



July 2016

## The Power of Legal and Historical Fiction(s): The Daniels Decision and the Enduring Influence of Colonial Ideology

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### Recommended Citation

Macdougall, B. (2016). The Power of Legal and Historical Fiction(s): The Daniels Decision and the Enduring Influence of Colonial Ideology. *The International Indigenous Policy Journal*, 7(3).

**DOI:** 10.18584/iipj.2016.7.3.1

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## Abstract

It's been several months since the Supreme Court of Canada (SCC) rendered its judgment in *Daniels v. Canada* (2016), affirming that the term "Indian" in s. 91(24) of the Constitution Act (1867) includes Métis and Non-Status Indians. There is a general hope that the decision marks a turning point for Métis and Non-Status Indians within Canada's colonial structures. I'm not certain this optimism is justified. The judgment was reached based on the types of historical evidence presented and, consequently, there are a couple of statements within the written judgment that give me pause to question how the evidence regarding the histories of Métis and Non-Status Indians were presented to, and then interpreted by, the justices. Bearing in mind that the crux of the case rested on the linguistic meaning and evolution of the term "Indian" in Canadian society through law and policy, evidence was introduced about how the term was used at various points in the past, as well as the context of that usage in order to demonstrate the evolution of a Canadian legal and historical fiction that increasingly restricted the idea of what an *Indian* was. What the SCC did with the Daniels Decision is reverse that restrictive trend for Indians while constructing new problems.

## Keywords

Daniels v. Canada, Indian Status, Métis, Non-Status, Indian Act, Supreme Court of Canada, legal rights

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## The Power of Legal and Historical Fiction(s): The Daniels Decision and the Enduring Influence of Colonial Ideology

It's been several months since the Supreme Court of Canada (SCC) rendered its judgment in *Daniels v. Canada* (2016), affirming that the term "Indian" in s. 91(24) of the Constitution Act (1867) includes Métis and Non-Status Indians. However, the SCC declined to respond to two other questions—whether the federal government had a fiduciary duty and, if so, a responsibility to consult and negotiate with these people when their collective rights were potentially compromised by resource development. Ruling in favour of Métis and Non-Status Indians resolved a substantive issue about federal jurisdictional responsibility, something contested since Confederation. While this did not truly break new ground in Canadian law, as the Inuit were declared to be "Indians" in 1939, it effectively reconciled s. 91(24) with s. 35 of the Constitution Act (1982), which states that the Aboriginal peoples of Canada are Indian, Inuit, and Métis.<sup>1</sup> It would be a gross understatement to say the ruling sparked an enthusiastic response. You only needed to watch the news coverage on April 14, 2016 to see the jubilant response of the people who gathered in anticipation of a positive ruling. Since then, one legal conference has been held and several more are being planned by political leaders, lawyers, and academics to discuss socio-historical, legal, political, and policy implications.<sup>2</sup>

There is a general hope that the decision marks a turning point for Métis and Non-Status Indians within Canada's colonial structures. I'm not certain this optimism is justified, and, as Chris Andersen (2016) noted, "The important thing to understand about court decisions—especially those written by the Supreme Court of Canada—is that they are beginnings as much as they are endings" (para. 4). I'm not going to focus here on where the Daniels decision may take us, but instead on why Harry Daniels, Terry Jourdy, and Leah Gardner brought this case forward in the first place. The answer is rooted in the history of Métis and Non-Status Indians, and the creation of colonial legal and historical fictions.<sup>3</sup> The judgment was reached based on the types of historical evidence presented and, consequently, there are a couple of statements within the written judgment that give me pause to question how the evidence regarding the histories of Métis and Non-Status Indians were presented to, and then interpreted by, the justices. Bearing in mind that the crux of the case rested on the linguistic meaning and evolution of the term "Indian" in Canadian society through law and policy, evidence was introduced about how the term was used at various points in the past, as well as the context of that usage in order to demonstrate the evolution of a Canadian legal and historical fiction that increasingly restricted the idea of what an *Indian* was. What the SCC did with the Daniels Decision though is reverse that restrictive trend for Indians while constructing new problems.

What struck me about the written judgement was the SCC's pre-occupation with defining Métis and Non-Status Indians by a new form of legal and historical fiction but in this case based on a criteria of

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<sup>1</sup> The SCC determined that the term "Indian" included the "Eskimo" (now Inuit) (see Reference whether

<sup>2</sup> The Pacific Business and Law Institute (PBLI) hosted the first conference on June 23 to 24, 2016 in Ottawa, and both Osgood Law School and the Faculty of Native Studies at the University of Alberta are planning others for fall 2016.

<sup>3</sup> These three people were all members of the Congress of Aboriginal People at the time of the initial filing in 1999. Harry Daniels was Métis from western Canada and, after his death in 2004, his son, Gabriel Daniels, was added as a plaintiff. Terry Jourdy and Leah Gardner are both non-Status Indians from Nova Scotia and northern Ontario, respectively.

