

The Wastelander Life: Living Before and After the Release of Daniels v Canada

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Commentary



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Abstract

The difficulties of entering the Canadian legal system for Indigenous peoples often includes the challenge of using the tools that have a history of harming those same peoples in the first place. Such a reality means the pursuit of recognition in Canadian law will not always be a positive experience—even when a decision supposedly represents a ‘win.’ Here, the author considers some of the effects that have developed from the release of Daniels v Canada. As with other Supreme Court of Canada releases, it inspires observations about colonialism, the modern plight of Indigenous peoples, and the rule of law.

Cover Page Footnote

Thanks to Nancy Carlson and Kerry Young for their impeccable research assistance. Devon Kapoor (OHLJ editor) also provided vital editorial guidance. Stepan Wood’s support also ensured this piece’s appearance.

Commentary

The Wastelander Life: Living Before and After the Release of *Daniels v Canada*

SIGNA A. DAUM SHANKS*

The difficulties of entering the Canadian legal system for Indigenous peoples often includes the challenge of using the tools that have a history of harming those same peoples in the first place. Such a reality means the pursuit of recognition in Canadian law will not always be a positive experience—even when a decision supposedly represents a ‘win.’ Here, the author considers some of the effects that have developed from the release of *Daniels v Canada*.¹ As with other Supreme Court of Canada releases, it inspires observations about colonialism, the modern plight of Indigenous peoples, and the rule of law.

Parmi les difficultés qu’ils rencontrent au sein du système juridique canadien, les Autochtones se retrouvent souvent aux prises avec des outils qui leur ont nui par le passé. Cet état de fait signifie que leur recherche de reconnaissance dans le droit canadien ne sera pas toujours une expérience positive, et ce, même lorsqu’une décision constitue en principe une « victoire ». Dans cet article, l’auteure étudie quelques-uns des effets découlant de l’arrêt *Daniels c. Canada*. Comme c’est le cas d’autres jugements rendus par la Cour suprême du Canada, cet arrêt inspire diverses observations sur le colonialisme, le sort moderne des Autochtones et la primauté du droit.

IMAGINE YOURSELF WAITING FOR SOME MATTERS TO FALL INTO PLACE. Trouble is, not only do you not know what those matters are, you don’t know how long you will be waiting. As you wonder what will happen, others tell you the waiting will not last long. Maybe they are being supportive, but it is just as likely they

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1. 2016 SCC 12, 1 SCR 99 [*Daniels*].

are responding to what they see as your impatience. And maybe, you fear, your anxious anticipation is due to the possibility that the wait will not only be for nothing, but will be for the worse. Still, you find a way, as the cliché goes, to hold your breath.² Sometimes, you hear of people who believe your waiting will be futile. As troubling, you meet others who think you shouldn't have anything to wait for at all.³ So, over and over, you are faced with people who challenge your own belief that the wait is worth it.⁴

The above thoughts recall themes from Samuel Beckett's most famous work, *Waiting for Godot*⁵—the going back and forth in one's mind about personal judgement and others' interests, or wondering whether a long haul is worth the risk. But now that I'm more attuned to my own family history and professional interests, such thoughts resonate in another way as well;⁶ they connect with what is currently going on in Métis country and the ambivalence, forced optimism, nervousness, and exhaustion developed in the various stages that led to the

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2. It seems as if the waiting arising from litigation has been as much a part of explaining the story of the Métis courtroom battle as the legal battle itself. See CTV News, "Aboriginal leader 'waiting for a call' from PM to respond to Indian status ruling" (16 April 2016), online: <www.ctvnews.ca/politics/aboriginal-leader-waiting-for-a-call-from-pm-to-respond-to-indian-status-ruling-1.2862168>.
 3. The debate around the application of Métis cases has also been heated—likely because of the relatively few decisions. As a result, Métis leaders from across Canada have often participated in critiques of cases from a jurisdiction to which they do not belong. See e.g. BC Métis Federation, "Federal Court of Appeal Rules Métis Have Rights" (17 April 2014), online: <bcmetis.com/2014/04/federal-court-of-appeal-rules-metis-have-rights>.
 4. On the issue of a lack of Indigenous representation in courts, and whether those asking for patience are appropriate in doing so, see Cristin Schmitz, "Nation 'woefully' short of judges with indigenous roots at top levels" (6 May 2016), online: The Lawyers Weekly <www.lawyersweekly.ca/articles/2668>.
 5. Samuel Beckett, *Waiting for Godot* (London: Faber and Faber, 1956).
 6. For a discussion of the issue of writing on a matter in law that one has personal ties to, see Arthur J Ray, *Telling it to the Judge: Taking Native History to Court* (Montreal: McGill-Queen's University Press, 2011). See also, Jeremy De Beer, "Copyright Royalty Stacking" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 335; Barack Obama, "The President's Role in Advancing Criminal Justice Reform" (2017) 130:3 Harv L Rev 811.

rendering of *Daniels v Canada* at the Supreme Court. While a number of people call the decision a ‘win,’⁷ I find myself slow to offer such praise.

