

Devoid of Principle

The Federal Court determination that section 91(24) of the Constitution Act, 1867 is a race-based provision

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The trial judge in Daniels was asked to determine whether Métis and non-status Indians are within federal jurisdiction under section 91(24) of the Constitution Act, 1867. The trial judge held that section 91(24) is a “race-based” head of power. The Federal Court of Appeal then failed to clearly reject this analysis. The central thesis of this article is that using a race-based analysis for section 91(24) is a continuation of Canada’s long history of systemic racism. The court’s reliance on a racial analysis of section 91(24) led it into an inappropriate focus on Métis individual biological ancestry and hybridity. The role of the Constitution is to frame the guiding legal principles of Canadian society. These guiding principles should not be based on a compromised scheme of justice that is devoid of principle.[†]

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† This article was written in advance of the release of the Supreme Court of Canada's decision in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, 264 ACWS (3d) 552.

I Introduction

The legal community was shocked in 2013 when the Federal Court of Canada Trial Division interpreted section 91(24) of the *Constitution Act, 1867* as a race-based power. Section 91(24) is the provision that sets out federal jurisdiction for “Indians, and Lands reserved for the Indians” and the question before the *Daniels* court was whether Métis and non-status Indians are “Indians” within the meaning of section 91(24). In his reasons for judgment, Justice Phelan held that section 91(24) was a “race-based”¹ head of power and held that “both non-status Indians and Métis are connected to the racial classification Indian by way of marriage, filiation and most clearly intermarriage”.²

The central thesis of this paper is that Phelan J’s racial analysis of section 91(24) should be rejected in favour of a principled approach to constitutional analysis. Canada has a long history of systemic racism with respect to Aboriginal peoples and a particular history of using mixed-race policy and law to deny the existence and rights of the Métis. This has contributed to the legal difficulty in recognizing the Métis as one of the “Aboriginal peoples of Canada.” Interpreting section 91(24) as a race-based provision in the twenty-first century will perpetuate that history.

One of the main roles of the courts is to clarify the law. The courts’ articulation and analysis of our Constitution helps to frame the guiding principles of our society. It is important that judicial constitutional analysis is based on principle and not on the discredited concept of race. We suggest that when the courts apply a racial analysis to a head of power, or when they fail to forcefully reject the application of a racial analysis, the courts fail to fulfil that role.³

The judicial interpretation of constitutional provisions demonstrates a disturbing history of race-based analysis. With respect to section 91(24) we can see this in the Supreme Court of Canada’s reasons for judgment in *Canard*.⁴ Another example of this can be seen in the *Manitoba Métis Federation* decision where the Supreme Court of Canada described the Métis as “the descendants of unions between white traders and explorers and Aboriginal women, now known as Métis.”⁵ This may be an accurate description of the origins of Métis individuals, but in describing the people by their original hybridity, this kind of analysis reinforces the inaccurate understanding that Métis are not an Aboriginal people and instead are individuals who are determined only by their individual biological mixed ancestry. It also ignores the fact that individual “Métis hybridity is no different from the hybridity that characterizes other Indigenous peoples.”⁶

II Terminology: Race, Ethnicity, Racism and Indians

The authors understand “race” to be a social construct based on a classification system that categorizes humans into groups based on physical characteristics, especially skin colour. We agree with the arguments of critical race theorists

1 *Daniels v Canada*, 2013 FC 6, [2013] FCJ No 4 at paras 378, 538 and 568 [*Daniels-FCTD*].

2 *Ibid* at 531.

3 The authors exempt section 15 of the *Charter of Rights and Freedoms*, which contains an explicit protection against racial discrimination and requires the courts to engage in a race-based analysis.

4 *Canard v Canada (Attorney General)*, [1976] 1 SCR 170, 52 DLR (3d) 548.

5 *Manitoba Métis Federation Inc v Canada (Attorney General) et al*, 2013 SCC 14, [2013] SCJ No 14 at para 2, which is an analysis of section 31 of the *Manitoba Act, 1870*.

6 Chris Anderson, *Métis: Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014) at 5.

which suggest that race has no biological validity as a classification scheme and does not correspond to any biological reality, and that society invents and manipulates racial categories for its continuing convenience.⁷ Indeed, the very word *race* is now considered to be problematic, “incoherent and unsound.”⁸

Unfortunately, the lack of biological validity and theoretical incoherence do not allow us to entirely side-step the question of race. As a social construct with very real material, cultural and legal effects, race cannot be ignored and racism is a very ordinary part of our society.⁹ Anderson reflects with accuracy that “Canadians continue to think about and position *race* as though it was ‘real’.”¹⁰ While race cannot be ignored as a powerful social construct, the authors reject the notion that Indians in section 91(24) of the *Constitution Act, 1867* should be considered a “race-based power” or that inclusion as an Indian in that provision should be determined by reference to a racial connection to Indians.

But if we reject race as the analytical tool for determining who is an Indian in section 91(24), how do we begin to understand membership in this constitutional category? Rather than understanding Indians in section 91(24) in terms of race, the authors suggest referring to Aboriginal collectives as a more useful starting point, and one which has a long history in Canada. As early as 1763, in the Royal Proclamation, George III proclaimed the relationship of the Crown to be with “Nations or Tribes”.

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection ...¹¹

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the rights of collectives or “peoples”¹² and the reference to Aboriginal collectives is emphasized in section 35(1) and (2) of the *Constitution Act, 1982* where “peoples” is used three times:

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

(2) In this Act, “Aboriginal Peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.¹³

7 Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 2d ed (New York and London: New York University Press, 2012) [Delgado & Stefancic] at 7; JC Long & RA Kittles, “Human genetic diversity and the nonexistence of biological races” (2003) 75 *Human Biology* 449–71.

8 S Grammond, “Disentangling ‘Race’ and Indigenous Status: The Role of Ethnicity” (2008) 33 *Queen’s LJ* 487 at 488.

9 L Cavalli-Sforza, P Menozzi & A Piazza, *The History and Geography of Human Genes* (Princeton: Princeton University Press, 1994); Delgado & Stefancic, *supra* note 7.

10 Chris Anderson, “From nation to population: the racialisation of ‘Métis’ in the Canadian census” (2008) 14:2 *Nations and Nationalism* 347 at 352.

11 George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, no 1.

12 *Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, UNGAOR, 61st Sess., Supp No 295, UN Doc A/61/L.67 (2007) [UNDRIP].

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

Ethnicity, which is generally used to refer to group cultural factors, is another term that can be helpful.¹⁴ Some scholars argue that the use of ethnicity rather than race is a distinction without a difference because ultimately these terms “share in common a differentiatedness from whitestream, Euro-Canadian normativity.”¹⁵ It is clear that whichever term is used — race or ethnicity — they each serve similarly to differentiate Aboriginal peoples from the Canadian norm. However, there is no getting away from the fact that Aboriginal peoples are differentiated in Canadian society and in the Constitution. As evidenced in the UN Declaration on the Rights of Indigenous Peoples it appears that differentiation is the goal of Aboriginal peoples.

