* case. The contemporary Métis community at question was Sault St-Marie. It was determined that “a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850” (*R v. Powley* 24). The *Powley* Court demonstrated flexibility in allowing these communities to look differently years later. I think of my community of St-Pierre Jolys, which can be both part of a larger historic Métis community (the Red River) and also a contemporary Métis community. Whilst Catholicism has dominated my town’s history and narrative, the town is slowly beginning to retrace the story of mobility of its first families who came to the village after being pushed out

of the Red River area, and who participated in the fur trade, by establishing along the Crow Wing trail.

What it means to be Métis today is complex, varies greatly per individual or community, and is ever changing. St-Onge and Podruchny wrote that “definitions of Métis that rely on the ingredients of hunting buffalo, practicing Roman Catholicism, speaking French, and wearing woven sashes imply that Métis cultural traits are static, exclusive, and singular, this precluding cultural change and the creation of diverse ranges of Métis cultural expression” (St-Onge et. Al 80). This makes defining Métis culture in a modern era quite difficult –but perhaps this is the essence of what it means to be Métis, that being Métis means to be adaptive. As my work seeks to be not only decolonial in nature but also Métis-specific, I want to keep this understanding in mind while interpreting the decision and the future of the Métis nation; namely, that rights, culture, geographical boundaries, identity, and relationships are never stagnant, but rather are always forming, changing, and reshaping.

Emphasis on Decolonizing

Most scholarship produced from the field of Native Studies operates from the fundamental recognition that Canada has had a long history of colonialism, and as such, understanding the realities and challenges of Indigenous peoples’ lives is not possible without fully grasping the history of colonization and its effects, as well as its continued presence in the lives of Indigenous Peoples. Sium et. al (2012) describe colonization as something which is “determined to stand as the final arbiter of who is human”, and that “integral to this process is the delegitimization of Indigenous humanity and life” (6). Colonization has threatened Indigenous cultures, traditions, languages, ways of knowing, and lands, and as a result, has

severely tainted the relationship between Indigenous people and their colonial government. Colonization has also severely strained many other types of relationships, such as those with the land, our culture, and our communities (Alfred, “Colonialism and State Dependency” 52).

Following an understanding of the detrimental effects of colonization on Indigenous peoples, I will remember the power dynamics at play in academic scholarship, in the legal system, in the documented colonial retellings of history, and in our society in general. This will include thinking about how the relationship between Métis people and the state, between Métis people and the law, and even between Métis people and their own identity have been altered due to processes and influences of colonization by the state and by the courts. As other scholarship in Native Studies, I will center my work on the understanding that colonization has been a huge source of disruption for the Métis nation, and we cannot decolonize without understanding the effects of colonization, past and present. At the same time, I also refute an understanding that the Métis were passive receivers of colonization. In fact, the Métis played a pivotal role in the creation of Canada, with Louis Riel being a founding father of Manitoba. This is why a Métis-specific approach is necessary. Unfortunately, as I will point out, much of the *Daniels* opinion understood the Métis as passive objects of colonization rather than active agents in their own destiny.

Most scholarship in Native Studies even operates under the assumption that colonization did not end but rather has taken on new forms, such as the systematic mistreatment of Indigenous peoples going through the justice system (see Comack). Linda Tuhiwai Smith (1999) has also pushed back against the notion of a “postcolonial society”, stating that “naming the world as ‘post-colonial’ is, from Indigenous perspectives, to name colonialism as finished business” (98). Scholarship too, can further the colonial agenda by not calling into question common

assumptions and challenging certain voices. As Margaret Kovach points out, since there continues to be colonial influences on Indigenous representations and voices in research, a decolonizing agenda must be present in modern Indigenous research.

With colonialism still affecting Native peoples' lives and still permeating the academy, scholarship regarding Indigenous peoples must respond to and address colonialism while also contributing to the decolonization, resurgence, and sovereignty of Indigenous peoples. Decolonization, however, is not a simple theory. Frantz Fanon reminds us that decolonization is complex and disruptive, making it so that "decolonization never takes place unnoticed" (36). In a fundamental reading on decolonization, Eve Tuck, and K. Wayne Yang state that decolonization must be unsettling, and that "decolonization is not a metaphor". They explain that all too often, non-Indigenous people try to "alleviate the impacts of colonization", actions which they have coined as "settler moves to innocence" (Tuck and Yang 3). They describe these moves to innocence as "strategies or positionings that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all" (Tuck and Yang 10). In my work on the *Daniels* case, I will call out such "settler moves to innocence", both by the courts' and by policy makers in the post-*Daniels* landscape. I will use this vision of decolonization to point to reasons why this decision may not further such a notion of decolonization, as well as suggest areas where it is hopeful in potentially creating pathways to action and self-determination for the Métis. Tuck and Yang also describe decolonization as "incommensurable", meaning it resembles something different in various situations for different nations (28). This reminds me that what may constitute decolonization for the Métis will be unique to the Métis, as it will respond to the Métis' history of marginalization by the state and

will be mindful of the Métis nation's unique history and identity. In fact, this might even mean different strategies for different Métis communities across Turtle Island.

As I will be working within the Euro-Canadian western legal system, I come to my research from the fundamental understanding that the Canadian legal system is a colonial institution with a history of furthering the state's interest, sometimes at the expense of Indigenous peoples, their lands, their languages, their spirituality, and their traditions. The extent to which the Canadian legal system has oppressed Indigenous peoples and denied them of their fundamental rights has been well documented, perhaps most notably by Indigenous legal scholar John Borrows. When faced with Indigenous legal questions, the courts have tested Indigenous history and laws against their own western norms, which leads to the courts having a large control over Indigenous peoples in the past but also in the present (Borrows *Canada's Indigenous Constitution*). As such, Indigenous peoples may feel reluctant to bring forth their perspectives in court as "their testimony and history are subject to discrediting cross-examinations and harsh burdens of proof" (Borrows *Canada's Indigenous Constitution* 173). Beginning in the 1990s, the courts have increasingly produced landmark rulings for Indigenous peoples (for example see *Sparrow* and *Delgamuukw*). Yet, even to this day, Indigenous peoples' traditions and ways of knowing have yet to be accepted in mainstream law, which John Borrows says, furthers the idea that Indigenous Peoples are lower on the "scale of civilization" (*Canada's Indigenous Constitution* 16). As such, my work seeks first to point out where the courts are still failing Indigenous peoples and where the courts can evolve to be a more welcoming arena for Indigenous peoples, producing more viable results for Indigenous nations.

Emphasis on Métis Voices

I also come to my research from the understanding that scholarship in the legal discipline, much like any scholarship within the academy, is typically produced from a western discipline which highlights colonial perspectives. As courts are a significant site of power in Canada and have typically focused on non-Indigenous perspectives, shifting whose voices and perspectives are given the most weight, particularly in legal analysis, has the potential to shift this long-standing power balance (Gaudry and Andersen). My research will respond to such imbalances by being produced from an Indigenous lens. Sium et. al have stated that “Decolonization does not exist without a framework that centers and privileges Indigenous life, community, and epistemology” (2). This will require that I privilege any Métis voices wherever possible, while calling out and challenging colonial ideas and perspectives. It will also require that I approach my goals and research questions from my own epistemological positioning as a Métis woman. This brings me to the next point of my theoretical framework.

Another lesson from the field of Native Studies is the emphasis it places on including Indigenous perspectives and Indigenous voices. Craig Womack says that “Native perspectives have to do with allowing Native people to speak for themselves, to prioritize Native voices” (Reder and Morra 242). Traditionally, history has always been told from the perspectives of those in a position of power, namely the colonizers (L. Smith 29). Knowledge acceptable in the western realm was socially constructed by the most powerful people (Brown and Strega 261). However, Raymond DeMallie states that “if we are to understand history as a lived reality, it is important to understand the perspectives of the actors involved” (526).

By presenting more Indigenous perspectives in research about Indigenous Peoples, ethical scholarship in Native Studies shifts the power balance from the colonizer to Indigenous

peoples (L. Smith 30; Kovach 82). Kathy Absolon and Cam Willett state that an Indigenous researcher must always locate themselves and their research within the power relations at play, while carefully choosing whose voices to include and what knowledge to place emphasis on in their work (Brown and Strega 113). As courts are a major site of power in Canada and have typically focused on non-Indigenous perspectives, shifting whose voices and perspectives are given the most weight particularly in legal analysis has the potential to shift this long-standing power balance (Gaudry and Andersen 23). Additionally, a researcher's choice of whose voices they include in their research influences the reader's perception of who has power (Kovach 81). Therefore, when no Indigenous voices are present, readers will assume Indigenous perspectives, Indigenous knowledges, and Indigenous peoples are generally inferior to mainstream knowledges and non-Indigenous peoples. This is no different in court, as players involved choose whose voices to include within the evidence and what witnesses to bring forth. Such choices by the courts also have an impact on all Canadians' perception of power. John Borrows explains a similar phenomenon which occurs when Indigenous legal traditions are not accepted as a legitimate form of law then Canadians come to accept that Indigenous peoples are lower on the "scale of civilization" (16).

Emphasis on the Present

Another important lesson from the field of Native Studies is to understand Indigenous Peoples' realities in the present day and to never overlook the understanding that Indigenous peoples, their traditions, their language, stories, and identities, can shift and adapt to modern realities. It wasn't until Vine Deloria called out Anthropologists and researchers for their appalling representation of Indigenous Peoples as savage and backwards in his pivotal book

“Custer Died for your Sins” that scholarship on Indigenous peoples moved away from representing Indigenous Peoples as primitive, savage, backwards, and violent (78-100). Along with including more Indigenous perspectives in scholarship, one of the main ways Native Studies has countered this problem is through not only focusing on Indigenous peoples of the past, but by also placing emphasis on Indigenous Peoples of today. As such, Native Studies becomes an opportunity for Indigenous Peoples to correct the way they have been misrepresented in scholarship and in history. Along with placing more emphasis on the present, ethical research in Native Studies should understand that Indigenous peoples are not stuck in the past and that their cultures and traditions are constantly evolving (L. Smith 74).

Additionally, while taking into consideration that this is a Métis-specific framework, it is especially important that this approach not solely rely on the past in order to apply a correct understanding of Métis peoples’ Indigeneity. Often, Indigeneity is a term thought to only apply to those who have occupied land before the arrival of colonizers. The Métis challenge this ideal notion of Indigeneity, as a people who were not yet an Indigenous people prior to the arrival of Europeans, unless you apply trace theory and trace the Métis’ lineage all the way to their First Nations ancestors who were here prior to the arrival of Europeans. Chartrand points out that trace theory is “counter intuitive to the nature of Aboriginal rights as collective rights and not individual rights” (Chartrand, “Are we Métis” 281). Trace theory risks denying the Métis’ nationhood, namely the unique political, socio-cultural, and historical aspects of their identity that has made them an Indigenous people. Therefore, as this approach is Métis specific, it is important that it not only consider the past.

While deconstructing history and privileging Indigenous voices is an important aspect of decolonization, Linda Smith also reminds us that decolonization is not simply the destruction of

settler-colonial narratives and the upbringing of Indigenous voices, as that does not necessarily ensure the survival and prosperity of Indigenous peoples. Here I am reminded that, while I will inevitably need to deconstruct the *Daniels* case from its colonial influences and values, in order for my work to be truly decolonizing it must benefit the Métis by contributing to their resurgence and revitalization as a people. I will begin to do this in Chapter 4, where I look at ways in which this decision can be used to benefit the Métis nation.

Can You Decolonize Using a Colonial Institution?

This brings up an important question that most critical readers are likely to ask. That is whether it is truly possible to decolonize using a decision produced in a colonial institution? Sium et. al too have wondered if we can be better off to “decolonize through more equitable recognition from colonial institutions?” (4). There are various positions on this matter. Glen Coulthard has argued for a bit more of an emancipatory process regarding the western legal system. In his text, *Red Skins, White Masks*, he explores how the politics of recognition and reconciliation in Canada are just another masked tool of colonization furthering Indigenous oppression (Coulthard). Coulthard worries that even whilst working cautiously with the federal government you cannot get rid of “some of the effects of colonial-capitalist exploitation and domination” without addressing the “generative structures” of colonialism (*Red Skin, White Masks* 35). Instead, he argues that we must create “a resurgent politics of recognition that seeks to practice decolonial, gender-emancipatory, and economically non-exploitative alternative structures of law and sovereign authority grounded on a critical refashioning of the best of Indigenous legal and political traditions” (Coulthard 179). In a similar manner, Taiaiake Alfred and Jeff Corntassel have argued for decolonization to occur outside any colonial institution, with

a focus on the level of the individual and the community. They write that “we will begin to realize decolonization in a real way when we begin to achieve the re-strengthening of our peoples as individuals so that these spaces can be occupied by decolonized people living authentic lives” (Alfred and Corntassel 605).

These are important questions I will consider in my research. Though, as the *Daniels* decision has been produced by the western legal system, I am not as much interested in rejecting this decision completely, but rather applying a Métis and decolonizing lens to understanding it and utilizing it to the benefit the Métis people. My thesis will have a section dedicated to this question and I will bring up some of the problems with including Métis under s. 91(24), such as the fact that s. 91(24) was a provision originally created to provide the state with unilateral control over Indigenous peoples and has been used to enact oppressive statutes like the Indian Act (Larry Chartrand, “The Failure of the Daniels Case” 182). I am interested in using this as an opportunity to call out the courts’ colonial influences and to think of the potential benefits of this decision for the Métis. Linda Smith has said that “decolonization [...] does not mean and has not meant a total rejection of all theory or research or Western knowledge. Rather, it is about centering our concerns and worldviews and then coming to know and understand theory and research from our own perspectives and for our own purposes” (L. Smith 39). In this way, I view my work, though perhaps not a total rejection of the western legal institution, still contributing to decolonization as it will understand this decision from a Métis perspective, for the purposes of the Métis people. Again, Willie Ermine’s “ethical space” is useful for situating my work as decolonizing scholarship while still conducted within or in close proximity to the western legal institution. In fact, participating within western institutions might even be more “traditional” for the Métis, who at times willingly participated in western democratic processes, as a calculated

move to ensure their survival and prosperity. For example, Riel did not shy away from creating a place for himself in Ottawa when discussions ensued about the creation of Manitoba, which would undoubtedly affect the Métis.

Critical Race Theory

Lastly, I will also rely on the tenets Critical Race Theory (CRT) in order to evaluate and study the *Daniels* case. One of the scholarly movement's first architects, Derrek Bell, writes that "critical race theory is a body of legal scholarship, now about a decade old, a majority of whose members are both existentially people of color and ideologically committed to the struggle against racism, particularly institutionalized in and by the law" (D. Bell 898). Another founder of the theory, Angela Harris, writes that coming to understand CRT means coming to a "recognition that racism is part of the structure of legal institutions" but to also be "invigorated by the creativity, power, wit, and humanity of the voices speaking about ways to change that structure" (Delgado xx). Certain tenets of CRT resemble aspects of a decolonizing framework used in Native Studies. Both CRT and decolonizing frameworks emphasize the first-person narrative and bring forth oppressed peoples' perspectives. Similar to scholarship in Native Studies, CRT understands that "some positions have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized" meanwhile, "the law simultaneously and systematically privileges subjects who are white" (D. Bell 901). CRT also aims to unmask and resist institutionalized white power, whereas decolonizing frameworks seek to unmask and resist colonial power, which usually also happens to be white power (D. Bell 902). I am also interested in CRT's "social construction thesis" which suggests that race is a social construct, created and manipulated by society, not by chance, but in a calculated manner which responds to

certain needs and goals (Delgado 7). Along with this idea, CRT says that the racialization of different groups alters based on different societal needs (Delgado 8). This understanding is important when deconstructing the history of the treatment of the Métis as “Indians” or as “white men”, which the *Daniels* courts consulted in coming to their conclusion. As my thesis will show, the Métis have been racialized as Native or white according to what best suited the colonial state’s interests and would allow it to further expand out west.

Methodology

In order to produce research that is Indigenous and decolonizing, my research must be conducted following certain steps, procedures, and ethics. In the past couple of decades, Indigenous and decolonizing methodologies have become more researched and articulated by other scholars, perhaps most notably by Maori scholar Linda Tihuwai Smith and Cree scholar Margaret Kovach. Their pivotal work has set a path for other younger scholars like myself who are conducting Indigenous research.

Firstly, Indigenous methodologies require that research and scholarship emphasize Indigenous perspectives and knowledges and bring forth Indigenous voices. By presenting more Indigenous perspectives in research about Indigenous Peoples, ethical scholarship in Native Studies shifts the power balance from the colonizer to Indigenous peoples (see L. Smith; see Kovach). In order to do so in my work, I will prioritize Métis voices wherever possible, either in the evidence and history consulted in *Daniels* or in recent debates concerning the *Daniels* decision. Kathy Absolon and Cam Willett state that an Indigenous researcher must always locate themselves and their research within the power relations at play, while carefully choosing whose voices to include and what knowledge to place emphasis on in their work (Absolon and Willett

113). As such, I will emphasize my own epistemological positioning as a Métis woman while conducting this research and bring forth my own Métis perspective in my interpretation of the *Daniels* opinion. While this may seem as biased scholarship for those accustomed to western academic norms, Margaret Kovach writes that “to embrace Indigenous methodologies is to accept Indigenous subjective knowledge” (111). Scholarship produced from a decolonizing and Indigenous lens is inherently subjective as it responds to and challenges the uneven power dynamics created by colonialism both in society and in scholarship, by challenging colonial voices while lifting Indigenous ones.

Also, as a response to the longstanding power imbalances between the researcher and Indigenous communities, decolonizing methodologies seek to restore to Indigenous communities their custodianship over their knowledge as well as the authority over any scholarship produced from such knowledge. Decolonizing methodologies understand that Indigenous knowledges have typically been extracted from Indigenous communities only to be of benefit to non-Indigenous peoples (L. Smith 1; 58). With this in mind, decolonizing research methodologies dictate that Indigenous communities must be continuously consulted and kept abreast of any scholarly work being conducted within their communities. Alongside this obligation, decolonizing methodologies produce scholarship that will first and foremost benefit Indigenous communities and ultimately lead to self-determination (L. Smith 117). For my thesis, I will be incorporating these methodologies by raising Métis voices, and by using my scholarship to help the Métis community understand and grapple with the ramifications of the *Daniels* decision. By following Indigenous and decolonizing methodologies, I hope to contribute to repairing the fragmented relationship between Indigenous communities and researchers, where “research” was, and in some cases, still is the “dirtiest words in the Indigenous world’s vocabulary” (L. Smith 1). It is

my hope that this research may even be used by Métis individuals and leadership to understand the *Daniels* decision, and lead to greater self-determination and sovereignty over our own affairs.

Chapter 2

Blowing Hot and Cold: A Brief Historical Overview of Métis Inclusion and Exclusion in Federal “Indian Policy”

To properly understand the circumstances that lead Harry Daniels and his colleagues to bring forth this litigation and to appreciate the significance of the *Daniels* decision and what it clarifies, it is important to outline and analyze the history of the government’s dealings with the Métis. The federal government’s treatment of the Métis is not only complex but has also been highly inconsistent over the years. The Métis have spent the last hundreds of years being moved in and out of the federal government’s jurisdiction, sometimes being treated and dealt with as “Indians”, other times they were explicitly excluded from this category, as I will show. In practice, extending federal jurisdiction over the Métis has meant that at times, Canada has enacted laws and legislation for the Métis or chosen to include them in already existing legislation for “Indians”. Other times, the federal government has explicitly chosen to deny its jurisdiction over the Métis. It is from this conflicting history that the *Daniels* case was born. This chapter seeks to explore this contradictory treatment of the Métis.

While this history at face value might seem to depict an uncertainty about the Métis’ Indigeneity, in this chapter I will demonstrate that by applying a critical Indigenous lens to this history, it becomes obvious that this treatment of the Métis as Indian or white had nothing to do with the Métis “Indianess” or their Indigeneity. Rather, such determinations were made on a case-by-case basis, depending on which view of the Métis furthered Canada’s own goals and motivations at the time. I will also show that with a racialized understanding of the Métis as mixed, the federal government could move the Métis in and out of the category of “Indian” as

they pleased. With such an understanding of Métis identity as mixed, the government could highlight whatever aspect of Métis identity –either their perceived likeliness to whites or Indians –depending on what could further the Crown’s agenda. As I will show in the following chapters, this logic was even replicated by the courts’ in their *Daniels* opinion. While it may seem in my retelling of this history that there is a lack of Métis agency, it is because there in fact is a huge denial of Métis agency by the federal government when it was making such determinations. My goal is to point this out. This was the same history used to decide the *Daniels* decision and unfortunately, the parties involved chose to look at ways the Métis were treated by the federal government, which often had nothing to do with the Métis themselves. By calling out the government’s ad hoc treatment of the Métis, my work stays decolonizing in nature.

Treaties

While the Métis may have never signed treaties with Canada, their exclusion in this policy era is noteworthy, as it was explored in the *Daniels* case. Prior to confederation, the Crown signed many treaties with Indigenous nations. There was no concrete approach when it came to negotiating and creating treaties. Treaties were diverse, each with their “own scope, provisions and characteristics” (*Daniels* FC para. 302). The government’s approach was particularly inconsistent concerning Métis’ involvement in treaty-making. Keeping in line with the definition of Métis provided in Chapter 1, I am more interested in exploring how Métis communities were included in treaty-making rather than instances when “mixed-blooded” individuals were included. Unfortunately, there is very little history where Métis were treated as collectives by their colonial governments during treaty negotiations. From the time Crown officials were sent out west to determine the willingness of Indigenous nations to enter treaty with the Crown, Métis people

presented a challenge to treaty negotiators. In an 1849 report documenting such visits, Vidal and Anderson came across Métis people and reported the following:

Another subject which may involve a difficulty is that of determining how far Half breeds are to be regarded as having a claim to share in the remuneration awarded to the Indians, and (as they can scarcely be altogether excluded without injustice to some) where and how the distinction should be made between them: - many of these are so closely connected. (Vidal and Anderson Report)

Treaty commissioners repeatedly informed the Métis that they were not empowered to deal with the Métis as collectives and could only identify Métis individually as Indians or white (Teillet, “Métis law” 1-7). This is no coincidence as this confusion on what to do with the Métis stems from a racial understanding of Indigeneity and thus an understanding of the Métis as mixed. As Michael Hogue points out, it is during the early treaty-making era where we begin to see government officials rely on race to classify people –a policy which carries on throughout federal Indian policy in the years to come (Hogue 103). This confusion on what to do with a “mixed-blooded” people during the treaty era is evidenced by the fact that these Indigenous families moved in and out of administrative categories of Indian and half-breed (Andersen 40; Adese, “R’ Is for Métis” 203-204).