But why am I hesitant?⁸ And why, after going through it in its entirety, do I keep returning to the phrase “jurisdictional wasteland?”⁹ Given that the Court held that “this case represents another chapter in the pursuit of reconciliation,”¹⁰ the hesitance I (and others) experience is even more confounding because it is

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7. See e.g. Gloria Galloway & Sean Fine, “Métis, non-status Indians Supreme Court battle over rights,” *The Globe and Mail* (14 April 2016), online: <www.theglobeandmail.com/news/national/metis-ruling/article29628869>; Keltie Lambert, “*Daniels v Canada*: Supreme Court Ends 150 Years of Political Football” (2016) 25:2 Const F 55; Marie Andrée Denis-Boileau, “Les Métis sont aussi des Indiens, tranche la Cour suprême” (2016) 48:5 J du B 28; David Dias, “SCC recognizes constitutional rights of Métis, non-status Indians” (April 2016), *Canadian Lawyer Magazine*, online: <www.canadianlawyermag.com/legalfeeds/3213/scc-recognize-constitutional-rights-of-metis-non-status-indians.html>; Cristin Schmitz, “Supreme Court Métis ruling perceived as ‘game changer’” (April 2016), online: *The Lawyer’s Daily* <www.thelawyersdaily.ca/articles/2104/supreme-court-m-tis-ruling-perceived-as-game-changer?article_related_content=1>; Kala Pendakur, “No More ‘Jurisdictional Wasteland’ for Métis and Non-Status Indians” (18 May 2016), online: *The Conference Board of Canada* <www.conferenceboard.ca/commentaries/northern-aboriginal/default/16-05-18/no_more_%E2%80%9Cjurisdictional_wasteland%E2%80%9D_for_m%C3%A9tis_and_non-status_indians.aspx>.
 8. Ian Peach & Aaron Mintz, “*Daniels v. Canada*: The Inevitable Comes to Pass, At Last” (2013) 50:4 *Alta L Rev* 883 at 884; Jason Madden, “Understanding *Daniels v Canada*: The Métis Perspective” (Presentation delivered at the 2016 National Conference: The Daniels Case & Understanding the New Era of Métis Rights in Canada, 22 September 2016 at 1:05:41-1:07:25) [unpublished] [Madden, “Understanding”]. Madden said that:

I consider Daniels like an inkblot—you know like those things that psychiatrists used to use? What do you see? I see a unicorn; I see my mother, and all that sort of thing. It is a very sloppily drafted decision. It ignores a bunch of issues that were clearly put before the court about the royal prerogative, about treaty making, about a whole host of things and they just answer it similar to what the court has been doing in a series of cases in the form of reconciliation. You heard yesterday from some members of the panel, my law partner Jean Teillet has some thoughts about it, I have some thoughts that actually disagree with her and others have thoughts that disagree with how we see it as well. I’m not sure what is in the inkblot yet. I think that’s to be determined but I think that everyone is trying to distil what comes out of it. At the end of the day though from a Métis perspective it’s a win because the answer to the question, I think that Karey already outlined, is “you’re in.” What does that mean? I think it’s to be determined and also does this create headaches for the jurisprudence that I’ve been a part of kind of developing over the last decade? I don’t think so but we shall see and there are definitely some challenges in how the court puts it together it can be read in a certain way that the concepts of Métis are revisited. I’ll explain to you how I think you can look at the inkblot this way and it doesn’t do that.

9. *Daniels*, *supra* note 1 at para 14.
10. *Ibid* at para 1.

as if I am told the decision's contents are an example of how to move forward.¹¹ If I've learned that I was in a Wasteland, and celebrating the acknowledgement of such recognition just isn't quite happening the way others would have expected, maybe it is important to find the trail to such a place and see the path that must have been made to suggest its end. And maybe, when that happens, it will become clear how something supposedly so great for me seems more neutral (or even negative) than progressive. Here's the trail that appeared to me...

Long before Harry Daniels put his name on a Statement of Claim, he had already earned a reputation for being courageous, rambunctious, and influential.¹² Diving into debates about politics, law, and culture as soon as he could get an audience, Daniels was active within Indigenous organizations at local and national levels. Through that work, he became part of both formal and unofficial contingents of Indigenous individuals who challenged non-Indigenous governments and their bureaucracies.¹³ His commitment to improving community conditions, and his comfort in the public spotlight, meant he was good at getting attention. He could write, he could speak, he could cajole, and, perhaps most importantly, he could be resilient when others were overcome with exhaustion.¹⁴

From the start, Daniels knew that what he wanted to tell others would not make for easy listening since he was taking on both the beliefs and actions of individuals who seemed ill-informed about Métis circumstances.¹⁵ Personally harmed by racist acts in his youth, and always aware that colonialism was not

11. Negative responses to the decision's lower-level form also developed. See generally, Larry Chartrand, "The Failure of the *Daniels* Case: Blindly Entrenching A Colonial Legacy" (2013) 51:1 *Alta L Rev* 181.

12. I worked at the Congress of Aboriginal Peoples (CAP) in 1996 where Daniels visited regularly and shortly thereafter became the national leader for the second time. I suspect that many Métis in Canada have their own ways of linking their lives to him. See the footage from the 2017 event organized by the University of Alberta's Rupertsland Centre for Métis Research, "Daniels Conference: In and Beyond the Law" (January 2017), online: <www.ualberta.ca/native-studies/research/rupertsland-centre-for-metis-research/news-and-events/daniels>.

13. Bonny Braden, "Natives Demand Equal Treatment at Regina Meeting," *Saskatoon Star/Phoenix* (20 March 1999) A4.

14. Métis Nation, "Order of the Métis Nation, Harry Daniels," online: www.metisnation.ca/index.php/who-are-the-metis/order-of-the-metis-nation/harry-daniels.

15. Andrew Russell, "Who is Harry Daniels? Man at Centre of Supreme Court decision on Métis, non-status Indians," *Global News* (14 April 2016), online: <globalnews.ca/news/2639226/who-is-harry-daniels-man-at-centre-of-supreme-court-decision-on-metis-non-status-indians>.

merely a part of history,¹⁶ Daniels also knew that getting colonizers to change meant he needed to speak in a language they could understand. This ability to enter conversations and use tactics to his advantage while abiding by his values made Daniels famous for regularly getting his way.¹⁷ In the past, some non-Métis commentators have observed that being Métis is akin to being “in between,” in the “middle ground,” or the “glue.”¹⁸ What Daniels wanted others to learn is, instead, that we are as strong as the parts from where we come.¹⁹ Moreover, and as he told a Senate Committee while addressing senators about constitutionalism, “we know who we are.”²⁰ When he announced he had decided to take Canada to court in order to get judicial recognition of that mislabelling, Daniels showed yet again how determination and a sense of the legal landscape can combine to move an issue forward.