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,¹⁶

Ethnicity should not be rejected simply because it is a more recent analysis in critical race theory or because it differentiates Aboriginal peoples from Euro-Canadian normativity.¹⁷ We suggest that ethnicity has utility and is preferable for three reasons. First, because it rejects the biological individual determinism that is inherent in a racial analysis. Second, because ethnicity recognizes an Aboriginal group based on its differentiation as a collective — as a culture with its own history and as a polity. Larry Chartrand takes this further and argues that because Aboriginal communities are political communities, section 91(24) should be interpreted as a treaty power between the federal government and Aboriginal peoples.¹⁸ Finally, we suggest that ethnicity has applicability because, properly considered, it should identify the group based on its own self-determination rather than as part of an administrative or legal construct.

In this paper we use the terms *peoples*, *nations*, *ethnicities* and *cultures* interchangeably. We distinguish these groups from nation-states which may, as Canada does, contain one or more such groups. With respect to the Aboriginal “peoples” of Canada, we note that there are over fifty different ethnicities or peoples within the country including the Cree, Haida, Inuit, Dene, Tlingit and Métis. The Aboriginal peoples of Canada are the self-governing, self-determining ethnicities that were here before Europeans asserted sovereignty and it is this prior existence as peoples that makes these ethnicities Aboriginal.

Racism in this paper refers to institutional or structural racism rather than individual racism. We take *structural racism* to mean a system whereby individuals are treated according to a constructed racial classification which normalizes societal advantage to white people over people of colour. Structural racism becomes institutional racism when it takes the form of unfair policies and inequitable opportunity based on race.¹⁹ The authors use *institutional* and *structural racism* interchangeably in this paper.

Two examples of institutional racism should suffice to illustrate its existence: apartheid in South Africa and the Jim Crow laws in the United States.

14 S Grammond, “Disentangling ‘Race’ and Indigenous Status: The Role of Ethnicity” (2008) 33 Queen’s LJ 487.

15 Anderson, *supra* note 10 at 352.

16 UNDRIP, *supra* note 12 at 1.

17 Anderson, *supra* note 10 at 352.

18 Larry Chartrand, “The Failure of the *Daniels* Case: Blindly Entrenching a Colonial Legacy” (2013) 50:1 Alta L Rev 1 at 185.

19 Delgado & Stefancic, *supra* note 7.

Unlike Canada, those countries can at least claim the virtue of having eliminated these specific laws. In Canada, institutional racism is still embedded in legislation such as the *Indian Act*, and most offensively in our highest law, when section 91(24) is interpreted by the courts using a racial analysis.

The legal term *Indians* includes individuals who are registered or are eligible to be registered under the *Indian Act*. That said, the courts have affirmed that Inuit are also considered to be included in the term *Indians* in section 91(24).²⁰ Whether *Indians* in section 91(24) refers to ethnicities or individuals, and whether it includes Métis and non-status Indians, is the subject of the *Daniels* case which we deal with in more depth below.

III Who Are the Métis?

A brief overview of how the Métis have named themselves and how they have been classified by others will provide insight into the complexities of their identity and treatment by Canada. Throughout this paper the term *Métis* is used in preference to other terms, such as *half-breed*, that have been applied by historians, government and other observers. *Métis* is how the people have chosen to name themselves. Louis Riel described his preference for the term *Métis* as follows:

The Métis have as paternal ancestors the former employees of the Hudson Bay and Northwest Companies, and as maternal ancestors Indian women belonging to various tribes. The French word “Métis” is derived from the Latin participle *mixtus*, which means “mixed;” it expresses well the idea it represents. Quite appropriate also, was the corresponding English term “Halfbreed” in the first generation of blood mixing, but now that European blood and Indian blood are mingled to varying degrees, it is no longer generally applicable. The French word “Métis” expresses the idea of this mixture in as satisfactory a way as possible, and becomes by that fact, a proper race name suitable for our race.

A little observation in passing without offending anyone. Very polite and amiable people, may sometimes say to a Métis, “You don't look at all like a Métis. You surely can't have much Indian blood. Why, you could pass anywhere for pure White.” The Métis, a trifle disconcerted by the tone of these remarks, would like to lay claim to both sides of his origin. But fear of upsetting or totally dispelling these kind assumptions holds him back. While he is hesitating to choose among the different replies that come to mind, words like these succeed in silencing him completely. “Ah! bah! You have scarcely any Indian blood. You haven't enough worth mentioning.” Here is how the Métis think privately.

It is true that our Indian origin is humble, but it is indeed just that we honour our mothers as well as our fathers. Why should we be so preoccupied with what degree of mingling we have of European and Indian blood? No matter how little we have of

20 Reference re Term “Indians” [1939] SCR 104, [1939] 2 DLR 417 [Re Eskimos].

one or the other, do not both gratitude and filial love require us to make a point of saying, “We are Métis.”²¹

Most English-language historical documents use the term *half-breed*. In 1963 F. Fanon’s ground-breaking book on colonization, *Les Damnés de la Terre*, was published in an English translation. Fanon wrote about the language of naming, and pointed out that we do not breed people, we breed animals.²² Using the term *half-breed* implies that a person is half animal. When the half-breed is half Aboriginal it is not a big stretch of the imagination to guess which half is meant to be the animal.

Before the 1970s the term *Métis* was mostly applied to the Métis Nation of the Northwest, but by the early 1970s the term Métis had become synonymous with anyone who had some Aboriginal ancestry. Today, aside from the Métis Nation of the Northwest, the term is generally taken to mean an individual of mixed race. It is an understatement to say that this more generalized adoption of the term beyond its application to the Northwest Métis Nation is confusing for everyone.

The historic records make it clear that a new Métis culture emerged in the early 1800s in the Canadian Northwest and established itself in-between the two hegemonies of the Amer-Indian society and the Euro-Canadian society. This is the ethnogenesis of the Métis Nation of the Northwest. Historian Frank Tough described the term *Northwest* as follows:

The Northwest ... would include the west, the western sub-Arctic of the northern plains; it would include the southern area of the Mackenzie District, or the Northwest Territories as we know it today, north of 60, Alberta, Saskatchewan and Manitoba, and northwestern Ontario. Northwest is a perspective, a geographical perspective ... from Montreal or Toronto or Ottawa ... it’s a view that comes out of the fur trade, the Montreal fur trade, the voyageurs, that they’re heading off to the “Northwest.” So it’s that region that’s north and west of Central Canada.²³

The Métis of the Northwest call themselves the Métis Nation. The use of the term *nation* by the Métis is by no means a recent adoption; it was first used almost two hundred years ago in May of 1815.²⁴ The historic Métis Nation was a large network that sprawled across thousands of miles — from the upper Great Lakes in Ontario to the Rocky Mountains. It was characterized by overlapping and multiple bonds, especially those of kinship and trade. The Métis Nation spoke many languages but developed their own unique language, Michif.²⁵ “Their high degree of mobility sustained their economy.”²⁶ Their mo-

21 AH de Tremaudan, *l’Histoire de la nation métisse dans l’Ouest*, translated by Elizabeth Maguet as *Hold High Your Heads* (Winnipeg: Pemmican Publications, 1982) at 200.

