Metis Constitutional Law Issues: Identity and Jurisdiction*

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Introduction

This chapter is a selective analysis of certain significant constitutional issues concerning the place of the Metis peoples and their identity within Canada.[1] Although Metis – Crown relations have existed since the 1700s, it is only relatively recent that the issue of Metis claims has led to the creation of uniquely Metis specific legal doctrine warranting the necessity of a separate chapter on Metis constitutional law. This development of Metis specific legal principles, however, is not without controversy.

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[1] This chapter focuses on Metis Aboriginal rights claims based primarily on s. 35 of the Canadian *Constitution*. For an account of Metis Treaty rights claims see Larry Chartrand, "Metis Treaties in Canada: Past Realities and Present Promise" in Christopher Adams, Gregg Dahl and Ian Peach, eds., *Metis in Canada: History, Identity, Law and Politics, 2nd Edition* (Edmonton: University of Alberta Press, forthcoming)

Foremost among the outstanding issues addressed in this chapter is the question over Metis identity and how to best determine when an assertion of Metis identity is legitimate. Of particular concern is the broad definition recently attributed to the term "Metis" by the Supreme Court of Canada in the *Daniels* decision and its failure to sufficiently contain the scope of Metis identify in deciding that Metis are Indians in s. 91(24) of the Constitution. In addition, there is a marked tension between the imposition of membership criteria by Canadian judicial intervention and the right to self-determine membership according to principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* that will be highlighted. Although this tension is applicable to all Indigenous peoples in Canada, it has unique dimensions in the case of the Metis due to judicially imposed definitions of who is Metis compared to the experiences of First Nations who have been the subject of federal legislative definitions.[2] These issues are but only a few of the major concerns that the courts and policy makers must address in this emerging and growing field of law.[3] The concern over the imposition of a judicially defined definition of Metis identity is addressed first.

The Imposition of Judicially Constructed Metis Identity

The issue of Metis identity is quite controversial. There are strong differences of opinion as to who can qualify as "Metis" for the purposes of self-identification especially in terms of asserting Metis rights in the Constitution. The academic literature reflects this debate. There are those

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[2] The experiences of Metis and First Nations are not completely separate as there is overlap in terms of the fact that some Metis have been affected by legislative definitions of who is an Indian under the *Indian Act*, and likewise some First Nations (primarily none-status Indians) have been influenced by judicial definitions of who is a Metis according to case law defining Metis.

[3] Other significant issues include concerns regarding the assessment of Metis title including the failure of the court to consider the negotiations that lead to the creation of the province of Manitoba as a treaty and the failure of the *Manitoba Metis Federation* [2013] 1 SCR 623 case to distinguish between Metis land holding customs internal to the people as compared to the assertion of occupation for the purposes of external recognition of Aboriginal title under s. 35. There are also significant division of powers issues regarding the validity of provincial laws relating to the Metis by provinces such as Alberta including identity and membership in settlements of land collectively set aside for the Metis and the recognition of a regime of self-government on those settlements. Concerns of inter-jurisdictional immunity clearly arise since *Daniels* clarified that Metis are Indians and therefore under federal jurisdiction. It is beyond the scope of this chapter to deal with these and other significant issues within this field of Aboriginal constitutional law.

that argue that the word "Metis" in s. 35 is a proper name that refers only to the Metis Nation, the core of which has been said to be geographically located in Red River. The Metis are those who are descendants of the historical Metis communities that have kinship, social and economic connections to Red River.[4] Others interpret the term Metis conceptually as representing a state of identity based solely on mixed-ancestry heritage unburdened by any particular temporally rooted ethnogenisis trajectory of Metis collective belonging.[5] Still others conceive of the term as reflecting a category of self-identifying mixed-ancestry communities that evolved into distinct communities separate from their First nation and European ancestral roots. According to this view, the Metis Nation is therefore not just a proper name for a specific "Metis people", but under the category approach the Metis Nation is also one among other potentially distinct Metis communities, nations or peoples.