Framed as a request for a set of declarations, the action contained Crown-speak and non-Indigenous legislation to make the point that Métis peoples had been misclassified for years, hurt by those actions, and then denied the benefits such a classification should have provided. Rather than focus on the modern debates about the role of the then-newly created section 35, the argument was linked to the *Indian Act* and section 91(24) of the *Constitution Act, 1867*. Daniels contended that the federal Crown had categorized the Métis as First Nations when Canada started its life as a country.²¹ But as more time passed, and as Canada had to admit that the category demanded the Crown follow through

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16. See generally, D Bruce Sealy & Antoine S Lussier, *The Métis: Canada's Forgotten People* (Winnipeg: Manitoba Métis Federation Press, 1975).
 17. Lorraine Mayer, “A Return to Reciprocity” (2007) 22:3 *Hypatia* 22.
 18. See Jacqueline Peterson, “Many roads to Red River: Métis genesis in the Great Lakes region, 1680–1815” in Jacqueline Peterson & Jennifer SH Brown, eds, *The New Peoples: Being and Becoming Métis in North America* (Winnipeg: University of Manitoba Press, 1985) at 41; Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (New York: Cambridge University Press, 1991); Michael Valpy, “The emerging face of academic scholarship in Canada,” *The Globe and Mail* (2 June 2007).
 19. F Laurie Barron, “The CCF and the Development of Metis Colonies in Southern Saskatchewan during the Premiership of TC Douglas, 1944-1961” (1990) 10:2 *CJNS* 243.
 20. Harry Daniels made this statement during a presentation in 1980 in front of both Members of Parliament and Senators. Senate, House of Commons, Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, vol 17, 2 December 1980 at 132.
 21. By the time the court argument was organized, Daniels was joined by Gabriel Daniels, Leah Gardner, Terry Joudrey, and the Congress of Aboriginal Peoples. Formerly the Native Council of Canada, CAP was one of the many organizations which Daniels had worked for and, at the time of the litigation, CAP maintained that it represented any Métis, non-status, or off-reserve First Nations who wished to join.

with certain responsibilities, it refused to admit the Métis were part of the original group in question. Daniels' claim described how historical information would easily reveal this part of Canada's past,²² and that a set of three declarations could adjust modern understandings:

1. Métis and non-status Indians are "Indians" under section 91(24) of the *Constitution Act, 1867*;
2. The federal government owes a fiduciary duty to Métis and non-status Indians; and
3. Métis and non-status Indians have the right to consultations and negotiations with the federal government respecting all their rights, interests and needs as Aboriginal peoples.²³

Mentioning the Métis was an obvious point. But Daniels also wanted to recognize the plight of those called "non-status" by Canada and to remember that this label was also wrongly used to classify Métis. By including the concern for individuals who experienced this form of classification, Daniels ensured all Indigenous peoples controlled and subsequently excluded from the *Indian Act* were acknowledged.²⁴

Daniels filed his Claim in 1999, but the trial decision was not reached until 2013. In the intervening years, plaintiffs and defendants regularly agreed to pause the litigation so more research could be completed. Case law also continued to surface that appeared related to the issue at hand, and as more years went by, Daniels unfortunately passed away. The Métis, however, never relented in their view that it was imperative that they acquire judicial recognition despite the fact that their leader was no longer with them to witness the final results of his efforts.²⁵ Since lawsuits almost never go to trial, such a strategy might have appeared overly

22. Truth and Reconciliation Commission of Canada, "Indigenous Law: Truth, reconciliation, and access to justice" in *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6*, (Montreal: McGill-Queen's University Press, 2015) 45 at 76.

23. *Daniels v Canada*, 2013 FC 6 at para 3, 2 FCR 268 [*Daniels FC 2013*].

24. Russell, *supra* note 15. In 1939, this same issue as is applied to the Inuit was litigated in *Reference whether "Indians" includes "Eskimo"* in which Canada was found to be responsible to the Inuit in similar ways as it had responsibility toward First Nations in northern Quebec. [1939] SCR 104 at 117, 2 DLR 417 [*Eskimo Reference*].

25. Julien Gignac, "Indigenous-rights activist Harry Daniels laid foundation for Supreme Court ruling," *The Globe and Mail* (14 April 2016), online: <www.theglobeandmail.com/news/national/indigenous-activist-harry-daniels-laid-foundation-for-supreme-court-ruling/article29640312>. For the court argument about the inclusion of different plaintiffs, see *Daniels v Canada*, 2005 FC 699, 272 FTR 288 [*Daniels FC 2005*].

stubborn or risky.²⁶ But, given Daniels' concern over government's continual efforts to duck their responsibilities, the interest in getting a judge to evaluate his views seemed more predicable.

When the plaintiffs and defendants finally got their day in court, the defendant, Canada, rejected the claim request in every way it could. It argued that the Métis were neither in section 91 directly, nor in section 91 by assumption, nor linked to section 91 by action, nor a federal prerogative because of their absence from section 92.²⁷ Bringing in two "historical expert witnesses" to provide coverage for this defence, Canada contended that the government understanding of "Indian" pertained only to those whose name appeared on a "band list" created as per the *Indian Act*.²⁸ But before these points were explained, the plaintiffs' own witnesses had introduced documents (including ones written by government officials) directly stating the moments when Métis were understood as Indians and when Métis were denied the benefits associated with such a status. Further, they criticized the Crown's choice of witnesses. In many respects, the plaintiffs' presentation was neither complicated nor weak. So perhaps it was not a surprise that the trial judge favoured Daniels' position.²⁹ This determination, however, was conditional, and in a way even the plaintiffs did not expect.