Unfortunately, even in the modern day there seems to be much confusion surrounding Métis identity when it comes to thinking about treaty participation. The trial judge in the Federal Court perpetuated an understanding of Métis as mixed while referring to early treaties. Justice Phelan spoke of the “Peace and Friendship” treaties of 1725 and 1789 conducted out East (FC 303), which as I have shown in Chapter 1, is outside of the Métis homeland (“Homeland Map Resolution”). Justice Phelan pointed out that treaty negotiators here did not exclude people of

mixed-blood (FC 304), though he failed to notice that these “mixed-blooded” individuals were not necessarily Métis and may have never identified as such. Rather, government officials and now current Canadian judges assumed and projected the definition of Métis on so called “mixed-blooded” individuals. Perhaps the grossest misunderstanding or projection of “Métis” on a person who never identified as such was when Justice Phellan of the Federal Court stated that Chief Kerr from the Six Nations was a “quarter blooded” Indian, who was still actively engaged in treaty-negotiations, despite being “mixed” (*Daniels* FC para. 304). The problem with bringing this as evidence is that it is equating someone with “mixed blood” or mixed ancestry to someone who is Métis and then using this as evidence to suggest Métis’ involvement in treaty-making. This is highly problematic as it not only racializes Métis identity as mixed but is also ignoring how individuals self-identified. It is ascribing the identity of “Métis” to someone who obviously did not identify as Métis, but rather as a member of the Six Nations First Nation. You do not serve as a nation’s chief unless you identify with said nation.

If we consider Métis communities rather than mixed individuals, there may still only be a handful of instances where Métis collectives participated in treaty-making. The most notable example was the Hudsons Bay Treaty of 1815 signed between the Métis and Lord Selkirk on behalf of the Hudson’s Bay Company, which followed a fur trade conflict between the Métis and the Hudson’s Bay Company (Chartrand, “Métis Treaties in Canada” 20). With plans on the horizon of a new colony of settlers affiliated with the HBC arriving to the Red River, the Métis who worked for the Northwest Company felt threatened. Led by Cuthbert Grant, the Métis protested the new colony through calculated persecutions of the new settlement which initiated a series of negotiations between the HBC and the Métis (Chartrand, “Métis Treaties in Canada” 21-22). Kelly Saunders points out the significance of this treaty, as it was the first time in Métis

history where we notice Métis political independence: they declared themselves a new Aboriginal nation and demanded to be treated as one (Saunders 343).

The Métis were also involved in treaties with other Indigenous nations. These relationships with other nations were pivotal in establishing the Métis nation as a political force to be reckoned with. Perhaps most notably, the Métis were one of the many Indigenous nations that made up the Iron confederacy, or the Nehiyaw-Pwat in Plains Cree, a political and military alliance made of multiple Indigenous groups across the plains. The confederacy was signed to create allies along the plains. The group was a powerful force during the height of the fur trade on the northern plains, as its members served as middlemen between Europeans and Aboriginal communities (Barkwell 1). The Métis joined the Iron Confederacy later in the early 1800s. As Adam Gaudry points out, the confederacy was governed by Indigenous protocols, Indigenous worldviews, languages, and tight kinship with one another. These close alliances with other First Nations, Gaudry suggests, significantly shaped the Métis nation's language and culture (Gaudry "Métis are a People, Not a Historical Process").

By the 1850s, the policy in dealing with the Métis for treaty-purposes was beginning to change and the Métis would mainly be dealt with as individuals, on a case-by-case basis. In 1850, when British agent for the British Colony of Canada West, William Robinson, was overseeing treaty-making along the Great Lakes area, he adopted a clear policy to *not* engage with Métis collectives, but left it open to chiefs to decide whether they wanted to include Métis individuals in their remuneration from the treaty:

As the half-breeds at Sault Ste. Marie and other places may seek to be recognized by the Government in future payments, it may be well that I should state here the answer that I gave to their demands on the present occasion. I told

them I came to treat with the chiefs who were present, that the money would be paid to them - and their receipt was sufficient for me - that when in their possession they might give as much or as little to that class of claimants as they pleased. To this no one, not even their advisers, could object, and I heard no more on the subject (qtd. in Taylor “A Historical Introduction” 153; qtd. in *Daniels*, FC para. 310).

While not recognized as collectives, Métis individuals were entitled to participate in treaty negotiations, but only if a Chief of a nation allowed it (Taylor “A Historical Introduction” 153). Robinson had counted those Métis individuals accepted by chiefs in the total population used to determine total treaty annuities beneficiaries, and these Métis individuals were paid such annuities (*Daniels* FC para. 311). According to professor William Wicken, the plaintiff’s expert witness in the *Daniels* trial, allowing Métis individuals to participate in these treaties if chiefs allowed them to was likely a response by treaty negotiators who noticed some Métis and Indians had developed “close cultural, linguistic, and social ties” in the Great Lakes region (*Daniels* FC para. 308). The *Daniels* trial opinion stated that the Robinson treaties were a response to the Mica Bay conflict of 1849, which involved both Métis and First Nations people protesting over mines which threatened their lands (*Daniels* FC para. 307). Therefore, it would have made sense for Robinson to allow some Métis to participate to settle tensions between Indigenous peoples and settlers, where the Métis were often at the front lines with their First Nations kin.

Still, Métis communities were not included in what the government viewed as nation-to-nation treaties, between Canada and the Métis. The denial of bargaining with Métis collectives was consistent with Indian policy at the time, as British North America was not yet prepared to acknowledge and deal with Métis collectives. Larry Chartrand points out that the government

could not fathom a group of “mixed” people gaining recognition, as “in the eyes of Canadian policy you could only be White or Indian” (Chartrand “Métis Treaties in Canada” 22). However, the denial of Métis collectives’ participation in treaties during this time cannot be used to suggest that the Métis did not exist as Indigenous collectives. Already beginning in 1850, Métis people all over Métis homeland were adamant about identifying a land base for themselves. Just like most Indigenous peoples, the Métis understood that the lands they occupied were in high demand by the settler colonies. With the buffalo population diminishing, many Métis took advantage of ongoing treaty negotiations to secure economic benefits (Hogue 110). They viewed their participation in treaty negotiations “as a necessary recognition in their long-standing territorial rights” (Hogue 112). By demanding to be included in treaties, Métis communities who did so presented much confusion to treaty negotiators who were not sure what to make of a population that was not Indian nor white. This was the case in the signing of the 1860 Robinson treaties, in the Sault Ste. Marie area. Chiefs from the Batchawana and Garden River bands wanted to obtain land for approximately 60 “half-breeds”. However, treaty negotiator William B. Robinson had to tell the chiefs that he was not able to include the Métis in Indian Treaties (Hele in Lischke and McNab 178). Hele notes that “by forcing the Métis to identify themselves as either Indian or white, the Province of Canada denied the distinctness of Métis communities and effectively placed those people in legal limbo” (Hele in Lischke and McNab 178). Unfortunately, as we will keep exploring, this legal limbo lasted until the release of the Daniels decision.

Generally, Métis communities who demanded to be involved during this time were ignored, but exceptions were made, such as when the governor of Minnesota Alexander Ramsay went to Pembina in the Red River Valley in 1851 for a “treaty trip” and chose to allow Métis participation. Historian Michael Hogue notes that including the Métis in treaty talks ran contrary

to the government's assimilationist goals at the time. He notes that "according to nineteenth-century racial thought, the dilution of Indian blood through intermarriage was supposed to yield an ever-descending quantity of Indianess (and not coincidentally, facilitate the transfer of Indian lands and resources into white hands)" (Hogue 113). As such, the government already considered the Métis to be halfway assimilated, and therefore, acknowledging them as "Indian" would run contrary to the government's goals of using the Métis to accelerate assimilation. This idea was carried on by the newly formed Canadian state into the 20th century during the infamous residential school era when Métis students were even encouraged to enroll in order to serve as an example to First-Nations students at the schools (TRC, "The Métis Experience" 13).

Once Canada was established through confederation, it was even more strict in denying Métis participation in the treaties it was signing out West, known as the "numbered treaties" or the "post-confederation treaties". These were a series of treaties signed between 1871 and 1921 which represented formal agreements following negotiations between Canada and Indigenous nations. These agreements cover most of Western Canada, with the exception of British Columbia. From the perspective of the newly formed Confederacy, entering into negotiations with Indigenous nations out West and subsequently signing treaty agreements was not only financially beneficial for Canada to avoid the cost of war with Indigenous nations, but would ensure the peaceful settlement of the West and the opportunity to build a transcontinental railway (Miller 156).

Much like the goals of the 1850s, the newly formed nation's assimilationist goals paired with its understanding of Indigenous identity as a racial category and as such, an understanding of the Métis as mixed, such exclusions of the Métis from treaty-making had nothing to do with

legitimately evaluating the Métis' "Indianess" yet everything to do with furthering Canada's own assimilationist agenda. As Larry Chartrand points out,

"The policy was, and to some extent still is today, fueled by racial categorization as synonymous with conceptions of civilization. Consider the fact that if the policy of the colonial government was to transform Indians into Whites – to civilize them in other words – what account would the federal government make of a community that insisted on being halfway "civilized"? Conceptually, to acknowledge the Métis as a distinct group would arguably be akin to acknowledging the failure of colonial policy designed to assimilate and civilize the Indians." (Chartrand, "Métis Treaties in Canada" 26)

Another layer of Métis participation in treaty-making worth exploring is the Métis' inclusion in treaty talks which was typically followed by their denial of treaty annuities. This was the case during Treaty Three negotiations. In 1875, the Métis community of Rainy River signed on as Treaty Three signatories, negotiated under the leadership of Alexander Morris, Commissioner for Treaty Three. David McNab notes that this was a departure from previous treaty policy during the earlier Robinson Huron and Robinson Superior Treaties, where a strict policy of non-recognition was explicitly adopted for the Métis (Lischke and McNab 138). Expert Witness in the *Daniels* case, Von Germet also noted that Métis participation in Treaty 3 was "among the strongest departures from Indian Treaty making in Canada" (*Daniels* FC para. 433). The Métis adhesion to Treaty Three was a departure from all other treaties in that the Métis elected to take the Treaty and were admitted as an identifiable group. There is no other situation where this was permitted. It is also the only time that the Métis, as a group, were given reserve lands (Teillet in Lischke & McNab 59). In fact, Morris was likely aware he was departing from the usual position

of not including the Métis in treaties as he felt the need to write extensively in his report to justify his inclusion of the Métis. In one of his reports to the government he writes, "I said the Treaty was not for whites, but I would recommend that those families [Métis families] should be permitted the option of taking either status as Indians or Whites but that they could not take both . . ." (Lischke and McNab 139). Morris is only able to view the Métis as "Indian" and therefore able to be included in treaty-making if they assume the identity of "Indian" and not that of a Métis. This is further testimony to the fact that colonial officials could not get past their anxieties of a perceived mixed group and therefore had to place the Métis as either Indian or white, stemming from the assimilationist goals mentioned earlier.

While the Métis community of Fort Frances could join as signatories of Treaty 3, eventually the government back-tracked and denied the Métis participation in the treaty, for which Chartrand blames the "hardening but porous federal government policy at the time of not recognizing Métis as distinct groups separate from First Nations or Europeans" (Chartrand, "Métis Treaties in Canada" 8). If we consider Canada's motive in this, it was likely attempting to limit the amount of "Indians" it had to pay annuities to. When the Métis of Fort Frances had asked to participate in Treaty 3, the government said yes you could be "Indian". But when it was time to pay up, it seemed to say "on second thought, you must not be Indian enough to receive treatment accordingly". I argue that this view of Métis as mixed is what the government used to permit such gross mistreatment of the Métis as sometimes Indian and then again sometimes white, depending on what was more beneficial to the state.

During the numbered treaties Métis individuals were often given the option to accept a treaty in an attempt to eradicate their claim of Indian Title, but whether the government intended to have Métis individuals receive treaty benefits is another question. As Canada was seeking to

expand its territory out west, it needed to find ways to deal with the large number of Métis people inhabiting the plains, which it wanted to open for settlement. While the government may not have sincerely understood the Métis to be Indigenous, it could not turn a blind eye to the simple fact that a large majority of the people in what was then Ruperts Land identified as Métis (10,000 of the 12,000 inhabitants were Métis, Anderson from nation to population). Many Métis people living “among the Indians” were offered the choice to either take Scrip or Treaty (*Daniels* FC para. 515). Nevertheless, it is well-documented that many Métis individuals were encouraged or even coerced into taking Scrip instead of Treaty in order to create a lucrative and profitable market for new and open lands for settlement (Frank Tough 140-142; Anderson 41).

The lack of Métis involvement in treaties cannot be used as evidence that the Métis ceased to exist as legitimate Indigenous nations at this time. Canada’s denial of Métis participation in treaty-making was fueled by its own assimilationist goals. Larry Chartrand has called this denial by Canada to deal with Métis nations as collectives during treaty-making, a “form of ethnic cleansing by colonial legal means”, as a simple tactic in reducing the amount of “Indians” in the newly formed nation (Chartrand, “Métis Treaties in Canada” 25). He reminds us that, “despite the lack of recognition of the Métis as “Indian” for the purposes of forming treaties, the power of law or federal policy itself cannot get rid of the factual existence of Métis collective ethnic and political consciousness. It is an organic and natural fact and will not disappear by legal non-recognition” (Chartrand, “Métis Treaties in Canada” 25). The Métis continued to demonstrate aspects of nationhood and continued to demand to be treated as an Indigenous nation, as evidenced by the pressure put on by Louis Riel and his provisional government in the debates leading up to the creation of the Manitoba Act.

The Manitoba Act

It was not until 1870 during the creation of the province of Manitoba that the Métis were treated as an “Indian” collective by the Canadian government through being regarded as having “Indian Title”. Though, as I will later show, this treatment of Métis as “Indian” was not necessarily genuine, as it was determined almost entirely on the government’s own aspirations at the time.

Following confederation in 1867, Canada was determined to expand out west and make room for rapid settlement after hearing of American goals of westward expansion. With the passing of the Rupert’s Land Act, 1868 (UK), the British Parliament agreed to cede the majority of Rupert’s Land to the Dominion of Canada (MMF v. Canada 24). These lands had been previously controlled by the Hudson’ Bay, who the British had “given” the exclusive trading authority over these lands which covered over two-thirds of present-day Canada.



Source: S. Smith.

The Hudson’s Bay Company previously possessed the governing authority over this vast territory, despite many sovereign Indigenous nations living throughout the territory. In exchange for the land, the Hudson Bay was paid 300,000 pounds and given one-twentieth of the land (Gaudry, “Fantasies of Sovereignty “45). This all occurred in London, without the consultation of the Métis. Adam Gaudry highlights the superiority of the British over Indigenous peoples and their lands, when he said, “the transfer agreement presumed that British sovereignty could be

asserted successfully through an act of imperial legislation half a world away, even if it conflicted with local proprietary claims” (“Fantasies of Sovereignty” 45).

This transfer of land, the largest acquisition of lands in Canadian history, was negotiated by colonial authorities under the concept of terra nullius, as they largely ignored Indigenous peoples who inhabited Rupert’s Land years before the Hudson’s Bay Company was even established (O’Byrne 95). With this transfer of land, Canada considered itself the owner of the Red River settlement, which was predominantly occupied by Métis people, with 10,000 of the 13,000 inhabitants identifying as Métis (Teillet and Madden 2). According to O’Byrne, Canada had “ignored the degree of political autonomy that existed in settled areas of the North-West –the most prominent being the settlement at Red River” (O’Byrne 96). When Métis leader Louis Riel heard of the transfer of Hudson Bay Company lands to the Canadian government without consulting the Métis, he organized a provisional government to protest these actions (O’Toole, “Thomas Flanagan” 138) From the Métis’ perspective, rapid white settlement into the area would threaten the Métis way of life as well as their lands. Led by Riel, the Métis opposed Canadian control of their lands through a series of well-calculated tactics such as blocking Canadian land surveyors from entering Métis territory (Andersen 113). John A. Macdonald quickly realized that Canada would be unable to assume control of the territory if there were any opposition from the Métis. A delegation of Métis was eventually invited to Ottawa for negotiations, after which they presented a bill of rights to Ottawa which included their list of demands. The Bill of Rights included a section on land protection for the Métis, as well as Métis representation in Parliament and protections for Roman Catholics and francophone rights (Andersen 113). These demands were subsequently adopted in part in the Manitoba Act, 1870, which ushered the tiny “postage stamp province” of Manitoba into confederation (“The

Manitoba Act”). On July 15, 1870, during this transfer of lands from the possession of Hudson’s Bay Company to Canada, s. 31 of the *Manitoba Act* stipulated that 1.4 million acres of land would be set aside “for the benefit of families of half-breed residents” (“The Manitoba Act”). Unfortunately, what first appeared to be a victory for the Métis would turn out to be nothing more than hollow words.

Such provisions promising land grants were negotiated and then enacted under the belief that like Indians, the Métis had a claim to Indian title (Lischke and McNab 60). The debate surrounding whether the Métis were “Indians” however, even at this time, resembled much of the debate that led up to the Daniels case. The Daniels Court wondered if the Métis were being asked to be treated as “Indians” (Daniels FC para. 392). The courts turned to the words of Métis leaders such as James Ross:

The fact is, we must take one side or the other. We must either be Indians and claim the privileges of Indians – certain reserves of land and annual compensation of blankets, powder and tobacco (laughter) – or else we must take the position of civilized men and claim rights accordingly ... Considering the progress we have made, and the position we occupy, we must claim the rights and privileges which civilized men in other countries claim (Daniels FC para. 392).

While the Court did look at Métis leaders’ thought-process on the matter, it is clear as evidenced by James Ross’ thinking, that the Métis already felt pigeon-holed between either putting forth an identity as “Indian” or as “civilized [white] men”. Despite suggesting they were “civilized”, as they were likely aware of the negative connotation associated with the other side of this “civ/sav” dichotomy, the Métis still put forth demands that would perhaps only be granted to an Indigenous nation such as land rights. One of the delegates sent to

Ottawa on behalf of the Métis, Reverend Noel Ritchot, speaks of this confusing touting between two identities:

They did not claim them (the privileges granted to Indians). They wish to be treated like the settlers of other provinces and it is reasonable. Well, while the Métis wish to be treated like the settlers of other provinces and they did not claim the privileges of Indians they nonetheless wanted certain land rights as descendant of Indians (Daniels FC para. 396).

This demonstrates that the government was not the only one able to manipulate the Métis' identity to suit their needs. Into the era of negotiations concerning the creation of the Manitoba Act, the Métis continued to move in and out of the category of "Indian" based on what benefitted their own needs. Regardless of this mobility between categories, the Métis still demanded to be treated as a nation and were treated as such, by sending a delegation to Ottawa and putting forth a list of demands.

The promises made to the Métis for their compensation of Indian Title were never delivered in full. In fact, federal officials who signed the *Manitoba Act* may have never intended to fulfill their ambitious promises to the Métis (Douaud 105). Evidence from these negotiations suggests that the Federal Government was not signing the *Manitoba Act* as a genuine act of recognition of Métis rights or Métis' "Indian title", but rather as a way to prevent a potential Métis uprising and to ensure Canada could peacefully and quickly expand into the West (Flannagan 74). For a land-hungry government, recognizing Métis' claim to Indian Title was Canada's last obstacle preventing it from achieving its expansionist goals (Weinstein 31). The trial judge in the *MMF v. Canada* case also made a similar observation by stating that the Métis' recognition of Indian Title was a "political expedient" used to "satisfy the delegates" that had

been sent to present Riel's "Métis Bill of Rights" (MMF v. Canada MBQB 656). Furthermore, the MMF case stated that the promise of land was "to be given on an individual basis for the benefit of the families, albeit given to the children, was given for the purpose of recognizing the role of the Métis in the Settlement both past and to the then present, *for the purpose of attempting to ensure the harmonious entry of the territory into Confederation*" (emphasis added, MMF para 544). When speaking about s. 31 of the Manitoba Act, Paul Chartrand wrote that providing land to Métis children "was a 'fast-track' version of the Indian enfranchisement legislation applied in eastern Canada" (Paul Chartrand 470).

This was even made clear by Canada's first prime minister, Sir John A. Macdonald, during an address to the Canadian Parliament on July 6th, 1885 when he said, "Whether they [the Métis] had any right to lands or not was not so much the question as it was a question of policy, to make an arrangement with the inhabitants of the province" (Flannagan 74). As this promise of lands to the Métis was an ad hoc policy only to free up Métis lands, Canada may have never intended to fully fulfill such promises. Regardless of their intentions, once the lands were freed up for settlement and the province was created, there was no need to be rigorous and keep such promises.

Even though the federal government only dealt with the Métis throughout this era as "Indian" because it served the purpose of quickly promoting western settlement, this cannot be used to suggest that the Métis did not understand and assert themselves as a people. Métis scholar Adam Gaudry reminds us that the Métis at this time were acting as a people, even though the federal government may not have respected that, or only treated them as such to quiet the Métis:

The people of the North-West entered into this confederation as a politically independent people, and the negotiation and the ratification processes of the Manitoba Treaty recognized this independence. Rather than acquiescing to British or Canadian authority, Métis initiated a treaty-making process consistent with their worldview. The bilateralism of the treaty negotiation process was repeatedly referenced by the Red River delegation to Ottawa, as well as the Canadian politicians who negotiated and ratified the agreement. (Gaudry, “Kaa-tipeyimishoyaahk” 365-366).

In the 2013 Supreme Court ruling of the *MMF v. Canada* case, the Court acknowledged that such promises made under the belief that the Métis had Indian Title were never delivered and as such, the Crown had breached its honour of the crown. However, the case was headed in the wrong direction at first, in the lower courts. A long-time expert historical witness for the federal government, and expert witness in the *MMF* case, Thomas Flanagan, has written many articles questioning Métis Aboriginal rights, which Darren O’Toole suggests surely affected the trial judges’ findings in *MMF* (O’toole, “Métis Claims”; O’Toole, “Breathing New Life” 671). Flanagan even testified in another famous Métis case, *R v. Blais*, that the Métis never “described themselves as an aboriginal people with special land rights” (*Blais* para. 160). Unfortunately, Flanagan’s arguments were accepted by the trial judge in the *MMF* case, when Justice McInnes suggested that the Métis may not have had any Aboriginal Title to surrender in the first place (*MMF* Queen’s Bench para. 631, 1205).

It seems here that the courts have mistakenly looked at the government’s intentions behind recognizing Métis’ Indian Title –that it was an expedient way to free up lands for settlement. Except instead of looking at how the government understood the Métis –which was typically

influenced by the governments self-motivations—we must look at what the nation itself was asserting at the time. Darren O’toole has published extensively on the topic of Métis claims to Indian title. He has even spent numerous articles refuting Thomas Flanagan’s flawed arguments against Métis’ claims to Indian Title (O’toole, “Métis Claims”; O’toole, “Manitoba History”; *MMF v. Canada*). In one of these articles, he cites a speech by Louis Riel to show that the Métis, who despite having to find a way to be recognized by a government who only saw Indian or white, the Métis nation was demanding their share of their land rights as a unique Métis people:

Rights put forward by Half-breeds need not necessarily be mixed up with those of Indians. It is quite possible that the two classes of rights can be separate and concurrent. My own idea is that reserves of land should be given to Half-breeds for their rights. (Louis Riel in O’toole, “Thomas Flanagan” 149).

While Flanagan tried to suggest that the desire for a land grant was only Riel’s idea, O’Toole demonstrates that this opinion to establish a Métis land base was reflected by other Métis leaders and community members (O’Toole “Thoms Flanagan” 149). The Métis had been in this area for generations and securing their lands for future Métis children is a key indicator that these leaders were fighting for the prosperity of their descendants.