To the disappointment of those who advocated for a singular exclusive Metis Nation definition and to those who advocated for a more broader open-ended definition, the Supreme Court of Canada in *Powley* instead opted to define the term "Metis" as a category representative of mixed-ancestry communities that have demonstrated continuity to a particular historical Metis community that existed prior to "effective European control" over the relevant territory.[6] The court stated:

> The term "Metis" in s. 35 does not encompass all individuals of mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed

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[4] Paul Chartrand, "The Constitutional Status and Rights of the Metis People in Canada" (2015) (Ottawa: University of Ottawa Conference on *Reconciliation and the Metis of Canada*). [unpublished]

[5] For example, the definition of "Metis" used by the Eastern Woodland Metis Nation Nova Scotia does not place geographical limits on the ancestry of their members. See http://easternwoodlandmetisnation.ca/main.htm.

[6] *R. v. Powley,* [2003] 4 C.N.L.R. 321 (SCC)

ancestry, developed their own customs, ways of life, and recognizable group identity separate from their Indian or Inuit and European forebears.[7]

The *Powley* decision also spoke to the issue of what an individual must prove in order to be considered a member of a Metis rights-bearing community. The court identified three indicia. Firstly, the claimant must self-identify as a member of a Metis community. Secondly, the claimant must present evidence of an ancestral connection to a historic Metis community. The court did not restrict this connection to a test of blood-quantum, but also allowed for birth, adoption or "other means" of becoming a member. Thirdly, the claimant must show that "he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed."[8]

There has been critical commentary on the court's indicia of proof of Metis belonging. Metis membership in Metis political organizations may include individuals that have been accepted by the community as Metis but for various reasons are unable to show an ancestral connection to a historic Metis community.[9] The *Powley* decision has the potential of dividing Metis communities between those who have rights and those who do not. Unless the community has set out a mechanism for inclusion of such individuals through "other means", they will become second class Metis.[10]

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[7] *Ibid,* at para. 10.

[8] *Ibid* at para. 31 – 33.

[9] For instance, a woman who married a non-status Indian would lose their Indian status according to the *Indian Act* before Bill C-31 was enacted in 1985 that allowed those that lost status to apply to regain it. However, this woman may have decided to join a Metis association and become an integral part of the Metis community possibly for decades and that identity of being Metis may have been passed on to her children. She and her children for all intensive purposes had become Metis by long time cultural association. Yet she or her children may not be able to benefit from Aboriginal rights belonging to the Metis community that she has become a part of because she as an individual of that community may not be able to prove the criteria of "Metis" ancestral connection through birth, adoption, or marriage. It is in circumstances like these that Metis law making authorities need to take advantage of the door left open in *Powley* to come up with "other means" for satisfying the criteria of ancestral connection.

[10] For a more detailed analysis of this issue, see Larry Chartrand, "Metis Identity and Citizenship" (2001) 12 Windsor Review of Legal and Social Issues 5.

Another concern with the judicially imposed *Powley* indicia relates to the imposition of identity criteria by a foreign institution from the perspective of Metis peoplehood independence. Such interference can be argued as a violation of Metis peoples' human rights according to international human rights standards as defined in the *United Nations Declaration on the Rights of Indigenous Peoples*.[11] Article 4 upholds the general right of self-determination of Indigenous peoples while Article 9 expressly recognizes the right of an Indigenous community to determine membership according to its traditions and customs. Metis rights scholar Paul Chartrand insists that it is the Metis that have the right to decide who are Metis and not the courts.[12] However, in the context of Canada, Paul Chartrand recognizes the reality that determining Metis identity and membership will most likely involve negotiations between political representatives of the Metis and the Crown.[13] But the determination of the boundaries of belonging must remain a political and not a judicial matter. Canadian courts have inappropriately assumed that they have a valid role in deciding questions of Indigenous peoplehood existence and whether an individual rightly or wrongly belongs to an Indigenous political collective in Canada.