In the trial decision, Justice Phelan agreed with the plaintiffs regarding the Crown's witnesses. Inappropriate due to their training and stalwartness, the witnesses' observations were largely rejected because they did not pertain to the case at hand.³⁰ Justice Phelan also agreed with Daniels' argument about history with or without extracting the evidence the Crown witnesses introduced. Justice Phelan even found it important to address Canada's long history of mislabelling and then mistreating all Indigenous peoples, referencing the Supreme Court decisions in the *Eskimo Reference* and *R v Powley*, as well as the lower court

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26. Almost all lawsuits are delayed due to discussions that almost always lead to settlement. Canada's Department of Justice claims "98 percent of civil suits never make it to the courts." Canada, Department of Justice, "Civil and criminal cases" (10 March 2017), online: <www.justice.gc.ca/eng/csj-sjc/just/08.html>.
27. *Daniels* FC 2013, *supra* note 23 at paras 5, 12, 69, 585.
28. *Ibid* at para 274.
29. *Ibid* at paras 107, 142, 169, 182, 525.
30. *Ibid* at paras 179-182, 193, 345.

decision in *Manitoba Métis Federation*.³¹ But, by referring to an earlier Supreme Court decision about the need to observe a “cognizable Indian interest,”³² Justice Phelan concluded he had no choice but to reject the second and third declarations. So, while much of the 619-paragraph decision supported Daniels’ interpretation of history and law, other portions of the reasoning for the “critical” and “straightforward” question called for a narrower resolution.³³

Despite the fact that the Métis plaintiffs were granted only one of the three declarations they sought, the Crown decided to appeal.³⁴ This time, however, six parties participated as interveners, offering their thoughts on the supposedly simple question Daniels’ claim raised. At the two-day hearing, the original litigants were followed by the arguments of five Métis governmental organizations and the province of Alberta. It took six months for the Federal Court of Appeal (FCA) to release its reasons. Like the trial judge, the unanimous court did not take exception to the overall interpretation of history or the understanding of case law. But, just like the trial judge, the justices could not reconcile the request with that history and use of precedents; they rejected the need for the second and third declaration. And, for their good measure, they extracted the references to non-status persons from the first declaration.³⁵

From writing that Canada “misread the [trial] Judge’s reasons,”³⁶ to informing the federal Crown that if it had wanted to appeal to certain facts it had not done so properly,³⁷ the FCA found Canada’s argumentation redundant and counter

31. Justice Phelan refers to the *Eskimo Reference* multiple times. *Ibid* at paras 17, 297, 528, 547, 550, 554-555, 560, 562, 564, 566, 572, 593. Justice Phelan directly cited *R v Powley*, 2003 SCC 43, 2 SCR 2007 [*Powley*]. *Ibid* at paras 74, 121, 126-128, 163, 232, 312, 314. Justice Phelan referred to *Powley* as “highly relevant” showing his confidence that the application of the decision was apt for the facts at hand. *Ibid* at para 163. Justice Phelan used the appellate court decision in *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2010 MBCA 71, 3 CNLR 233 [*Manitoba Métis Federation*]. *Ibid* at paras 71, 125, 385.

32. Citing Binnie J in *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 85, 4 SCR 245. *Ibid* at para 606.

33. *Ibid* at para 1.

34. Empirical research suggests the Crown almost always appeals a loss against an Indigenous party when the case pertains to constitutional rights. Grace Li Xiu Woo, *Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press, 2011) at 171.

35. *Canada (Indian Affairs) v Daniels*, 2014 FCA 101 at paras 1-5, 4 FCR 97 [*Daniels* FCA]. Notably, such a modification was proposed by one of the Métis interveners, the Manitoba Métis Federation. *Ibid* at para 3.

36. *Ibid* at para 86.

37. *Ibid* at para 70.

to precedent and legislative interpretation.³⁸ The court did not, however, accept that any declaration needed reference to non-status persons if the purpose was to acknowledge the misclassified role of Métis. Relying on *Powley* to justify the decision to extract the mention of “non-status” individuals, the FCA conceded Canada’s point that the trial judge failed to reveal how he understood the nature and scope of “Métis.”³⁹ The Federal Court of Appeal concluded that *Powley* was an appropriate precedent to use when concluding that the plaintiff’s first declaration had merit. But because the court shortened the declaration by taking out the reference to “non-status” persons,⁴⁰ the Métis ‘win’ was narrowed in scope.

The Métis plaintiffs appealed the decision, as did the Crown. And, to make the simple request further complicated, there were now fourteen parties seeking to offer their opinion on what it meant to be Métis in the Crown’s eyes during the nineteenth century. So, after the Supreme Court of Canada (SCC) granted an appeal hearing, a multiplicity of voices began contending that their opinion would be the one to influence the Court in its decision on Daniels’ original request. Perhaps the most delicately positioned party was the Assembly of First Nations (AFN). Would it want historical recognition of mislabelling? Of course. Would it want more individuals considered status First Nations as a result? This depended on myriad factors, such as existing financial commitments, available administrative capacity, and other matters already in precarious condition.⁴¹ But, if the number of First Nations linked to the *Indian Act* expanded, that could mean more peoples could be linked to the AFN’s governmental functions.⁴²

The Supreme Court’s decision appeared relatively quickly; it was concise and it was unanimous—approving the first declaration in Daniels’ original request.⁴³ Writing for the Court, Justice Abella found that the first declaration would have important practical utility.⁴⁴ Further, Justice Abella concluded that an acceptance

38. *Ibid* at para 76.