22 F Fanon, *Les damnés de la terre* translated by C Farrington (New York: Grove Press, 1963) at 34–35.

23 Testimony of Dr F Tough, *R v Goodon* (June 21 2007), Manitoba 006-40438 (Man Prov Ct) at 33–34.

24 J Pritchard, “Narrative of Mr. John Pritchard of the Red River Settlement”, 4 May 1819, Selkirk Papers, HBCA E.8/5 (Red River Settlement: Papers relating to Disturbances, forwarded to Lord Bathurst, 1815–1819) at 331 verso.

25 P Bakker, *A Language of Our Own; The Genesis of Michif, the Mixed Cree-French Language of the Canadian Métis* (New York: Oxford University Press, 1997).

bility, identifiable homeland, kinship connections, economy and Michif language are the characteristics of a distinct Aboriginal people: the Métis Nation.

While the Métis proclaimed themselves a nation, the historical record is replete with recognition of Métis only as mixed-race individuals, particularly in the treaty and scrip processes.²⁷ The very ability to receive scrip, the legal mechanism used by the Canadian government from 1885–1921 to extinguish the Indian title of the Métis, was contingent on the individual swearing to be a half-breed. In the treaty process of the nineteenth and early twentieth century, with the exception of the *Addendum to Treaty Three by the Half Breeds of Rainy Lake and Rainy River*, Métis were permitted to take treaty only if they were associated with a particular Indian band.²⁸

Outsiders have considerable difficulty recognizing the Métis Nation as a polity.²⁹ But the historic record is clear that the Métis of the Northwest are not simply an aggregate of individuals with mixed ancestry. They are a distinct Aboriginal people in their own right. Expert evidence at several Métis rights trials has shown that whichever term is used, *half-breed* or *Métis*, the people in the Northwest referred to are essentially the same.³⁰ Unfortunately the practice of referring to the Métis solely on the basis of their mixed ancestry or by reference to their biology or blood relationship to Indians, rather than to their distinct society, is a socially constructed race-based analysis and “its persistence evidences the enduring symbolic power of race in shaping the processes of indigenous collective formation.”³¹

IV Mixed-Race Resistance

The Métis have often been referred to as a mixed-race people. While much has been made of their different Euro-Canadian ancestors — specifically whether the French Métis are a different people from the Scottish or English Métis — this discussion itself is evidence of the preoccupation of Euro-Canadians with their own ancestry. Little reference is ever made in the record to the many different Aboriginal ancestors of the Métis, which are in fact quite varied and include the Iroquois, Ojibway, Cree, Sioux, Dene and Blackfoot.

Canada is a nation that was and is very attached to binary descriptions of itself and its people, which has left little place for those that navigate the spaces between the hegemonies. At one time our founding myth was that of two nations, French and English, which denied the very existence of Aboriginal people. In the 1970s we embraced hyphenated identities such as Ukrainian-Canadian in our multicultural policy. The multicultural policy was concerned only with individuals, not Aboriginal collectives.

26 J Teillet, *The Métis of the Northwest: Towards a Definition of a Rights-Bearing Community for a Mobile People* (LLM Thesis, University of Toronto Faculty of Law, 2008) [unpublished] at 6.

27 Louis Riel, “Les Métis du Nord-Ouest” in GF Stanley; Raymond JA Huel; Gilles Martel et al, eds, *The Collected Writings of Louis Riel/Les Ecrits complets de Louis Riel* (Edmonton: University of Alberta Press, 1985) vol 3-156 at 278–279; Pritchard *supra* note 24.

28 *Indian Treaties and Surrenders*, vol 1 (Saskatoon: Fifth House Publishers, 1992) at 308–309.

29 Teillet, *supra* note 26 at 16 and 17. See also John McDougall, *On Western Trails in the Early Seventies: Frontier Pioneer Life in the Canadian North-West* (Toronto: William Briggs, 1911) at 222–223.

30 Arthur Ray, “An Economic History of the Robinson Treaty Area Before 1860” expert historical report prepared for trial in *R v Powley* (1998) [unpublished].

31 Anderson, *supra* note 10 at 353.

Mahtani suggests that mixed-race individuals challenge established racial hierarchies or boundaries.³² As she has noted, “the public imagination surrounding mixed-race individuals has been traditionally marked by a ‘relentless negativity’”³³ and the very notion of an individual identifying as mixed-race has been resisted.

Theories of race have always reflected beliefs about the sanctity of so-called racial purity, where these powerful social constructions have become fully embedded in social relations, political interactions and economic structures [...] The mere presence of ‘mixed race’ people challenges mainstream racial categories constructed precisely to police boundaries that are already heavy with classed and gendered meanings [...] Clearly, ‘mixed race’ people have been made intelligible in ways that maintain racial hierarchies.³⁴

We can see the same negativity in the historic record regarding individuals who self-identify, or are identified by others, as Métis.

... the French half-breeds were indolent, thoughtless and improvident, unrestrained in their desires, restless, clannish and vain.³⁵

Twenty white informants were invited to submit a definition of a Métis or Half-Breed ... [the sixth definition was] a person who when he has money lives like a white man and when he is broke lives like an Indian.³⁶

A primitive people, the Half-breeds were bound to give way before the march of more progressive people.³⁷

Unfortunately this Métis-targeted negativity is not limited to the historic record. Thomas Flanagan, who was at one time a professor at the University of Calgary and advisor to Prime Minister Stephen Harper, contends that:

‘Métis aboriginal rights’ are a historical mistake [...] At this point, the best strategy to minimize the damage caused by the thoughtless elevation of the Métis to the status of a distinct ‘aboriginal’ people is to emphasize the word ‘existing’ in section 35 of the Charter of Rights and Freedoms.³⁸

32 Minelle Mahtani, “Mixed metaphors: situating mixed race identity” in J Lee & J Lutz, eds, *Situating “Race” and Racisms in Space, Time and Theory* (Montreal: McGill-Queen’s University Press, 2005) at 78.

33 Minelle Mahtani, “What’s in a name? Exploring the employment of ‘mixed race’ as an identification” (2002) 4 *Ethnicities* 2 at 470.

34 *Ibid* at 471.

