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***Daniels v. Canada*: Reflections on Constitutional Technique**

S. Ronald Stevenson*

The decision of the Supreme Court of Canada in *Daniels v. Canada (Indian Affairs and Northern Development)*,¹ has resolved a long-standing dispute about the scope of section 91(24) of the *Constitution Act, 1867*.² We now know with certainty that both Métis and non-status Indians fall within the constitutional category of “Indians” that is contained in this provision. However, many questions remain about the interpretation and impact of section 91(24). This article will only attempt to address a small sub-set of these questions, focusing primarily on methods of constitutional interpretation. This argument begins by noting that the Supreme Court of Canada in *Daniels* seems to be using both originalist and progressive techniques of constitutional interpretation. I describe and evaluate the specific evidence raised to support the originalist side of the argument, that is, the claim that the word “Indians” in section 91(24) was always understood as including the Métis. I argue that much of this evidence is not particularly strong, and that some of the arguments developed based on this evidence risk bringing racist and assimilationist beliefs and policies of the time into our contemporary constitutional practice. I then turn to the arguments Abella J. makes for a progressive interpretation of section 91(24) which are much stronger in my view. I conclude by suggesting a variety of ways by which future constitutional interpretation in this field might draw from the stronger progressive side of the *Daniels* decision, while considering ways to avoid the potential pitfalls of reifying 19th century racial distinctions. Such an

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¹ [2016] S.C.J. No. 12, 2016 SCC 12 (S.C.C.) [hereinafter “*Daniels*”].

² (U.K.), 30 & 31 Vict., c. 3 [hereinafter “*Constitution Act, 1867*”].

approach might provide a stronger foundation for future efforts to achieve reconciliation.

One of the dominant questions in Canadian constitutional law has been how the words of the Constitution are understood over time. While there are areas where the “intent of the framers”, the original understanding of key terms and the historical practice at key moments are very important,³ the dominant metaphor for understanding the task of constitutional interpretation has been the “living tree”.⁴ The latter has also been described as progressive interpretation.⁵ The *Daniels* decision stands out as an example where both originalist and progressive approaches to interpretation were deployed. The decision can be most fairly read as concluding that section 91(24) was always broad enough to support valid legislation dealing with Métis and non-status Indians and that modern developments, especially the explicit inclusion of the Métis in the 1982 package of amendments, reinforced this broad interpretation. However, it must be noted that an element of imprecision is added by using both techniques of constitutional interpretation simultaneously as they tend to pull in different directions. An originalist argument is deployed to suggest an element of constraint at the time of enactment while a progressive argument tends to focus on the capacity of key constitutional terms to change over time. While the historical aspect of the *Daniels* decision is open to some critical scrutiny, the conclusion as to the impact of the 1982 amendments arguably provides a firmer foundation for a broad interpretation of Parliament’s legislative authority under section 91(24).

Justice Abella turned to several sources of evidence to support the conclusion that the term “Indians” was always understood to include the Métis prior to and after the enactment of section 91(24) and that this view can be reasonably ascribed to the framers of the Constitution. There is no direct evidence about deliberations or debates in the development of the *Constitution Act, 1867* on the use of the word “Indians” so a wide range of indirect evidence is considered. The problem that this article identifies is that none of this evidence really engages directly with the argument that was presented to the Court in favour of an interpretation of section 91(24) that

³ J.G. Morley, “Dead Hands, Living Trees, Historic Compromises: The Senate Reform and Supreme Court References Bring the Originalism Debate to Canada” (2016) 53 Osgoode Hall L.J. 745-798; B. Oliphant and L. Sirota, “Has the Supreme Court of Canada Rejected ‘Originalism?’” (2016) 42:1 Queen’s L.J. 107-164; L. Sirota and B. Oliphant, “Originalist Reasoning in Canadian Constitutional Jurisprudence” (2017) 50 UBC L. Rev. 505-574.

⁴ The Honourable Justice R.J. Sharpe, “The Persons case and the Living Tree Theory of Constitutional Interpretation” (2013) 64 U.N.B.L.J. 1-18.

⁵ I. Binnie, “Constitutional Interpretation and Original Intent” (2004) S.C.L.R. (2d) 345.

excludes the Métis. This argument can be summarized in three propositions. First, a clear distinction was made between Indians and the Métis at the time that section 91(24) was enacted, including by the Indigenous groups themselves. Second, this core distinction is not negated by the occasional inclusion of Métis individuals in federal programs or legislation, rather it is a standard application of the ancillary and aspect doctrines of Canadian constitutional law. Third, the jurisprudence up to *Daniels* had been largely consistent with the distinction between Métis and Indians as separate collectives.⁶ The purpose of this article is not to suggest that a lengthy debate be reopened as it is the role of the courts to bring such debate to a close.⁷ However, close attention to constitutional reasoning might liberate possibilities for future constitutional interpretation.

With this intention in mind, three preliminary points can be made about the approach of the Court to historical evidence in *Daniels*. First, the evidence tends to consider evidence of treatment of Métis individuals rather than collectives. Second, a model starts to emerge of section 91(24) as conferring authority to deal with a relatively undifferentiated class of individuals rather than as a provision enabling legislation with respect to Indigenous collectives. Third, the methodology differs greatly from that normally deployed in a division of powers case. The net effect of these three points is that the task of interpretation is cast as finding the outer