Legal commentators often fall into the same limited colonial understanding. For example Thomas Isaac, in his monograph on *Metis Rights* distinguishes the issue of Metis identity between its legal understanding and its political and social understandings.[14] In doing so, Isaac contrasts Metis leaders as concerned with the question as a social and political issue as opposed to Canadian law making institutions that are concerned with the question as a legal matter. In making this distinction, Isaac has adopted a colonial and racialized approach to the issue.

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[11] GA Res. 61/295 (Annex). UN GAOR, 61st Sess., No 49, Vol. III, UN Doc. A/61/49 (2008) 15 (hereinafter UNDRIP). For a useful review and analysis of the Declaration see Indigenous Bar Association, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook*, (Winnipeg: Indigenous Bar Association, 2011)

[12] Paul Chartrand, "Defining the 'Metis' of Canada: A Principled Approach to Crown – Aboriginal Relations" in Frederica Wilson & Melanie Mallet, eds., *Metis – Crown Relations: Rights: Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008) 27 at 35.

[13] *Ibid,* at 36.

[14] Thomas Isaac, *Metis Rights* (Saskatoon: University of Saskatchewan, Native Law Centre, 2008) at 9.

Nowhere does Isaac acknowledge that the issue of Metis citizenship and belonging is very much a legal question within Metis law making institutions and political traditions. He fails to recognize that the Metis have a legal tradition that has something to say about who can or cannot be a citizen of their political community.[15] The legal determination of Metis identity is not the exclusive preserve of Canadian law as Isaac assumes. Consequently his entire "legal" analysis, commendable as it is from within a colonial perspective, is found wanting as such a limited colonial understanding of Metis identity and rights is of marginal benefit to a comprehensive analysis of the issue expected in a post-colonial Canada.

To be fair, however, this is not a criticism that is applicable to only Isaac, it is an indictment of many legal scholars and their publishers that continue to comment on Aboriginal legal issues in Canada and do not appreciate the racist nature of Aboriginal rights doctrine as currently articulated by the judiciary in this country and thus fail to acknowledge its colonial and Euro-biased nature. By putting on blinders, lawyers and judges can conveniently declare that the black letter law of Aboriginal doctrine is all that matters. It is beyond their professional competence to argue for "social" change. Yet, there is no shortage of critical scholarship on Aboriginal rights doctrine.[16] To ignore this relevant scholarship is tantamount to witnessing an act of violence being committed against a vulnerable person and not doing anything about it. Then again, the common law has never acknowledged a positive obligation to rescue anyone in trouble.[17] Silence on the point is understandable, given the uncritical application of legal doctrine by many practitioner lawyers (and judges who ignore the difficult issues) who get paid to apply the law and not question it - but it does not make it right.

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[15] For a thorough account of the complex nature of membership and community inclusion of Metis in Northwestern Saskatchewan communities see Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth – Century Northwestern Saskatchewan* (Vancouver: UBC Press, 2010)

[16] Such authors include Larry Chartrand, Justice Harry Laforme, Michael Asch, John Borrows, Gordon Christie, D'Arcy Vermette, Taiaiake Alfred, Darren O'toole, Glen Coulthard, and many others who have consistently shown how Aboriginal law principles and doctrine are fundamentally discriminatory and racist at their core.

[17] In contrast, among Metis customary practices there is an obligation to help others in need. See commentary by Elder Joe Pangman in Fred Shore and Lawrence Barkwell, *Past Reflects the Present: The Metis Elders Conference* (Winnipeg: Manitoba Metis Federation, 1997) at 82.

At the time *Powley* was decided, the criteria of membership paralleled closely to the criteria adopted by the Metis National Council.[18] Thus, the human rights concern over the courts determining membership criteria has not been a serious issue from the perspective of the national Metis political body. However, whether the membership criteria adopted by the Metis National Council reflects accurately Metis customs and traditions is debatable given the significance of membership migration between First Nation and Metis communities historically.[19]

Robert Innes notes that the Cree, Saulteaux and Assiniboine were so closely intertwined that "multicultural" bands were common on the prairies. Building alliances through marriage was encouraged and the Metis welcomed their Indian kin into their buffalo hunting brigades and vice versa.[20] "Given the remarkable overlap between Metis and other peoples, contemporary political policies based on mutual exclusion should not be projected back onto the history of Metis, Cree, Assiniboine and Saulteaux relations."[21] Porous identity and membership boundaries were commonplace and economically encouraged.[22]

For instance, it is a troubling issue how certain strictly applied membership codes concerning Metis identity have affected individuals who have chosen to accept Indian status to obtain certain

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[18] Isaac, *supra* note 14 at 10.