Scrip

Today, the Métis still do not have an identifiable land-base that belongs to them. The only exception to this situation is Alberta who legislated the Métis Settlement Betterment Act in 1938, which established 12 Métis communities, of which 8 are still in existence today (Métis Settlements Act). The lack of Métis land base is not because the Métis did not have a homeland and were not promised a certain portion of that homeland. Rather, as the Royal Commission on

Aboriginal Peoples found, “[I]t is unquestionable that the governments of Canada and the prairie provinces must bear paramount responsibility for the lack of an adequate Métis land and resource base today” (“Métis perspectives” 230). The Canadian government had promised the Métis land grants through s. 31 of the *Manitoba Act* as part of Métis’ claim to Indian Title, s. 31 was poorly interpreted and through delays and administrative stalling, to the point where the possibility of a Métis settlement was basically placed “on hold” for 6 years (Ken 122, Manitoba Act 20-27). This is when the idea of a Scrip Commission was born in 1874 to deal with these outstanding claims (Hatt 122).

The issuance of scrip, or of “Half Breed Land Grants,” was meant to extinguish Métis’ claim to “Indian Title” much in the same way as treaties had been used to extinguish First Nations’ claims to lands (*Daniels FC* para. 136). Contrary to the numbered treaties signed with First-Nations, Canada took a more individualistic approach with the Métis, through the distribution of individual land grants, even though the Métis had made collective claims to Indian Title. Even Thomas Flanagan recognized that the Métis did not claim a bundle of individual private property rights, but rather, a collective and public title to the land (O’Toole, “Métis Claims” 254). Darren O’Toole highlights speeches made by Métis and government or religious leaders which he says demonstrates how the “Métis did not view individual and collective rights as being mutually exclusive, but as being [...] complementary and congruent.” (O’toole, “Métis Claims” 261).

Since the Crown had recognized that the Métis had a claim to Indian Title through s. 31 of the *Manitoba Act*, the Crown had offered individual Métis the choice to accept treaty (Lischke and McNab 60). However, most Métis did not accept treaty like their First-Nations neighbors since they were heavily encouraged by the federal government to instead take scrip (Anderson

41). Canada had quickly realized that the scrip system would be the quickest way to conclude the treaty-making period and open up public lands for large-scale settlement of the West. Some Métis were even coerced by government officials into taking scrip instead of entering into a treaty with Canada (Anderson 42). Many individuals who had already accepted treaty withdrew themselves from treaty tolls in order to receive scrip (“List of Halfbreeds”).

The scrip policy must have seemed enticing when explained by government officials but in reality, it failed to provide many Métis scrip beneficiaries with their 240 acres of land. With the establishment of the Northwestern Scrip Commission in 1885, scrip commissioners traveled to Manitoba and held gatherings across Métis homelands where Métis individuals could come and fill out applications for their land grant. Métis individuals eligible for scrip were provided with a simple piece of paper resembling a coupon. These scrip coupons were redeemable for either 240 dollars or 240 acres of land, and the individual could choose whether to accept a cash payment or a land payment for compensation of their claim to Indian Title (Ens and Sawchuck 159-160). Most Métis accepted cash payment as they knew the 240 acres of land were not always worth \$240. Many settlers profited off of Métis lands, who turned around and sold Métis land for well over the 240 dollars the Métis individuals were given to compensate for the land (Tough 136). Moreover, when Métis individuals accepted the land option, they did not have a choice in selecting the plot, and these lands were often very far from Métis homelands and typically not as rich in resources (Andersen 17).

Additionally, the process for Métis individuals to redeem either dollars or lands from their scrip coupons was extremely lengthy and bureaucratic (Tough 114- 142). Since Canada’s priorities during the issuance of scrip was mainly to free up Métis lands for settlement, once it had done so, issuing the monies or lands to the Métis no longer seemed to be a main priority. As

scrip scholar D.N Sprague demonstrates, through various amendments to the s. 31 and 32 of the Manitoba Act, the federal government was not supplementing the legislation but rather slowly legislating the loss of Métis land rights (Sprague 109-127). As a result, the process of administering lands or payments to the Métis was drawn out, and many Métis individuals never even saw the lands they were promised. While it may be difficult to prove the delay was intentional, Sprague believes that it was in fact intentional, as John A. Macdonald had been provided many opportunities and clear examples of solutions to the “problem”, but continuously rejected his colleagues’ suggestions (Sprague 107). Once the objective of opening up lands for settlers was accomplished, John A. Macdonald brushed off any responsibility, telling “local militia” to handle disputes between “actual settlers” and “former occupants” (Sprague 107). The failure of the scrip system was no coincidence, since Canada saw the recognition of Métis’ claim to Indian Title as a strategic move to keep the Métis quiet. In the words of John A. Macdonald:

We, at the last moment, made concessions, and we did for the sake of peace. The Government knew ... that we were not acting in the interests of the half-breed in granting them scrip ... and I said “Well, for God’s sake let them have the scrip; they will either drink it or waste it or sell it; but let us have peace.” (qtd. in Niemi-Bohun 80)

If we consider that Canada’s motivations at the time of the Scrip policy were to attract settlers to the West and make room for the national railway to be built, then it is clear that Métis settlements were in the way of such goals. The government had to think fast to get the Métis out of their lands while also appearing to appease promises made during Manitoba Act negotiations. As Robert Grove et al. note, “the [scrip] process was motivated by federal expedience and was abandoned or corrupted as soon as was practicable by those in charge, such as the land and

immigration agents then flooding into the region with strong support from both the Canadian Pacific Railway company and the federal government that was financing its endeavors” (Groves and Morse 292).

The Royal Commission on Aboriginal Peoples has called such dealings by the federal government in delivering the said “benefits” or obligations from the Manitoba Act as “fraud”, stating that “The ‘market transactions’ whereby many Métis were stripped of their land were marked by sharp dealing and fraud on the part of private land agents and occasionally of government officials”, and that “the government of Canada was aware that such a sharp dealing and fraud was being practiced on a large scale but failed to take effective steps to prevent it or to compensate for it” (“Métis Perspectives” 231). Again, if we turn to the words of John A. Macdonald, it is apparent that the government knew that by delaying the scrip process, the Métis would become further marginalized by the accelerated settlement of their lands “. . . it will require a considerable management to keep those wild people quiet. In another year the present residents will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers” (qtd. in *MMF v. Canada* 150).

By pressuring the Métis to accept scrip, the government would also be simultaneously furthering its assimilationist agenda. The moment a Métis individual accepted a scrip land grant they could no longer legally be considered an Indian (Teillet, “Métis Law” 1-13). According to Métis lawyer, Jean Teillet, “after the scrip process was completed, the Métis virtually disappear from the historic record. In the eyes of the state, the Métis people had been extinguished through the scrip process and were henceforth invisible (Teillet, “Métis Law” 1-7). Not only would the government be reducing the amount of legal “Indians” in the state, but it assumed it was ridding itself of financial obligations to those scrip-accepting Métis. Because of this policy, many Métis

communities were broken up and families were forced into poverty and became referred to as “Road Allowance People”, who squatted on Crown land, often wherever employment was available (“Indigenous Peoples Atlas”).

These wrongdoings were finally acknowledged in 2013, when the highest court in Canada recognized that Canada never fully delivered its promises to distribute 1.4 million acres of land to the Métis (MMF v. Canada). The Court acknowledged that “the most serious complaint regarding scrip is that Canada took too long to issue it” (MMF v. Canada 122). The Court also acknowledged the destruction of this policy on the Métis, but did not want to draw any kind of “bad faith”, saying that, “while dishonesty and bad faith were not established, government error and inaction led to lengthy delay in implementing s. 31 and s. 32, and left 993 Métis children who were entitled to a grant with scrip instead of land” (MMF v. Canada 14). As the Métis Nation of Ontario stated in its factum as an intervener in the MMF case, s. 31 “could not be honoured by a process that ultimately defeated the purpose of the provision” (MMF v. Canada 86).

Both the Métis and First-Nations Peoples suffered a loss of identity and land rights during the early days of Canadian Federal Indian policy, as the goals of Indian policy at this time were to extinguish Indian Title in order to begin an accelerated settlement of the West (Hawkes 66). However, the Métis were never fully afforded even the small benefits that came with the recognition of having Indian Title. This is because Canada viewed the Métis as Indian enough to accept their claims to Indian Title when this would benefit Canada, but then again not Indian enough to be deserving of the actual benefits associated with this recognition. Sound familiar by now? Unfortunately, the federal government continued to manipulate Métis identity and treat the Métis inconsistently as “Indian” throughout the history of the Indian Act, as I will show.

The Indian Act

John Borrows has written that the Indian Act “flows from the *idea* that Indigenous people are inferior and must be schooled in Canadian forms to hasten assimilation... its underlying philosophy damages most everyone it touches. Its provisions narrowly define and heavily regulate Indigenous peoples’ citizenship, land rights, succession rules, political organization, economic opportunities, fiscal management, educational patterns, and attainment” (Borrows, “Unextinguished” 5). With all of this, Métis people may believe they dodged a bullet by being excluded from the Indian Act, however that has not always been the case.

The *Indian Act, 1876* came together as a consolidation of many separate acts that outlined different areas of treatment and governance of the Indian population (Bartlett 583-584). The new consolidated *Indian Act* did not contain any substantive changes from its earlier statutes, except that it came to only apply to Indians (Métis and Inuit were not included). Prior to the consolidation of the *Indian Act*, the Métis had been considered to be Indian under many earlier versions of the *Act* (Andersen 43). For example, the first statute enacted by the Dominion of Canada which included the word Indian was the *1868 Secretary of State Act*, which defined Indians as all people of Indian blood and their descendants (Bartlett 589). Under this description, there was no distinction made between Indians and “half breeds” since, under a racial understanding of Indigeneity, the Métis were still considered to have some Indian blood (Andersen 43). But by 1876, the consolidated *Indian Act* specifically declared that anyone who had received scrip, as well as their descendants, could not be considered to have status under the *Indian Act* (Bartlett 590). This was the first explicit legal definition of the word Indian to clearly articulate a policy of non-recognition of the Métis. As Brenda Macdougall points out, this simple

definition of who is an “Indian” as explicitly excluding Métis, or “Half-breeds” has created a deep-rooted, long-lasting “legal fiction” in Canadian consciousness (Macdougall 2), that legal fiction being relying on race and blood to create socially constructed categories of Indigenous identity. Under this model, certain Indigenous people possess more “Indian blood” therefore deeming them “Indians”, and others with more European ancestry are not given the same recognition.²

As has been the case for the Métis in the history surveyed so far, the Métis do not always stay permanently in either category of “Indian” or of “not Indian”. Remember that the government manipulates Métis identity to suit its own needs, and was not interested in looking at how the Métis were defining themselves. Despite the Indian Act specifically stating that Métis were not “Indians” for the purposes of the Act, exceptions could be made. For example, in 1884, the *Act* was amended to include a prohibition of selling ammunition to First-Nations People and to Half-breeds. The Métis were only included in this provision of the Act as the Canadian government felt it should limit the number of arms available to the Métis in order to prevent any potential political uprisings from the Métis (Bartlett 585). This would have been a valid concern for Canada at the time, considering the Métis already had a history of rebelling against the federal government when they felt their livelihood threatened, as they did a decade prior during the Red River Resistance of 1869-1870³. Additionally, the political climate between the Métis

² The Indian Act still relies on race and blood to classify status Indians- see Chelsea Vowel discussion on this, also still has an assimilatory aspect as it will inevitably reduce the amount of individuals having status in Canada (Indigenous writes 25-35, also 73-89). Also, Brenda Macdougall explains how “while there are no official blood-quantum criteria within the legislation, the manner in which status has been defined reflects a defacto blood-quantum system because those who married men without status are presumed to have married out of their Indianess, and so their children were (and are) considered “mixed-bloods,” even if their fathers were indigenous (Macdougall 3).

³ See Weinstein 14-16. The Red River Rebellion occurred immediately before the creation of the province of Manitoba and was a protest by the Métis to ensure their rights through the creation of the new province. During the rebellion, the Métis formed a provisional government, led by Louis Riel, and the occupied of a small part of the land that was going to be transferred to Canada’s possession.

and Canada would have been tense at the time, as Louis Riel was returning to Canada after being in exile and was calling his followers to take arms in Batoche (Sprague 3). The federal government was likely making one last attempt to prevent another armed rebellion led by the Métis. As the RCAP has stated, this measure was “adopted for purely political motives — to foil the Métis and Cree peoples, who were increasingly discontented with government policy toward them.” (Martel 266).

Another exception to the policy of non-recognition was made a decade later, in 1894, when Parliament amended a specific provision meant to prohibit the sale of “intoxicating liquors” to “Indians”, by broadening who could be included. When members of the North-West Mounted Police were purportedly having issues distinguishing “Half Breeds” from “Indians”, Parliament granted the authority to prohibit the sales of liquor to Métis people as well (*Daniels* FC para. 446). The Act defined an “Indian” as “any person... who follows an Indian mode of life” (*Daniels* FC para. 447). As the trial judge in *Daniels* pointed out, this sudden inclusion of the Métis here was not based on any objective factor about the Métis’ “indianess” or their Indigeneity, but on a “descriptively impossible ‘Indian mode of life’” (*Daniels* FC para. 451). The judge however, still used this as evidence to say the Métis were treated as Indian. The definition was originally worded so as to give the government the freedom to extend this provision over whoever it wanted to. Though perhaps better than a blood quantum definition of “Indian”, as the judge pointed out, the definition became problematic as it could even be used to describe some white people who lived among Indigenous peoples.

While exceptions could be made during the Act’s first decades of existence, later, the *Act* came to only apply to those Indians who had been given reservations, who are now known as First-Nations Indians (Weinstein 31). The shift in the *Act*’s broader view of Indians to a narrower

one conveniently corresponded with the goals of the federal government at the time these definitions of Indian were produced. For example, the very first statutes which would later come together to form the *Indian Act* usually applied to all those with any level of Indian blood and their descendants (Bartlett 589). At the same time, one of the *Act's* early purposes was to assimilate or civilize “Indians”, as evidenced through the titles of these early *Acts*, including titles such as “*The Civilization of Indian Tribes Act of 1857*” (Bartlett 582-583). Here we see the government exhibiting an understanding of Indigeneity to be synonymous with the “sav” or “savage” side of what Emma LaRocque has termed as the civ/sav dichotomy employed by settlers to classify Indigenous people either are civilized or savage (LaRocque 37-38). The government only included the Métis who were purportedly drinking in public or leading rebellions –behaviours or stereotypes often associated when the image of the “savage Indian” is evoked. Consequently, in the eyes of the Canadian government, it would have made sense to want to assimilate the Métis, as the Canadian government viewed them as not entirely Indian, but not entirely white either. Viewing the Métis exhibiting some stereotypic behavior the government associated with “Indians” meant it viewed the Métis in need of assimilation to become fully “civilized” men. While these determinations may have had a place in the past, these markers of “civilized” versus “savage” should not be used to make laws today.

Decades after the disastrous White Paper Policy which sought to fully get rid of the existence of separate sovereign First Nations and take up First Nations people into the general Canadian body, the official policy shifted from explicit assimilationist goals to more implicit ones (Kulchyski “Hegemony” 62). The Indian Act seems to follow new Canadian policy based on a nation-to-nation approach. Though as the RCAP points out, the Indian Act even to this day still treats First-Nations as wards of the state, who need oversight and protection (Martel 289).

Along with such an understanding of First Nations, which was made clear during the Penner Commission on the Indian Self Government, the Act came to require more federal spending, not surprisingly the Métis were never included (Martel 292). This was because the *Act* finally required Canada to fulfill certain responsibilities towards “Indians” (Milloy 14-15). As a result, it would have been strategic for Canada to exclude the Métis from the *Act*, so that it could limit the number of people it had to specifically govern and provide services to. For this reason, despite being included as Indian in earlier versions of the *Indian Act*, the Métis people eventually came to be excluded altogether from the *Act*, and no further exceptions were made (Indian Act).

By now it should be clear that the federal government could include the Métis under its jurisdiction as it pleased. This was not determined on any intrinsic categories about the Métis and their identity, and not because it truly understood the Métis to be part of Canada’s Indigenous population, but purely based on a matter of making policy that benefited the state. This was even highlighted in the *Daniels* trial court, where Justice Phelan stated that “consistent with the inclusion and exclusion of half-breeds in the numbered treaties, the federal government chose when and if to exercise its constitutional jurisdiction over this group” (FC 458).

As I have been suggesting throughout this chapter, the government’s choice to not include the Métis in the Indian Act does not mean the Métis were not Indigenous enough. As I have shown, this non-recognition was made entirely on the basis of what benefited the government. Moreover, Larry Chartrand points out that “the very direct act of non-recognition is itself strong evidence of the very existence of independent “Half-breed” bands; otherwise there would be no need for an official policy of non-recognition in the first place” (Chartrand *Métis Treaties in Canada* 9). While the *Indian Act* was meant to outline Canada’s governance of “Indians”, other aspects of governance of Indigenous peoples in Canada today are outlined

elsewhere, perhaps most importantly within the Canadian Constitution. It is important to look at how the Métis are defined in the Canadian Constitution, as even though they came to be explicitly excluded from the Indian Act, they have come to be included in the Constitution (Sawchuck 15). As I will further suggest, the same trend persists in these following statutes as the Métis get moved in and out of recognition.

The Constitution Act, 1867

The *Constitution Act, 1867*, passed by the British Parliament as the *British North American Act*, created the Dominion of Canada as it unified the three separate colonies of Canada (Quebec and Ontario), Nova Scotia, and New Brunswick. Arguably, the Act did not provide any specific recognition of Indigenous Peoples as the First Peoples of Canada or any recognition of Indigenous rights. Section 91 was the only area in the Constitution with any mention of “Indians”. Section 91 and 92 dictate the division of powers in Canada between the provinces and the federal government. Section 91 is an enumeration of subjects over which the Canadian federal government has jurisdiction, such as marriage and divorce, the postal service, and coasts and fisheries. Section 92, on the other hand, lists provincial powers such as the management of hospitals. Section 91(24), also known as the Indian power, specifically gives the federal government the exclusive jurisdiction over “Indians, and Lands Reserved for Indians” (*The Constitution Act, 1867*). In contrast to how the Indian Act specifically explains who it includes, the framers of the Constitution never specified who qualifies as “Indian” under s. 91(24). This lack of definition around the language has meant that in practice, the federal government has both legislated for the Métis and denied the Métis inclusion in this provision.

Keeping with the pattern I have pointed out throughout this chapter; Canada's own goals and motivations likely caused the inconsistent treatment of the Métis as "Indian" under s. 91(24).

In the years following the creation of s. 91(24), the Métis were largely understood to be included as Indian under 91(24) as the federal government willingly exerted its jurisdiction over the Métis by enacting statutes and laws for the Métis. Presumably, the government was enacting such laws under the assumption that it had the jurisdiction to do so thanks to its s. 91(24) power. These include the recognition of Métis' claim to Indian Title and Métis inclusion in the Indian Act, as previously mentioned. The trial judge in *Daniels* also accepted the fact that generally, in Canada's early years following confederation and until the mid-1980s, instances where the government acted on its jurisdiction over the Métis were common (*Daniels* FC para. 27).

Although as the years progressed and over the past 100 years, the Canadian government argued that the definition of Indian implied under s. 91(24) only included status Indians. Provinces at the same time also denied dealing with Métis (other than Alberta) (Chartrand, "Métis Identity and Citizenship" 26). Even after the inclusion of Métis in the *Constitution Act, 1982*, the government still denied federal jurisdiction over Métis (FC 506). During the 1950s and until the *Daniels* case was brought forth in 1999, it became clear that the Federal Government was attempting to get rid of some of its responsibilities towards Métis. It did so by pointing to s. 91(24), stating the Métis were not considered "Indians" under this provision and therefore officially outside of federal jurisdiction (Hawkes 71). Eventually, the Canadian government came to clearly articulate that the Métis were officially outside of the federal jurisdictional powers regarding Indians, stating that the Métis were the provinces' responsibility (Hawkes 71).

The provinces typically had an issue with this, as they argued they did not have the funds available to legislate over the Métis, and that the Métis were the exclusive responsibility of the

federal government (Hawkes 67). The provinces continued to hold this position into the *Daniels* case, even going so far as acting as interveners to make sure they would not be responsible for the Métis (Factum of the Intervener, Attorney General of Saskatchewan; *Daniels* FC para. 100). Although there were some exceptions, such as the provincial government of Alberta who had enacted Métis-specific legislation (Métis Settlements Act 1938) which set aside specific land bases for the Métis, known as the Métis settlements (*Daniels* FC para. 587-588). Alberta wanted to ensure this legislation would not be affected by a declaration in the plaintiffs' favour. Saskatchewan also created the "Métis Act" for the Métis in 2002, which formally recognized all the Métis contributions to the province of Saskatchewan and set out ways the province of Saskatchewan and the Métis work together, such as on the delivery of provincial programming and services to the Métis, and transfer of land for economic development (Métis Act). Other than these few exceptions, the provinces maintained that the Métis were the Federal government's responsibility and maintained this position throughout the *Daniels* trial (*Daniels* FC para. 86, 106, 480). Even where provinces did create Métis initiatives, it has thus far not lead to a great deal of spending or provincial programming.

Even in the last three decades, the federal government has been the most adamant that the Métis do not fall under s. 91(24). At the same time, the goals of federal Indian policy have shifted from an era of assimilation and paternalism, to an era where Indigenous rights are beginning to be recognized, albeit fitfully. Beginning in the 1980s, a new era in federal Indigenous policy began, with a focus on providing services and programs as repatriation for the years of oppressive policies Indigenous People had endured (FC 501). Whilst this is what was discussed in the *Daniels* hearing, it appears that in the 1980s the government was trying to cut down on spending for Indigenous peoples. The then Deputy Prime Minister, Eric Nielson,

headed a report with similar objectives to the infamous “White Paper policy” of the Pierre Elliot Trudeau government –the report was part of a broader government objective to cut back on spending following a recession, and suggested a cap for spending on “Indian programs” (Dyck and Waldram 92-93). Therefore, as Justice Phelan highlighted, it was perhaps more financially beneficial for Canada to reject viewing the Métis as s. 91(24) Indians (*Daniels* FC para. 501-508). Again, this distinction was not made on a genuine recognition or lack of recognition of the Métis’ Indigeneity, but rather a distinction made strategically.

The plaintiffs in *Daniels* pointed out to this shift in federal policy considering the Métis, suggesting that the federal government was trying to rid itself of financial obligations (*Daniels* FC para. 508). However, the trial judge went on to say that “the [financial] reasons are not relevant to the legal considerations of constitutional interpretation. The Court will not draw any sort of “bad faith” conclusion.” (*Daniels* FC para. 509). Just as the Supreme Court had done in its MMF opinion, it recognized that the government dealt with the Métis a certain way based on actions that would benefit its agenda, yet the Supreme Court in 2013 and then in 2016 said it cannot use this to draw any “bad faith” from the government. While the Court finds these motivations may not be important in drawing legal conclusion, they are important to consider as they remind us that such determinations of the Métis as “Indian” and more recently with denials of Métis as “Indians”, were yet again not based on any inherent characteristics of the Métis but rather based on the government’s motives and agenda.