⁶ Limitations of space preclude assessing the treatment of key precedents considered in the *Daniels* judgment. Suffice to say that there is a strand of interpretation that has consistently focussed on the historical distinction between Indians and Métis. The two key cases are *R. v. Blais*, [2003] S.C.J. No. 44, 2003 SCC 44 (S.C.C.) [hereinafter “*Blais*”] and *Reference re: British North America Act, 1867 (U.K.), s. 91 (sub nom. Re Eskimo)*, [1939] S.C.J. No. 5, [1939] S.C.R. 104 (S.C.C.) (Reference as to whether “Indians” in s. 91(24) of the *B.N.A. Act* includes Eskimo inhabitants of the Province of Quebec). In *Blais*, the conclusion that the Métis did not fall under the term “Indian” within the meaning of paragraph 13 of the *Natural Resources Transfer Agreement (Manitoba)*, Schedule to the *Constitution Act, 1930* (U.K.), 20-21 Geo. V, c. 26 [hereinafter “*Natural Resources Transfer Agreement*”], turns in part on the different treatment of the Inuit and the Métis in the Hudson’s Bay Company census that was the primary historical source for the inclusion of the Inuit within the category of Indians. The Hudson’s Bay Company included the Inuit and the Indians within the same category in this census. In contrast, the Supreme Court of Canada concluded in *Blais* that the same report contrasted “Whites and half-breeds” from those who were identifiable as Indians. This evidence is not considered in the Supreme Court of Canada in *Daniels*, *supra*, note 1. *Blais* itself is distinguished on the basis that the *Natural Resources Transfer Agreement* is a constitutional agreement and not part of the Constitution. However, this is a strange conclusion in light of the inclusion of the Agreement in the Schedule of the *Constitution Act, 1930* setting out the documents that are part of the *Constitution Act, 1982*, *supra*, note 2, Schedule B under section 52. This conclusion is also difficult to square with the reasoning of the Supreme Court of Canada in *R. v. Horseman*, [1990] S.C.J. No. 39, [1990] 1 S.C.R. 901 (S.C.C.), where the constitutional status of the *Natural Resources Transfer Agreement*, including its ability to modify the division of powers, provides a key reason for the conclusion reached by the Court about the scope of paragraph 13.

⁷ *R. v. Marshall*, [1999] S.C.J. No. 55, 1999 3 S.C.R. 456 at para. 37 (S.C.C.).

boundaries of a class of individuals who might be described as “91(24) Indians” rather than asking what kinds of laws might be passed under Parliament’s exclusive authority under section 91(24). All three levels of court shifted the focus away from the legality of the criteria used by Parliament (genealogy, self-identification, group acceptance, cultural practice *etc.*) in favour of thinking about section 91(24) as covering a shifting group of individuals who identify as Indigenous.

I. “ORIGINALIST” ARGUMENTS FROM EVIDENCE

Eight different categories of evidence were considered by Abella J. in supporting the conclusion that Métis were historically considered to be Indians within the meaning of the Constitution. These include: the prevailing views of academics;⁸ a quote from the author Thomas King;⁹ the inclusion of Métis under an 1868 statute;¹⁰ the inclusion of Métis in “many” post-Confederation statutes;¹¹ the consistency of inclusion of the Métis with the fundamental goals of Confederation;¹² the inclusion of Métis in the residential schools program;¹³ the participation of Métis in pre- and post-Confederation treaties;¹⁴ and the opinions expressed in an internal federal discussion paper prepared in 1980 in preparation for constitutional discussions.¹⁵ It will not be possible to assess the treatment of all the evidence but enough will be addressed to make the point that the inclusion of the Métis as a collective within section 91(24) is not strongly supported.

⁸ The key academics cited, *Daniels*, *supra*, note 1, at para. 22, are P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (Toronto: Carswell, 2007, updated 2015, release 1) at 28-24 [hereinafter “Hogg, ‘Constitutional Law’”]; J.E. Magnet, “Who are the Aboriginal Peoples of Canada?” in D.A. Dorey and J.E. Magnet, eds. *Aboriginal Rights Litigation* (Markham: LexisNexis Butterworths, 2003) 23, at 44 [hereinafter “Magnet, ‘Who are the Aboriginal People of Canada?’”]; C. Chartier, “Indian”: An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1967” (1978-79), 43 Sask. L. Rev. 37 [hereinafter “Chartier, ‘Indian’”]; M. Stevenson, “Section 91(24) and Canada’s Legislative Jurisdiction with Respect to the Métis” (2002) 1 Indigenous L.J. 237 [hereinafter “Stevenson, ‘Section 91(24)’”]; N. Lyon, “Constitutional Issues in Native Law” in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*, rev. 1st ed. (Ottawa: Carleton University Press, 1989) 408, at 430 [hereinafter “Lyon, ‘Constitutional Issues in Native Law’”].

⁹ *Daniels*, *supra*, note 1, at para. 23.

¹⁰ *Id.*, at para. 24. (The statute is *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c.42.)

¹¹ *Daniels*, *id.*, at paras. 24 and 27.

¹² *Id.*, at para. 25.

¹³ *Id.*, at paras. 28-30.

¹⁴ *Id.*, at paras. 31-32.

¹⁵ *Id.*, at para. 33.

A consistent pattern starts to emerge that the exception is used to prove the rule. There were certainly boundary issues where individual Métis were included under statutory schemes, treaties or programs such as residential schools but the general rule was that Métis were systematically excluded from these activities. The general rule was that the Métis, in contrast to Indians, were not part of the treaty process that spread west and north across Canada, were not included under the *Indian Act* regime and were generally excluded from such programs as residential schools. This is not to say that there was no federal law governing the engagement between the Métis and the Crown but that it followed a completely different trajectory. These points can be understood by briefly looking at the eight classes of evidence that were considered in the *Daniels* ruling.