39. *Ibid* at paras 87-88.

40. *Ibid* at para 159.

41. The AFN focused its presentation on reminding the Court of the inherent right to sovereignty and self-determination, international law, and a purposive approach to section 91(24). It maintained that the 1867 understanding of “Indian” was aimed at “controlling, colonizing and dismantling the distinct identities of First Nations” but did not take any position to whether the term included the Métis. *Daniels v Canada*, 2016 SCC 12, 1 SCR 99 (Factum of the Intervener, The Assembly of First Nations, at 1).

42. Karina Roman, “Métis rights case finally before Supreme Court of Canada” *CBC News* (8 October 2015), online: <www.cbc.ca/news/politics/m%C3%A9tis-rights-case-finally-before-supreme-court-of-canada-1.3261226>.

43. *Daniels*, *supra* note 1 at para 50.

44. *Ibid* at para 12.

of the request would not conflict with any other governmental efforts regarding Métis circumstances.⁴⁵

Containing refreshing nods to those concerned that Canada's collective memory needs to shift, the Court integrated sources such as the reports from the Truth and Reconciliation Commission and the Royal Commission on Aboriginal Peoples to adroitly redress issues of historic marginalization interwoven within Canada's legal system.⁴⁶ As well, the Court brought light to some subjects previously underappreciated—if acknowledged at all—such as how many “Métis were also sent to Indian Residential Schools, another example of federal authority over ‘Indians.’”⁴⁷ Repeatedly, the Court illustrated how a modern concern for Métis circumstances was justified after learning about various events in the past.

So, what would it take for these commendable qualities to lose their sheen? After all, they seemed to support Daniels' contentions. If government officials recoiled after reading these facts acknowledged in a Supreme Court decision, those same reflections about history would be welcomed by the Indigenous litigants. And surely that has some type of restorative value. Given the number of times courts have allowed the Crown's view of history to prevail, *Daniels* definitely contains a sense of optimism for those who have lamented what the courts have done to historical presentations in the past.⁴⁸ Going beyond the discourse inspired by the famous “we are all here to stay,” *Daniels* sends a strong message that some parties in Canada simply have to do more to justify never leaving.⁴⁹ Early signs of progress, however, do not always last.

What could overtake these signs? First, and a sign of the nuances of the case, the Court invented the possibility that a group previously unknown as Indigenous via the *Indian Act* can contend that it should be recognized as such.⁵⁰ Certainly, it is difficult to imagine any person with Indigenous heritage not encouraging others to familiarize themselves with the cultural background of Indigenous peoples. This possibility of additional recognition, however, will

45. *Ibid* at para 51.

46. *Ibid* at paras 30, 36-37.

47. *Ibid* at para 30.

48. See e.g. Frank Tough, “Prof v Prof in the Trial of the Treaty Eight Tax Case: Some Thoughts on Academics as Expert Witnesses” (2004) 15:1 *Native Stud Rev* 53; Arthur Ray, “Creating the Image of the *Savage in Defence of the Crown: The Ethnohistorian in Court*” (1990) 6:2 *Native Stud Rev* 13.

49. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 153 DLR (4th) 193.

50. Tom Isaac, “Post-*Daniels*: The Road Ahead” (Presentation delivered at the 2016 National Conference: The Daniels Case & Understanding the New Era of Métis Rights in Canada, 22 September 2016 at 2:28:28) [unpublished].

create a challenge for Indigenous governments and organizations that currently exist. What will their obligations be if a (non-Indigenous) court approves of such a designation? While the Court mentions the importance of a case-by-case approach to quell any concerns about opening the proverbial floodgates to claims pertaining to Indigeneity,⁵¹ it is possible such a reassurance will not be enough to assuage any nervousness *Daniels* triggers amongst First Nations leadership. The lack of guidance about how to evaluate groups not part of what is listed in section 35, along with the fact that the matter will prove debatable in Indigenous and non-Indigenous circles alike, means that it will invariably need more judicial commentary.⁵² It can then come as no surprise that commentators, such as Tom Isaacs, see *Daniels* as a “pivot point rather than a step forward or even precedent-setting.”⁵³

But this quality is overshadowed by another matter that is more deeply problematic. It is hard to articulate the issue, however, because it means criticizing a court, and it is made even harder by the fact that it means telling the court that it effectively reinforced the problem *Daniels* came to argue in the first place. And, realizing that this hard place will exist takes only a few moments to realize: *Powley*'s uncertain status is illustrated in the headnote preceding the Court's decision in *Daniels*, where it appears as “distinguished.”

Every case, of course, has its own unique set of facts which means that the case law used to evaluate it may not be what society or its lawyers would first presume. As such, the fact that *Powley* was not labeled a usable tool is not inherently problematic. Just because a party is Métis does not mean they will need to directly utilize the contents of this case.

But, because of other themes within *Daniels*, distinguishing *Powley* creates a sense of unease—while the Court supports the view that Métis peoples are part and parcel of conversations about reshaping this country's social memory of the past, “[r]econciliation ... is a process flowing from rights guaranteed by s. 35(1).”⁵⁴ As such, it is difficult to envisage how the Métis and reconciliation

51. *Daniels*, *supra* note 1 at para 47.

52. Madden, “Understanding,” *supra* note 8.

53. Isaac, *supra* note 50 at 2:05:26.

54. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32, 3 SCR 511.

can be introduced⁵⁵ into the decision because the Court explained that *Daniels* is not about section 35.⁵⁶

The conclusion by the Court that *Daniels* is not about modern constitutional rights has some contemplative place—the facts, unlike *Powley*, do not present an obvious link to section 35 discourse or Indigenous rights—but what makes the Court’s abandonment of *Powley* so notable is that that case was not only about Indigenous rights. Rather, it was also about how Métis people define themselves. And, as the Supreme Court decided to make *Daniels* about definitions, they laid the ground for a link to *Powley*, only to refrain from continuing the precedential chain. Indeed, the Court broke the topical link altogether by integrating standards for cultural definition that are a contradiction to Harry Daniels’ original argument—that he had experienced poor treatment due to inappropriate definitions by non-Indigenous authorities.