The Constitution Act, 1982

With the creation of the *Constitution Act, 1982*, for the first time the Métis were specifically included in the Constitution as “Aboriginal Peoples” of Canada, a new term meant to

refer to the major Indigenous peoples in Canada: the Inuit, the Métis, and First-Nations peoples. This was a crucial moment in Métis politics as a long policy of non-recognition seemed to have shifted. Unfortunately, as I will point out, this may have been yet another time in Métis-Canada history where the government acquiesced to Métis demands with no real intention to follow the course on such recognition.

Section 35 of the *Constitution Act, 1982* reaffirmed existing aboriginal and treaty rights and specifically included the Métis as one of the three peoples who together make up the “aboriginal peoples of Canada”. This new term was meant to refer to all three larger Indigenous groups, the Métis, Indians, and Inuit. Section 35 reads as follows:

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

35 (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada (*The Constitution Act, 1982*).

This is generally accepted as the first time the Métis appeared in the Constitution. Instead of extinguishing Métis rights, this section was created to uphold existing Aboriginal rights. While the intention behind section 35 was the recognition and affirmation of Métis constitutional rights, as Mark Stevenson points out, “Canada’s intentions with respect to s. 35 can be measured by the number of times that the federal government intervenes in s. 35 cases against those who dare to exercise their rights” (Stevenson p. 309). Twenty years later, Groves and Morse note that s. 35 has not come to its full maturity, especially concerning its responsibility to the Métis:

This drawn-out maturity appears particularly problematic for the Métis. They have received the least attention from non-Aboriginal governments to date in constitutional efforts, Royal Commission on Aboriginal Peoples (RCAP)

recommendations, and especially in tangible efforts to reach agreements on self-government. In some senses, recognition of Métis identities is still in the teething stage (Groves and Morse 261).

The government has long denied that it does not possess jurisdiction to legislate for the Métis which they did not consider to be “Indians” under s. 91(24). Thus, s. 35 of the *Constitution Act, 1982* as well as s. 91(24) of the *Constitution Act, 1867*, while they have very different purposes, are closely related. While the government could not explicitly deny that the Métis were under s. 35, it continued to deny it had jurisdiction over the Métis. At a 1984 conference, Minister of Justice, John Crosbie stated:

“To answer that question, we have to recognize the fact that the word “Métis” was put in Section 35 of the Constitution Act in 1982, not in 1867. The Federal Department of Justice has concluded -- has reached a legal opinion that Parliament cannot legislate for Métis as a distinct people” (*Daniels* FC para. 505).

Now with the *Daniels* decision, the government can no longer hide behind its excuse of not having jurisdiction over the Métis. Not only can s. 91(24) influence further actions taken to highlight and protect s. 35 rights, but as vice-versa, s. 35 may dictate the use of s. 91(24). As John Borrows has pointed out, s. 35 should serve as a guideline when enacting laws and legislating for Indigenous peoples under its s. 91(24) jurisdiction. He suggests that, read in conjunction with Section 35, Section 91(24) cannot be used to govern Indigenous peoples unilaterally:

“Federal power should not make “Indians” subordinate within Canada’s political and legal orders. Federal officers should not have the last or only word in this

field. The invocation of Aboriginal rights can assist in this goal because constitutional rights are supposed to limit government action. With s. 35(1) as a guide, s. 91(24) is open to more democratic interpretations. It does not have to read to justify domination” (Borrows, “Unextinguished” *Act* 11).

Jennifer Adese also suggests that we need to be mindful of the history of disposition of the Métis and the history of colonization under s. 91(24), and that because of this, it makes sense to be wary of s. 91(24) inclusion, as many Métis have been (Adese, “A Tale of Two Constitutions” 18). Therefore, by reading s. 91(24) in this way, namely being mindful of this colonial history, legislators and policy-makers can make sure to not repeat this history and instead, use s. 91(24) to correct such historical injustices. Unfortunately, as I will show, in bringing up the *Daniels* question, the parties involved did not grapple with this enough. While they recounted a history of dispossession and denial of Métis rights, they did so to determine whether the federal government had legislated for the Métis in the past. The following chapter will demonstrate how the *Daniels* Court made a modern-day court decision based on outdated principles.

While inclusion within s. 35 has been marked as a victory, as we have done throughout this chapter, it is important to note the government’s intentions behind certain Métis inclusion in federal Indigenous policy. This inclusion of the Métis in this section can undoubtedly be traced to the advocacy work by Métis leaders such as Harry Daniels himself, Tony Belcourt, and Clement Chartier, who stormed Ottawa and put pressure on government leaders to make sure the Métis were included in s. 35. Not only did the Métis need to fight to make sure they were included in s. 35, but before that, during the first draft of Pierre Elliot Trudeau’s Constitution, s. 35 was non-existent. Indigenous Peoples protested this and were backed by the United Nations

and the British parliament. With such pressure, the government agreed to include Aboriginal rights in the Constitution:

The national Indian, Métis and Inuit organizations in Canada had energetically pressured the Joint Parliamentary Committee to amend the proposed resolution to entrench aboriginal and treaty rights. In a dramatic reversal of policy, the federal government agreed in late January to a number of important changes which, at least partially, met the requests of the native organizations (Romanow et. al 121–122).

We thus wonder if it had not been for the work of these Métis and other Indigenous leaders what the future of Métis rights would have been. So perhaps this inclusion was not so much the government acting proactively by creating s. 35 and subsequently including the Métis as “Aboriginal people”, but rather that Métis leaders had put enough pressure on the government as their ancestors had done before. Except in this era, Indigenous peoples have a greater platform in the media and a louder voice together, so Canada could not discreetly ignore the Métis during the consultative process. Unfortunately, it seems Canada was not prepared to subsequently recognize Métis’ s. 35 rights concretely. Even at the time the Métis became enshrined in this provision, throughout the 1980s, Canada went to extensive lengths to deny its responsibility to the Métis (Adese 16). Perhaps the word “existing”, which was only added at the last minute, was incorporated to try and limit or even deny the Métis’ rights, suggesting that the Métis have very little “existing” rights (see Teillet “Thirty Years of Sec 35”). Brian Slattery takes on a wider view of the word “existing”, suggesting that just as intended in the Royal Proclamation, s. 35 rights should be allowed to shift and evolve, pointing out that “to confirm a document may mean to give it a life it otherwise lacked” (Slattery). As he suggests, there would be little to no point in

confirming rights if the point is to restrict their recognition. This should have been the purpose to include the Métis in s. 35, whose rights were not always confirmed. Unfortunately, it was not.

Even into the twenty-first century, governments continued to deny that distinct Métis communities existed and even denied that the Métis were Aboriginal (Lischke 63). Therefore, governments denied the Métis their Aboriginal and treaty rights, and denied any legal duties towards the Métis (Lischke 63). After the inclusion of the Métis under s. 35 in 1982, Métis leaders asked to meet with the Canadian government to clarify their “existing aboriginal and treaty rights” under s. 35. However, the federal government argued that it did not have federal jurisdiction over the Métis under s. 91(24) and therefore, it could not meet with the Métis (*Daniels* FC para. 4c). At a December 1984 conference, Minister of Justice, John Crosbie, responded to efforts by Harry Daniels saying that he “cannot change what the Constitution says” denying its jurisdiction over the Métis (*Daniels* para. FC 505).

Jean Teillet details the history following Métis’ inclusion under s. 35, showing how “it has taken 30 years for the true meaning of constitutional inclusion to become clear” (Teillet “Thirty Years” 339). Individuals who were seeking to have their s. 35 rights defined often had no choice but to turn to the courts, where they have been successful. Most notably in 2006 during the Powley hearing, where the courts reaffirmed Métis’ s. 35 harvesting rights in the Powley case. While the Powley case was celebrated as a victory for the Métis in having their s. 35 rights affirmed, it is important to note the definition of those Métis who fall under s. 35 rights-bearing Métis is quite narrow. The Supreme Court in its Powley opinion formulated a ten-part test to determine who are rights-bearing Métis (*R. v. Powley*). Nonetheless, the reluctance of the government to discuss such rights, while asserting that it does not possess jurisdiction over the Métis under s. 91(24), has made it difficult for the Métis to determine their s. 35 rights. Now,

with the release of Daniels and the removal of this obstacle of denying s. 91(24) jurisdiction, hopefully there will be developments in s. 35 rights for the Métis. A post-doctoral student, Brian Bird, eloquently states that, “Section 35(1) delivers the constitutional base for negotiation; it gives Aboriginal peoples a constitutional bargaining chip at the negotiating table, but not the negotiating table itself” (Bird). Access to the negotiating table is what has lacked for the Métis thus far.

Conclusion

For the past 150 years and more, the Métis have moved in and out of the federal government’s jurisdiction over “Indians”. Melanie Niemi-Bohun summarizes it perfectly when she says that such changes in Métis federal policy were simply, “a reaction to problems as they arose” (Niemi-Bohun 80). I wanted to go further and show that the reason the government was able to manipulate the Métis as it wished was due to its racial understanding of Métis as mixed, and its understanding of Indigenous identity in all or nothing terms. Even when the Métis were viewed as “Indian” under a certain statute, they would eventually come to be explicitly excluded as “Indians”, or were never afforded the treatment that should have accompanied such recognitions. An overarching trend has persisted throughout this history. When the government was looking to assimilate the Indigenous population, the Métis could be included, but when it was time to provide for a marginalized Indigenous population, Canada sought to rid itself of its responsibilities to the Métis. Many scholars have called out the government’s narrowing of the term “Indian” for what it really was –a matter of policy:

Over several centuries, legislation was enacted that incrementally diminished the scope of what “Indian” meant in Canadian law, establishing categories of

difference that had nothing to do with who people actually were in relation to one another, but everything to do with the needs of colonial administrators to rid themselves of “the Indian problem” by reducing the numbers of Indians (Macdougall 2).

Consequently, the Métis have been exposed to similar oppressions by the government as any other Indigenous Peoples in Canada, but were never included in programs and services that could have alleviated such hardships. Aware of this, Justice Phelan wrote in the *Daniels* opinion, “the Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities [...] they are the most disadvantaged of all Canadian citizens” (*Daniels* FC para. 84).

Due to its racial understanding of the Métis as mixed, Canada has been able to manipulate the Métis’ identity to fulfill its own goals and motivations at any given policy era. Other Indigenous groups in Canada such as First Nations or Inuit people have not received such hot and cold treatment by the federal government, over an extended period. However, it is important to note that, while the government never questioned the Inuit’s indigeneity, it still included or dropped them from government statutes like the Indian Act, and denied responsibility over them, which led to the *Re Eskimo* decision (Tester and Kulchyski 19). While the Inuit were for a long time denied appropriate social welfare, it was never based on questioning their indigeneity, but rather based on the idea of “leaving them alone” (Tester and Kulchyski 20). The government did not necessarily deny the Inuit being an Indigenous population, but in the *Re Eskimo* case, it argued that the Inuit were not of the same “race” as Indians (Tester and Kulchyski 32). While the Métis also experienced the effects of denial of federal jurisdiction, their very indigeneity was often called into question, as the government had difficulty placing them within the racial groups

it created. The only other group in Canada who has experienced similar treatment, as a people, are non-status Indians, who were also plaintiffs in the *Daniels* case. From the eyes of the government, both groups have in common a certain “mixing” with Euro-Canadians. This makes it clear that the underlying obstacle for Canada in viewing the Métis as Indigenous and thus, deserving of treatment as such, is the Métis’ so-called “mixedness”, or “dilutedness”, which makes them less “Indian” in the eyes of the government.

These contradicting positions on the Métis as Indian have led to the Métis holding a very unclear position in federal Aboriginal law and policy today and it is from this history which the *Daniels* case was born. The history I have surveyed here is the very history analyzed in *Daniels*, as the courts attempted to determine whether the Métis can be included in federal jurisdiction by looking at instances where the government has either legislated over the Métis (usually these were the historical examples highlighted by Métis and NSI in the case) or denied the inclusion of the Métis in federal Indian policy (usually these were the type of historical examples highlighted by the federal government). However, the courts did not always point out to the government’s motivations in choosing to treat the Métis as Indian or not. Instead, the Court has made new law based on these outdated motives and understandings. This, as I will show, was due to the Court’s use of originalism. Applying a critical Indigenous and decolonial lens, the next chapter will analyze the *Daniels* case and point out to instances where the courts have perpetuated some of these historical flaws, such as emphasizing the perspectives of colonial government officials and as such, spreading racial (mis)understandings of Indigeneity and an inappropriate understanding of s. 91(24)’s purposes. Lastly, as I have pointed out throughout this chapter, it is important to remember that regardless of the government’s treatment of the Métis, and regardless of what the Supreme Court opines, the Métis have always been consistent in asserting themselves as an

Indigenous nation from the 1800s to the present. The Federal Court of Appeals also suggests this when it stated that just because you are not status Indian in the eyes of the federal law, it does not mean that you are not Indian in fact or included in s. 91(24) of the Constitution Act (FCA 139).

Chapter 3

Too Good to be True? The Problems and Pitfalls of the *Daniels* Decision

In Canadian law, since 1949 the Supreme Court serves as the final arbiter in matters of high importance. Its rulings shape future laws and legislation and they dictate how to interpret existing laws and documents, such as the Charter of Rights and Freedoms. Despite the Court's role as the final decider of legal uncertainty, its decisions still need to be examined and unpacked. Increasingly the Court is hearing more cases of Indigenous rights and Indigenous affairs that could have perhaps been solved with government negotiations, on a nation-to-nation basis. This is especially true for the Métis who have been denied even the simplest government sit-downs to negotiate their rights and recognition and have therefore needed to turn to the courts for relief (*R v. Powley*, *MMF v. Canada*). These cases reverberate into society, often in ways which were never intended. It is especially important for Indigenous peoples to continue criticizing the courts, their decisions, and their processes, using appreciative or critical evaluations where appropriate. This may help improve the outcomes of future decisions being made in a colonial institution, fraught with colonial values, which will have concrete effects on the lives of Indigenous peoples. This chapter seeks to critically examine the *Daniels* case from the Métis conceptual framework provided in Chapter 1, which differs significantly from the perspectives of those involved in deciding the *Daniels* matter. This chapter will be divided into two main parts. First, I will examine the *Daniels* question itself and the problems associated with the way the question was brought forth and the way it was phrased from the beginning. The second part will then delve into the *Daniels* decision and look at where the decision perpetuated problematic understandings of the Métis and Canadian history, Indigeneity, and Métis identity.

Before I begin my critique of the Daniels decision, I want to make a note on the criticism I will make, and where it is targeted. I understand that once the Daniels question made its way through the courts, judges and justices only had available information that was presented to them by parties involved. Therefore, when I criticize the decision, some of the criticism should be shared by those who framed the question as it is, and brought forth the type of evidence which they did. Additionally, I come to critique this decision less so for whether it is wrong or right, but rather to point out what Chris Anderson calls the “generative” power of the courts where “the dynamism of court struggles produces a form of ‘juridical capital’ that rather than directly constituting social relations or (re) producing a ‘grand hegemony,’ generates particular depictions and problemizations of social issues and classifications that can potentially shape the parameters within which subsequent political strategies and struggles ensure, but only upon their subsequent successful translation into those fields” (Andersen 63). He notes that we should understand courts as “a powerful actor in the broader field of juridical power – itself within a broader field of colonial power” which then “requires that we accord the courts with a function that is indirectly generative as opposed to directly constitutive” (Andersen 63). With this in mind, I plan to point out the ways in which the *Daniels* decision may not be itself wrong, meaning its analysis and its findings may not be flawed, but rather the ways in which the decision may cause unintended consequences for the Métis. I want to point out that, though the problem may be sourced either in the judges’ or claimants’ claims, *Daniels* has an unfortunately indistinct approach to defining and talking about the Métis, and Métis history which may cause further issues and challenges for the Métis’ pursuit of rights and recognition.

Problems with the *Daniels* Question

Is the Court the Best Remedy? Operating in a Western Legal System

The first main problem with the *Daniels* question, namely whether the Métis are considered to be 91(24) “Indians” and thus whether the Métis fall under federal jurisdiction, is the fact that this question is being answered within the Western legal system. In a best-case scenario, this matter should have never made its way to the Supreme Court and should have instead been resolved by having the government sit down and negotiate with the Métis. Unfortunately, the Métis were even denied a place at the table concerning many Crown-Indigenous conversations, as the federal government pointed to section 91(24) and told the Métis they had no jurisdiction over them. With this as an obstacle, the Métis had no other choice but to turn to the courts. The Supreme Court is increasingly hearing cases concerning Aboriginal people. From 2000 to 2004 the percentage of total Supreme Court cases involving Indigenous peoples rose from 4% to 16% (L Chartrand et al. 148-149). Despite these growing numbers, the Court may still not be welcoming of Indigenous perspectives or Indigenous legal traditions and may be neglecting to consider the perspective of Indigenous history. Still, some strides were made, such as in the landmark *Delgamuukw* Supreme Court ruling in 1997, which stated that oral sources should not be considered inferior to written ones, as court cases still rely heavily on colonial sources and missionary or early government officials’ retellings of history. The *Tsilhqot’in* decision also accommodated Indigenous stories, going as far as to extend court hours to accommodate for traditional storytelling procedures (*Tsilhqot’in* para 167).

While the courts are beginning to be more welcoming of Indigenous perspectives, an area in legal interpretation that is still lacking Indigenous representation is by the justices on the bench of the Supreme Court. This can perhaps be attributed to the fact there is no representation

of Indigenous peoples and thus Indigenous perspectives on the bench. The *Daniels* case was heard by courts with not one single Aboriginal judge or Justice, whether First Nations, Métis or Inuit. Unfortunately, there has never been an aboriginal justice to serve on Canada's Supreme Court to this day. Before his retirement, Justice Louis Lebel, the second longest-serving Justice, suggested that Canada make a stronger effort to appoint Aboriginal Justices (MacCharles). This is also something the Royal Commission on Aboriginal Peoples pressed for in its 1996 Report, when they suggested that a spot on the bench be reserved for an Aboriginal justice – a recommendation which was supported by the Canadian Bar Association and the Indigenous Bar Association (Cheeke note 16). Scholars have said that Aboriginal peoples need to be given extra consideration and involvement as founders of the Nation because without Aboriginal involvement in decision making at the Supreme Court, the Canadian courts will never be fully legitimate when ruling on Indigenous rights (see Hopkins and Peeling). Chartrand et al. also suggest that including at least one aboriginal justice will help in incorporating Indigenous values, beliefs and legal traditions, and help in achieving reconciliation within the current legal and constitutional realms (Chartrand et al. 151).

This suggestion has been met with pushback from government officials and Canadians who say having Aboriginal Justices would not be able to objectively answer questions pertaining to Aboriginal Peoples (Hopkins and Peeling 2). However, the same can be said about the current Court. According to Absolon and Willett, the objective does not exist since all research is conducted through “human epistemological lenses” (Brown and Strega 113). The same can be said about legal research and deliberation. The epistemological lens being relied on to interpret these decisions is not an Indigenous one, but from a Euro-Canadian western perspective and therefore is also inherently biased. Non-aboriginal justices may have a bias towards Aboriginal

Peoples, or a misunderstanding of Aboriginal identity (Hopkins and Peeling 2). This is one of the main problems with the *Daniels* case, as the Justices may have perpetuated incorrect understandings of Indigeneity and the Métis, as I will soon demonstrate. By having a Justice speak in a relational way, the Supreme Court would be achieving what Absolon and Willett have suggested in “claiming your personal space within your research and writing”, which they say, “counters objectivity and neutrality with subjectivity, credibility, accountability, and humanity” (Brown and Strega 113). The historical experts called to testify in these cases were all trained within the academy and likely operated from their western and non-Indigenous epistemological lenses. Instead, there should be larger efforts by all parties involved to include Indigenous academics who can evaluate and sort through historical evidence and speak to it from their own epistemological positioning as an Indigenous leader. Not only were there no Indigenous justices deciding the *Daniels* decision, but the historical experts called to testify in *Daniels*, though they were called by the parties involved, were also not Métis.

Aboriginal People, more than any other minority in Canada, should have representation on the bench of the Supreme Court because of their unique status as Canada’s First Peoples who have formed the bedrock of the country we have today. Instead, they have historically been left out of the debates during the time Canada entered confederation (Hopkins and Peeling 6). Having Aboriginal Justices on the Court is crucial in achieving reconciliation between Aboriginal Peoples and Canada, which is what this case strives for and what is at the center of current Aboriginal policy (Hopkins and Peeling 14). In its final report, the Truth and Reconciliation Commission (TRC) suggested that “Aboriginal peoples need to become the law’s architects and interpreters where it applies to their collective rights and interests” (TRC, “The Métis Experience” 51). The TRC said that “establishing respectful relationships also requires the

revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit, and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process” (TRC, “Reconciliation” 11-12). What better way to understand this, than to have someone who can speak from experience? It seems difficult to understand Métis or Indigenous ways of “resolving conflict and repairing [colonial] harm” if you’re debating a conversation about colonial harm without anyone who has been or whose ancestors have been colonized and who lives the effects of this every day. Only Aboriginal People who have suffered under colonial governments are in the position to ensure that court decisions are aware of these injustices and are thinking of the best path to ensure reconciliation. As Larry Chartrand *et al* suggest, having an Aboriginal justice who is also trained in Common law could take into account the perspective of the Indigenous peoples who for example, could be bringing forward a s. 31 complaint, while also ensuring the interpretation of the problem is congruent with common law (L Chartrand *et. al* 149-151). Furthermore, Aboriginal People are also the most likely to be able to educate the Court in Aboriginal perspectives and make sure that court debates do not further colonial ideas of Indigeneity (Hopkins and Peeling 18).

The lack of an Aboriginal Justice on the Supreme Court and therefore the lack of representation of an Indigenous perspective has in turn created a court decision fraught with colonial values, which relied on colonial sources as evidence, as I will later show. The *Daniels* case lacks in Métis perspectives, and the majority of the evidence considered was evidence produced by colonial and religious authorities. In his book, *Canada’s Indigenous Constitution*, John Borrows shares a quote from a Professor of law, Noel Lyon. Professor Lyon made a wise observation that unfortunately many Supreme Court Justices may never realize:

As I've listened to the Elders, I have begun to understand that what I've learned about Aboriginal peoples and their situation in Canada has largely come from written sources, from books, and there are a lot of things that were embedded in me in my legal education that I haven't overcome. The most important one, I think, is that law school indoctrinated me with the belief that the Crown is all-powerful, and I think that's a real problem, because I think legal education, it may not be that bad today, but I think there is a tendency to regard the Crown almost in the way that the First Nations people regard the Creator, as being the source of all things. And from that flows the proposition that the treaties are seen by the non-Aboriginal community as just another body of laws that define the status and rights of Aboriginal peoples, rather than seeing the treaties as a nation-to-nation partnership, inter-societal law... It had never occurred to me until Elder Crowe said this yesterday or the day before: that the right of the white people to be on this land is founded in the treaty (Borrows *Canada's Indigenous Constitution* 28).