35 GF Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1963) at 8–9.

36 J Legasse, *The People of Indian Ancestry of Manitoba: A Social and Economic Study*, vol 1 (Winnipeg: Government of Manitoba, 1958) at 56–57.

37 Stanley, *supra* note 35 at 49.

38 Thomas Flanagan, “The Case Against Métis Aboriginal Rights” (1983) 9:3 *Can Pub Pol’y* 314.

V Is There More than One Métis People?

While there are many individuals who now call themselves Métis in all parts of Canada, other than the Métis Nation of the Northwest there do not appear to be any Métis “peoples” in Canada. The boundaries of the Métis Nation, and whether or not there are Métis peoples elsewhere in Canada, are matters of much current academic debate.³⁹ The *Report of the Royal Commission on Aboriginal Peoples (RCAP Report)* mentions “the other Métis” and specifically mentions Métis in Labrador and Ontario:

Several Métis communities came into existence, independently of the Métis Nation, in the eastern part of what we now call Canada, some of them predating the establishment of the Métis Nation. The history of Métis people who are not part of the Métis Nation is not easy to relate. For one thing, their past has not been much studied by historians. If the Métis Nation's story is unfamiliar to most Canadians, the story of the 'other' Métis is almost untold.⁴⁰

The *RCAP Report* was published in 1996. Since then, there has been a considerable amount of research into the existence of other Métis communities.⁴¹ Some research was conducted to support Métis rights litigation.⁴² More recent research suggests that the Métis Nation of the Northwest includes the Ontario Métis of the upper Great Lakes and that these Ontario Métis are not “other Métis.”⁴³

The Labrador Métis, despite being mentioned in the *RCAP Report* as an “other Métis community,” have never asserted that they are a separate and distinct Métis people. In *Labrador Métis Nation v Newfoundland & Labrador* the former president of the Labrador Métis Nation explained in an affidavit why they adopted the name.

After discussion, it was decided to use the term "metis" in the title of the organization since this literally meant "person of mixed aboriginal ancestry" [...] To us, it signified our continu-

39 Darren O’Toole, “From Entity to Identity to Nation” in Christopher Adams, Greg Dahl & Ian Peach, eds, *Métis in Canada: History, Identity, Law & Politics* (Edmonton: University of Alberta Press, 2013) at 143; Paul Chartrand, “Confronting the ‘mixed-blood majic’: Towards a definition of ‘Métis’ for purposes of section 35” (Saskatoon: Gabriel Dumont Institute, 2001), online: Virtual Museum of Métis History and Culture <<http://www.metismuseum.ca/resource.php/06517>>; Catherine Bell, “Who are the Metis in Section 35(2)?” (1991) 83 Alta L Rev 351–381; Larry Chartrand, “The Definition of Métis Peoples in Section 35(2) of the Constitution Act, 1982” (2004) 67 Sask L Rev 209; Anderson, *supra* note 10 at 351.

40 *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol 4, ch 5, 3.1 (Ottawa: Canada Communications Group, 1996) at 237 [*RCAP Report*].

41 The Federal Department of Justice commissioned research papers on fifteen communities: Northeastern Alberta, AB; Wabasca-Desmarais Settlement Area, AB; Lower North Saskatchewan River, SK; Cumberland Lake, MB/SK; Northern Lake Winnipeg, MB; Great Slave Lake, NWT; Lower Fraser River Valley, BC; Central British Columbia, BC; Western Mackenzie Drainage Basin, BC/YK; Lake of the Woods, ON; James Bay, ON; Outaouais River, QB; Northern New Brunswick, NB; Southern Nova Scotia, NS; Côte Nord, QB. See Austin Lawrence, “A Program of Research Related to Historical Métis Communities” (2008) 15 JustResearch 12, online: JustResearch <<http://www.justice.gc.ca/eng/rp-pr/jr/>>.

42 GCD Jones, “The Historic Métis in Southern and Central Alberta”, expert historical report prepared for *R v Hirsekorn* (2009) [unpublished].

43 Ray, *supra* note 30.

ing existence *as the Inuit descendant people* of south and central Labrador, inclusive of our mixed-ancestry members.⁴⁴

They further stated that they "did not live in any separate organized society, apart from the Labrador Inuit. They were Inuit people, living in Inuit communities in south and central Labrador, some of whom possessed mixed heritage".⁴⁵ More recent court documents indicate that they no longer call themselves the Labrador Métis Nation and have renamed themselves as NunatuKavut.⁴⁶ As noted by the Supreme Court of Canada, one of the hallmarks of the Métis of Canada is that they "share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots."⁴⁷ The fact that the Labrador group did not form a new culture separate from their Inuit ancestors and that they self-identify as Inuit indicates that they should not be considered Métis by others.

In Quebec, the *Corneau* case has recently determined that there was no evidence of a Métis rights-bearing collective in the Saguenay region.

Taken together, all of this information failed to reveal in the territory in question any objective evidence pointing to a historic collectivity as having any particular form of social organization that distinguished it from either the first inhabitants or the Euro-Canadians that followed. Nothing showed these individuals of mixed ancestry to be distinguished from their biological ancestors, be it by their clothes, language, specific cultural practices, religion or folklore; not a behavior, thought, or interest was in anyway different or unique to a group that was neither native nor white.⁴⁸

The defendants, through the testimony of an expert anthropologist, Emmanuel Michaux, argued that it was inconsistent with constructivist social theory to require them to establish the existence of a distinct historic Métis ethnic group in the territory in question. Rather, they argued, evidence of a diffuse and dispersed cultural community and genetic link ought to be sufficient. The Court rejected this argument.

In the expert's mind, it would no doubt suffice for a group of individuals, each having a genetic link to a native ancestor and sharing a common interest in hunting to constitute a contemporary Métis community and thereby establish a link via the fruits of historic intermarriage to the historic community.

Such a conception of a virtual aboriginal people would lead to an unacceptable, inequitable deterioration of the notion of aboriginal people within the meaning of section 35.⁴⁹

44 *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation and Works)* 2006 NLTD 119, at para 29, 2006 NLSCTD 119 [emphasis added].

45 *Ibid.*

46 *Nunatukavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corp (Nalcor Energy)*, 2011 NLTD(G) 44, [2011] NJ No 102 at para 2.

47 *R v Powley*, 2003 SCC 43, [2003] SCJ No 43 at para 11 [Powley].

48 *Québec (Procureur général) (Ministère des Ressources naturelles) c Corneau*, 2015 QCCS 482, [2015] JQ no 1026 at para 256 [translated by the authors].

49 *Ibid* at para 233 & 234 [translated by the authors].

Several cases in New Brunswick have shown similar results, with the defendants' own experts failing to produce evidence of any historic or contemporary Métis rights-bearing communities.⁵⁰ Courts in New Brunswick have been rather scathing in their dismissal of cases that appear to rely solely on a racial connection to an ever-so-great Indian ancestor for a claim of Métis section 35 rights. This is best illustrated by one case, *R c Castonguay*. The trial judge found Castonguay's claim of Métis rights to be more opportunistic than factual.