1. Academic Opinion

There is certainly supportive material in the academic articles cited in the decision, most particularly in the Chartier article,¹⁶ but on the whole the articles tend to have a different focus than the intention of the framers in 1867. In fact, the Hogg, Magnet and Lyon pieces tend to focus on the progressive interpretation of section 91(24).¹⁷ The Stevenson article offers significant criticism of several evidentiary sources set out in the Chartier article and relied upon in the *Daniels* judgment.¹⁸ There is no doubt that the “prevailing view” has been that section 91(24) has a “wide compass” but it would have been useful to see a closer examination of the various arguments considered in the academic literature.¹⁹ This may have opened up the possibility of an analytical separation between the meaning of the term “Indians” in 1867 and its contemporary interpretation.

2. Quote from Thomas King

Justice Abella offered up this quote from Thomas King’s *The Inconvenient Indian*:

No one really believed that there was only one Indian. No one ever said there was only one Indian. But as North America began to experiment

¹⁶ Chartier, “Indian”, *supra*, note 8.

¹⁷ Hogg, “Constitutional Law”; Magnet, “Who are the Aboriginal People of Canada?”; and Lyon, “Constitutional Issues in Native Law”, *id.*

¹⁸ Stevenson, “Section 91(24)”, *id.*, at 251ff.

¹⁹ *Daniels*, *supra*, note 1, at para. 22.

with its “Indian programs,” it did so with a “one size fits all” mindset. Rather than see tribes as an arrangement of separate nation states in the style of the Old World, North America imagined that Indians were basically the same.²⁰

Not much needs to be said about this quote as it does not advance constitutional law argument one way or the other.²¹

3. 1868 Statute

A close examination of this statute does not support the inclusion of the Métis within the category of Indians. The statute is a transitional measure to ensure protection of lands formally set aside for bands of Indians and does not expressly apply to Métis groups. It does have a relatively open-ended definition of “Indian” that applies to individuals with mixed blood, though they must be associated with a “tribe, band or body” of Indians.²²

4. Inclusion of the Métis in “many” post-Confederation Statutes

Among the statutes that are mentioned is an 1894 amendment to the *Indian Act* dealing with the sale of liquor.²³ An amendment to this statute provided for the extension of the prohibition to any person “who follows the Indian mode of life”. This provision, and others that use similar language, are used to support the conclusion that a reference to Indians would have been interpreted to include the Métis. It cannot be denied that the application of these provisions included individuals who undoubtedly identified as Métis but a close examination of the history of this provision suggests that these cases were exceptions that were contradicted by the general rule.

A vivid picture of the context of these provisions is painted by Constance McIntosh in her study of the legal history of the phrase “Indian mode of life”.²⁴ She shows that the Statute was a continuation of

²⁰ T. King, *The Inconvenient Indian: A Curious Account of Native People in North America*, 1st ed. (Toronto: Doubleday Canada, 2012) 83 cited at *Daniels, id.*, at para. 23.

²¹ *Daniels, id.*

²² See Stevenson, “Section 91(24)”, *supra*, note 8, at 251ff.

²³ *Daniels, supra*, note 1, at para. 27, referring to *An Act to further amend “The Indian Act”*, S.C. 1894, c. 32.

²⁴ C. McIntosh, “From Judging Culture to Taxing ‘Indians’: Tracing the Legal Discourse of the ‘Indian Mode of Life’” (2009) 47 *Osgoode Hall L.J.* 399-437 [hereinafter “McIntosh ‘Judging Culture’”].

a practice that distinguished between “Indians” (who were perceived as in need of protection) and the Métis (who were perceived as moving into the mainstream and not in need of protection).²⁵ There is no doubt that the Statute was applied to individuals who might have been considered to be Métis but the main thrust of the Statute was to distinguish between the two groups. In other words, these statutory provisions were designed to police a boundary that was defined by 19th century classifications based on race, progress and civilization. McIntosh argues, that “This was a logical (if racist) exercise to enable the state to determine whether individual “non-treaty Indians” were already assimilated into the industrial “way of life”. If they were still like “Indians”, they would need to be subjected to the restraints and protections of the assimilation apparatus.”²⁶

A stark example of this brand of thinking is found in a statement from Lieutenant Governor Alexander Morris in the context of the negotiation of Treaty 3 with the Salteaux in 1873: “...They must be either white or Indian. If Indians, they get treaty money; if the Half-breeds call themselves white, they get land.”²⁷ Though these statutes support the conclusion that there was some overlap between the categories of Indian and Métis, they do not support the conclusion that Indians and Métis were treated the same or that the Métis were considered a subset of the category of Indians. Rather than being treated the same, Métis were offered land on an individual basis, either under the terms of the *Manitoba Act* or, further west, under federal statute.²⁸ This land was conveyed through “scrip” (a document which ostensibly could be redeemed for land) and the administration of these land instruments led to problems of implementation, speculation and delay that are explained fully in the Manitoba Métis decision.²⁹

5. Goal of Confederation

Some considerable weight is placed on the importance of the goal of building a national railway as part of the Confederation project. It would

²⁵ *Id.*, at 406.

²⁶ *Id.*, at 409.

²⁷ A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North West Territories, Including the Negotiations on Which they Were Based and Other Information Relating Thereto* (Toronto: Belfords, Clarke & Co., 1880), at 69. See also McIntosh “Judging Culture”, *id.*, at 415.

²⁸ *Manitoba Act*, S.C. 1870, c. 3; *An Act Respecting the Public Lands of the Dominion*, S.C. 1879, c. 23.