[19] Robert Innes, "Multicultural Bands on the Northern Plains and the Notion of Tribal Histories" in Robin Jarvis Brownlie and Valerie J. Korinek, eds., *Finding a Way to the Heart: Feminist Writings on Aboriginal and Women's History in Canada* (Winnipeg: University of Manitoba Press, 2012). Of course, Indigenous peoples traditions and customs should be allowed to evolve. I wonder whether the current criteria would be upheld under *Powley* if the claim was based on an Aboriginal right to determine membership instead of the right to hunt.

[20] Robert Innes, *Elder Brother and the Law of the People: Contemporary Kinship and Cowessess First Nation* (Winnipeg: University of Manitoba Press, 2013) at 86.

[21] … "'The Indian Blood in their veins established their right or title to land': The Law and Politics of Metis Title" (2016) … Osgoode Hall Law Journal .. at 41 [forthcoming]

[22] Nicole St-Onge, "Uncertain Margins: Métis and Saulteaux identities in St-Paul des Saulteaux – Red River 1821-1870" (2006) 53 Manitoba History 1 at 9.

benefits available only to status Indians such as non-issued health care benefits, but in doing so have been wrongly criticised as crossing identity and cultural boundaries. This is particularly the case when Metis choose to apply for Indian status and are successful but are then denied membership in Metis communities for doing so.[23] In the *Cunningham* case, the plaintiff was denied membership on one the Alberta Metis settlements because he obtained status under Bill C-31. Choosing Indian status in this context for the reasons explained by the plaintiff has nothing to do with ethnic, cultural or national identity. Problematic still, is that if Mr. Cunningham chose to reject status under the *Indian Act* and to regain membership in his long-time home community of Peavine this culturally Metis individual would be unable to do so as there is no mechanism in the current legislation to voluntarily reject Indian status. In such scenarios, federal and provincial policy that view Aboriginal categories as closed and exclusionary become sources of personal and community injustice. Nor should Metis political organizations exacerbate such injustices by insisting on strict membership boundaries, which are not consistent with Metis historical customs and traditions.

As a Metis researcher and scholar, I want to make sure that Canadian law (and Aboriginal rights doctrine) does the least damage as possible to the truth of our Metis nature. I would like our nature as peoples to be accurately reflected in the claims we make through laws that recognize our customs of belonging and lifestyle patterns as accurately as possible. We should not have to restructure our historical narrative to fit into existing Eurocentric boxes created by the courts or through a Eurocentric policy lens.

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[23] *Alberta v. Cunningham,* [2011] 2 SCR 670. Having acquired Indian status under the *Indian Act*, the plaintiff in Cunningham complained that his exclusion from membership in the settlement because of acquiring Indian status amounted to discrimination contrary to s. 15 (1) of the *Charter*. The court held that s. 15(2) provides a good answer to the charge of discrimination because s. 15 (2) is concerned with promoting substantive equality for disadvantaged groups. The court held that those Métis who benefit from the *Metis Settlements Act,* RSA 2000, c. M-14 are part of an ameliorative program because the legislation at issue was part of a negotiated agreement between the government of Alberta and the Métis Settlements Federation to "establish a Métis land base to preserve and enhance Métis identity, culture and self-government, as distinct from Indian Identity, culture and modes of governance." (para. 69).