... the Court heard no evidence based on which it could hold that there ever was a Métis community in New Brunswick. At one point, there clearly were Métis, that is to say children of one aboriginal parent and one parent of European descent. The family trees prepared by Donald Morrison provide ample evidence of this with respect to each of the defendants. Having said this, an aboriginal genetic connection that was formed ten generations ago and has no continuity with the present cannot give rise to a constitutional right.

The defendants established a so-called "Métis" association for the purpose of claiming their rights as Métis. In my opinion, such a claim cannot be made out merely by creating an association and relying on an ancestral connection that is ten or more generations old. The aboriginal right in issue is protected and recognized by the Constitution of Canada. Such rights are not acquired so easily.⁵¹

The *RCAP Report* affirmed that the Métis Nation is a distinct Aboriginal people, "neither First Nations nor Inuit. Although their early ancestors included First Nations people [...] they have been independent peoples for generations."⁵² While there are many individuals who now claim to be Métis, based on the evidence produced to date we conclude that there appears to be only one Métis polity in Canada: the Métis Nation of the Northwest.

VI Recognition of the Métis in Law and by Government

Prior to the 1830s, Métis individuals shared in the annual distribution of presents given by the British Crown to Aboriginal allies. Giving presents was a symbolic means of cementing the friendship and alliance between Aboriginal peoples and the Crown. After 1830, British policy towards Aboriginal people in Canada shifted, which resulted in the increased marginalization of Métis and their separation, in their relationship with government, from Indians. The driving force for the exclusionary policy was the government's desire to decrease its financial obligations by reducing their numbers. In 1844, the Bagot Commission recommended that certain classes of persons should be ineligible to receive treaty payments; these classes included "all persons of mixed Indian and non-

50 *R v Castonguay*, 2006 NBCA 43, [2006] NBJ No 183; *R c Chiasson*, 2004 NBQB 80, [2004] NBJ No 62 leave to appeal to the Court of Appeal denied 2005 NBCA 82, 291 NBR (2d) 156.

51 *R v Castonguay*, 2003 NBCP 16 at para 74–75, 271 NBR (2d) 128.

52 *RCAP Report*, *supra* note 40 at vol 4, ch 5, 186.

Indian blood who had not been adopted by the band [and] all Indian women who married non-Indian men and their children.”⁵³

In 1870, the Canadian government, under pressure from the Red River Provisional Government led by Louis Riel, recognized the Métis in section 31 of the *Manitoba Act, 1870*. While Canada negotiated with the Métis, who were the majority of the population of Red River at the time, the negotiators represented all of the Red River population, not just the Métis. Section 31 is not a provision that acknowledges the existence of a collective. The language of the provision clearly refers to “half-breed residents” and “half-breed heads of families”.

The federal government in 1875 also recognized Métis in south-western Ontario in the *Addendum to Treaty Three by the Half Breeds of Rainy Lake and Rainy River*.⁵⁴ The very act of entering into such a treaty can be seen as legal recognition of a Métis collective. Unfortunately, the Métis did not get the requested legal recognition of their land holdings. In the end, if the Rainy Lake and Rainy River Métis wanted any benefits from their Treaty Adhesion they had to become status Indians.⁵⁵

In 1885 Canada hanged Louis Riel. From 1885 until the Alberta government created the Métis Settlements in the 1930s, there was no recognition of the Métis in law other than a few hunting regulations that permitted half-breeds to hunt and fish.⁵⁶

The government policy for Indians and Métis was assimilation. That was what drove the removal of Métis from treaty. On the Prairies another process, scrip, was meant to accomplish the same goal. Scrip is a certificate that grants the holder the right to receive cash or land. Beginning in 1885 and continuing into the early part of the twentieth century, land grants and scrip were distributed under the *Manitoba Act* and the *Dominion Lands Acts*.⁵⁷ At that time government believed that scrip extinguished the Indian title of scrip recipients and also extinguished their Aboriginality. Scrip also severed the Crown’s relationship with the Métis.

Following the Rebellion in 1885, the government deliberately excluded the Métis from Indian policy and law. The historical record demonstrates an increase in explicit racist language directed at the Métis. E.B. Borron, a magistrate who was commissioned to report on the Robinson Huron Treaties, noted:

Had he [W.B. Robinson] intended to include, or ever anticipated — that French Canadians and French Half-breeds or other breeds of like fecundity and longevity — were to be recognized as Indians by the Department of Indian Affairs and permitted to draw Annuities which his Province would be called upon to pay a man of the Hon. W.B. Robinson’s sagacity and shrewdness

53 *Ibid* at vol 1, ch 9, 268 and see vol 1, Part 2, ch 9 at 247.

54 *Indian Treaties and Surrenders*, *supra* note 28 at 308–309.

55 V Lytwyn, “In the Shadows of the Honourable Company, Nicolas Chatelain and the Métis of Fort Frances” in N St-Onge, C Podruchny & B Macdougall, eds, *Contours of a People: Metis Family, Mobility, and History* (Norman: University of Oklahoma Press, 2012) 194 at 219–220.

56 *Special Fisheries Regulations for the Provinces of Saskatchewan and Alberta and the Territories North Thereof*, 27 May 1927, PC 21146, 28 November 1928, as cited in *RCAP Report*, *supra* note 40 at 331.

57 *Manitoba Act*, SC 1870, c 3, ss 31–32; *Dominion Lands Act*, SC 1879, c 31, s 125(e).

would surely have inserted a clause in the treaty to protect the Province from such an imposition.⁵⁸

The treaty process and the process for the distribution of land under the *Manitoba Act* and the *Dominion Lands Act* had an effect beyond the immediate goal of extinguishment of Aboriginal title. Virtually all of the individual members of the Métis Nation were identified in the nineteenth and early twentieth centuries by the Canadian government through the treaty, scrip and land grants processes. These records provide a unique and rich source of Métis self-identification. Unfortunately, after their initial creation the records were never updated.

As noted above, the government appears to have operated on the theory that a process extinguishing any title claimed by the Métis also had the effect of severing Crown ties with them. Thus developed the history of the Métis as the forgotten people — an Aboriginal people who were conveniently forgotten and lost in the public record. The Métis Nation, as a polity, had been defeated by the events of Red River in 1870 and by the events that lead to the hanging of Louis Riel in 1885. The Crown believed that their Aboriginal rights had been extinguished through land grants and scrip. In the mind of the Crown, the Métis were never named as a people, and therefore never had legal status as an ethnicity. Métis as individuals ceased legally to be named as Métis or half-breeds after taking scrip. As Barman notes, those who are not named have little access to redress either socially or legally.⁵⁹

The *RCAP Report* noted that the Métis, formerly known as the independent ones, suffered greatly from a legal regime that persistently refused to acknowledge them.