“mixedness.” According to the SCC, “there was no need to delineate which mixed-ancestry communities are Métis and which are Non-Status Indians. They are all ‘Indians’ under s. 91(24) by virtue of the fact they are all Aboriginal people” (*Daniels v. Canada*, 2016, para. 46). While there’s a certain logic to this statement, it is frustratingly simplistic when historically contextualized. That is, focusing on *mixed*-ancestry ignores the history of who the Métis and Non-Status people were therefore misrepresents who they are today. Of course there were mixed-blood people in eastern Canada as early as the seventeenth century, but equating them with the Métis, known historically as *la nouvelle nation*, is not borne out by historical evidence.

Canada’s colonial legacy is layered and complex, but distilled. As the Crown attempted to gain and control its foothold in British North America, it constructed a series of legal principles that defined its relationship with Indigenous nations. 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. As a result, this legislative reality gave the federal government ever-greater powers over the lives and territories of Indigenous people. The Royal Proclamation (1763) first specified that only the Crown could treat for land with “Nations or Tribes of Indians.” Then, a century later, under s. 91(24) of the Constitution Act (1867), the federal government assumed jurisdictional authority over “Indians, and Lands reserved for Indians.” Neither of these documents defined in practice what or who was an Indian. It was the 1876 federal Indian Act by which Canada codified a narrow, patriarchal, legal definition as to who could possess legal *status* as an “Indian” and, just as significantly, who could not.<sup>4</sup>

As of 1876, an Indian was defined as a man with Indian blood who belonged to a specific band. Women and children were Indians only inasmuch as they were the spouse or child of an Indian man. So, women and children themselves did not, by law, have independent status as Indians. The Indian Act further identified the Métis (or halfbreed in nineteenth-century language), specifying that “no half-breed in Manitoba who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall . . . be accounted an Indian, or entitled to be admitted into any Indian treaty.” (Indian Act, 1867, s. 3(e)).<sup>5</sup> So, while the Act conferred status on some, it denied it to others, creating a legal fiction that is now enshrined in popular Canadian history that cannot now distinguish Indigenous cultural identities from colonial machinations.

The federal Indian registry that recorded those who possessed status, along with their wives and children, was developed over time, but without consistent criteria. In Western Canada, signatories of the

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<sup>4</sup> The Royal Proclamation was issued by King George III as an administrative document to deal with the acquisition of French Canada by the British as a result of the Conquest. Those portions pertinent to Aboriginal people can be found at: <http://indigenousfoundations.arts.ubc.ca/home/government-policy/royal-proclamation-1763.html>. The Constitution (1867) can be read online at the Government of Canada website: <http://laws-lois.justice.gc.ca/eng/const/page-4.html>. The Indian Act (1876) can be found at [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/1876c18\\_1100100010253\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/1876c18_1100100010253_eng.pdf). It should be noted that s. 91 contains 29 areas that express what the federal Crown has legislative authority, including post offices, copyright, and censuses.

<sup>5</sup> Camilla Augustus (2013), notably, has explored the racialization of Métis within the Indian Act.

numbered treaties automatically became status Indians, while in other parts of Canada colonial officials developed records that identified Indians and the bands to which they belonged, and those became part of the registry. In the process, many Indigenous people—sometimes entire communities—were never registered for a variety of reasons, such as being absent when treaties were signed, lack of contact with colonial officials, or because the province in which they lived joined Confederation too late.<sup>6</sup> It needs to be understood, then, that application of Indian status was entirely arbitrary, inconsistent, and based on the decisions of government representatives.

There have been small adjustments to the legal definition in the last 140-years—notably the passage of Bill C-31 in 1985—but the basic premise that the Canadian state, not Indigenous societies, control the definition of who is and who isn't an "Indian" remains.<sup>7</sup> 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 Indian status are presumed to have married out of their Indianness, and so their children were (and are) considered "mixed-bloods," even if their fathers were Indigenous.

So, while prior to 1876 Indian was a fairly fluid term applied to a range of Indigenous societies, much as the terms Aboriginal, Native, and Indigenous are used today, the Indian Act constricted its meaning and use. The SCC in the Daniels decision affirmed this, stating that the term Indian within the constitutional context must now be understood as having two meanings: "

A broad meaning as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term, 'aboriginal people of Canada' used in s. 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. (*Daniels v. Canada*, 2016, "On Appeal from the Federal Court of Appeal," para. 7)

With this statement the SCC reopened the meaning of Indian, but then went the other direction with the term Métis by stating, "There is no one exclusive Métis people in Canada," and that first Métis community developed in "Le Heve [sic] Nova Scotia in 1650" (*Daniels v. Canada*, 2016, para. 17).<sup>8</sup>

It is here that the Court, in attempting to correct one historical and legal fiction, contributes to the creation of new ones. Already there is a popular perception that the term Métis applies loosely to anyone

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<sup>6</sup> This was the case of Newfoundland, which from the time it joined Canada in 1949 until 2009, had no legally recognized Indian population, despite being home to a sizeable Mi'kmaq population.