Metis as "Indians" within s. 91(24) of the *Constitution Act, 1982*

To achieve reconciliation with the Metis peoples of Canada requires the federal government to recognize the Metis as distinct peoples in contemporary society and not a phenomenon of the past. Metis studies scholar Paul Chartrand made an interesting remark in a keynote address about reconciliation being like an "ingredient that can be added to any relationship or transaction to make it better. Like French Fries, '*would you like some reconciliation with that'?"*[24] What has become apparent in Metis discussions of reconciliation is that you can't have reconciliation until you actually have a meaningful relationship to begin with. From the Metis perspective, the relationship with Canada has always been peripheral at best and non-existent at worse. Metis scholars have consistently noted that this denial of Metis peoplehood status has been the result of entrenched federal policy.[25]

Although 1982 marked a watershed moment in terms of Metis recognition due to their inclusion in s.35 of the *Constitution*, the federal government was nonetheless very reluctant to acknowledge the change in policy terms; claiming that the Metis are a provincial responsibility and not a federal responsibility. When Canada apologized to the victims of residential schools, on June 11, 2008, Clem Chartier, President of the Metis National Council, made it clear in his response to Parliament and Prime Minister Harper that the Metis are tired of being excluded; "the Metis Nation… wants in", he stated to the politicians and the public at large.[26] With the clarification that Metis are under federal jurisdiction, the Supreme Court of Canada in the *Daniels* case held that the federal government no longer has an excuse to deny jurisdictional

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[24] Paul Chartrand, *supra* note 4 at 8

[25] For example see Michel Hogue, *Metis and the Medicine Line* (Regina: University of Regina Press, 2015) at 113.

[26] See Canada, House of Commons Debates, 11 June 2008, starting at page 1605. President Chartier's statement appears on page 1619. Quoted in Signa Daum Shanks, *Searching for Sakitawak: Place and People in Northern Saskatchewan's Ile-A La Crosse* (2015). Electronic Thesis and Dissertation Repository. Paper 3328. (University of Western Ontario) at 3.

responsibility for the Metis.[27] Unfortunately, it took 17 years of litigation to create the main course for the accompanying French fries.

Daniels is a watershed case, the implications of which will likely take many years to fully appreciate. In rendering its decision the Supreme Court upheld the Federal Court trial decision of Justice Phelan and agreed with his conclusions on the purpose of s. 91(24). Justice Phelan held that 91(24) was intended 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".[28] The court recalled that at the time of confederation the Dominion intended to develop the North-Western territory, and since Metis occupied the North-Western territory, it is consistent with the described purpose of s. 91(24) to define "Indians" as inclusive of a "broad range of people sharing a Native hereditary base".[29] The Supreme Court decided that the constitution would be more coherent by holding that s. 91(24) is synonymous with s. 35 (2) which defines Aboriginal peoples as including "Indians, Inuit and Metis".

Given the decision, it is now clear which level of government has responsibility for policy involving the Metis. The jurisdictional uncertainty is finally resolved. Yet, Joseph Magnet, lead counsel for Mr. Daniels, was not assured that the federal government would necessarily act on its jurisdiction over the Metis if the court found them to be "Indians" under s. 91 (24). Hence he also asked the court for a declaration that the Crown has a positive obligation to negotiate and resolve outstanding claims rather that to wait for Metis to assert them in a context where lack of financial recourses and alternative decision-making forums make it next to impossible to do so. He stated, "It is unlikely these negotiations will happen unless the court issues the third

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[27] *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12.

[28] *Ibid* at para. 5 quoting Justice Phelan, [2013] 2 F.C.R. 268 (F.C. Trial Division) at para. 353.

[29] *Ibid,* FC Trial Division at para. 566.

declaration, the obligation to negotiate with the representatives of the peoples concerned."[30] This declaration was not granted.[31]

However, the Supreme Court did emphasis the importance of Parliament's obligation to "reconcile with *all* of Canada's Aboriginal peoples."[32] Whether this translates into the federal government deciding to include the Metis within the existing comprehensive and specific claims processes remains uncertain.[33] However, given the likelihood of court action based on discrimination for non-inclusion and the current government's openness to working with the Metis there is a good possibility that inclusion in existing processes or the creation of a new targeted process specifically for Metis and non-status claims will likely develop.[34]