Increasing immigration and development consumed their historical lands at a distressing rate. Increasingly restrictive hunting laws, with which they were required to comply despite their aboriginal heritage, made it more and more difficult to follow traditional pursuits. While they were never well off, Indian people at least had their reserves and benefited from various social services provided by the government of Canada. Not so the Métis. In the early twentieth century, the circumstances of the Alberta Métis were especially grim in the central and north-central regions ... Game was scarce, prohibitively expensive fishing licences were required, and white settlement was spreading remorselessly. The majority of the Metis were reduced to squatting on the fringes of Indian reserves and white settlements and on road allowances. The 'independent ones,' who had been the diplomats and brokers of the entire northwest were now being referred to as the 'road allowance people'.⁶⁰

Legal recognition of Métis in the nineteenth and early twentieth centuries was by and large as individuals. The legal record is silent with respect to whether they are a distinct people. The record is not concerned with determin-

58 EB Borron, "Report of E.B. Borron 1891" as cited in AE Gale, *Robinson Treaty Métis: Historical Report* (Ottawa: Department of Indian Affairs and Northern Development, 1998) at 45.

59 J Barman, "At the edge of law's empire: Aboriginal interraciality, citizenship, and the law in British Columbia" (2006) 24 Windsor YB Access Just 3 at 12.

60 *RCAP Report*, *supra* note 40 vol 4, ch 5 at 212.

ing their Euro-Canadian or Amer-Indian antecedents. It was enough for the law that the Métis were identified racially as half-breeds and that any claim to Indian title was extinguished.

There was also a historic resistance to including Métis in the jurisdictional landscape. The Federal Government and the Provinces all deny legal jurisdiction for Métis and assert that the other bears the jurisdiction. This game of jurisdictional avoidance was looked on with contempt by the Saskatchewan Court of Appeal in *R v Grumbo*. Wakeling JA, in his dissenting judgment, had this to say:

I view it as unfortunate that there appears to be a considerable amount of tactical manoeuvring involved in the positions taken by the federal and provincial authorities [...]

[...] This province probably felt obliged to maintain the position it had consistently taken that the Métis are a federal responsibility. To buttress this position, it has been their contention that the reference to Indian in s. 91(24) also embraces the Métis [...] The province then seeks to avoid the consequences of this admission by saying that while Indian includes Métis in s. 91(24) [...] “Indians” in paragraph 12 of the NRTA did not include Métis. This position the Province has adopted leads to the judicial temptation to conclude it cannot blow hot and cold [...] I refrain from such temptation only because I have decided the position taken by the Province is, in all likelihood, one thrust upon it by the historical inability of governments to agree on the extent of the responsibility owed to the Métis and which level of government has that responsibility. It is a political rather than a legal foundation which they stand upon [...]

It is of interest that the Federal government was made aware of this appeal and chose not to become involved. It too may have had the difficulty of denying responsibility for the Métis since it is their position the Métis were not included as an Indian in s. 91(24) and at the same time acknowledging the existence of certain rights of the Métis now recognized in s. 35 of the *Constitution Act, 1982*. These inconsistencies in the position of governments reinforce my view that the judicial process should give but scant attention to the positions they have adopted as they appear to be tainted by considerations beyond those which are properly relevant to a judicial determination.⁶¹

In the twentieth and twenty-first centuries the question of jurisdiction for Métis has arisen in almost every aspect of Métis life. While there has always been institutional recognition at the federal level for Indians, there are few permanent institutions of government that accept responsibility for Métis. Since *Powley* this changed somewhat. For example, the Ontario Ministry of Aboriginal Affairs now includes Métis within its mandate. However, in the federal government the Métis portfolio is held by the Federal Interlocutor within the Department of Aboriginal Affairs and Northern Development Canada. The very term *interlocutor* is problematic and well illustrates the embedded racism in our

61 *R v Grumbo*, [1998] 3 CNLR 172 (Sask CA) at paras 83, 84 and 87, 159 DLR (4th) 577.

structures of government: In law, *interlocutory* means “provisional; interim; temporary; not final.”⁶² The emphasis on the temporary nature of the office is a signal to the Métis that the government has no intention of having a permanent relationship with them.

We also take note of the very tangible results of jurisdictional avoidance. It means that Métis cannot partake of any of the systems set up to deal with Aboriginal issues such as the Indian Claims Commission, the Comprehensive Claims Process, the Specific Claims Process and test case funding, etc. These are symbolic and tangible examples of institutional racism in Canada.

VII Section 35 of the Constitution Act, 1982

The inclusion of the Métis in section 35 of the *Constitution Act, 1982* should have provided the impetus to change the racism embedded in our law. Section 35 reads as follows:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

The text of section 35 and the jurisprudence suggest that the Aboriginal and treaty rights of all of the Aboriginal peoples of Canada were recognized and affirmed for the same reasons. It seems clear that the Métis, whose Aboriginal and treaty rights are recognized within section 35, are Métis collectives, not individuals of mixed ancestry. Unlike section 91(24), the text expressly focuses on peoples rather than individuals and as noted above, the word *peoples* is used three times within section 35.

R v Powley, the first Métis case that came before the Supreme Court of Canada dealing with section 35 Métis rights, concerned two Métis from Sault Ste. Marie, Ontario who were charged with hunting without a license. The court confirmed the existence of a Métis rights-bearing community in Sault Ste. Marie. Since that time there have been several harvesting rights cases in the Northwest that have affirmed the existence of Métis rights-bearing communities.⁶³

Despite affirmation that section 35 recognizes Métis as rights-bearing collectives, section 91(24) has continued to operate on the basis of individual racial connections. These two different legal streams — section 35 and section 91(24) — have now collided in the *Daniels* case, where one of the central issues is whether to define the Métis as mixed-race individuals (the plaintiff Congress of Aboriginal People’s position, supported by the trial judge) or as an ethnicity (the submissions of several Métis interveners at the Court of Appeal).⁶⁴

VIII Daniels v Canada

The late Harry Daniels was an influential Métis leader. He initiated an action in 1999 that sought declarations from the court to address discrimination against

62 *Black’s Law Dictionary*, 5th ed (St. Paul: West Publishing Company, 1979) *sub verbo* “interlocutory”.

63 *R v Lavolette*, [2005] 3 CNLR 202, 2005 SKPC 70 (CanLII); *R v Belhumeur*, [2008] 2 CNLR 311, 2007 SKPC 114 (CanLII); *R v Goodon*, [2008] MBPC 59, [2009] MJ No 3.

64 Métis interveners at the Federal Court of Appeal included the Métis Nation of Ontario, the Manitoba Métis Federation and the Métis National Council.