²⁹ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14 (S.C.C.) [hereinafter “*Manitoba Métis Federation*”].

be consistent with this goal to have as broad as possible a legislative power to remove obstacles to its achievement, including a broad authority to deal with Indigenous peoples. However, the historical record demonstrates that the primary constitutional tool chosen to achieve this goal was the retention of federal control over public lands on the Prairies well into the 20th century. Thomas Berger, speaking of John A. Macdonald, observes that "...However, his journal records indicate that Macdonald and Cartier insisted that they had to have a free hand to build the railway across Manitoba; thus, public lands would have to be in federal ownership."³⁰ Indeed, federal policy instruments chosen to address Métis demands in the 19th century were oriented around the issuance of land scrip rather than the negotiation of treaties. Until the enactment of the *Natural Resources Transfer Agreements* in 1930,³¹ federal policy with respect to Indigenous peoples, certainly with respect to land in the Prairies, was not dependent on the breadth of section 91(24).³²

6. Inclusion in Residential Schools

A key piece of evidence to support that the conclusion that Métis were treated as Indians as federal policy is a quote from Indian Affairs Minister Clifford Sifton from 1899 expressing the view that "...I am decidedly of the opinion that all children, even those of mixed blood ... should be eligible for admission in the schools"³³ However, to get the full import of the quotation it is necessary to read it in full with the inclusion of the words omitted in the ellipsis: "...I am decidedly of the opinion that all children, even those of mixed blood, *whether legitimate or not, who live upon an Indian reserve and whose parents on either side live as Indians upon a reserve, even if they are not annuitants*, should be eligible for admission to the schools."³⁴

³⁰ T.R. Berger, QC, "The Manitoba Métis Decision and the Uses of History" (2015) 38:1 Man. L.J. 1-27, at 6; see also D. O'Toole, "Section 31 of the Manitoba Act, 1870: A Land Claim Agreement" (2015) 37:1 Man. L.J. 73-117, at 105.

³¹ *Supra*, note 6. Separate schedules are set out for each of the four western provinces.

³² The argument is not that s. 91(24) played no role on the Prairies during the 19th and early 20th century, especially after the admission of the provinces of Manitoba, Saskatchewan and Alberta, but rather that retention of control of public lands was the primary foundation for federal policy with respect to both Indian and Métis claims.

³³ *Daniels, supra*, note 1, at para. 28.

³⁴ As cited in Canada, Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Métis Experience: The Final Report of the Truth and Reconciliation Commission of Canada* (Montreal: McGill-Queen's Press, 2016) at 16 (emphasis added).

The quote as presented is designed to support the view that Indian and Métis individuals were treated in a similar fashion but the full quote discloses a far more restricted practice.

7. Participation in Indian Treaties

There are certainly examples of Métis individuals and even communities being included in the negotiation of several treaties.³⁵ However, these examples are exceptions to the general rule that Métis collectives were generally not included in the negotiation of either pre- or post-Confederation treaties. The primary evidence in support of inclusion of Métis in the negotiation and administration of treaties is a judicial report prepared by Mr. Justice W.A. Macdonald in 1944.³⁶ This report was prepared pursuant to an Inquiry established under section 18 of the *Indian Act*.³⁷ While the Report does confirm the continuation on band lists of individuals who had been removed because they had mixed blood, the bulk of the Report and the context under which it was prepared are more consistent with the distinction that had been historically made between Indians and the Métis. The Report is full of the language of racial hierarchy that is so effectively portrayed by Constance McIntosh.³⁸ While the quotes that are reproduced in the judgment tend to equate individuals with mixed blood and Indians, the theme of the Report is more consistent with the historical pattern of distinguishing between Métis and Indians. For example, in the next paragraph after the passage quoted by Abella J., Macdonald J. observes that:

It is well known that among the aboriginal inhabitants there were many individuals of mixed blood who were not properly speaking Halfbreeds. Persons of mixed blood who became identified with the Indians, lived with them, spoke their language and followed their way of life, were recognized as Indians. The fact that there was white blood in their veins was no bar to their admission into the Indian bands among whom they resided.³⁹

³⁵ See Stevenson, “Section 91(24)”, *supra*, note 8, at 254-57.

³⁶ *Report of Mr. Justice W.A. Macdonald Following an Enquiry Directed Under Section 18 of the Indian Act*, August 7, 1944 [hereinafter “Macdonald Report”] (*Daniels*, *supra*, note 1, at paras. 31-32).

³⁷ R.S.C. 1927, c. 98.

³⁸ McIntosh, “Judging Culture”, *supra*, note 24.

³⁹ Macdonald Report, *supra*, note 36, at 557.

The basis for the refusal to remove mixed blood individuals from the Band Rolls and from the Reserves was the long-standing presence of these individuals within the Indian community:

It is a reasonable inference from the evidence that no striking change in the condition of these people has taken place in the years that have intervened since the treaty was signed. They are still fit subjects for the paternal care of the Government.⁴⁰

This report is a striking illustration of how far into the 20th century the language of racial hierarchy and protection continued in public discourse, but it is certainly not strong evidence for the simple equation of Indians and Métis for constitutional purposes.

8. 1980 Paper on Constitutional Reform

Some weight is given to the opinions expressed in an internal federal document that was prepared to aid preparation for negotiations about constitutional reform.⁴¹ The unnamed author (or authors) of this report expressed the view that Métis were included in the constitutional category “Indians”. A little over a decade after the preparation of this report a formal proposal was made to amend section 91(24) to clarify that the Métis were included in the legislative authority of Parliament but this proposal was not implemented because of the failure of a national referendum.⁴² There are two problems with the reliance on this document to support a conclusion about the original meaning of a constitutional term. First, the Report appears to be silent as to whether the conclusion is based on an assessment of the original meaning of section 91(24) or on the modern or progressive interpretation of this provision.⁴³ Second, and more fundamentally, it appears risky to rely on internal advice tendered to a party to litigation rather than the position that is adopted by that party in court. In contrast, in the *Patriation Reference*, the Court was much more reluctant to draw inferences from the contents of reports prepared to aid constitutional negotiations.⁴⁴

⁴⁰ *Id.*, at 559.