The Supreme Court’s classification of *Powley* is different than those of the lower courts. The SCC, however, did not chastise the Federal Court and Federal Court of Appeal for their understanding of *Powley*. What it did instead was to explain that the *Powley* analysis pertains to section 35 and, therefore, is of no assistance. By making this choice, the SCC ignored *Powley*’s evaluations of historic treaties, fiduciary obligations, and modern legal placement. Woven within the deft analysis constructed by the Ontario Court of Appeal and then reaffirmed by the Supreme Court in *Powley*, Métis cultural ways were also contextualized in terms of historic pre-Crown sovereignty standards.⁵⁷ In that way, *Powley* has much to offer should any court wish to contemplate issues such as the gathering of historical evidence or Métis self-understandings of cultural definition. Simply put, *Powley* is not only about section 35 in the way that *Daniels* intimates.

So, in choosing not to interweave *Powley*’s remarks on Métis-sourced views on cultural identity, and without referencing Métis-sourced documentation or

55. Even before the rendering of *Daniels*, the link between Métis histories and reconciliation had a difficult form. Tricia Logan, “A Métis Perspective on Truth and Reconciliation: Reflections of a Métis Researcher” in Marlene Brant Castellano et al, eds, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) at 83.

56. *Daniels*, *supra* note 1 at para 49. The Court observed that:

The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s. 35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose.

57. *R v Powley*, (2001) 53 OR (3d) 35, 196 DLR (4th) 221 [*Powley* ONCA]; *Powley*, *supra* note 31.

strong modern research, the Court held that “[t]here is no consensus on who is considered Métis or a non-status Indian, nor need there be.”⁵⁸ Without paying heed to the strongly-worded and compelling guidance crafted by the Ontario Court of Appeal about Métis culture,⁵⁹ it supports its interpretation by introducing sources less renowned in modern times and, of notable contradiction, pertaining to section 35. So, while the Court claimed that *Daniels* is about separating it from section 35 analysis, the Court relied upon a section 35 analysis that tautologically weakened the observation in the first place.⁶⁰ Given the upsurge of Métis-sourced and Métis-presented data,⁶¹ this strategy can be contrasted with typical historiographical standards pertaining to the use of the most contextualized sources for accuracy.⁶² The Court has already faced responses about its assumptions of being able to set standards on Indigenous cultural identity.⁶³ What makes such a moment in *Daniels* arguably more profound is that more time has passed for others to realise the impact of such practices. The misstep is further frustrating because of positive moments within *Daniels* that suggest sudden moments of clarity, such as when the Court relied on Thomas

58. *Daniels*, *supra* note 1 at para 17.

59. *Powley* ONCA, *supra* note 57. The decision considers a number of references to fiduciary roles distinct from section 35 relationships. While that fiduciary duty is part of section 35 analysis, it is also considered a link distinct to section 35 and one important to recall when evaluating Crown–Indigenous ties.

60. The Court cites RE Gaffney, GP Gould & AJ Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (Fredericton: New Brunswick Association of Métis and Non-Status Indians, 1984) at 62. *Daniels*, *supra* note 1 at para 17. Of particular note is the reference to the “Métis of eastern Canada,” a point that runs counter to the spirit of *Daniels*’ argument and arguably against some of the most profound themes captured by the Court in *Powley* and *Manitoba Metis Federation*.

61. Examples of works by Métis scholars available prior to the litigation include Chris Andersen, *“Métis”: Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014); Larry Chartrand et al, “Reconciliation and Transformation in Practice: Aboriginal Judicial Appointments to the Supreme Court” (2008) 51:1 Can Pub Admin 143.

62. Margaret MacMillan, *The Uses and Abuses of History* (Toronto: Penguin Canada, 2009) at 35.

63. Russel Lawrence Barsh & James Youngblood Henderson, “The Supreme Court’s Van der Peet Trilogy: Native Imperialism and Ropes of Sand” (1997) 42:4 McGill LJ 993.

King's *The Inconvenient Indian*⁶⁴ and the TRC's *Final Report*. Braided together, then, is a mix of instances of understanding with other sections of less supported observations. Considering the historically inaccurate conclusion that "Métis" is a general term for anyone with mixed European and Indigenous heritage,⁶⁵ the decision seems to reinforce what Adam Gaudry and Chris Andersen call a "fall back on deeply racialized "Métis-as-mixed" logic."⁶⁶ In putting forward the idea that Métisness means "anyone," *Daniels* ultimately conflicts with Métis-based sources.⁶⁷ The Court's decision is an example of what Jason Madden has called a "prototype" rather than a precedent; it might be lauded right now but has the potential to be lamented as more time passes. The holding appears to make it a win for Métis, but the way that the Court reached its decision raises issues that could turn into insurmountable hurdles in the future.⁶⁸ Just as the response to what became known as *Marshall 1* and *Marshall 2* included a nervousness of what to use and what to avoid,⁶⁹ *Daniels* creates trepidation about how to predict which moments of historical referencing will be more palatable to courts in the

64. The Court refers to Thomas King's *The Inconvenient Indian* to explain how the term "Indian" was a non-Indigenous invention used to label all Indigenous peoples. *Daniels*, *supra* note 1 at para 23. As well, the Court references the work as "*The Inconvenient Indian: A Curious Account of Native People in North America* (2013), winner of the 2014 RBC Taylor Prize." While certainly an impactful work, whether it is the one most heavily used by academics (and even lawyers) to highlight this point in court is, in my view, one worthy of a deeper discussion. It is not typically considered part of the citation system to highlight when a work wins an award, so it is likely the Court decided to mention this point as a way to justify its use. Whether the inclusion of this work should occur in the future will be difficult for a litigating party to discern as King's writing is also based on other sources that would be considered the original location of data and, as such, using the King as a tool would be akin to an unofficial reporter of case law.