Borrows uses Professor Lyon's words to point out the difference in the way a document such as a treaty is interpreted by someone trained in Western legal thought versus how an Indigenous person whose life is tangibly shaped by such a document, understands and interprets it.

Unfortunately, these two contradicting worldviews are apparent in the *Daniels* case, as I will later show. The Court may have failed to view some of these statutes, such as the Manitoba Act, or Métis' inclusion in s. 35, as bodies of law affecting Métis people and their descendants.

Professor Lyon also points out that from a legal perspective, we tend to regard the Crown almost in the way that the First Nations people regard the Creator, as being the source of all things. But,

as Borrows points out, “colonization is not a strong place to rest the foundation of Canadian law” (Borrows *Canada’s Indigenous Constitution* 14). Though as I will show, much of the *Daniels* opinion began from this point of understanding, as those deciding and even arguing *Daniels* regarded the framers of the Constitution almost as though they were interpreting the words of great leaders, paying homage and respecting their understandings of the Métis, Indigeneity, and the purpose of s. 91(24). This could have been different had there been an Indigenous justice on the Supreme Court. Perhaps then, after hearing an Indigenous perspective, other justices could have come to a similar realization as the one shared above.

A Constitutional Provision Doomed from the Start? The Colonial History Behind Section 91(24)

The first problem with attempting to redress this issue has to do with the constitutional provision in question. It was created in 1867 to provide the federal government with the exclusive jurisdiction over “Indians and lands reserved for the Indians”, which until the *Daniels* decision, has usually been interpreted to mean First Nations and then later, Inuit people. This has denied the Métis the opportunity to be included in important negotiations, discussions, and programs and policies for Indigenous peoples. It is important to note that s. 91(24) was not always used to foster discussions and negotiations, but rather was originally created with purposes to control and assimilate Indigenous peoples. As Stevenson (2004) points out, s. 91(24) has had a colonial history regarding Aboriginal peoples in Canada, and under such powers, the Crown has asserted its sovereignty over every aspect of Indigenous peoples’ lives and Indigenous peoples’ lands (Stevenson 302-306). Under s. 91(24) the government has enacted legislation such as the Indian Act, which has a long history of attempting to control and

assimilate Indigenous peoples and estrange them from their lands, spirituality and traditions (see Chapter 9 of the RCAP *Indian Act*). It is no surprise then, that many Métis individuals today worry that being included under s. 91(24) and under federal jurisdiction will translate into Indian Act-like government control and discrimination over the Métis (Adese, “A Tale of Two Constitutions” 18).

Discrimination or not, the entire nature of s. 91(24) has for a long time been interpreted by the government to signal a paternalistic relationship, where the government acts as the guardian and can legislate for Indigenous peoples who risk being viewed and treated as wards of the state. While in *Re Eskimo*, the question of inclusion under 91(24) was framed as a jurisdictional one, once the Inuit were included, it was used to enact assimilationist policies (Tester and Kulchyski 12). Section 91(24) at its basis says the government has jurisdiction *over* or *of* those included as “Indians”, thus there is no mention of a bilateral relationship, but rather the government creating policies and legislating for Indigenous people. Moreover, there is nothing within s. 91(24) that necessarily outlines or speaks of a nation-to-nation relationship that should exist between Indigenous people and the government. Larry Chartrand has suggested that, by bringing this action forward, the plaintiffs have stated that they are willing to give up their self-determination by allowing the federal government to exercise its unilateral governance over the Métis and Non-Status Indians (Chartrand, “The Failure of the Daniels Case” 182). Chartrand adds that believing the federal government can legislate unilaterally for Indigenous peoples is itself colonial thinking. Thus, one wonders whether this legal action will help the Métis pursue self-determination and develop a nation-to-nation relationship with Canada, or will it simply incorporate the Métis into a long-standing, paternalistic relationship that exists between the government and Indigenous peoples? Some scholars have pointed out that even when the Métis

were not understood to be part of s. 91(24), many Métis organizations already did engage in self-determination by offering similar programs for the betterment of their people as those offered by the federal government (Dubois and Saunders 193-197). Alternatively, Catherine Bell has suggested that the Métis can be better served if they pursue their agenda through the international arena (Stevenson 243). As the next chapter will examine, even since the release of *Daniels*, more monies have become available to the Métis to then disseminate as they wish. Although, when money comes from a source, are there certain expectations tied to it? Take the Indian Act for example, and monies received by First Nations. Is it truly self-government, when we consider all of the reporting requirements and the level of bureaucracy which the department of Indigenous Affairs imposes?

The other possible pitfall with s. 91(24) is that it has the potential to approach Indigenous issues from a pan-Indian understanding. Larry Chartrand cautions that the idea of “lumping all Indigenous nations into one category of ‘Indians’ is problematic because such a definition forces a unification of distinct societies and essentializes multiple nations and cultures into one uniform and artificial ethnic class” (Chartrand, “The Failure of the Daniels Case” 186). Unlike s. 35 of the *Constitution Act, 1982*, s. 91(24) does not differentiate between different Aboriginal groups, therefore there is no incentive for the government to tailor its programs to specifically address each Indigenous group’s unique needs (Chartrand, “The Failure of the Daniels Case” 186).⁴ Nonetheless, Daniels was an important first step in getting in the fictional door that is Ottawa.

⁴ Even though section 35 delineates between Métis, FN, and Inuit, there can still be some “lumping” as we know even First Nations differ so much from nation to nation.

Métis Identity Doomed from the Start? Drawing Similarities between Métis and Non-Status Indians

The *Daniels* case was brought forward by Harry Daniels and the Congress of Aboriginal Peoples (CAP) in 1999. The Congress of Aboriginal Peoples (CAP) was founded in 1971 as the Native Council of Canada to represent the Métis and Non-Status Indians who both lacked status as Indigenous under the eyes of the government and were often left out of government discussions and programs for Canada's Indigenous peoples. In 1983, the Métis Nation separated itself from the Native Council of Canada as it saw a need for a Métis specific voice. The Métis formed the Métis National Council which gets its mandate from the democratically elected leaders of provincial Métis organizations in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia (Métis National Council). The CAP continued to represent Métis and non-status Indians simultaneously, thus its motion was asking clarification as to whether the Métis, as well as Non-Status Indians, could be considered "Indian" under s. 91(24). As Jean and Carly Teillet highlight, the *Daniels* case was doomed from the start as the very first mistake was made on behalf of the Congress of Aboriginal Peoples, who brought this case forward with NSI and Métis *together* as plaintiffs (17). This required the courts to reflect on the similarity between these two groups. The Federal Court then logically found a similarity between these two groups' identities, saying that "Non-status Indians and Métis were differentiated from others in Canadian society, particularly Euro-Canadians, because of their connection to this racial classification" (*Daniels* FC para. 532). To say that both the Métis and NSI are connected to this notion of the Indian race is backward and wrong, because we know that race is no longer an appropriate means to measure Indigenous identity and should be rejected as the basis for determining inclusion under 91(24) (Teillet and Teillet). Another common feature between these two groups,

the Court found, was their “strong affinity for their Indian heritage without possessing Indian status” (*Daniels* FC para. 117). By wondering about the similarities between these two groups which has permitted their exclusion under 91(24), the trial judge then inadvertently makes a reference to race by making the connection that both groups are mixed, and as Métis and NSI’s “mixed” identities a result of that, both groups lost their status due to being “mixed” with European ancestry. This immediately gives the image of an Indigenous person being “diluted” and less Indigenous. This then marks the entire *Daniels* case with a conversation around both the.

The SCC’s connection between Métis and NSI went so far that they decided they did not need to differentiate between the Métis from NSI, saying that there is no need “to delineate which mixed-ancestry communities are Métis and which are NSI” (*Daniels* SCC para. 46). This is a clear ignorance of both groups’ unique political, social, and cultural differences, and demonstrates how the SCC still places race as an important indicator of Aboriginal identity. The Court in its opinion even uses the terms NSI and Métis interchangeably. When speaking about Non-status Indians, it stated that “some closely identify with their Indian heritage while others feel that the term Métis is more reflective of their mixed origins” (*Daniels* SCC 18). Fred Shore clearly summarizes why this happens, where people who are not Métis identify as such.

Groups like the Labrador Métis are not Métis. They are, in fact, First Nations, but they are not recognized as such by the Canadian government. Given the restrictions on “Indian,” Inuit and Métis in Section 35(1), their only way to access aboriginality is with the Métis part of the Section in question. There is no non-status “Indian” in Section 35(1), and Canada’s usual definition of the Métis as anyone with partial “Indian” ancestry, leaves the door open for them to access

Aboriginal recognition by this route. However, this does not make them Métis (Shore 123).

It is not that these individuals are not Indigenous, but that the easiest way for them to achieve some form of recognition is through claiming to be Métis, and unfortunately, passages like these by Courts will further this phenomenon. According to Brenda Macdougall, this definition of Métis is “overly simplistic when historically contextualized” (Macdougall 1-2). Non-Status Indians have ties to First-Nations, yet through colonial rules of registration within the Indian Act that still rely on blood, status can be lost within two generations of “marrying out” and these individuals get stripped of their status. As I demonstrated in Chapter 1, the process of “mixing” that lead to Métis ethnogenesis happened long ago. Métis people have ties to an ancestral Métis community or settlement and have *Métis* ancestors rather than some white and some First-Nations, as do Non-Status Indians (non-status Indians may not even have any Métis ancestry or ties to Métis homelands). While the Court was trying to steer clear from the issue of defining the Métis, it unwillingly perpetuates a phenomenon where “Métis” becomes the catch all term for people who have lost status due to colonial practices of ascribing Indigenous people status.

Even today some of the Congress of Aboriginal Peoples’ operations are slightly controversial, as they claim to represent communities in Quebec and out East, such as the “Alliance Autochtone du Quebec”, who then claim to represent the “Métis” in Quebec. Darryl Leroux writes that these Eastern Métis are engaging “settler self-indigenization” where they apply the “tactical use of long-ago ancestors to reimagine a “Métis” identity” which in turn “disregards the development of Métis peoplehood out West” (Leroux and Gaudry).

Problems with the *Daniels* Decision

While the *Daniels* question may have been slightly flawed before it could even be debated, the Métis would likely have remained in gridlock without this declaration, especially when we consider the history the Métis have had with inclusion under federal jurisdiction (surveyed in the previous chapter). While the Métis may not have had a choice but to turn to the courts, the Courts still had some agency in deciding the *Daniels* decision. This decision was initially celebrated for what it accomplished, yet, it is important to unpack how the Supreme Court came to their conclusion, and what exactly they said in their opinion. When I set out to write this thesis after my grandfather told me about this case, one of my main goals was to provide the public, my family, my friends, and my nation with accessible information regarding the case which they could then use to understand the tangible effects this decision would have on their lives. The role of academics engaged in legal research in part, involves providing interpretations of the court decisions which are not always transparent, as a very small percentage of people set out to read court opinions in their entirety (Chemerinsky 948-951). This next part will examine how the Court came to its decision and what they wrote about the Métis and the Constitution.

Moreover, I believe it to be my role to point out the Supreme Court's Eurocentrism and Western bias in deciding the *Daniels* case. Professors Scheb and Lyons have noted that very few people believe that ideology plays no role for judges when interpreting the Constitution. Chemerinsky points out that, "[t]he public realizes, even without sophisticated understanding, the key constitutional questions are unresolved by any external source, such as the text or the framers' intent, and that the Court is making value choices about how to interpret a very broadly worded document" (951). As such, in this next section I will point out how the Supreme Court

justices, as well as the judges involved in earlier *Daniels* opinions, have deliberately chosen to interpret the *Daniels* question in a way that furthers colonial perspectives and values. They may have masked it as “the framers’ intentions”, but I will show that their choice in constitutional interpretation has led to a cluster of misrepresentations and misunderstandings, of the Métis, of Indigeneity, and the federal government’s “Indian power”.

The Fork in the Road of Legal Interpretation: The Living Tree or Originalism?

As this case was brought forth in the western legal system, those deciding *Daniels* had to operate within the system’s rigidity. The Supreme Court has many options of legal interpretation that are available to them when questions of Constitutional interpretation arise. Two competing methods of constitutional interpretation are the Living Tree approach and the Originalist interpretation. First, the Originalist interpretation demands a conservative and rigid interpretation of the words of the Constitution. It requires viewing the Constitution as somewhat “frozen” from the time it was created (Miller 331). As its name specifies, under the Originalist approach the Constitution gets interpreted to maintain the original text, the original intentions, original understandings, and original values of the provision (Richard 336-339). In other words, the Court engages with the framers’ perspectives regarding the provision in question. An Originalist interpretation may also include a purposive approach, where the Court asks themselves what the was purpose underlying the provision at the time it was created (Miller 342-348).

This method of interpretation is at odds with the more modern Living Tree approach, which allows for a broader, more liberal and flexible interpretation of the Constitution. It views the Constitution as a Living Tree, which “accommodates and addresses the realities of modern

life” (Reference re. Same-sex Marriage 22). Chief Justice Beverly McLaughlin rejected an Originalist interpretation of the Constitution in the Same-Sex case, saying that “the ‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian Constitutional interpretation,” namely that the Constitution should be allowed to change as society progresses (Reference re. Same-Sex Marriage 22). While the Originalist approach focuses on its purpose at the time of enactment, a Living Tree approach focuses on a living, organic purpose that does not necessarily coincide with the original purpose of the provision (Miller 339-340).

In sum, the courts could have interpreted the *Daniels* question from a modern perspective, in line with present-day realities, or from the perspectives of the framers of the Constitution, pertaining to the goals of a newly formed Confederacy in 1867. They chose the latter despite the circumstances surrounding this case which would favour a Living Tree approach.

Choosing an Originalist Interpretation: The Colonial Agenda Prevails and Survives

Early in its *Daniels* opinion, the lower courts indicated that, “in the absence of any record of debates or discussions concerning this Indian Power”, they would try to uncover what the framers of the Constitution would have intended while drafting the word “Indian” (*Daniels* FC para. 24). As there were no records of what the framers meant by “Indian” in 1867, the Federal Court said it would “rely on how Canadian government officials interpreted this provision just before and for some period after Confederation to give context and meaning to the words of s. 91(24)”, thus giving a clear indication of its choice to implement the Originalist approach (*Daniels* FC para. 24). Furthermore, the Supreme Court stated it would work with the original

purposes behind s. 91(24) and the overall Constitution to determine the *Daniels* question when it opined that “the purpose of s. 91(24) was closely related to the expansionist goals of Confederation” such as “expanding the country across the west” and “building a national railway” (*Daniels* SCC para. 4), and “to eventually civilize and assimilate Native peoples” (*Daniels* SCC para. 5).

Times have changed since 1867 regarding Crown-Aboriginal relations, and Canada should no longer use its jurisdiction over “Indians” to assimilate and control Indigenous people. Additionally, we should be critical, even in retellings of history, of goals of expansion that perpetuate the “manifest destiny” ideas assumed by government officials that viewed no other future for Canada but for it to expand out West and take over Indigenous lands in the process. Rather, Canada should be using its jurisdiction in the modern-day, to engage with Indigenous peoples on a nation-to-nation basis, to promote Indigenous peoples’ rights, and to work towards reconciliation. Hiding behind a western legal doctrine of “originalism”, the Court was able to rely on such outdated principles, which as I will point out in the following sections, has inflicted all sorts of problematic understandings within the *Daniels* rationale. Métis legal scholar Larry Chartrand has found that the proper approach in *Daniels* would have been to interpret this question from a Living Tree approach, to “be consistent with contemporary human rights values and principles” (Chartrand *The Failure of the Daniels Case* 185). Unfortunately, by choosing the Originalist method, the Court has demonstrated its loyalty to the framers of the Constitution.

Colonial Voices and Colonial Perspectives

Edward Saïd has asked “Who writes? For whom is the writing being done? In what circumstances?” (L. Smith 37). Linda Tihuwai Smith in her ground-breaking work *Indigenous*

Methodologies provides some rather grim answers to this question, as she suggests that “history is also about power. In fact, history is mostly about power. It is the story of the powerful and how they became powerful, and then how they use their power to keep them in positions in which they can continue to dominate others” (L. Smith 34). By presenting the voices of early Euro-Canadian officials, the history presented and relied on in *Daniels* is all about the colonialists and how they exerted their power over the Indigenous peoples of Turtle Island.

With its originalist approach, the Court placed an overwhelming amount of weight on Euro-Canadians’ perspectives of history and of the Métis during colonial times. The *Daniels* trial relied on 800 pieces of evidence contained within 15,000 documents (*Daniels* FC para. 70), most of which were speeches or archival records made by government officials, fathers of the Confederation, priests and missionaries, as well as legal statutes, treaties, acts of legislation, and past Supreme Court rulings. These types of sources do not present the voice of the Métis, but rather the voice and interpretation of white Euro-Canadian colonialists.

Some of the only Métis voices and perspectives presented in the *Daniels* hearing are found within archival evidence. Although, these exhibits typically represent Métis voices from the past which have been reinterpreted by Europeans and Canadian officials. For example, the trial judge quoted a speech by Sir John A. MacDonald made in the House of Commons in July of 1885, who said “The half breeds did not allow themselves to be Indians” (*Daniels* FC para. 413). While this seems to be a clear indication of what the Métis thought of themselves, this is simply a representation of the Métis’ voice and thought through a government official. It also disregards some of the realities the Métis needed to consider in making such statements, like the fact that being considered Indian at this time would likely mean facing many discriminations by government and peers, and the Métis had to survive in such a discriminative environment. An

expert witness in the *Daniels* trial testified that many Métis chose to distinguish themselves from the Indians because, according to government thought of the era, “the closer you were to being considered white, the higher you were on the social scale” (*Daniels* FC para. 377). By highlighting these colonists’ perspectives, the courts further perpetuate a history that chooses to be blind to colonial oppression, which would have influenced such assertions from the Métis, and where it is acknowledged, it is still used as the foundation from which to build new laws. With so few Métis voices presented throughout the *Daniels* trial, the Métis simply become what Francis Jennings calls, “participants in the white man’s history” that is being told in the *Daniels* case (29). It is not that this particular expert testimony is wrong. In fact, many Métis people themselves, being aware of this social ladder, played upon their own identities and likely the government’s understanding of the Métis as “mixed” in order to succeed economically. Nicole St-Onge and Carolyn Podruchny provide many examples of Métis leaders who moved in and out of Indigenous identities. For example, they share the story of Johnny Grant, a Métis individual who they say throughout his life, “fluctuated among a variety of identifications, including Euro-Canadian, Métis and Indian, depending on which was most economically and socially advantageous” (St-Onge et al. 79). The problem is that the *Daniels* case relied on colonialists’ perspectives of the Métis.

In choosing to retell a Euro-Canadian history, it is clear whose perspectives the courts relied upon. James Blaut, in his study *The Colonizer’s Model of the World*, writes about our presumed preference and un-censoring of all western knowledge as he describes eurocentrism as “a set of beliefs that are statements about empirical reality, statements educated, and usually unprejudiced Europeans accept as true, as propositions supported by ‘the facts’” (Blaut 9). In regurgitating and not questioning such a colonial history, the *Daniels* decision perpetuates

colonial narratives and is based on Eurocentric beliefs, and therefore, it has put forth a “colonizer’s model of the world,” or more precisely, early Canadian colonial model of Canada (Blaut 10). What happens then, when you test Indigenous peoples’ rights in court against this type of colonial history? This next section will demonstrate the negative consequences that accompany this type of legal interpretation.

Colonial Values and Colonial Goals

As the Supreme Court chose to implement an Originalist interpretation, the Court grappled with the original intentions of the framers as they were when they drafted s. 91(24) in 1867. The Court stated that the purposes of s. 91(24) were originally to expand the country out West (*Daniels* SCC para. 4), and thus, to be able to deal with Indigenous peoples who already inhabited these lands. In their words, 91(24) would serve to “control Native people and communities where necessary to facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain . . . [and] eventually to civilize and assimilate Native people” (*Daniels* SCC para. 5). The Supreme Court then found evidence to show that the federal government would have wanted to include the Métis as “Indians” as the Métis had already blocked government surveyors from entering their lands in the process of opening them up for settlement, and therefore, could have presented an obstacle to Canadian westward expansion (*Daniels* SCC para. 25). Moreover, the Court found that “with jurisdiction over Aboriginal peoples, the new federal government could ‘protect the railway from attack’” from the Métis (*Daniels* SCC para. 24).

Contained within this historical evidence used by the Supreme Court to come to their conclusion that the Métis are 91(24) “Indians”, are two problematic narrative assumptions often

told in Euro-Canadian history. First is the idea of the savage Indian needing to be tamed and controlled by a colonial entity who will, in turn, enlighten the “Indians” by bringing them “the gift of civilization” (Blaut 6). What was not mentioned while recounting such history is that if the Métis chose to prevent the construction of a railway, such protests would have been well-calculated demonstrations by the Métis to protect their land from encroachment by the colonial state. The decision is thus problematic as it perpetuates these colonial narratives – and fails to account for the power of the Métis at the time. Instead of recognizing this, the decision perpetuates what Joyce Green describes as the “repetition of historical accounts that are partial and exclusionary; in the carefully maintained incomprehension at Indigenous nations' resistance to assimilation and struggle for self-determination” (Green para. 20).

The next problematic assumption that often accompanies such historical narratives is the assumed inevitability of Canadian expansion out West. Emma LaRocque describes this as “peopling the West,” which the colonizers saw as an inevitable and benevolent gesture on their part (LaRocque 44). This account of colonial history is in line with the colonial theory of the “myth of emptiness” articulated by Blaut, where colonizers view a non-European region as barren land, which may include inhabitants, though they are nomadic and therefore from a western perspective, they are not utilizing their resources properly (Blaut 15). This idea completely overlooks the fact that Indigenous people already inhabited these lands and did use the resources available to them in a highly sophisticated way and that many Indigenous peoples were displaced in the name of colonialism⁵. While it is true that expansion out west would have been a goal of the Confederacy in 1867, we now know the destructive impacts this objective has

⁵ See Jennings' Chapter 5 where Jennings destroys the myth that “Indians” were savage and therefore, unable to properly use the land; a myth invented by the colonizer for its own benefit.

had on Indigenous peoples and the Métis, and we know that today, s. 91(24) has very contradicting goals relating to Indigenous peoples. This means that a modern decision interpreting the Constitution has potentially re-legitimized these racist and colonial goals.