⁴¹ *Daniels*, *supra*, note 1, at para. 33.

⁴² *Consensus Report on the Constitution*, August 28, 1992 (popularly known as the Charlottetown Accord). See especially sections 54, 55 and 56.

⁴³ The tenor of the quotes offered tends to be that coverage under the *Indian Act* is not required to be included under s. 91(24) but no constitutional analysis is provided.

⁴⁴ *Ref Re Amendment of Constitution of Canada*, [1981] S.C.J. No. 58, [1981] 1 S.C.R. 753 at 888*ff.*, especially at 900 (S.C.C.).

This article has not considered all of the evidence considered by Abella J. to support the conclusion that federal practice tended to treat Métis and Indians in a similar fashion. While there is certainly evidence that tends to support this conclusion, a case can be made that the evidence tends to refer to the exception rather than the rule. Indeed, when some of the evidence is considered in the context of the time, clear distinctions were made between the category Indian and Métis and these distinctions tended to be mired in racial rhetoric about progress and civilization.

II. THE LIVING TREE: ARGUMENTS FROM PROGRESSIVE CONSTITUTIONAL INTERPRETATION

In contrast, it is hard to criticize any element of the part of the ruling dealing with progressive interpretation.⁴⁵ The analysis is very brief and it follows rather well-trodden paths of division of powers analysis. As was the case in the *Tsilhqot'in* decision,⁴⁶ the enactment of section 35 of the *Constitution Act, 1982*, which recognized and affirmed the existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada, is held to be relevant to the interpretation of section 91(24) of the *Constitution Act, 1867*.⁴⁷ It is difficult to disagree with the Court's conclusion that it would be anomalous to split jurisdiction over the three Aboriginal peoples of Canada identified in section 35(2), particularly in light of the federal concession that non-status Indians fell under the scope of section 91(24). However, it would have been useful to explore more fully the parallels between the constitutional issues raised in the two decisions. *Tsilhqot'in* essentially concluded that section 35 provided a better constitutional tool than the interjurisdictional immunity doctrine to resolve competing Indigenous and government rights. Important questions remain about the relationship between section 35 and section 91(24).⁴⁸ While *Tsilhqot'in* provides room for a large overlap in practice in the operation of federal, provincial and Indigenous laws, the rights protected by section 35 remain at the core of section 91(24). Earlier decisions had commented on the inability of a province to alter or supplement Aboriginal or treaty rights,

⁴⁵ *Daniels, supra*, note 1, at paras. 34-37.

⁴⁶ *Tsilhqot'in Nation v. British Columbia (Minister of Forests)*, [2014] S.C.J. No. 44, 2014 SCC 44 (S.C.C.) [hereinafter "*Tsilhqot'in*"].

⁴⁷ *Daniels, supra*, note 1, at para. 34.

⁴⁸ *Tsilhqot'in, supra*, note 46, at para. 142.

implying that such matters fall within the exclusive authority of Parliament.⁴⁹ While both federal and provincial orders of government can infringe section 35 rights and present arguments to justify such infringements, legislation that is directed at the rights regime itself seems to be reserved to Parliament.⁵⁰ These issues will undoubtedly be explored as the jurisprudence develops, but *Daniels* does not advance our understanding as much as it could have if the progressive interpretation arguments had been the primary focus of the decision. That said, the four paragraphs that cover progressive interpretation are quite rich and provide an important foundation for deeper thinking about the modern project of reconciliation and building a nation to nation relationship with Indigenous peoples. However, *Daniels* would have provided a stronger foundation for reconciliation if these four paragraphs formed the core of the ruling and fleshed out some of the modern implications of the division of powers for federal, provincial and Indigenous authority. It would also have been helpful to have had a crisper analytical separation between the broadly “originalist” and “progressive” components of the judgment.⁵¹

III. THE NEED TO RESOLVE INTERPRETIVE DISCONNECTS IN *DANIELS*

Stepping away from the details of the ruling on the historic and modern meaning of the term “Indians” and the inclusion of non-status Indians within this category, it may be helpful to isolate some broader characteristics of the ruling. Most notably, it reads very differently from a standard division of powers decision. Rather than focusing on the

⁴⁹ *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, 2003 SCC 55, especially at paras. 6, 19 and 29 (S.C.C.) [hereinafter “*Paul*”].

⁵⁰ Complex questions about what it means to be responsible for a unitary rights regime under s. 35 cannot be addressed in this short commentary. *Paul, id.*, sets out some of the limitations on provincial power but there is nothing in *Daniels* that assists with defining the legislative authority of Parliament in relation to rights.

⁵¹ The focus of this argument has been that the historical analysis with respect to the Métis is contestable and that the progressive analysis of the modern meaning of s. 91(24) is sound but underdeveloped. In contrast, the analysis of the inclusion of non-status Indians within the category “Indians” is completely undeveloped because it was resolved on the basis of a federal concession, *Daniels, supra*, note 1, at para. 20. It is certainly not surprising that the federal Parliament cannot define the scope of its jurisdiction by conferring or withholding status, but no clear picture of the class of non-status Indians emerges from this judgment. It should be remembered that the notion of “status” can only be securely traced back to 1951 amendments of the *Indian Act*, as it was only in 1951 that a central registry was included within the scheme of the *Indian Act*, and with it the idea of status. Before that time, it would have been more common to speak of band membership or inclusion within a treaty.