Métis and non-status Indians. After a long trial, Phelan J granted a declaration that Métis and non-status Indians are Indians within the meaning of “Indians, and Lands reserved for the Indians”, which is section 91(24) of the *Constitution Act, 1867*. The essence of the case concerned settling the ongoing dispute about which level of government has jurisdiction for Métis and non-status Indians: the federal government or the provinces. As Catherine Bell notes, “*Daniels* is also about the denial of the existence of Métis as a distinct Aboriginal people with Aboriginal constitutional rights.”⁶⁵

It should be noted that the question in section 91(24) is not whether Métis are Indians in the cultural or social sense. Rather, it is strictly in the legal sense of the term that Métis seek inclusion in section 91(24) as Indians. In *Daniels*, the definition of Métis as individuals or as an ethnicity was a central issue that the trial judge struggled with and that became a main focus of the submissions made to the Court of Appeal. It was suggested by Métis Nation interveners at the Court of Appeal that the trial judge’s definition of Métis was problematic and that a definition was not strictly necessary. After all there is no definition of *Indian* in section 91(24) and no definition of *Eskimo* was put forward by the court in *Re Eskimos*. In overruling the trial judge’s highly problematic definition of Métis, the Court of Appeal held that it was not “necessary to exhaustively or definitively define the term Métis in order to determine whether the Métis people fall within the scope of section 91(24).”⁶⁶ The Court of Appeal instead agreed with the Métis interveners that collectives should be the starting point and held that “the criteria identified by the Supreme Court in *Powley* informs the understanding of who the Métis people are for the purpose of the division of powers analysis.”⁶⁷

The complexity of Métis identity was not entirely lost on Justice Phelan. Unfortunately he did not define the Métis as members of Métis collectives, nor did he remain silent on the issue, which would allow the Métis to define their identity autonomously. Despite their inclusion in section 35 as one of the “aboriginal peoples of Canada” Phelan J did not accept that the section 35 peoples had any relevance to section 91(24). Instead he unnecessarily tried to decipher the roots of Métis Aboriginality. The judge focused on the ancestral antecedents of the Métis and ignored their collectivity and well-established ethnogenesis.⁶⁸

Based on scattered references in the historic record to individuals identified as half-breeds in various parts of the country, Phelan J reduced the Métis collective into only one thing: an individual’s connection to the Indian race. In his insistence on an individual analysis and in his confusion of ethnicity with bloodlines, Phelan J provided a troubling and unprincipled racial definition of Métis. The Court of Appeal attempted to reconstruct Phelan J’s analysis by holding that he “meant Indian heritage to mean indigenesness or Aboriginal

65 Catherine Bell, “R. v. Daniels: Issues of Jurisdiction, Identity and Practical Utility” (2014) 3:3 Aboriginal Policy Studies 132 at 133.

66 *Daniels v Canada*, 2014 FCA 101, [2014] 4 FCR 97 at para 110 [*Daniels-FCA*].

67 *Ibid* at para 99.

68 For some examples of works that address the ethnogenesis of the Métis, or the Métis as a distinct and unique people see: J Peterson and JSH Brown, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985); GJ Ens, *Homeland to Hinterland: The Changing Worlds of the Red River Métis in the Nineteenth Century* (Toronto: University of Toronto Press, 1996); Bakker, *supra* note 25; Ray, *supra* note 30; M Giraud, *The Métis in the Canadian West* translated by G Woodcock (Alberta: University of Alberta Press, 1986).

heritage.”⁶⁹ Unfortunately this is what Anderson has referred to as becoming “clearly (if hopelessly) entangled in an ontology of race.”⁷⁰

It is important to note that the Congress of Aboriginal Peoples, the pan-Aboriginal organization that initiated this action, appears to suffer from a similar entanglement. In its submissions, the Congress conflated Métis and non-status Indians into one group of “disadvantaged” Aboriginals and presented their case with a wide national scope.⁷¹ Unfortunately, Phelan J followed their lead and lumped Métis and non-status Indians together as a group with a “community of interest as people of Indian ancestry.”⁷² While this may accurately reflect the composition of the individual members of the pan-Aboriginal organization known as the Congress of Aboriginal Peoples, it appears that it may actually exclude the Métis Nation of the Northwest as a distinct polity because the Métis of the Northwest do not identify as people of Indian ancestry; they identify as people of Métis ancestry. Phelan J’s grouping also created a false dichotomy of status Indians and others, akin to the colonial racial dichotomy of whites and others, that can be critiqued on multiple fronts.⁷³

The trial judge erroneously grouped Métis with non-status Indians⁷⁴ based on the fact that some Indians lost their status by marrying non-Indians (through the provisions in the *Indian Act* often called the marrying-out provisions)⁷⁵ and the historical application of the term *half-breed*.⁷⁶ Phelan J distilled Métis and non-status Indians into a subset, created in part by marriage and breeding, of what he determined to be a race: Indian. This is the very essence of a racial analysis and the judge justified his use of racial discourse with his proclamation that “s. 91(24) is a race-based power.”⁷⁷

The racial analysis of *Indian* in section 91(24) and the racial definition of *Métis* are highly flawed, as both operate on discredited principles. Grammond, who was called as an expert witness in *Daniels*, states in his book that “a racial conception [of identity] is based on the belief that cultural traits are transmitted biologically, an assumption contradicted by modern science.”⁷⁸ In essence the authors propose that a quantum of blood — pure or mixed — does not a people make.

On the simplest and most basic level, one’s Aboriginality cannot be defined by racial terms such as “Indianness” because the term *Indian* is a legal construct. The judicial use of a racial analysis that defines Métis as individuals primarily identified by their “Indianness” also departs significantly from estab-

69 *Daniels-FCA*, *supra* note 66 at para 108.

70 Anderson, *supra* note 10 at 354.

71 Métis and non-status Indians have been grouped together by not only the Congress of Aboriginal Peoples but also the federal government since at least the 1970s. *Daniels-FCTD*, *supra* note 1 at para 25 and 84.

72 *Daniels-FCTD*, *supra* note 1 at para 94.

73 BG Miller, *Invisible Indigenes: The politics of nonrecognition* (Nebraska: University of Nebraska Press, 2003); JA Byrd, *The Transit of Empire: Indigenous Critiques of Colonialism* (Minneapolis: University of Minnesota Press, 2011); V Seth, *Europe’s Indians: Producing Racial Difference, 1500–1900* (Durham: Duke University Press, 2010).

74 *Daniels-FCTD*, *supra* note 1 at paras 54, 117, 130, 381.

75 *Ibid* at para 531.

76 *Ibid* at paras 277, 287, 291, 294.

77 *Ibid* at paras 568, 378 and 538.