65. *Ibid* at para 17.

66. Adam Gaudry & Chris Andersen, "*Daniels v Canada: Racialized Legacies, Settler Self-Indigenization and the Denial of Indigenous Peoplehood*" (2016) 36 *Topia* 19 at 23.

67. Compare the Court's view to the Métis National Council's comment: Métis are not so "not because we are of mixed Aboriginal and European ancestry, but because we are descendant from distinct Métis communities that emerged and thrived in various parts of Canada before the Canadian state took control." Métis National Council, Métis Registration Guide, 2.

68. Jason Madden, "The Implications of *Daniels* and Recent Federal Developments on Métis Land Rights and Other Métis Claims: The Métis Perspective" (Presentation delivered at the 2016 National Conference: The Daniels Case & Understanding the New Era of Métis Rights in Canada, 22 September 2016 at 6:47:28) [unpublished].

69. A similar response (or similar set of mixed responses) developed after the release of *R v Marshall* [1999] 3 SCR 456, 177 DLR (4th) and the subsequent appearance of *R v Marshall* [1999] 3 SCR 533, 179 DLR (4th) 193 (acting as a further explanation of the former). See also Robert G Adlam, "Indigenous Rights, the Marshall Decision and Cultural Restoration" (2003) 33:1 *Acadiensis* 108 at 111.

future. Will a Métis group in the future be challenged about its membership standards? How can both the definitional constructs of *Daniels* and *Powley* be respected simultaneously? *Daniels* triggers many questions whose nature is troubling given that they often represent a non-Métis telling Métis what they are—the fundamental issue *Daniels* was supposed to address and what the Court claims *Daniels* arguably solves.

The Court has held that “the unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import.”⁷⁰ Moreover, the justices unanimously concluded that the matters *Daniels* represents demand “both certainty and accountability.”⁷¹ But because anyone who is a Métis will need to prepare for the questions about cultural identity that *Daniels* invariably encourages,⁷² it is unsurprising that more and more experts are claiming that *Daniels* is neither constitutionally strong, certain, or accountable.⁷³

Within walking distance from the Supreme Court, and coincidentally open as the Court organized its findings in *Daniels*, the Library and Archives Canada hosted a display on its main public floor about how the Métis were often “hiding in plain sight” due to how institutions and other cultures both ignored and misclassified its culture’s families.⁷⁴ At another event last year that focused on Métis roles in Canada, a senior Assistant Deputy Minister for Canada publicly

70. *Manitoba Métis Federation*, *supra* note 31 at para 140.

71. *Daniels*, *supra* note 1 at para 15.

72. Canada, Indigenous and Northern Affairs Canada, *A Matter of National and Constitutional Import: Report of the Minister’s Special Representative on Reconciliation with Métis: Section 35 Métis Rights and the Manitoba Métis Federation Decision*, by Thomas Isaac (Ottawa: Government of Canada, 2016) at 30, 42.

73. One of the most significant set of responses to *Daniels* occurred at an event called the “Daniels Conference: In and Beyond the Law” at the University of Alberta in January 2017. Online: <www.ualberta.ca/native-studies/research/rupertsland-centre-for-metis-research/news-and-events/daniels>.

74. From 11 February 2016 to 22 April 2016, Library and Archives Canada hosted an exhibition entitled “Hiding in Plain Sight: The Métis Nation.” The exhibition coincidentally ran between the hearing for *Daniels* and the release of the decision. The news release for the event stated, “*Hiding in Plain Sight: Discovering the Métis Nation in the Collection of Library and Archives Canada* presents reproductions of selected artwork and photographs pertaining to the Métis. It is hoped that the images featured in the exhibition will help foster a better understanding of the history and culture of the Métis Nation, and that many Canadians will be encouraged to research this topic further in LAC’s collection.” Library and Archives Canada, New Release, (10 Feb 2016), online: <www.canada.ca/en/library-archives/news/2016/02/hiding-in-plain-sight-discovering-the-metis-nation-in-the-collection-of-library-and-archives-canada.html?=-undefined&>>. See also how Métis “independence” transformed into “road allowance people”—“the “independent ones,” who had been the diplomats and brokers of the entire northwest were now being referred to as the “road

concluded “reconciliation is about deconstructing colonialism.”⁷⁵ Within the Supreme Court, reflections about the impact of colonialism have already appeared.⁷⁶ We can understand these events as important and inspirational signs that discussions about history, law, and the importance of recognizing marginalization can indeed happen within Canada’s legal regime and society as a whole.⁷⁷ But I am also recalling an observation by an author mentioned in *Daniels*: “What the Native people of North America do with the future should be very curious indeed.”⁷⁸ I (and I think, many others) did not think the curiosity would have been inspired in the way it has been by *Daniels*. The various ‘wins’ *Daniels* represented were—and are—hard to see.⁷⁹ As a result, it is likely that some of us will argue that “we wait ... we’ll be alone once more, in the midst of (legal) nothingness.”⁸⁰ In 1867, it might have been Canada that placed us there. But now it is the Court’s definitional standards that ensure it is the Wasteland where we remain. *Daniels* can be commended for demanding more governmental respect. But it will invariably be just as known for taking away from a Métis cultural presence in court, exacerbated by the point that the Court will need to be told its claim of being more embracing of Métis identity has actually impeded that pursuit. The decision has a double-identity in law, and one of those personae is the very face *Daniels* went to erase. And now we face the hardship of telling the Court its finding of justice for the Métis is arguably the opposite. Yet again,

allowance people.”” Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 4 (Ottawa: Communication Group, 1996) at 212.