abstract meaning of the wording of a constitutional provision, most decisions look to particular pieces of legislation, the assignment of a matter and the classification of that matter within federal and provincial heads of power. In contrast, this decision looks to delineate an *a priori* category of “Indians” who are external to the provision but who are regulated by the provision. A key methodological choice is made in all three levels of court in the *Daniels* case. Constitutional argument is directed to determining the scope of a class of individuals who fall within the category of “Indians”. Though the jurisprudence provides few examples, a more traditional approach would be to assess the criteria that are used by Parliament in reliance on the constitutional provision in terms of whether those criteria are rationally related to the constitutional provision. This is the approach that is used in the *Canard* decision, which decides that federal regulation of Indian testamentary matters can be upheld as a legitimate exercise of section 91(24):

The *British North America Act, 1867*, under the authority of which the *Canadian Bill of Rights* was enacted, by using the word ‘Indians’ in s. 91(24), creates a racial classification and refers to a racial group for whom it contemplates the possibility of a special treatment. It does not define the expression ‘Indian’. This Parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values which, apparently were not proven in *Lavell*, or of legislative history of which the Court could and did take cognizance.⁵²

A key problem with this quotation is that section 91(24) is considered to be a “race” power. While this characterization has occurred in other more recent Supreme Court of Canada decisions,⁵³ there is a strong case to be made that jurisdiction over “Indians and Lands reserved for the Indians” is not a race-based power but, in contrast, deals with legislation in relation to Indigenous peoples who have rights based on prior occupation and governance.⁵⁴ However, if the reference to race is disregarded in this quotation, it provides a sensible approach to the division of powers. Rather than focusing on identifying the class of individuals who fall within the category “Indians”, the focus is on the

⁵² *Canard v. Canada (Attorney General)*, [1975] S.C.J. No. 26, [1976] 1 S.C.R. 170, at 207 (S.C.C.).

⁵³ *R. v. Kapp*, [2008] S.C.J. No. 42, 2008 SCC 41, at paras. 2 and 29 (S.C.C.).

⁵⁴ S. Grammond, *Identity Captured by Law: Membership in Canada’s Indigenous Peoples and Linguistic Minorities* (Montreal and Kingston: McGill-Queen’s University Press, 2009).

legitimacy of the criteria that may be used by Parliament in the exercise of this power. These criteria can change over time and it is not unreasonable that they will be more inclusive and respectful as our understanding of rights and obligations develops. This is the essential insight in the powerful first paragraph of Abella J.:

As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust. This case represents another chapter in the pursuit of reconciliation and redress in that relationship.⁵⁵

The paragraphs from the judgment which deal with the progressive understanding of section 91(24) are fully consistent with the spirit of this observation. However, the analysis of the historical record appears to literally be caught in another era. It would be unfortunate if our understanding of a constitutional provision was influenced by the restricted and racially-based thinking of an earlier era.⁵⁶ As a matter of historical fact, Indians and Métis were not treated in precisely the same fashion and the reasons for this are tied up with early views on the appropriate treatment of Indigenous peoples. It is useful to recall the purposes of section 91(24) as they are quoted in the judgment from the Supreme Court of Canada:

Accordingly, the purposes of s. 91(24) were 'to control Native people and communities where necessary to facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain ... [and] eventually to civilize and assimilate Native people': para. 353. Since much of the North-Western Territory was occupied by Métis, only a definition of "Indians" in s. 91(24) that included 'a broad range of people sharing a Native hereditary base' (para. 566) would give Parliament the necessary authority to pursue its agenda.⁵⁷

It does seem quite problematic to have notions of "civilization" and "assimilation" written into the hard-wiring of a constitutional provision. It seems equally problematic that arguments about the historical meaning of the provision are tethered to deeply contestable 19th century notions of racial hierarchy and identity. This applies equally to arguments for why the Métis are "in" section 91(24) as to arguments for why they are "out".

⁵⁵ *Daniels, supra*, note 1, at para. 1.

⁵⁶ McIntosh, "Judging Culture", *supra*, note 24.

⁵⁷ *Daniels, supra*, note 1, at para. 5.

The problem is compounded when, as shown above, the arguments for the inclusion of the Métis tend to transform exceptional examples into the norm.

One approach that might be recommended is to place dominant reliance on the “progressive” parts of the ruling. The fundamental task we now face is to develop our understanding of the role that legislation places in the ongoing project of reconciliation. Cases such as *Tsilhqot’in* have shown that there will be a complex interplay between the recognition and affirmation of rights and the operation of division of powers rules. Will there be any need to have recourse to the historical understanding of the term “Indians”? One possibility, which seems counter-intuitive, is a future action testing whether the Federal Crown diligently implemented section 91(24).⁵⁸ It seems counter-intuitive because the purpose of a provision conferring authority under the division of powers is to confer the legislative capacity to make choices. The Federal Crown clearly made choices to generally treat Métis and Indians differently but also to treat some Métis individuals the same way as Indians. What would it mean to ask whether these choices amount to a failure of diligent implementation? The better view is that section 91(24) empowered choices to be made by Parliament. On the Prairies, a broader range of choices was possible because of federal control of public lands. It would seem exceedingly anomalous to second-guess these choices from a division of powers perspective, especially as it has been confirmed that there is no duty to legislate.⁵⁹ It would be particularly problematic to conduct such an assessment based on outdated 19th century approaches to race and indigeneity.

It seems more appropriate to salvage the broad approach to section 91(24) while downplaying attitudes of particular individuals about differentiation between different classes of people. The practice of the time should be less important than the question of whether section 91(24) inherently constrains the authority of Parliament to enact legislation. There are several techniques that can be used to support an interpretation of section 91(24) that is flexible and capable of growth. For example, there are pre-Confederation sources that speak more generally of British policy towards a broad category of “aborigines”.⁶⁰ It is not difficult, especially considering the absence of explicit discussion during the Confederation debates on the meaning of section 91(24), to see the reference to “Indians” as being

⁵⁸ *Manitoba Métis Federation*, *supra*, note 29.