78 Sébastien Grammond, *Identity Captured by Law: Membership in Canada’s Indigenous Peoples and Linguistic Minorities* (Quebec, McGill University Press, 2009) at 190; Grammond, expert historical report prepared for trial of *R v Daniels* (2013) at p 009534 of Appeal book para 15 [unpublished].

lished case law. In *Powley* the Supreme Court of Canada stated that the “Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry” and the “Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots.”⁷⁹ Moreover the Supreme Court of Canada in *Cunningham* emphasized that the court must respect “the role of the Métis in defining themselves as a people.”⁸⁰

In explanation for his departure from established case law, Phelan J noted that none of the previous cases addressed section 91(24), and agreed with the plaintiffs that the geographic range of the Métis was countrywide.⁸¹ He noted that the evidence illustrated that the term *Métis* was and is used outside of Western Canada, and that cases involving agreements or provincial laws are not necessarily determinative of the jurisdiction issue.

Phelan J dismissed all three parts of the *Powley* test — self-identification as Métis, connection to a historic Métis community, and acceptance by a Métis community — and focused solely on an individual’s connection to his or her Indian heritage. He held that community acceptance was relevant only to individual claims to exercise a collective right such as hunting. Phelan J noted that there may be circumstances where there is “no such association, council or organization” but that there may be objective evidence that the person identifies subjectively as a Métis.⁸² He held that there is no “one size/description fits all” when it comes to examining Métis on a national scale.⁸³ Furthermore, in his analysis he entirely eliminated any reference to the fact that the ancestral connection discussed in *Powley* was to a Métis community, not to an Indian community. In the end he adopted the government’s 1980 definition of Métis and non-status Indians. In so doing he held that Métis, for the purposes of federal jurisdiction, are defined as “a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status.”⁸⁴

This definition is highly problematic for many reasons. First, contrary to the judge’s promise that he would provide a method for defining Métis, the above statement is not a method. Second, the statement does not even mention the word *Métis*. Third, putting the emphasis on “a strong affinity for their Indian heritage” dismisses any notion of a distinct people. Focus on an individual’s genealogy, bloodlines or race assumes that the only relevant fact is a genetic link to a fictional racial group: Indians. The fact that Indians are not a racial group but a collection of several ethnicities appears to have escaped the judge. 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.

In 2014 the Federal Court of Appeal handed down its reasons for judgment in *Daniels*.⁸⁵ The Court of Appeal drew on section 35 Métis jurisprudence in its

79 *Powley*, *supra* note 48 at paras 10–11.

80 *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, [2011] SCJ No 37 at para 83.

81 *Daniels-FCTD*, *supra* note 1 at paras 125–129.

82 *Ibid* at para 128.

83 *Ibid* at para 129.

84 *Ibid* at para 117.

85 *Daniels-FCA* *supra* note 66.

analysis of section 91(24), the trial decision and the identification of Métis. Dawson JA stated:

The criteria identified by the Supreme Court in *Powley* inform the understanding of who the Métis people are for the purpose of the division of powers analysis. The *Powley* criteria are inconsistent with a race-based identification of the Métis.⁸⁶

At the hearing, the Métis Nation of Ontario put the issue of Phelan J's racial analysis of section 91(24) squarely before the court.⁸⁷ Dawson JA, writing on behalf of the Court of Appeal, held that:

[...] I acknowledge that historically subsection 91(24) was viewed to be a race-based head of power. Thus, in *Canard*, at page 207, Justice Beetz wrote that by using the word "Indians" in subsection 91(24), the *Constitution Act, 1867* created a racial classification and referred to a racial group that could receive special treatment.

However, the "Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life" (*Reference re Same-Sex Marriage*, at paragraph 22). This is particularly so when dealing with the heads of power enumerated in sections 91 and 92 of the *Constitution Act, 1867* as they must "continually adapt to cover new realities" (*Reference re Same-Sex Marriage*, at paragraph 30).

I accept the submission of the intervener Métis Nation of Ontario that a progressive interpretation of subsection 91(24) requires the term Métis to mean more than individuals' racial connection to their Indian ancestors. The Métis have their own language, culture, kinship connections and territory. It is these factors that make the Métis one of the Aboriginal peoples of Canada.⁸⁸

While Dawson JA's reasons do go part of the way towards the negation of a racial analysis of section 91(24), they don't go far enough. It is unfortunate that Dawson JA did not categorically state that section 91(24) is not a "race-based provision". In fact, her reasons could be read to mean that despite a "progressive interpretation" she affirmed the basic requirement that Métis must establish a "racial connection to their Indian ancestors" and then something "more."

IX Conclusion

This paper has demonstrated that racism is embedded in our law, policy and institutions. Phelan J's reasons for judgment in the *Daniels* case illustrate the dangers in applying a racial analysis to a constitutional provision. As such it provides an example of continuing structural racism that operates to deny the existence of one of the Aboriginal peoples of Canada: the Métis Nation of the

86 *Ibid* at para 99.

87 In the interests of full disclosure, one of the authors of this paper, Jean Teillet, was legal counsel for the intervenor, the Métis Nation of Ontario, at the Court of Appeal in *Daniels*.

88 *Daniels-FCA*, *supra* note 66 at paras 94–96.

Northwest. *Daniels* also illustrates the collision between two separate streams of Aboriginal jurisprudence and law — section 35 and section 91(24). Section 35 affirms constitutional recognition of collectives that are Aboriginal. Section 91(24) has now been interpreted as a provision based on an individual connection to a fictional race called Indians. To the extent that section 91(24) drives Métis individuals to identify with a fictional Indian race it amounts to an attempt to prove fiction as fact.

As the judge noted, there are divergent views as to the definition of the Métis. The Congress of Aboriginal Peoples asserts that individual Métis and non-status Indians should be treated as Indians for jurisdictional purposes regardless of whether they belong to any ethnicity. It is enough for the Congress that these individuals have some racial tie to Indians. On the other side of the equation stands the Métis Nation of the Northwest, which says that Métis should be treated as Indians because they are members of an ethnicity and one of the “aboriginal peoples of Canada”. These claims stand in stark contrast to each other.

Dworkin provides us with a theoretical basis for distinguishing between these two contrasting theories. His theory is that a legal system must be animated by integrity. He suggests that where people hold widely divergent views on an issue, choices must be made on the basis of principle.

If there must be compromise because people are divided about justice, then [...] compromise [must be] about which scheme of justice to adopt rather than a compromised scheme of justice.⁸⁹

The issue of whether Métis are within section 91(24) is a question of justice and the interpretation and application of section 91(24) must be on the basis of principle. Nothing less will suffice for a constitutional provision. If section 91(24) is interpreted on an individual basis it will continue to be a race-based provision, a compromised scheme of justice and devoid of principle. *Daniels* provides the court with an important opportunity to include the Métis as an Aboriginal people in section 91(24) and thereby adopt a principled analysis of this head of power. It is to be hoped that the Supreme Court of Canada will seize the opportunity.

89 Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986) at 179.