<sup>7</sup> This amendment restored status to women and/or their children who had been removed from the registries a generation or two earlier. It did not, however, end the discriminatory nature of the Indian Act. Instead s. 6 of the Act, "Persons Entitled to be Registered," created two classes of Indians: 6(1), those who can pass Indian status to their children; and 6(2), those who have Indian status, but cannot pass their status to their children unless the other parent also has status. Prior to 1985, Status Indian men could pass their status and today their children are considered 6(1). However, the children of women who had "married out" are today considered 6(2)s, creating a "second-generation cutoff" because 6(2)s cannot pass on status to their children. These revisions have been critiqued for only deferring the termination of Indian status by a generation, rather than adequately addressing the legal issues with the ways that legal status is determined and conferred. See Bill C-31 (n.d.) for more information regarding this issue.

<sup>8</sup> The reference is to LaHave, NS, once the Acadian capital.

with mixed Indigenous and non-Indigenous heritage. This misperception ignores the culture, history, language, economy, and socio-political structures that were a part of Métis societies as, by the early nineteenth century, they forged themselves into a new nation. The error is in presuming that the term Métis today means the same as it did in the seventeenth and eighteenth centuries, failing to account for shifts in linguistic usage as this new nation evolved and as Canada responded to that evolution. It is one thing for the average Canadian to believe this, but egregious for any government responsible for colonial policies and legal principles to accept such historical inaccuracy as fact. Make no mistake, the Crown knew who we were long before the Daniels case was brought before the courts in 1999. There was no confusion identifying us when we were denied entrance into treaties and instead offered scrip—individual land coupons to “extinguish halfbreed title to land”—or in 1869–1870 and 1885 when Canadian soldiers were deployed to fight us at Red River and Batoche. The history of the Métis in Canada after 1885 was one of physical diaspora and coerced relocations from traditional homelands, leading to almost complete social, political, and economic marginalization in the twentieth century. For Non-Status people, the story was different, but the outcome the same—disenfranchisement and marginalization as Indigenous peoples even as they continued to live and subsist within their traditional homelands.

Certainly, all across North America at the time of contact, inter-racial relationships produced children of mixed blood, but who those people became varied based on the larger and more intimate geographic, economic, political, and social realities in which they were raised and lived their lives. So here’s the issue—“mixed blood” does not equal Métis any more than “full blood” equals Indian. Both statements are based on racialized historical fictions, but whereas the latter was codified in colonial law, the former lives on in the minds of so many Canadians. Métisness arose out of a unique socio-cultural context centred on specific economic activities associated with the fur trade, which then led them to develop a political expression of distinctiveness. Métis people saw themselves—and were regarded by others—as different from their paternal and maternal relatives because they enacted their sense of self through a cultural worldview centred on kinship connections spread throughout the historic homeland, a region between the Great Lakes and the continental divide to the west and from the subarctic regions down through the Judith Basin to the south (roughly northern Ontario, Rocky Mountains, southern Yukon and Northwest Territories, and Montana and North Dakota). I realize that many will vehemently disagree with me, but continuing to assert that that the first Métis was born nine months after contact is nothing but an historically inaccurate quip that supports a colonial fantasy of benevolent relations. Absolutely, there are a range of Indigenous people who were the products of historical mixed unions between Whites and Indians, just as there are people born today from such relationships. And now, as then, some of them are Indians, some are White, some are Inuit, and some are Métis. But, let’s be clear, not all are Métis.

Within a Canadian historical context, the term Métis evolved from simply meaning “mixed” to referring to a specific nation whose citizens shared a historical and socio-cultural context, political structure, and defined economic niche, and existed within a clearly delineated, albeit expansive, geography. Are there rights-bearing people outside this geography or who don’t fit this description who should be recognized as Indian for the purposes of law and jurisdictional authority? Yes, of course. But the Daniels case was not Métis-specific. The other parties to this action were Non-Status Indians. Contrary to the SCC’s statement that “there is no need to delineate which mixed-ancestry communities are Métis and which are Non-status Indians,” (*Daniels v. Canada*, 2016, “On Appeal from the Federal Court of Appeal,” para.

6) there is every reason to differentiate because, although our experience with the colonial governments of Canada have been similar, they are not, in fact, the same. While the courts have affirmed that both are now Indians under s. 91(24), we must be careful not to conflate national identities or cultural realities. Yet, this is already happening. Recently, the Canada Research Chair on Métis identity, anthropologist Denis Gagnon (2016), stated that “the future will tell which self-identification [Métis or Non-Status] will be *the better strategic choice* [emphasis added],” but that those pursuing Aboriginal rights “remain free to give themselves any name they choose” (“Looking Forward,” para. 1). But for us, being Métis has never been a choice, as I’m sure is also true for Non-Status Indians, because we know who we are, we know our history, and so should Canada.

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