Furthermore, the Court suggested that the framers would have also utilized their s. 91(24) powers in attempts to assimilate the Métis (*Daniels FC* para. 151, 278, 353, 567; *Daniels SC* para. 5). For example, the Court highlighted that the federal government exercised its jurisdiction over the Métis as s. 91(24) “Indians,” to control the sales of “intoxicating liquors” to the Métis who were causing problems in their inebriated state (*Daniels SCC* para. 27). This piece of evidence evokes the image of the “savage Indian” which plays upon the “civ/sav” dichotomy, a term coined by LaRocque which she describes as “an ideological container for the systematic construction of self-confirming ‘evidence’ that Natives were savages who ‘inevitably’ had to yield to the superior powers of civilization as carried forward by Euro-Canadian civilizers” (LaRocque 37-38). Indeed, the Federal Court proved that it interpreted Indian identity along a civ/sav dichotomy when it said, “the dichotomy between Indian/Half-breed and Whites, between civilized and uncivilized/savage was further complicated by the varying degrees of civilized behaviors or ways of life practiced by the Indian/Half-breeds”. The Court then goes on to list evidence of the Métis as not-quite “civilized”, yet not-entirely “savage” either (*Daniels FC* para. 380). Within this list (originally brought to them by a frequently used expert historical witness Alexander Von Germet), the Federal Court Judge chose to highlight that “in a typically 19th-century comment, Alexander Ross said that some Métis are respectable in their habits while others are as ‘improvident as the savages themselves’” (*Daniels FC* para. 380). Such statements made by colonial officials that perpetuate the idea of Indigenous peoples as savage and inferior should only be brought forward if they are being criticized: not to be used to decide a modern-

day court decision, which will significantly impact the modern Métis nation. Commenting on the *Daniels* decision, Larry Chartrand has suggested that “the objective of ‘civilization’ is no longer acceptable in a society that realizes that Indigenous societies were far from uncivilized” (Chartrand, “The Failure of the Daniels Case” 185) and should therefore not form the basis of lawmaking. Moreover, as Francis Jennings has explained, the “civilized/uncivilized distinction is a moral sanction, not a set of traits” (8), and such a determination was never an objective “standard of measurement” (8) which relied on “empirical data” (10) but was rather a political and self-serving distinction. Therefore, if the distinction of civilized/savage was never made on facts but rather determined by the government to serve its own political ambitions at the time being, it is even more unsettling for such distinctions to serve as the foundation from which to interpret the Constitution and build a modern court decision. As John Borrows has clearly expressed, “colonization is not a strong place to rest the foundation of Canadian law” (Borrows *Canada’s Indigenous Constitution* 14).

While s. 91(24) may have been drafted to give the government the power to expand the new Confederation out West and assimilate and control the Indians in 1867, these goals are no longer compatible with Indian policy today and such values should have no place in our legal institutions. In portraying history, Green says the way forward is by “facing up to the colonial past, in taking responsibility for it” which she says, “means owning all of our history, rather than perpetuating the myth of white settlers creating civilization in uncharted wilderness” (Green, para. 62). Perhaps there is a place and time to bring up the colonial perspectives of early Canadian history and theorize with the motives, thoughts, and desires of settlers, but only if we wish to learn from such history and not simply perpetuate its myths. We certainly should not use

such accounts of history and values as the basis of modern-day legal analysis. As Glen Coulthard remarks,

Over the last forty years Indigenous peoples have become incredibly skilled at participating in the Canadian legal and political practices... however, our efforts to engage these discursive and institutional spaces to secure recognition of our rights have not only failed, but have instead served to subtly reproduce the forms of racist, sexist, economic, and political configurations of power that we initially sought, through our engagements and negotiations with the state, to challenge (Coulthard *Red Skin, White Mask* 179).

Unfortunately, this seems to be the case for the Métis regarding the *Daniels* decision which, in the process of seeking to secure Métis rights through a colonial institution, has reproduced even without question, problematic 1867 colonial thought. While the Métis were engaging with the Canadian legal system to better themselves, along the way archaic colonial values, goals, and understandings of Indigeneity have been upheld and given too much standing in modern legal analysis.

Section 91(24) as Creating a Racial Classification Among Canadians

Among the old colonial thought that was reproduced was the understanding that s. 91(24) created a racial classification among Canadians. This began in the Federal Court, where Justice Phelan quoted the *Canard* decision saying that Justice Beetz recognized that the s. 91(24) “creates a racial classification and refers to a racial group” (*Daniels* FC para. 114). As Catherine Bell has written, there should be no room for a racialized understanding of the provision in a progressive constitutional interpretation: “Given the role of constitutional law in reflecting and

shaping national values to guide Canadian society, race-based analysis grounded in colonial relationships and objectives of assimilation should no longer play a role in progressive and purposive interpretation of sec 91(24)” (C. Bell, “The Practical Implications” 232). Nevertheless, the race-based interpretation was carried forward even by the Supreme Court, who further supported an understanding of s.91(24) as a racial demarcation between Canadians, when it too cites *Canard* saying that “*Canard* shows that intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24)” (*Daniels* SCC para. 41). With this statement, the Supreme Court is treading a fine line where it seems to be suggesting that the Métis can be included under a racial classification among Canadians, *even though they are mixed*, because they still possess some degree of Indian blood. This appears as though the Court is suggesting that, just because a Métis person is mixed, we will *still* allow you to be part of this category, as you still have *some* degree of Indian blood. In *Canard*, the Court has explicitly proven Andersen’s point that with an understanding of Métis as mixed, the Métis are only allowed into this category because of the part of them that is Indigenous and as such, appear as less Indigenous than others. This shows that, despite the perceived success of the *Daniels* decision, further analysis reveals that the Métis are yet again included not for who they are but only because of a part of their racial identity. This method of including the Métis in a category of Indigeneity that is racialized is also often referred to as “trace theory”, where the Métis achieve rights and recognition because of their Indian Ancestry, traced back many generations, and not because of their Métis ancestors (*Chartrand The Definition of Métis people in Sec 35(2)* 228).

Defining the Métis as “Mixed”

With an understanding of Canada’s “Indian power” as creating a racial category among Canadians, paired with the Supreme Court articulating that, despite the Métis having “mixed ancestry” or having “intermarried” (SCC para 41), the conversation about Métis identity that inevitably followed viewed the Métis as racially “mixed”. In other words, after the Court puts forward an understanding of s. 91(24) as a racial classification, it needs to justify the inclusion of Métis in this category. How does the Court do this? By highlighting ways in which the Métis’ mixedness allows them to be included. Firstly, there are many linguistic references in the SCC’s opinion to the Métis being considered “mixed”. For example, the SCC’s *Daniels* opinion is full of references to Métis’ “Mixedness”, with words such as “half breed”, “mixed communities”, and “mixed people” (*Daniels* SCC Intro, 17, 18). Jean and Carly Teillet explain the detriment in referring to the Métis as half-breeds. They quote Frantz Fanon who has said that “we don’t breed humans; we breed animals”, therefore the application of the term half-breed, especially used today, suggests that a person is half animal (Teillet and Teillet 6). Jennifer Adese too writes that “It is my contention that the utilization of the term “Half-breed” cannot be understood as anything but derogatory, as was (and is) the entire process of “administering Indians” (Adese “R” is for Métis 206). For the Métis, the use of “mixed” or “half breed” is especially problematic as they already have to constantly battle misconceptions of their identity as mixed or as less Indigenous than other recognized Indigenous groups. By using the language of “mixed” in its opinion, the SCC works to legitimize this notion of the Métis as mixed. Margaret Kovach explains that “language matters because it holds within it a people’s worldview” (Kovach 59). Here, however, the worldview expressed is that of the colonizers or the western world. Therefore, it is important to consider how the Métis chose to refer to themselves. The Métis

chose the term “Métis” rather than half breeds as a better depiction of themselves as a people. Louis Riel himself stated that this term was more appropriate as it placed less emphasis on the degree of Indian blood present in a Métis person (Teillet and Teillet 5). The Supreme Court should have thought about the importance of language in its opinion, and refrained from speaking about the Métis as mixed, unless it was to correct historical assumptions. Fred Shore too has written that such terms (half-breed or mixed-bloods) “are based in the belief of racial superiority held by Europeans. They should never have been used to refer to human beings” (Shore 12).

Additionally, the SCC stated that it understands how “Métis” can mean two different peoples, one of which reduces the Métis to nothing more than “mixed”, or part Indian, part white. In Justice Abella’s opinion she wrote that, “there is no consensus on who is considered Métis or a non-status Indian, nor need there be. Cultural and ethnic labels do not lend themselves to neat boundaries. ‘Métis’ can refer to the historic Métis community in Manitoba’s Red River Settlement or it can be used as a general term for anyone with mixed European and Aboriginal heritage. Some mixed-ancestry communities identify as Métis, others as Indian” (*Daniels* SCC para. 17). Not only does this understanding of Métis as mixed reduce the Métis to being only part indigenous and therefore less indigenous, but this definition of Métis can even be used to refer to people who may have never identified as Métis or even Indigenous. As Fred Shore demonstrates, some mixed-ancestry communities were fully taken into the dominant culture, either French or First Nations (Shore 27). The source of this problem, as mentioned earlier, was that the plaintiff was the CAP, which represents both Métis and NSI. Also, as mentioned earlier, some NSI will use the term “Métis” to define themselves, when they are not Métis, but rather trying to gain recognition the best way they deem fit. By reproducing these narratives, the court perhaps

legitimizes a racialization of Indigenous identity, and the use of “Métis”, for anyone with “mixed” ancestry, and the term “Métis” again becomes the term used for any Indigenous people who, through colonial practices, have lost recognition.

This definition of Métis as mixed is not only problematic for how the Métis are understood (or questioned) as Indigenous by others, but it already has had tangible effects in Canadian society with people making false claims to Métis identity. By stating that the Métis could include “all those with mixed blood”, the Court has opened the floodgates to have many more Canadians identify as Métis (Gaudry and Andersen 23, Vowel and Leroux 33). In fact, in 1978, the federal government established the Consultative Group on Métis and Non-status Indians’ Socioeconomic Development, which highlighted in its report that if we were to equate Métis and NSI to all Canadians with some degree of Aboriginal ancestry, the number of Métis and NSI would be in the millions (Appellant’s Factum 13-14). All these individuals cannot be Métis, as Métis identity is much more than Indigenous ancestry, as I have shown in Chapter 1. Since the release of the SCC’s *Daniels* decision, this seems to be what is happening as the number of people using the label of Métis is growing as many people with distant indigenous relatives are now claiming to be Indigenous. For example, the newly formed Mikinak nation of Quebec exemplifies this trend. The group was founded in December 2015 and accepts as members anyone who can prove a genealogical connection to at least one Aboriginal ancestor in their past, even if all of these peoples’ Indigenous ancestors may have come from completely different nations and have had no kinship ties to one another (Andersen and Gaudry 26). The groups’ “chief” called people to submit their applications by stating “even if it’s eight generations back, that’s OK. The most important thing is that you feel it inside you” (Hamilton 2016).

These groups are echoing the Court's findings, that “Métis” or “Indigenous” can mean as little as being “mixed”. Jean and Carly Teillet too, worry that “in defining Métis in a manner that would include anyone with a drop of Indian blood, Phelan J potentially creates a Métis out of a person who may not self-identify as Métis, may not be considered Métis by a Métis community, and may have no ancestral ties to a Métis community” (18). The Supreme Court seems to have completely ignored the political, social, cultural, and linguistic markers of Métisness, and instead, has reduced it to something it works hard combatting: the idea that Métis can simply mean mixed-race. The law firm, Pape Salter Teillet, said it bluntly in a release on the *Daniels* decision when it stated that:

The Métis Nation, whose communities have established Métis harvesting rights in *Powley* as well as other cases from Ontario westward, cannot be defined for the purposes of s. 91(24) based on their “Indian ancestry” or “strong affinity for their Indian heritage” because they don’t have any. The members of these communities have Métis ancestry and an affinity to their Métis heritage. Clearly, while the Trial Judge’s definition may work for non-status Indians, it is incompatible with *Powley* and the realities of the only known Métis ‘people’ in Canada – the Métis Nation” (“Plainspeak on the Daniels Case 7).

The reason *Daniels* is incompatible with *Powley*, or rather ignores the good work laid out in *Powley*, is that it does not go far enough to define a Métis person as having a connection to a Métis historical community, as *Powley* did, and instead says a Métis person can be someone who is simply “mixed”. Though the courts in *Powley* were seemingly catching on to the fact that the Métis can finally be considered Indigenous through their own right, the *Daniels* case seems to have taken a few steps back by defining the Métis through their connection to “Indians”. Again,

it seems as though the Métis only gain recognition into this category through what is reminiscent of trace theory. The SCC failed to see that mixed blood does not mean Métis just as full blood does not mean Indian (Macdougall 4).

Rejection of What is at the Core of Métis Identity

Not only has the Court allowed for groups with no ties to historic Métis communities to see themselves in this ruling and to then feel it is acceptable to make claims to being Métis, but the Supreme Court has also deemed it unnecessary for an individual to be accepted in a Métis community to fall under s. 91(24) jurisdiction (*Daniels* SCC para. 49). Jean and Carly Teillet argue against viewing Aboriginal people as a race, but rather as a collective (3). As a matter of fact, community is at the heart of what founded the Métis as a people. It is what made them different from their First Nations ancestors and their European ancestors, as Métis communities were marked by a bridging of certain aspects of Indian culture, language, practices, as well as certain aspects of European life (Teillet “Métis law” 1-2), which resulted in the organic birth of Métis communities and eventually, their own political organizations (Weinstein 3). These communities then banded together and asserted themselves as a nation before the Crown. Andersen rejects a racial definition of the Métis and instead defines the Métis through an events-based approach, where he highlights important events where the Métis have had to band together in resistance against colonial oppression, such as the Battle of Seven Oaks, to demonstrate the formation of Métis nationalism and Métis political identity (see Andersen 91-132).

The SCC stated that, unlike the test for determining Métis identity in *Powley*, community acceptance will play not factor in determining who are s. 91(24) Métis (*Daniels* SCC para. 47). Therefore, not only did the SCC make it clear that it viewed Métis identity as a racial identity,

but the Court further chooses to not consider a definition of a Métis individual belonging to a Métis community or Métis organization, whether historical or contemporary. The Supreme Court's reasoning behind this was logical and perhaps even decolonizing in its rationale, as the court wanted to make sure that even if someone's ties to their community were severed due to colonial policies such as residential schools, they would not be left out of important social programs (*Daniels* SCC para. 49) . While the courts intentions were good and practical, the court may have “disregarded generations of political practice” of Métis people being accepted into a Métis community (Andersen and Gaudry 28).

Belonging to a nation continues to play a critical role in defining Métis identity, both in the courts and in many Métis organizations' definitions of themselves. Métis organizations already have set their own criteria for membership, and most of them do rely on community acceptance as a crucial factor to determine who is Métis. The Métis National Council, for example, adopted this definition of Métis in 2002, “*Métis*” means 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.” In thinking about who are the Métis, the parties involved in the Daniels question could have turned to International law and looked at the UNDRIP to realize that first, Indigenous identity is a political identity and not one based on race (UNDRIP Annex, p. 2, Articles 3,4,5). The Court could have also followed the UN's recommendation to decide to leave it up to the Métis to define their own identities (UNDRIP article 33). The SCC has already listed community acceptance as a criterion in determining who is Métis for the purposes of establishing s. 35 rights (*R. v. Powley*). The *Daniels* Court recognized this but said it would not deny Métis inclusion under 91(24) as it served a different purpose (*Daniels* SCC para. 49). Jean Teillet and

Jason Madden argue that Canada's constitutional responsibility to Indigenous peoples has always been about dealing with Aboriginal collectives:

The fundamental principle that the Crown's obligations and responsibilities are owing to Aboriginal collectives (not simply individuals) dates back to the *Royal Proclamation, 1763*. This principle has been a constant in Canada's ongoing history with Aboriginal peoples. It was reaffirmed in 1982 with s. 35 of the *Constitution Act, 1982*. It has been central to the decisions of the Supreme Court of Canada over the last fifty years. While it is acknowledged that different parts of Canada's Constitution do not need to have the same meaning, we do not believe that one of the fundamental tenets of Crown-Aboriginal relations (that Canada's constitutional obligations are owed to Aboriginal collectives) can be discarded in defining the Métis for the purposes of s. 91(24). ("Plainspeak on the Daniels Case").

So why include community acceptance for s. 35 rights, but not for the federal government's jurisdiction over Métis? The Court should have upheld Métis communities' right to set their own community parameters, especially seeing as parliament is not equipped to determine who is and is not Métis. Does this mean then that parliament can create laws for people who are not accepted by the Métis nation as Métis, and then people who may have no valid claim to being Métis may be able to take advantage of programs and services created for the Métis? Does this mean that "proving" the burden of Aboriginal rights under s. 35 requires community acceptance, yet more than just the Métis Nation will be able to reap the benefits of future programs created by the government for the Métis, under its s. 91(24) powers? Jean Teillet and Jason Madden suggests that even though s. 91(24) and s. 35 deal with very different aspects, the judges'

definition of Métis for the purposes of 91(24) is not compatible with Powley, which should have had a binding authority on the Court (Plainspeak on Daniels 6). Furthermore, the Supreme Court has already ruled in R v. Sparrow that s. 35 and s. 91(24) must be read together. As the Supreme Court already established belonging to a historic and contemporary Métis community as defining s. 35 rights-bearing Métis, it is inconsistent for the Daniels Court to deny this significant development in s. 35.

Looking for Métis' "Indianess"

Another major issue with the *Daniels* opinion is the Court's obsession with looking to see how the Métis fit the stereotypical and often negative and archaic image of an "Indian". Due to its understanding of the Métis as mixed and by understanding s. 91(24) as a racial classification, the Court needed to find ways to allow the Métis to fit within this definition. With a racial understanding of Métis, the most logical way to include the Métis who are thought of as mixed, was to highlight the part of them that is "Indian" and therefore allows them to fit within s. 91(24) as a racial classification, as I will show. I want to point out as Chris Andersen has already done, that racial understandings of Indigeneity do not only involve phenotypical but also cultural differences, saying that, "additional cultural differences - food, language, religion, lifestyle, and even moral comportment - have all contributed to the complexity of practices of racialization at various times, singularly and in combination" (Andersen 35). The courts made this mistake when they were searching for Métis behavior throughout history that was congruent with stereotypically "Indian" behavior. Instead of being an evaluation of the Métis' unique cultural and political aspects that make them Indigenous, the Court began to highlight ways in which the Métis resembled "Indians", in the sense of negative stereotypes put forth during colonial Indian

policy. The Supreme Court then pointed out the fact that Métis also would have needed to be assimilated, suggesting that Métis also went to residential school like the Indians, as there would have been a need to assimilate them into greater Canadian society (*Daniels* SCC para. 28-30). Moreover, the SCC relied on the fact that many Métis lived on reserves like the Indians (*Daniels* SCC para. 31). Some Métis even lived on a “reserve” specifically created for the Métis, called St-Paul de Métis (*Daniels* SCC para. 29). By highlighting this type of evidence, the Court is clearly missing the point of who is Métis, instead, trying to match “Métis” with negative assumptions and stereotypical understandings of “Indian”.

The problem with highlighting this as evidence is that it is looking for the interdependence of the definition of Métis and Indian. This is not a new phenomenon for the Métis, who are often talked about in parallel terms to “Indians,” and compared to them, whether to point out their differences or in this case, their similarities. Brenda Gunn explains that “continued emphasis on Métis culture in opposition to Indian culture limits understanding Métis as a people because the gaze is not turned inward” (Gunn 439). I would add that also understanding Métis culture in relation to Indian culture essentially creates the same problem, by also limiting our understanding of the Métis as a unique Indigenous people because we are still focusing on what is Indian and not what is Métis. She adds that “the problem with the use of ‘Métis not Indian’ reiterates that one cannot know who is Métis without knowing who is Indian” (Gunn 446). The same problems exist when we try to match an understanding of Métis with an understanding of Indian. Here, the Court shows that it understands Indian as someone needing to be assimilated, or controlled, and then goes on to show how the Métis, like the Indians, also needed to be assimilated and controlled (*Daniels* SCC para. 25-27). Conversations like these seem inappropriate in modern day Court decisions.

The Supreme Court opinion further proves the detriment in defining Métis in relation to Indian, as it not only fails to properly understand what is “Métis”, the Court also mischaracterizes an “Indian”- even in a historical context. The opinion puts forth and understanding of “Indianess” that is synonymous with backwards and in need of civilization. For example, by highlighting the Métis’ inclusion under s. 91(24) because the Crown would have needed to prevent any Métis rebellions as it expanded further west (*Daniels* SCC para. 25-26), the Court says it understands “Indianess” to be more in line with “savage”. This evokes the image of the “savage” and violent “Indian”, by not sympathizing with the Métis’ fight against the encroachment of their land. LaRocque points to this double standard, saying it was okay for whites or settlers to act in violence and warfare, they were still ascribed positive traits, but meanwhile “Native people were not allowed the right to defend themselves” (49-50). The decision completely fails to account for the fact that the Métis were not rebelling, but rather resisting. Furthermore, by highlighting the Métis’ inclusion in a statute from the Indian Act which meant to prevent sales of intoxicating liquors to the Métis (*Daniels* SCC para. 27), the Supreme Court further entrenched another variation of the image of the savage “Indian”, namely the “drunken Indian”. Jean and Carly Teillet explain how the “Indianess” that the courts are in search of is a legal construct, created by the courts in order to verify Indigenous peoples’ claims to Indigenous rights (17). Therefore, defining the Métis in terms of their “Indianess” is not only wrong because it is not a correct representation of “Métis”, it is not even a correct representation of “Indian” or Indigeneity. Rather, the Daniels decision has simply reiterated negative stereotypes of what constitutes “Indianess”, and even used such stereotypes as the basis to create modern law.

Before becoming a legal construct, “Indianess” has long been a social construct, created by the colonizers from their western-oriented perspective and understanding of Indigenous peoples to serve a benefit their agenda. Robert Williams in his book *Savage Anxieties: The Invention of the Western Civilization* traces the understanding of Indigenous Peoples as savage and backward, as it becomes used to justify violence, assimilation and discrimination towards Indigenous Peoples (Williams). Jennings too has traced the origin of this “differing”, but to the Irishmen and Englishmen, and suggests that “the difference was political and no more” (Jennings 7). Today, we have come to internalize our obsessions with viewing Indigenous Peoples as different (Williams 223). This understanding of Indigenous Peoples as inherently different than the West has become a social construct in Canadian society at large. Therefore, when Indigenous Peoples are not totally different from western society, their claims to Indigeneity are questioned. Because the Métis blended certain aspects of an apparent “civilized” European society and of the supposedly contrasting backward Indigenous societies, viewing them as fully Indigenous under this definition of Indian is all the more difficult. This is because, instead of being viewed as civilized or savage, the Métis are understood as mixed and are thus viewed as half-savage or half-civilized, excluding them from either side of this binary (Teillet “Métis Law” 1-5). In other words, the Métis have historically shared many similarities to the “civilized” European society and continue to do so today, therefore making them not entirely different from those who created these categories of difference. In *Daniels*, the courts are desperately looking for the Métis’ “Indianess”, which they understand as being in clear opposition or contrast to western customs and civilization, which they then used to justify their inclusion under 91(24). Thus, the Court places itself in a position where it has to highlight instances where the Métis resemble this myth of the Indian as different than Euro-Canadians. Defining the Métis in terms of their “Indianess”

in the court system can have greater ramifications among Canadian society at large by legitimizing the social construct of “Indian” as the other, as backwards, uncivilized, and savage. This is especially problematic for the Métis, who may not have seemed completely different from western society even in the 1800s and today are phenotypically and culturally not necessarily different from Euro-Canadians as well.