75. Joe Wild, “Post Daniels: What Does the Road Ahead Look Like?” (Speaking at the 2016 National Conference: The Daniels Case & Understanding the New Era of Métis Rights in Canada, 22 September 2016 at 2:57:53) [unpublished].
76. See e.g. *R v Ipeelee*, 2012 SCC 13 at para 60, 1 SCR 433; *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 131, 161 DLR (4th) 385 [*Secession Reference*].
77. The idea of attempting to reconcile better relations to ensure a more just future was part of Riel’s efforts and has yet to leave the spectre of Métis resistance to non-Métis oppressive tactics disguised as justified concepts of Canadian law. See Karen Drake & Adam Gaudry, “The lands ... belonged to them, once by the Indian title, twice for having defended them ... and thrice for having built and lived on them’: The Law and Politics of Métis Title” (2016) 54:1 Osgoode Hall LJ 1 at 29.
78. According to Thomas King, “What the Native people of North America do with the future should be very curious indeed.” *The Inconvenient Indian: A Curious Account of Native People in North America* (Toronto: Doubleday Canada, 2012) at 266.
79. For analysis on the Federal Court and Federal Court of Appeal’s reinforcement of systemically race-based analysis, see Jean Teillet & Carly Teillet, “Devoid of Principle: The Federal Court determination that section 91(24) of the Constitution Act, 1867 is a race-based provision” (2016) 13 Indigenous LJ 1 at 16. As of 15 July 2017, *Daniels* has already been cited in twenty-five cases across Canada. *Daniels*, *supra* note 1.
80. Beckett, *supra* note 5 at 81.

the Métis are placed in a location of finding the energy, the diplomacy, and the wits to take on an authority claiming kindness. Disagreeing with an institution is one matter. But when that same governance must be told it is harmful when it considers itself moving forward, well, the delicacy required is unjustly part of the path toward better relations.⁸¹

With an obvious tribute to the late Harry Daniels in mind, Brenda Macdougall espoused that “we know who we are, we know our history, and so should Canada.”⁸² That Canada includes a judiciary. Because of *Daniels*, we are now at a place where “many other legal actions may now be begun.”⁸³ However, until these cases are brought, it is that absence of knowing how the courts will determine our cultural placement that will ensure the Métis will not quite leave the Wasteland. And it is that inconsistency of not allowing a culture to define itself that makes the rule of law less apparent for the Métis and a feeling of hurtful exclusion to continue within that culture.⁸⁴ Perhaps some of us still might share some feelings of anticipation with Beckett’s Vladimir and Estragon when we read *Daniels*. But because we also share even more history and experience with Harry Daniels himself, at least we know we should plan our trail out of the Wasteland

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81. For further analysis of the difficult position for Indigenous parties, see Clare Land, *Decolonizing Solidarity: Dilemmas and Directions for Supporters of Indigenous Struggles* (London: Zed Books, 2015) at 248-266.
 82. Brenda Macdougall, “The Power of Legal and Historical Fiction(s): The Daniels Decision and the Enduring Influence of Colonial Ideology” (2016) 7:3 Int’l Indigenous Pol’y J 1 at 5.
 83. Marc Montgomery, “Landmark legal decision for Canada’s Metis, but...” (14 April 2016), online: Radio Canada International <www.rcinet.ca/en/2016/04/14/landmark-legal-decision-for-canadas-metis-but>. In literature, Margaret Atwood has made use of such contradiction and paradox to create a type of ‘parody’ about the subject at hand. See Barbara Godard, “Telling it Over Again: Atwood’s Art of Parody” (1987) 21 Can Poetry 1.
 84. For remarks pertaining to the quality of consistency in the rule of law, see Robert Justin Lipkin, *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism* (Durham: Duke University Press, 2000) at 221; *Secession Reference, supra* note 74 at para 95.

in the meantime.⁸⁵ And let it be known that it will happen. And all of Canada will be better off when it does.⁸⁶

85. Chris Coppin, “How the Métis Confront the Challenges of the Canadian Legal System” (15 October 2014), online: Legal Feeds: The Blog of the Canadian Lawyer and Law Times <www.canadianlawyermag.com/legalfeeds/2328/how-the-metis-confront-the-challenges-of-the-canadian-legal-system.html>. In this article, Coppin speaks with Jason Madden. Coppin writes that:

Métis are not considered to be Indians (First Nations), but are a separate cultural group. One of the problems presented by this distinction, as described by Madden, is that the Métis people have found it difficult, if not impossible, to get the federal government or provincial governments to engage the Métis in negotiations to resolve Métis claims to lands, harvesting rights, self-governing rights and compensation for past wrongs.

ot unlike Estragon and Vladimir in *Waiting for Godot*, the Métis continued to wait in vain for either the federal or provincial governments to appear.

86. Métis Nation of Ontario President Margaret Froh recently explained: “We will work with the federal government to realize our shared vision of a renewed relationship with the Métis Peoples of Canada, for the benefit of all Canadians.” See “The Métis Nation signs historic accord with Canada” (13 April 2017), online: Cision <www.newswire.ca/news-releases/the-metis-nation-signs-historic-accord-with-canada-619372484.html>. Views vary about the impact *Daniels* had on accord talks. See Waubgeshig Rice, “Métis, non-status Indians call for action one year after Daniels ruling,” *CBC News* (22 March 2017), online: <www.cbc.ca/news/canada/ottawa/metis-non-status-daniels-ruling-1.4034693>.