⁵⁹ *Daniels*, *supra*, note 1, at para. 15.

⁶⁰ These reports are thoroughly considered in Stevenson, “Section 91(24)”, *supra*, note 8, at 246-50.

coterminous with this broader category. This understanding would line up with Abella J.'s initial observation about increasing sensitivity to human rights concerns of this society over time. Even if the Métis, as a discrete collective, were perceived to be fundamentally different from "Indians" at an early stage of Canada's history, room is left for the very concept of indigeneity to grow and deepen over time.

A good source for exploring these issues might be the ongoing debate that is occurring in the United States about different approaches to originalism. Classical approaches to originalism tend to focus on the views and practices of the framers. A revised approach to originalism, commonly called "living originalism", tends to focus on the semantic meaning of terms in the written text of the Constitution rather than the expected application of those terms at the time of enactment.⁶¹ This approach also draws a distinction between interpretation and construction of a constitutional provision and highlights the different constraining force of constitutional rules, standards and principles. This approach would be far less likely to be governed by how a provision was applied in the past than whether the semantic meaning of the provision provides a clear constraint on a constitutional power. When looked at from a sufficiently high level of generality, the term "Indians" can clearly be read in a fashion that does not disqualify revised approaches over time in the legislative response to indigeneity.

To give an example of a useful line of inquiry inspired by the notion of "living originalism", Jack Balkin has observed that a term may have been inserted in the Constitution as a kind of marker or shorthand for a common law rule.⁶² In other words, when terms like "Indians" and "Lands reserved for the Indians" were inserted into section 91(24), they could be seen as a synoptic reference to incipient common law rules about "native title" and the requirements of Imperial instruments such as the Royal Proclamation of 1763. If so, it is not unreasonable for such terms to have room to expand in response to developments in the common law. Rather than focus on how words were used by actors at the time, ascending to a different level of generality and considering the

⁶¹ J. Balkin, *Living Originalism* (Cambridge, Mass.: Belknap Press of Harvard University, 2011).

⁶² J. Balkin, "Must we be Faithful to Original Meaning?" (2013) 7 *Jerusalem Review of Legal Studies* 57, at 61: "The same reasoning applies when the Constitution uses a generally recognized term of art. Such words should continue to be understood as a term of art, even if they have taken on a different meaning in contemporary language. Nevertheless, some terms of art in the Constitution might be taken from the common law and intended to incorporate common law reasoning. If so, then these terms of art should be subject to continuous evolution, just as the common law is."

gradual development of common law norms dealing with Indigenous issues, a strong case can be made that section 91(24) had an element of flexibility enshrined in its original terms. Another benefit of this approach to interpretation is that it is far less likely to privilege long-rejected notions about assimilation and civilization. It is often noted that the term “Indian” is very much a creation of European thought — there were no Indians prior to the colonial encounter. Rather there were separate and distinct Indigenous nations with highly diverse legal and political systems. One of the likely consequences of deploying some of the interpretative techniques of new originalist thinking is that the distance between a progressive and an originalist interpretation of a provision such as section 91(24) becomes smaller. We now know, particularly after enactment of the 1982 reform package, that there is a strong rationale for unitary legislative authority over a constitutionally protected rights regime. A different approach to the constraining force of the original constitution opens up possibilities for understanding a key term like “Indians” in a different way and at a higher level of generality. We would not have to understand constitutional authority in a manner that is tethered to outdated notions of assimilation, civilization and protection. An approach inspired by American scholarship on “new originalism” may open up diverse and productive avenues for thinking about both the scope and limits of section 91(24), especially as we move into an era based on nation to nation relationships and self-determination.

We also know that the role of legislation has considerably changed in the modern era of relations between governments and Indigenous peoples. Many expenditure programs are managed under the spending power. The centre of gravity is rapidly shifting towards Indigenous self-government. Key tools for advancing equality of treatment, especially section 15 of the *Canadian Charter of Rights and Freedoms*,⁶³ are not strictly confined by the division of powers. Most importantly, the dominant trend of division of powers jurisprudence has reflected overlapping application of federal, provincial and Indigenous law rather than watertight compartments. Seen from this angle, it becomes less important to attempt to define the group of individuals who are “91(24) Indians”. If it is simply accepted that the original provision is not overly constraining so long as there is a rational connection to indigeneity, the focus can shift to the reasonableness of the criteria that are used by

⁶³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Parliament to craft its legislative response and the appropriate balance that is set between federal, provincial and Indigenous interests. These may look rather different as the trend towards self-government becomes further entrenched. It is becoming increasingly anomalous to think that Parliament has the jurisdiction to define who may be considered an Indigenous person. From this perspective, the most challenging aspect of the *Daniels* decision may turn out to be the alteration of the three-part *Powley* test (self-identification as Métis, an ancestral connection to an historic Métis community and acceptance by a modern Métis community) in the context of the division of powers.⁶⁴ The abandonment of the community acceptance criterion for the purposes of the division of powers appears to be related to a concern about the rights of individuals who are not accepted as part of the community. However, it is not obvious that a federal legislative role is the only way to address these concerns. Section 35, Charter equality rights and statutory human rights codes may provide alternative remedies. It is too early to tell what complications or questions will arise from defining the scope of Métis for division of powers purposes in a broader fashion than the scope of Métis as holders of section 35 rights.