Not only can a Supreme Court decision based on highlighting Métis’ Indianess work to legitimize a certain expectation of Indigeneity, but it can also become internalized by Métis peoples themselves, since Indigenous peoples often define themselves as a response to government expectations of what is Indian (Sawchuck 73). For example, the Manitoba Métis Federation changed its definition to include the Dominion Lands Act and Manitoba Act in the 2000s because it started pursuing a big land claims case (Sawchuck 78). While this is likely a creative response from Indigenous nations seeking to further their rights, it is important to note that these court decisions are not made in a vacuum and will have real impacts on Indigenous peoples who are trying to survive and better themselves in a western legal and political system.

Conclusion

Instead of viewing 91(24) as a racial classification and viewing the Métis as mixed, the Supreme Court could have echoed Métis organizations’ definitions of “Métis”. For example, the Métis Nation of Canada says the Métis are a unique people, who emerged out of historical and political circumstances (Stevenson 241). Yet the SCC relied an originalist interpretation of the *Daniels* question, thus, it is no wonder its opinion contained so many references to race, to the Métis as mixed, and to s. 91(24) as a racial classification. In turn, this has thrown us back into 19th-century colonial thought about Indigenous Peoples and back to Confederationist,

assimilationist, and expansionist goals. Such goals should not serve as the bedrock from which to build a modern court decision which is meant to foster a nation-to-nation relationship between the federal government and the Métis. How can a decision built on such a shaky foundation benefit the Métis and usher in genuine reconciliation for the Métis? John Borrows has noted, "when you build a structure on an unstable base, you risk harming all who depend on it for security and protection" (Borrows *Canada's Indigenous Constitution* 101). When cases of Indigenous rights or recognition are built upon such a colonial foundation, how can Indigenous people decolonize, self-govern, and reconcile past wrongdoing? In this next chapter, I will begin to explore ways which this decision has impacted the landscape of Métis rights and policy, Métis-Canada relationship and perceptions about Métis identity, as well as how it will affect the future of Métis self-government and Métis rights.

Chapter 4

Moving Forward: The Potential Outcomes and Implications of the *Daniels* Decision

Now that we have surveyed the actual *Daniels* decision from a critical decolonizing and Métis lens, this chapter will focus on the aftermath of *Daniels*. In this chapter, I seek to answer the “now what” question. This is no easy task, however, as major legal victories such as this one take years, even decades to reverberate into society and affect Indigenous policy and legislation. Still, some societal or perhaps colloquial impacts of this decision have been felt immediately, such as many more individuals identifying as Métis in response to the Supreme Court’s definition of Métis. This chapter will be split into three parts. First, I will debunk myths regarding the *Daniels* decision. Second, I will explore public opinion and perceptions about the *Daniels* decision, by Métis people, by non-Indigenous Canadians and by other Indigenous peoples as well. In the last section of this chapter, I will attempt to delve into the future implications of the *Daniels* case. I will look at what this decision might mean in terms of including the Métis in government programs for Indigenous peoples. I will situate this aspect of my research in a reconciliation framework and wonder how the government of Canada can utilize the *Daniels* decision to begin the process of reconciliation with the Métis Nation. This section will also suggest ways which the Métis can use this decision to better themselves.

Dispelling Myths: What Daniels Does Not Say

Daniels Does Not Mean that Métis are Status Indians Under the Indian Act

Legal scholars agree that large court decisions take years, even decades to play out and have significant implications on Indigenous policy and Indigenous peoples’ lives. The *MMF v. Canada* decision, for example, is only now having practical effects for the Métis, who are finally

seeing legitimate repatriation for their stolen lands. At this stage in the *Daniels* decisions' aftermath, it is much easier to say what the *Daniels* decision does not say and what it may not affect. Largely misunderstood due to the s. 91(24) wording which uses "Indians" much in the same way "Aboriginal" is now used to describe all of Canada's Indigenous people, many have confused this decision to affect the pre-existing Indian Act and assumed that Métis people will now be included in the Indian Act. The Supreme Court has been extremely clear that *Daniels* does not say that the Métis are now included in the Indian Act, as the Indian Act stands on its own as an existing piece of legislation (Mandell Pinder). The Indian Act still does not apply to the Inuit and Métis people (Vowel and Leroux 32).

The Indian Act was created in 1876 and over the course of its life, has mainly targeted First Nations people living on reserve (see Bartlett for a thorough history of Indian Act). While Canada did legislate the Indian Act via its power achieved through s. 91(24), the Indian Act targets a specific Indigenous population and not all those considered "Indians" under s. 91(24). For instance, Inuit people, though also under 91(24) and thus also part of Canada's population of "Indians" which it can legislate for, are not included in the Indian Act⁶. I have already argued that s. 91(24) risks lumping all Indigenous peoples together, however, the Indian Act is testimony to the fact that Canada can if it desires, target a specific population to create laws and statutes for. Now, if the federal government created a new scheme or program for Indigenous peoples through its 91(24) jurisdiction, and deliberately chose to leave the Métis out of it, perhaps the *Daniels* decision could be used to suggest that, as Tom Isaac has stated, there ought to be no hierarchy of rights and Métis people should be afforded the same programs and services (Rossiter and Kermoal 24).

⁶ The Inuit were included under the Indian Act for a brief period of time in 1924 but were quickly removed (Tester and Kulchyski 19).

Unfortunately, the confusion did not end there. For example, many comments were thrown around the internet where readers commented on the case's release worrying that their taxes would now rise since the total number of Indigenous people was now rising. Even trustworthy news outlets misreported the potential impacts of *Daniels v. Canada*. For example, a CTV article published just days after the release of the decision read that "Thursday's decision could cost the government billions more by granting Métis and non-status Indians benefits that, until now, have only been available to status Indians. Those include dental and vision care, prescription drugs, access to housing and certain tax exemptions" ("SCC rules Métis"). News like this is false in that the financial benefits to "Indians" which are stated here stem from the Indian Act and the Indian Act will not all of a sudden apply to the Métis. Most of the things that Canadians assume are "perks" for Indigenous peoples mostly apply to Status Indians and stem from the Indian Act (Vowel and Leroux 32). Such comments are rooted in racism and in the failure to understand that first, any perceived financial benefits or services provided to Indigenous peoples result from pre-existing treaties and years of dispossession and assimilation efforts. Even then, Indigenous peoples do not get free money and free housing and most Indigenous Canadians do pay taxes (see Vowel 135-151). Yes, the number of Indigenous peoples under Canada's jurisdiction will now be higher, but the Métis have always been there; they were simply ignored. Only those "new age Métis" groups which, as I will later show, if accepted as "Indigenous" would add to the number of Canada's Indigenous peoples.

Section 35 and Section 91(24) are not the Same but do Influence Each Other

As previously explained, s. 35 and s. 91(24) deal with very different purposes. Section 35 is about Aboriginal rights, whereas s. 91(24) is about jurisdiction. Despite serving different

purposes, s. 35 and the Métis' inclusion in the 1982 provision noticeably influenced the Court in coming to its conclusion in *Daniels*. In the 2013 MMF case, the Supreme Court stated that sec. 35 and 91(24) should be read together, and that s. 35 requires that the crown act honourably in its s. 91(24) dealings with the Métis (*MMF v. Canada* 69). Three years later, the Court did just this in *Daniels*, when it stated that “it would be constitutionally anomalous, as the Crown also conceded, for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24).” (*Daniels* SCC para. 35). Still, the *Daniels* Court was adamant that s. 91(24) and s. 35 had very different constitutional purposes and therefore, did not automatically encompass the same group of “Métis” as s. 35. The Court overruled the *Powley* test created for s. 35 rights and determined that Métis people under federal jurisdiction may not need to prove community acceptance, unlike the *Powley* test (*Daniels* SCC para. 49).

While s. 91(24) does not necessarily influence s. 35 and Métis rights, some legal players are hopeful that this decision will finally help clarify questions about s. 35 for the Métis. Lawyer Tom Isaacs stated at the *Daniels* conference that there is still no process in place to determine who are s. 35 rights holders, despite the *Powley* decision of 2003 (Rossiter and Kermoal 23). Métis individuals are still having to turn to the courts in some instances. Thus, with a new declaration of federal responsibility for the Métis, perhaps the federal government and Métis stakeholders can sit together and determine a process to clearly articulate Métis s. 35 rights. Legal players have even articulated that now, with s. 91(24) inclusion of the Métis, this may finally require the federal government to move away from an old understanding that there are only two Indigenous groups in Canada deserving of rights and recognition (First Nations and Inuit) (RCAP “Métis Perspectives” 219). Writing about Métis s. 35 rights in 1997, before the

Powley decision and before the *Daniels* decision, Professor Catherine Bell estimated that the declaration of a fiduciary duty would require the government to clarify s. 35 rights:

As fiduciary responsibilities in other constitutional contexts "have long been recognized to be positive as well as negative," there is no logical reason why positive obligations should be excluded from the analysis of federal-Aboriginal fiduciary relationships. Applied to the federal treatment of Métis people, this could mean that the federal government has a general equitable obligation to treat Métis people as equivalent to other Aboriginal people - a general obligation which is supported by s.35 and would require the extension of government programs to the Métis. (C. Bell "Métis Constitutional Rights in Section 35(1) 198).

Now with the release of the *Daniels* decision, paired with Métis inclusion in s. 35, Catherine Bell points out that it is way more than just "can", but rather there is a positive duty flowing from the government to the Métis: "Following MMF and *Daniels*, one can argue that the federal government has both the constitutional authority under sec 91(24) and the duty to diligently pursue such unfulfilled obligations to Métis and engage in processes for honourable reconciliation of Crown and Métis interests" (C. Bell "The Practical Implications" 225). Lawyer Tom Isaac also articulated at the *Daniels* conference that we are still in the early stages of fully understanding nature of Métis claims and rights under s. 35, but that if anything, this declaration should signal to the federal government that there is no such thing as a hierarchy of rights (Rossiter and Kermoal 22). If the Métis are now included in all the same places in the constitution as other Indigenous groups, why are they not afforded the same programs and services, and why are many Métis groups still having difficulties articulating their s. 35 rights

that were enshrined in the Constitution over 30 years ago? I suspect this has something to do with the government still having an issue believing the Métis are just as Indigenous as other groups, despite court rulings in Métis' favour. There will be no way to enforce this, as Canada clearly articulated over and over throughout the *Daniels* proceedings that a declaration of jurisdictional responsibility does not necessarily require the government to act proactively for the Métis, perhaps leaving us at square one regarding the s. 35 clarification (Webcast *Daniels v. Canada* at approx. 68:00; *Daniels* FC para. 72). This brings me to my next point.

Daniels Does not Require the Federal Government to Act

Within hours of the release of the *Daniels* decision on April 16th, 2016, the media had already blown it up as a huge victory for the Métis. This case was a significant landmark ruling for the Métis, ending years of jurisdictional battles and political tug of war between the provinces and the federal government. The reason behind the media hype was the perception that this decision would change the current state of the Métis. People immediately thought “money, programs, and services”. However, the court and legal players have been clear that this decision does not require the government to act. In other words, it simply says the government *can* act if it wishes to. *Daniels* lays the road map for who is responsible for the Métis. This is why policy experts such as Tom Isaac have described *Daniels* as a "pivot point rather than a step forward or even precedent-setting" (Shanks 1352).

At the very least, *Daniels* has simply removed an obstacle towards action for the Métis. This can be concerning for the Métis, since much of their success in developing policy and programs will depend on government good-will. Admittedly, when the *Daniels* case was moving through the courts, the federal government continued to argue that even with a declaration in

favour of the plaintiffs, it would not act (Webcast *Daniels v. Canada* at approx. 68:00; *Daniels* FC 72) and that this decision would only lead to more litigation (*Daniels* FC para. 14-15). If we rewind to the *Re Eskimo* court litigation, the federal government, as early as the 1930s, was also arguing that s. 91(24) was simply about jurisdiction. According to Tester and Kulchyski, “No one was prepared to suggest that s. 91(24) of the BNA Act conveyed anything more than jurisdictional authority; obligations, including respect for Aboriginal title, were not the order of the day” (38). Unfortunately, decades later, the government put forth the same argument regarding the Métis’ inclusion in s. 91(24). It doesn't help too, that the Supreme Court did not provide the plaintiffs with the second and third declaration, which stated that the Crown owes a fiduciary duty to the Métis and has a duty to consult the Métis⁷. While this is not a clear statement that the federal government is off the hook, the government may interpret the lack of these declarations to mean that it is not required to act.

During the majority of the *Daniels* trial, a conservative government was in power and as such, represented the Crown. Since the release of *Daniels*, a liberal government has been more willing to implement the *Daniels* decision and act for the Métis. The liberals have already promised billions of dollars to the Métis in forms of land claims resulting from the 2013 MMF decision (Maclean). But, all of the progress made between the Métis and the federal government risks being lost with a new government that does not prioritize Métis relations. Tom Isaac too worries that “Federal election cycles challenge the ability to move forward. Reconciliation requires truth in the matters, and truthful dialogue is key- but politics does not make this a straightforward approach. We need policy that will go beyond politics” (Rossiter and Kermoal 24). Even though changing governments has the potential to stall positive outcomes for the

⁷ The Court did say that these duties exist, and as such that it lacked “practical utility” to make these declarations (*Daniels* SC 53-54).

Daniels decision, we should not diminish the potential of the *Daniels* decision. It does eliminate a huge barrier behind which the government was hiding to deny any attention to the Métis.

Nevertheless, is this, on its own, still enough to celebrate? Signa Shanks, when writing about the *Daniels* decision, expressed unease, saying that she does not understand how she is expected to feel about this decision. She wonders how she is supposed to express excitement after being told she was in a jurisdictional wasteland, and now the Court has simply acknowledged that (Shanks 1343-1344). Chris Andersen and Adam Gaudry too have asked “Even if the court case is about jurisdiction rather than rights, lawyers for various interveners have asked, what is the point of gaining jurisdiction if no rights are attached?” (23).

Provinces Are Not “Off the Hook” for the Métis

Another gross misinterpretation of *Daniels* is the idea that the provinces gained a win from this decision, as the Métis do not fall under their jurisdiction. Many players were involved in the *Daniels* proceedings as interveners --meaning they believed they have a stake in the decision, from Indigenous organizations such as the Congress of Aboriginal Peoples (CAP), or the Assembly of First Nations (AFN), to provinces such as Alberta and Saskatchewan. The Métis Settlements Act’s intervener status came from their worries that if the Supreme Court provided the plaintiffs’ declaration, that existing Alberta legislation for the Métis (Métis Settlements Act) would no longer be valid, or deemed *ultra vires*, meaning that the Alberta government acted beyond the scope of its powers (Factum of intervener, Métis Settlements General Counsel). While the Métis were found to be a federal responsibility, the Court ruled that the existing legislation coming out of Alberta was still valid. Meanwhile, provinces who acted as interveners, may believe such a statement was a victory, believing they are “off the hook” from dealing with

their Métis population and providing programming and services for the Métis (Rupertsland Center for Métis Research at 35:00 mins). The Province of Saskatchewan was intervening because it did not want to hold the exclusive responsibility for the Métis (Factum of the Intervener, Attorney General for Saskatchewan). While they made no direct mention of funding, this likely has to do with worrying that with an increased responsibility will come with an increased spending requirement. Instead, the provinces should welcome this decision and ask themselves what they can do to better their Métis population. Tom Isaac worries that viewing *Daniels* as ridding them of responsibility towards the Métis is “an impoverished view of our country, of s. 91(24), of what the Court was doing in *Daniels*” (Rupertsland Center for Métis Research at 36:00 minutes). Even before the release of the *Daniels* opinion by the Supreme Court, Catherine Bell foresaw this issue by stating that “a range of constitutional arguments can be advanced to support the constitutionality of provincial Métis legislation” (Bell “A New Era” 40). The Supreme Court in *Daniels* did acknowledge the lasting legitimacy of provincial legislation for the Métis, stating that “federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*” (*Daniels* SCC para. 51). The same share of responsibility was outlined by the Supreme Court in *Tsilhqot’in Nation v. British Columbia* concerning s. 35 rights, where the Court stated that “the s. 35. Framework applies to exercises of both provincial and federal power” (*Tsilhqot’in Nation v. British Columbia* 152). Regrettably, this conversation seems irrelevant when we consider the reluctance by both levels of government, which have played this “political football” with the Métis for years, both denying any financial responsibility to the Métis (*Daniels* SCC para. 14). While existing provincial legislation will not be threatened by *Daniels*, any new provincial legislation for the Métis might become a rarity. If the federal

government now no longer possesses the power to turn the Métis down by on the basis of jurisdiction, will the provinces now have the ability to tell their Métis citizens that they no longer possess jurisdiction to work with them?

Seeing the Self: Different Interpretations of *Daniels*

When I attended the *Daniels* conference, I heard Chris Andersen speak about what he calls “self-making”, which happens when individuals or certain groups see a reflection of themselves in Supreme Court decisions (Rossiter and Kermoal 13). He explained that “for people who are not regularly involved with courts and law, they instead end up seeing a colouring book: one where each person chooses their own colours and interprets the image as they see fit. People bring their own meanings to these decisions, and sometimes people in leadership positions produce ideas that were never intended by the court” (Rossiter and Kermoal 12). In a way, much of my work on the *Daniels* case thus far has been my own “self-making” regarding the *Daniels* decision, namely how I interpreted *Daniels* from a Métis perspective and from my training as a Native Studies scholar, which I argued was necessary in a field dominated by western perceptions. In this next section I will examine how other groups have brought their own meaning to this decision or have seen themselves reaffirmed by the Supreme Court. I also want to examine where these meanings come from and the motives behind such meanings.

How Self-Identifying Settlers Have Reacted

As Chris Andersen expressed at the *Daniels* conference, “issues get translated from a social to legal arena, then back into society. These court decisions are considered by many to be indisputable, rather than influenced by things such as colonialism, racism, and power” (Rossiter

and Kermoal 12). A certain section of the Supreme Court's *Daniels* decision has some settlers infusing their own kind of racism and power into their interpretation of *Daniels*. Perhaps in the most contested paragraph of the *Daniels* opinion, the Supreme Court said Métis can refer to two different kinds of Métis, Métis from Red River and Métis who have Indian and white ancestry (*Daniels* SCC para. 17). Vowel and Leroux point out that, despite all the buzz surrounding this statement, it is not a finding of fact, or does not mean the Court is saying definitively that there are Métis communities in Nova Scotia, for example. Rather, it "merely substantiates the Court's understanding that the term "Métis" is contested", which we all know to be true since the time the Métis first arose within the plains landscape (Vowel and Leroux 33).

Nonetheless, it is still important to look at how this statement has been interpreted by such groups out east. These groups of people are merely settlers with long-ago Indigenous ancestors who have begun claiming Métis identity and are now seeing themselves and their identity affirmed and legitimized by this decision. Andersen and Gaudry have called this process "settler self-Indigenization", and they call out such groups saying that these people "make use of their white privilege to make claims to Indigeneity at the expense of the place- and history-based peoplehood of Indigenous collectives" (Andersen and Gaudry 27).

While non-Métis people gained access to Métis identity since the earliest days of the Métis nation, these families were typically placed into these categories by the British, Hudson's Bay officials and later the Canadian government (see Shore 29-32). The motives for settlers to gain status as Métis nowadays are much more lucrative with such court victories yielding perceived financial benefits for the Métis. I want to explore these settlers' motives for wanting to claim an Indigenous identity. Anderson and Gaudry go on to say that such motivations for claiming Indigenous identity by white people is fueled by two desires, first "wanting to feel

something more” and second “wanting to get something more” (27). Tuck and Yang expand on settlers who first want to *feel* something more, usually in response to learning about Indigenous history and guilt, as a means to deflect responsibility, all the while continuing to enjoy white privilege (11). They have called this “settler nativism”, where “settlers locate or invent a long-lost ancestor who is rumored to have had “Indian blood,” and they use this claim to mark themselves as blameless in the attempted eradications of Indigenous peoples” (Tuck and Yang 10).

As for groups who want more materially, perhaps the most blatant example of this is from Quebec, where a group of people who may only have one distant Indigenous ancestor each who are all unrelated to each other call themselves the Mikinak Nation. They claim that their membership is “open to those who can provide genealogical evidence of at least one Aboriginal ancestor at some point in the past” (Hamilton). The group’s leader, Brisebois said that “Even if it’s eight generations back, that’s OK,”. “The most important thing is that you feel it inside you” (Hamilton). This group exhibits exactly what Tuck and Yang refer to as settler nativism, by “feeling” Indigenous. The Mikinak have gone as far to argue that with their membership cards, they should be exempt from paying taxes at Costco (Andersen and Gaudry 27). It is pretty clear that the Mikinak’s motives for claiming Indigenous identity are a perceived financial benefit. These individuals want to claim Indigenous identity but have not suffered under the same colonial oppression as Indigenous peoples. This also demonstrates the groups’ gross misunderstanding of treaty rights and benefits. The fact of the matter is, even legitimate Métis or Status Indians have to pay taxes at Costco. Another material gain which leads many to claim an Indigenous identity is the hunting and fishing rights of Indigenous peoples. Another group claiming to be Métis formed in Gaspé, purely out of a desire to keep hunting on the Mi’kmaw

controlled territory, after an agreement made between the provincial government and the Gesgapegiag Mi'kmaw (Leroux "Self-Made Métis").

Claims like these, while they are not often taken seriously, still impact the Métis nation. As some legal scholars have articulated, it will be extremely difficult for any of these communities to prove any of the criteria needed to prove s. 35 rights and thus far, no eastern Métis community has had their rights affirmed by the Supreme Court. Still, these claims are threatening to the Métis nation as the MNC (Métis Nation of Canada), perhaps responding to such claims, released in 2018 the map of the Métis homeland ("Homeland Map Resolution"). This was a clear and timely statement from the Métis nation saying that to be considered Métis and to be accepted by the Métis nation, you must be from a traditional and historical Métis nation, and there were never any Métis nations out East if we followed the process of Métis ethnogenesis provided in Chapter 1.

How [Racist] non-Indigenous Canadians Have Reacted

With the release of the *Daniels* decision, many Canadians expressed their frustrations and confusion which I will show, stem from being misinformed about the decision and long-held racialized beliefs of Indigenous identity. Firstly, many Canadians expressed concerns that their taxes would be raised now with this recognition of Métis as Indigenous. There are two major issues here, the first being the long-standing argument employed by Canadians that they somehow pay for the treaty benefits of status Indians (Alfred *Wasáse* 151-152). Such benefits were put in place during land transfer agreements that existed probably long before many of these online trolls even had ancestors to step foot in the country. Second, as I have already mentioned this decision does not affect the Indian Act where the majority of these perceived

benefits stem from (Vowel “What a Landmark Ruling Means”). This decision is purely about jurisdiction and does not require the government to act.

Moreover, some Canadians were simply confused by their own racialized understanding of Indigenous identity. Rooted in the understanding of Métis identity which I debunked in Chapter 1, many Canadians became confused when the *Daniels* decision suggested that, just like First Nations and Inuit people, the Métis are also considered under the same category of people to whom the government is constitutionally responsible. For some people whose understanding that the Métis as mixed and therefore less indigenous, they wondered how a “mixed” group, or even how “white people” could be recognized as Indigenous. Some online readers commented that “I have a hard time with blonde blue eyes calling themselves Métis. Louis Riel according to wiki was 7/8 Frenchman with 1/8 native. I think a jury of his peers would call him a Frenchman” (Jack Reader comment on Teillet “The Confusing World”). This man’s comment completely disregards any aspect of Indigenous identity tied to nationhood, and is purely made on the basis of race and phenotypic observation. Unfortunately, with an understanding of the Métis as mixed, Canadians will have difficulty respecting this decision by viewing the Métis as just as Indigenous as others. Just as it had been done historically by government officials, people still somehow believe that whatever “Indian” blood the Métis have, white ancestry is stronger and therefore they emphasize their whiteness over their indigeneity.

How Other Indigenous Peoples Have Reacted

When I attended the Conference “Daniels: In and Beyond the Law”, hosted by the University of Alberta in January 2017, I listened to Tony Belcourt speak of his efforts to get the Métis recognized as one of Canada’s Aboriginal peoples in the *Constitution Act, 1982* under s.

35. During his efforts, he had to respond to a comment from a representative of the Indian Brotherhood, who worried that with an explicit recognition of Métis rights, this would somehow affect First Nations Peoples' pre-existing access to funding and programs. He explained to Belcourt that the metaphorical loaf of bread that is federal funding for Indigenous people would now have to be split among more people, making their slice of bread that much smaller.

Belcourt's brilliant response was that "Ottawa is not a loaf of bread. Ottawa is a bakery. And you're not getting your fair share. And we're not getting anything". In his response, Belcourt reaffirmed the pain felt by a lack of funding for First-Nations, but explained that it was time for Ottawa to also work with the Métis –which should not remove any attention to First Nations peoples' struggles (Rossiter and Kermoal 17). Again, though this decision does not necessarily affect funding, there is the potential for Métis programs to be created in the future.

Contained within this anecdote is the all too common misconception that Métis people face that, with gained attention to Métis people's struggles, this will somehow remove attention or funding to First Nations or Inuit peoples' programs. Unfortunately, there has been similar opposition to the *Daniels* case from other Indigenous groups. I have heard far too often similar comments from First Nations colleagues. I was once asked by a former boss about my research. He was a status Indian and admitted to having heard about the *Daniels* case, but he had his reservations. He proceeded to ask me how the *Daniels* case will affect him, his family, and his access to funding. He also believed that his probably very limited benefits from being a status Indian would be affected by funding for Métis. Everyone is wondering how this decision will affect them, and perhaps he is not wrong to worry about this. As I have already argued, this case is obviously about more than jurisdiction and will eventually result in programing and services to Métis people. As Tom Isaac suggested, while this case was about jurisdiction, the fact that the

Métis are now included in both s. 35 and s. 91(24), the government will have difficulties justifying creating programs only for First Nation's people. Isaac also realizes as of now, the resources are scarce: "The federal government cannot afford to take on services for everyone covered under 91(24). Hit the fast-forward button and you see where this is going – the feds have to get out of the way. They only have so much money to go around. They can just vacate the space and leave it to the provinces" (Beazley). This further highlights the need for a tripartite approach to government programs for the Métis.

Let us explore where such comments come from and dissect them to reveal their colonial origins. As we have already explored in Chapter 2, not only have government officials relied on race to classify and organize Indigenous peoples, but these definitions of Indigeneity have been internalized by Indigenous peoples themselves. Hilary Weaver explores the policing of Indigenous identity and argues that some of the worst identity police are Indigenous peoples themselves. She writes that "the roots for this type of behaviour probably lie deep in the accuser's own insecurities about identity and racism learned as part of the colonization process" (251). While referring to an American context, she provides the example of Indigenous people carrying plates which read "FBI: Full Blooded Indian", which she asks "What message does this communicate to people of mixed heritage? Does this mean that they are somehow lesser human beings and cannot have strong cultural connections?" (Weaver 250). Unfortunately, she is not wrong when she writes that, "through internalized oppression/colonization, we have become our own worst enemies" (Weaver 252). It was not always the case, and true decolonization will require that we get rid of such thought and repair broken relationships with other Indigenous groups. According to Zoe Todd, a decolonial way of looking at this requires that we rekindle our connections to other Indigenous nations. We should realize that a lot of the animosity between

Indigenous nations, particularly between Métis and First Nations, comes not only from internalized oppression but also from the government elevating one Indigenous group over another, suggesting they are higher on the perceived scale of civilization. This was the case for the Métis, who were considered by the government to be more “civilized” than Indians. In fact, in the residential school era, it was seen as a good thing to enroll Métis students who could serve as an example to “Indian” children, as the Métis were seen as not entirely “Indian”, but on their way to be fully assimilated (TRC, “The Métis Experience” 13). Viewing the Métis as not entirely “Indian”, but halfway assimilated also occurred during the treaty era. As Niemi-Bohun writes, “In a paternalistic and ethnocentric manner typical of the period, Indian agents and local clergy advised commissioners on whether or not the applicant was considered ‘civilized’ enough to qualify for withdrawal [of treaty] to take scrip” (Niemi-Bohun 82).

Anticipating the Future: What Will Come from Daniels?

Métis people, scholars, activists, and leaders are undoubtedly familiar with the concept that nothing is ever simple, especially while working within colonial institutions and governments. While the *Daniels* case brings a certain level of clarity for the Métis, it has also opened up many more questions that are left unanswered. At the *Daniels* conference, Muriel Venne from the Institute for the Advancement of Aboriginal Women probably spoke what was on everyone’s mind when she said, “Maybe one of the things that happened with *Daniels* is that things have become more complicated” (Rossiter and Kermoal 42). This may be a sign that the real work now begins. While major court victories such as this one take decades to play out, this next section will examine in what ways the *Daniels* case has already impacted the Métis. I will

also consider the many ways *Daniels* might be applied by Métis leaders and respected by government officials to then promote Métis rights, self-governance, and reconciliation.

How has the Daniels Decision Affected the Métis so far?

While major Supreme Court decisions such as this one take years, even decades to play out, *Daniels v. Canada* has already begun to alter the landscape of Métis rights and Métis-Canada relations. According to some law firms, the *Daniels* decision is likely to result in many negotiations and even more litigations in the years to follow (Mandel Pinder). Though difficult to tie explicitly to the *Daniels* victory, long overdue important discussions and negotiations are already being held between the federal government and the Métis. Perhaps most significantly, after many negotiations, in September 2018, the federal government promised the Manitoba Métis Federation (MMF) \$154 million of funding, resulting from the 2013 MMF decision which found that Canada had failed to implement promises of land to the Métis enacted under the Manitoba Act of 1870 (Maclean). President of the MMF, David Chartrand stated that the federal government's plan also includes a process to work towards a self-government agreement, where they would be recognized as a Métis government (MMF is currently operating as a corporation) (Maclean). Again, while difficult to tie to the *Daniels* case, President Chartrand's comments on this plan signal that a lot has changed since the release of *Daniels*, where the Métis were tossed around as a political football and never invited to deal with Canada as one of Canada's Aboriginal peoples: "we've always been looking through the window, never invited into the room, provincially or federally. But now we're right inside the room and having a chance to make a difference for our people", he said (Maclean). The *Daniels* victory has provided the momentum to deal with longstanding Métis issues.

Perhaps the Métis are already underway to establishing self-governance where they will be able to provide for their members. While the Métis have been providing programs and services to their membership for decades now, these have mostly focused on employment and training assistance, and harvesting programs. Recently, however, the Manitoba Métis Federation has unveiled a program for first-time homeowners to receive up to \$15,000 for a down payment on a home, in an effort to return home and land ownership to the Métis who were dispossessed of their lands in the 1800s (MMF First Time Home Purchase Program). These examples are likely the result of the Métis finally being able to sit down with the federal government, post *Daniels* decision. As Catherine Bell writes: “A practical consequence of clarifying federal jurisdiction may be a corresponding duty for the federal government to participate in good faith in negotiation aimed at resolving claims arising from historical promises to Métis as an Aboriginal people” (C. Bell “The Practical Implications” 219), and this is in fact what we are beginning to see. While the MMF has always provided some assistance for post-secondary education, this fund was typically limited and only accessible during the final year of your degree. Recently, the MMF launched its Post-Secondary Education Program, where students at recognized post-secondary Universities can apply for assistance with their tuition. While difficult to tie these initiatives specifically to the *Daniels* victory, the post-*Daniels* landscape has definitely changed in that the Métis seem to have a clearer line of communication with the federal government. In general, there seems to be more exposure to Métis struggles and culture.

Métis legal scholars anticipated this happening. In 2017, Métis lawyer Jason Madden has said that on its own, *Daniels* is merely about jurisdiction. Yet, when it is read in conjunction with the MMF and Powley, these three decisions, which Madden calls the “Métis Trifecta”, prescribe a “positive obligation to the federal government to address outstanding claims and outstanding

rights” (“Focus: Rulings Impact Métis”). That is because Powley and MMF provide the government with a clear indication that such promises to the Métis were never delivered (MMF) and that the Métis distinctly have “pre-existing Aboriginal and Treaty Rights” that must be defined (*R. v. Powley*). While *Daniels* may not have created significant changes to Métis’ lives in the four years since its release, lawyers agree that this decision is likely to lead to more negotiations and even litigation (Mandell Pinder; Shanks 1357).

Including the Métis in Programs and Services for Indigenous Peoples?

As much as this case was simply about jurisdiction, it is obviously about much more than that. While the very meat and bones of this decision is about jurisdiction, the plaintiff would not have brought this action forward if they did not believe that something would be achieved from being told the Métis are the government’s constitutional responsibility. Even if this case was simply about jurisdiction, it will surely shape the future of Métis law, Métis policy, Métis reconciliation, and hopefully have significant impacts on Métis people. According to University of Ottawa law professor and now federal court judge, Sebastien Grammond, “now that the jurisdictional football has finally landed in the hands of the federal government, other issues need to be resolved” (“Focus: Rulings Impact Métis”). Grammond understands that this case is simply about jurisdiction, yet its potential is immense: “It could mean the federal government is responsible for spending money to set up programs aimed at Indigenous peoples other than status Indians. And that would be the major impact of *Daniels*. Although this is not spelled out in the decision itself, because the decision speaks only about jurisdiction,” says Grammond (“Focus: Rulings Impact Métis”).

Thomas Isaac has also been vocal that at the very least, *Daniels* should affect Indigenous policy in that it should signal to the federal government that there ought to be no hierarchy of rights between different Indigenous groups (Rossiter and Kermoal 23). Now that the Métis are equally included in all sections of the Constitution alongside Inuit and First Nations people, it may seem unfair for the government to create programs for Indigenous peoples and deny access to the Métis. Canada's position during the *Daniels* trial was that even though the Métis are included in 91(24), it is not required to act. Although, the division of power under sections 91 and 92 are there because it means it expects the federal government to have a responsibility, thus it implies there should be something there. Despite all Indigenous groups now seen equally under Canadian Constitutional law, Canadian government and policy officials will have to do some serious decolonizing work themselves and get rid of the long practice of viewing the Métis as mixed and learn to understand and view Métis people as just as Indigenous as other Indigenous groups.

In an era where reconciliation is a big buzzword, and where governments are eager to apply it insincerely where it suits them, *Daniels* should serve as the perfect roadmap for true and honest reconciliation. In my opinion, Indigenous peoples have taken on the burden of doing most of the work required for reconciliation, but it's time the government showed up. If Canada puts in the work towards reconciliation, this is where the potential for *Daniels* to affect the most change exists. Professor of law, Eric Adams, urges Canada to utilize the Constitution in its reconciliation efforts:

The challenge for Canada is what to do with its constitutional jurisdiction now clarified.

In many ways, the *Daniels* case stands as an exemplar of the tremendous waste of resources that can be spent in litigation as opposed to sensible and good faith

negotiations. After numerous and expensive hearings, motions, and appeals, we arrive at the place we should have begun: the moment for Canada to devote its energies to using its jurisdiction to find agreement with Indigenous peoples about their needs and aspirations. A Constitution, in other words, not of power over people, but of recognition, justice, and respect. (Adams)

In his opinion piece, Adams also alludes to Canada's strong opposition to the Métis being included in sec. 91(24), which resulted in costs that could have been spared. This is why I am skeptical that change will come soon. A metaphor perhaps helpful in thinking about this is to think of one party pleading not guilty to a crime they committed on another party. Later, let us say the offender gets convicted of the crime. In a new type of restorative justice program imagine the offender has to repair the relationship with the victim by writing an apology letter and engaging in mediation. Surely, it will be a while before the victim and the accused reconcile, as not too long ago, the victim was not even prepared to admit guilt of the crime they committed. This is how I see it for the Métis and Canada.

To attempt to predict the following years post-*Daniels*, we can turn to a similar court victory, *Re Eskimo*, where the Inuit were declared to be included under federal government jurisdiction under s. 91(24). Arising out of a similar jurisdictional dispute between the provinces, specifically Quebec, and the federal government, the Supreme Court in 1939 ruled that the Inuit were included under s. 91(24) and thus a federal responsibility. Though, the circumstances leading up to the *Re Eskimo* decision were quite different. In 1924, an amendment to the Indian Act included the Inuit as "Indians". In 1930, this amendment was repealed, though the federal government continued to "administer" over the Inuit through the Northwest Mounted Police and the Northwest Territory Council from Ottawa (Taylor, "Canadian Indian Policy" 87-88). In the

years following this historic ruling however, the federal government developed various social welfare programs for the Inuit including health care, as opposed to the previously church-funded welfare initiatives (Duibaldo 24). According to Sarah Bonesteel, the decision did very little to bring forth the delivery of government programs and services for the Métis, as the government's main concern at the time was assertion of sovereignty in the north (26). It was not until 1945 that the government started providing Inuit families welfare assistance as religious organizations were stepping back (Bonesteel 26). While in a very different time frame, perhaps this should indicate to the federal government that following this decision, it is now time for the government to include the Métis in social welfare programs. Additionally, there is precedent in how the government continued to treat the Inuit as a separate Indigenous group post-*Re Eskimo*. For example, the Inuit were given the right to vote in the 1950s, despite First-Nations not being able to vote until the 1960s (26). Unfortunately, Tester and Kulchyski highlighted the history post *Re Eskimo*, and they demonstrate that even after the Supreme Court decision which was meant to settle the question of jurisdiction, the provinces and federal government kept throwing each other the jurisdictional football and as late as the year 1966 the minister of the department of Indian Affairs and Northern development still had to clarify that the Inuit were under federal jurisdiction (Tester and Kuchyski 40). Learning from this history, the different Métis governments, the federal government, as well as provincial governments should meet to discuss the future of Métis-government relations. The Manitoba Métis Federation already set a tri-partite government department whose vision is “to enhance the wellbeing of the Manitoba Métis community by promoting and strengthening the institutions of self-government through robust tripartite arrangements and effective partnerships between the MMF, the Government of Canada and the Province of Manitoba” (MMF Tripartite Self-Government Negotiations).

Federal Indigenous policy has surely changed since the 1930s, and now that the Métis should not be left out of Indigenous policy, we have to think about what constitutes good Indigenous policy in 2020. McIvor, a Métis from the Red River settlement, writes how he feels about the post-*Daniels* landscape:

I think it's an example of a case that started a long time ago and the law has evolved a lot since the case began. While it's an important decision to a large degree, it is out of step with what Indigenous people across Canada and around the world are seeking to achieve. They're seeking to achieve recognition of their own, inherent jurisdiction. They're not in court looking to confirm the Crown jurisdiction over them, says McIvor ("Focus: Rulings Impact Métis")

Again, comments like this signal how the potential in *Daniels* lies beyond what the Court simply stated. Real success and progress will come when all the stars align, when there is a government that prioritizes the Métis and values creating programs, services, and policy that go beyond old practices of just doing what is perceived to be best for the Métis. Unfortunately, I am doubtful that change will only come from government good-will. The Métis will have to continue putting on the pressure as they have been doing for years, to say that we are here, and we need to be taken seriously. If one thing is for certain, the importance of this decision cannot be minimized and will likely be the starting point for much good to come for the Métis. If the Court had not ruled that the Métis were under s. 91(24), who knows what the future of the Métis nation would look like. According to Tester and Kulchyski, had the *Re Eskimo* decision been decided otherwise, the future of Inuit rights would be very different today, as this case formed the basis for legally protected Inuit rights (Tester and Kulchyski 41). We might dismiss *Daniels* as a case

simply about jurisdiction, but the excitement of the case lies in how it will serve as the backbone for future developments in the era of Métis rights.

Conclusion

At the very best, *Daniels* can usher in a new era for Métis, where tons of unanswered questions and disputes get solved, where the Métis can help shape any future programs, and the Métis are involved in a nation-to-nation relationship with Canada. At the very least, the *Daniels* decision has simply removed the obstacle of government denial of its jurisdiction over the Métis, and the government may continue to cite the fact that this decision does not require it to act for the Métis. In sum, the destiny of this decision may still depend on government good-will. Nonetheless, it will provide the Métis with the ability to keep fighting for their rights, as they will finally be heard and have a seat at the table of federal jurisdiction and representation.

Chapter 5

Concluding Thoughts, Remarks, and Areas for Further Research

Throughout this thesis, I hope to have provided a better understanding of the history that lead to the *Daniels* case, a better understanding of how the decision was achieved, what it means, where it has gone wrong, and the potential impacts of the decision. In Chapter 1, I presented my Métis decolonizing framework. This framework ensured that my research was done from a Métis epistemological lens, which refused to define the Métis as “mixed” and worked to correct colonial retellings of history by emphasizing Métis voices wherever possible, by calling out racialized understandings of Indigenous identity, and by keeping with the principles of scholarship within the field of Native Studies. In Chapter 2, I overviewed the complex history of Métis inclusion and exclusion in Canadian federal Indigenous policy to paint a clear picture of the circumstances that lead to this legal action. I demonstrated that the Canadian government has moved the Métis in and out of its jurisdiction as it wished, never based on the Métis’ “Indigeneity” but rather based on what benefited Canada’s agenda. Finally, in Chapter 3 I dove into the *Daniels* opinion and dissected it from its colonial influences. I pointed out where the Court went wrong –most of which can be traced back to its choice to implement an originalist interpretation of the Constitution. Throughout Chapter 3, I demonstrated how, despite the decision achieving what the plaintiffs wanted, this decision was achieved while relying on, and perpetuating colonial values and understandings. Chapter 4 was where I began to explore the potential implications of *Daniels*. I dispelled some common myths regarding the decision and observed how things have already changed for the Métis post-*Daniels*. I also suggested ways in which the government and the Métis can move forward using this decision to achieve genuine

reconciliation. In Chapter 4 I showed that, at the very least, *Daniels* may not accomplish much. However, paired with a government who prioritizes genuine reconciliation, *Daniels* may be used to finally signal that there are no hierarchy of rights in Canada among Indigenous peoples, and the Métis people are just as deserving of the same nation-to-nation relationship with Canada and the same ameliorative programs as other Indigenous Canadians, or even better, deserving of Métis-specific programs and policy.

Implications of Research

While this was the first thesis project to fully delve into the *Daniels* decision in depth, this case will continue to have significant implications in decades to come. Already, the Supreme Court opinion has been cited 113 times (see headings in *Daniels v. Canada* SCC). Nonetheless, this preliminary research highlights some important findings.

The first major theme that emerged throughout is that, while *Daniels* was initially celebrated, it may not be deserving of such praise. A further look into the Court's process and reasoning demonstrates that the *Daniels* decision is fraught with colonial values and voices and lacks in Métis voices or history told from a Métis perspective. Furthermore, the actual decision does not accomplish much at its most basic form. It simply clarifies that the Métis are a federal constitutional responsibility and not a provincial one – though provinces are not off the hook completely.

The key findings here suggest that, while Indigenous peoples are increasingly turning to the courts to have their rights recognized or affirmed, we must be wary of decisions made in a colonial institution. This brings us back to asking ourselves whether it is truly possible to decolonize using a western institution?

Limitations of Research

One of the greatest limitations from this research has to do with the novelty of the decision, as Supreme Court decisions take years, even decades, to affect real change, especially decisions which involve Indigenous peoples. With the limited amount of information available on the *Daniels* case, much of this work was my own preliminary research where I analyzed the decisions myself, from the framework I developed in Chapter 1.

Areas for Further Research

While this was the first thesis to focus on the *Daniels* case, more scholarly work on *Daniels* will be needed in the future, as the effects of the decision will continue to unfold. The shortest section of my thesis was the last section, where I went over how the *Daniels* case has impacted the Métis and how it will potentially impact Métis-Canada relations and programs and services to the Métis. In the years to come this area will gain more attention as the Métis should come to be included in more programs and services to Indigenous peoples created under the government's s. 91(24) power.

Daniels will surely continue to impact other Métis legal victories and therefore, more research will be needed to understand how these major Métis court cases interact. How will the *MMF v. Canada* ruling come to full fruition? Will Métis people still have to continue going to court to defend their s. 35 rights, or will the process to have these rights recognized finally be streamlined? Will the debate of who are Métis under s. 91(24) follow the same debate concerning Métis who can prove s. 35 rights, or will this s. 91(24) category of "Métis" be

broader? Hopefully the *Daniels* decision can help answer some of these questions, or as I have shown, perhaps *Daniels* creates even more uncertainty.

Lastly, I believe more work is needed to demonstrate to Métis governments and leaders how they can weaponize *Daniels* as a tool to garner attention to Métis issues by the government and provoke real change and reconciliation. On the other hand, I believe policy officials should also become more familiar with the *Daniels* decision as they write policies and create programs for Canada's Indigenous peoples. As I have shown, they will quickly realize that *Daniels* should signal that there is no hierarchy of rights and access to programs among different Indigenous groups in Canada. Similarly, these government officials should be versed in the same type of decolonial Métis lens, to ensure they carry forth a proper understanding of Métis identity when creating Métis-specific programs.

Final Thoughts

Throughout this process I gained newfound knowledge, but most importantly new confidence. I gained confidence in trusting my own interpretive lens and not being afraid to criticize certain institutions, "facts", or things that are typically taken to be true. I also learned the importance of deconstructing things built or created in a colonial setting, with colonial thought, if we are going to use them to decolonize. For example, it would be difficult for the Métis to use the *Daniels* decision without fully understanding and being critical of the lens, the history, the method which the courts used to evaluate the question of Métis inclusion in s. 91(24) "Indians". My hope is that Métis governments and officials do the same before celebrating these "victories". I especially worry about my Métis government, the Manitoba Métis Federation, that perhaps they are forgetting this important step in achieving self-governance and Métis

resurgence. The MMF has recently been making strides with Prime Minister Justin Trudeau but I wonder at what expense? Recently the MMF has released a statement in support of the pipeline and opposing the protests against the Coastal Gas Link pipeline (“Special statement from President Chartrand”). This has made some Métis citizens very unhappy with their government, who accuse the MMF government of “selling out” for money, and not representing their citizens (Christie Belcourt Twitter).

My goal in writing this thesis began because I wanted to know more about the *Daniels* decision. I wanted to know what the decision said exactly, how it affected me, my Métis family, my kin, and what it would mean for our collective future. I feel as though perhaps most successfully, I have identified what this decision says, and how powerful court decisions can be when others, such as myself, add their own meaning to it. However, I have only just grazed the tip of the iceberg in beginning to find out how this decision will continue to shape our lives.

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