The focus on individuals brought within section 91(24) also does not sit well with the growing focus on collective rights and collective governance.⁶⁵ As Indigenous nations carve out space within Canadian constitutionalism, assert room for their own legal systems and work out relationships with other orders of government, an approach to the division of powers that focusses on classes of individuals will be increasingly anachronistic. It is true that an individual needs to know to which government a claim can be presented,⁶⁶ but this will naturally be harder to envisage in a jurisdictional universe with interlocking legal systems and overlapping laws. The very complexity of the post-*Tsilhqot'in* jurisdictional environment, particularly when space is made for Indigenous legal systems,

⁶⁴ *Daniels*, *supra*, note 1, at para. 49 citing *R. v. Powley*, [2003] S.C.J. No. 43, 2003 SCC 43 (S.C.C.). For more discussion of *Powley*, see C. Bell & C. Leonard, "A New Era in Métis Constitutional Rights: The Importance of *Powley* and Blais Forum: Métis and Treaty Rights" (2004) 41 *Alta. L. Rev.* 1049-1083; L. Sterling & P. Lemmond, "R. v. *Powley*: Building a Foundation for the Constitutional Recognition of Métis Aboriginal Rights" (2004), 24:1 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, online: <<http://digitalcommons.osgoode.yorku.ca/sclr/vol24/iss1/10>>; J. Teillet, "Old and Difficult Grievances: Examining the Relationship Between the Métis and the Crown" (2004), 24:1 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*, online: <<http://digitalcommons.osgoode.yorku.ca/sclr/vol24/iss1/12>>.

⁶⁵ *Behn v. Moulton Contracting Ltd.*, [2013] S.C.J. No. 26, 2013 SCC 26 (S.C.C.).

⁶⁶ *Daniels*, *supra*, note 1, at paras. 15 and 50.

speaks strongly to the need for a more traditional approach to the division of powers.⁶⁷ Rather than attempting to further refine the abstract meaning of the category of “Indians”, it would be strongly advisable to test particular legislative initiatives in terms of the criteria that are used to forge the necessary connection to indigeneity. Tools such as the aspect doctrine, paramountcy and section 35 can be tailored to set the optimal balance between federal, provincial and Indigenous law.

Similar care should be taken with respect to the task of giving meaning to the references to constitutional “responsibility” in the *Daniels* judgment.⁶⁸ It no longer makes sense to speak of federal responsibility as if it carved out an area that is immune from the influence of other jurisdictions. It is particularly difficult to give operational meaning to the term “responsibility” in light of the conclusion that there is no duty to legislate.⁶⁹ That is not to say that responsibility is not a major part of the environment of Canadian Aboriginal law. But it is more sensible to turn to section 35, especially the doctrine of the honour of the Crown, and the obligations that flow from it such as fiduciary duty, duties to consult and accommodate and duty to negotiate, to flesh out the nature of constitutional responsibilities. There is certainly a place for Parliament to show leadership through the enactment of legislation but such legislation will increasingly differ from the *Indian Act* and similar legislation.

IV. CONCLUSION

The *Daniels* decision is a major landmark in Canadian constitutional law. It resolves with finality a long-standing dispute about the constitutional scope of section 91(24). We now know that Métis and non-status Indians fall within the scope of federal power. However, the decision does not provide much guidance beyond this simple statement. We are told that there is no constitutional obligation to enact legislation though there are unspecified responsibilities that are in play. The tenor of the judgment as a whole is to conceive of section 91(24) as being characterized by externally defined collections of “Indians”, including

⁶⁷ A more traditional approach to the division of powers would require the presence of contested legislation to determine validity, application and operability. A more incremental approach from a procedural perspective would be better suited to fine tune the complex relationship between federal, provincial and Indigenous jurisdictions. This approach would also work best with the continuing role of section 35 of the *Constitution Act, 1897*, *supra*, note 2.

⁶⁸ *Daniels*, *supra*, note 1, at paras. 11, 15, 36 and 50.

⁶⁹ *Id.*, at para. 15.

the Métis and non-status Indians. But will this characterization ultimately prove helpful in assessing future federal legislation? Ultimately, it is likely that the question of what the legislation does will be far more important than to whom it applies. There will certainly be no shortage of questions that will emerge in the near future. This will include the elaboration of section 35 rights held by Métis and non-status groups, including Aboriginal title, the determination of who may legitimately claim to represent the Métis and assertions of entitlements to programs and services that are currently not available to Métis and non-status Indians. Division of powers questions may arise with respect to existing provincial legislation such as the Alberta Métis settlement legislation.⁷⁰ If we have learned anything over the last decade it is that the law of the division of powers, section 35, equality rights and fiduciary law are becoming increasingly intertwined. It is for this reason that this article has suggested that primary weight should be accorded to the progressive interpretation aspects of the decision. The parts of the judgment dealing with historical interpretation and original intent raise difficult problems and may not provide the same level of assistance in achieving reconciliation between the Crown and all Indigenous groups within section 91(24). It is particularly worrying that the historical analysis inevitably relies upon evidence that is drenched with the racial hierarchies of the 19th century. The focus has now decisively shifted to the negotiation table, including bilateral discussions with the Métis National Council, the Manitoba Métis Federation and other groups. Much more needs to be done to work out the details of productive and respectful relationships between the federal, provincial and Indigenous orders of government. From time to time the parties will find it necessary to turn to the courts to resolve disputes that have proven intractable. While the *Daniels* decision lays out the overall map on the scope of section 91(24), it may not prove productive to continue to attempt to define the outer limits of the provision in an abstract way. It may be time to turn back to the traditional methods of the division of powers that deal with legislative proposals as they are enacted. The *Daniels* decision has made an important contribution to the modern unfolding of a respectful relationship between the Crown and all Indigenous peoples in Canada but a different focus might be necessary in the future to support the kind of negotiated outcomes that can achieve meaningful reconciliation.

⁷⁰ The history of this legislation is set out comprehensively in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] S.C.J. No. 37, 2011 SCC 37 (S.C.C.).