Previously I had criticized the trial court decision of *Daniels* because of the implications on Metis peoplehood equality and self-determination.[35] I expressed the concern about the potential incompatibility of being subjected to unilateral federal regulation with the principle of self-determination and free prior and informed consent recognized in UNDRIP. In the past, the ability of the federal government to rely on s. 91(24) has proved disastrous to Indigenous rights and governance and was the source of authority to impose the residential school system. The

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[30] Joseph Magnet, Reconciliation and the Metis of Canada Conference, transcript of proceedings (University of Ottawa, October, 2015) at 5. Conference presentation videos are available on the Metis Treaties Project website. See http://www.metistreatiesproject.ca/conference/

[31] However, since the release of the *Daniels* decision in 2016, the Justin Trudeau government has expressed a willingness to engage with the Metis to discuss outstanding claims. See Angela Mulholland, "SCC rules Metis, non-status Indians are federal responsibility" CTV News, April 14, 2016. Online: http://www.ctvnews.ca/canada/scc-rules-metis-non-status-indians-are-federal-responsibility-1.2858535

[32] *Daniels*, *supra* note 27 at para. 19.

[33] At time of writing the policy of the federal government has been to exclude the Metis from both the comprehensive claims process (expect for in the Northwest Territories) and specific claims processes.

[34] For a review of current federal policy processes regarding Metis issues see Larry Chartrand, (2016) 4:2 Northern Public Affairs. Online: http://www.northernpublicaffairs.ca/index/magazine/volume-4-issue-2/metis-land-claim-participation-in-the-north-implications-for-southern-canada/

[35] Larry Chartrand, "The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy" (2013) 50 Alberta Law Review 1.

danger of colonial power and the corresponding vulnerability to unilateral legislation by the federal government poses a serious potential risk to the freedom and integrity of Aboriginal peoples. I had hoped that when the Supreme Court of Canada decided *Daniels*, it would reframe the nature of the power in s. 91(24) to make it compatible with the principle of self-determination and UNDRIP's provisions regarding free prior and informed consent.

I argue that s. 91(24) has been mistakenly interpreted and assumed to be plenary in nature by the jurisprudence and treated like the other heads of power in s. 91 and s 92 of the Constitution. Interpretation should be based on a more comprehensive review of the historical evidence combined with a progressive interpretation of the constitution as a "living tree". Section 91(24) should be read in a way that is consistent with the principle of free prior and informed consent. This would mean that s. 91(24) has a built in limitation and its use is dependent on whether the Aboriginal peoples that would be affected by proposed federal legislation have provided consent. This interpretation of s. 91(24) was not addressed by the Supreme Court in *Daniels* and remains a concern.

Yet, interestingly the language used by the court in characterizing s. 91(24) in *Daniels* seems to have indirectly reframed its purpose to reflect a qualified understanding of the power. Without explicitly stating that s. 91(24) is limited in its plenary nature, the court carefully connects the reconciliatory purpose of s. 35 of the Constitution with a characterization of s. 91(24) as expressing a federal responsibility to Aboriginal peoples and avoids using the language of power and jurisdiction normally associated with division of powers analysis. [36] The court states that s. 91(24) must be read in a broader contemporary societal context consistent with the purpose of s. 35 as mandating the reconciliation of Aboriginal peoples' interests with the Canadian state. Moreover, the court held that s. 91(24) is about the "federal government's relationship with Canada's Aboriginal peoples" which is markedly distinct from previous articulations of the

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[36] *Daniels, supra* note 27 at para. 34.

section being a power over Indians as a subject matter of jurisdiction.[37] This characterization of a federal head of power is qualitatively distinct from characterizations typical of other heads of power. For example it would be awkward to speak of the federal government as having a relationship with "navigation and shipping" or "Banking". More to the point, the court speaks of s. 91(24) as "Parliament's protective authority" in regards to Aboriginal peoples.[38] Thus, without explicitly stating that the plenary nature of s. 91(24) is limited or conditioned, the tone and approach the court takes in describing this power certainly is very suggestive that it ought to be understood in the context of a relationship of respect and reconciliation that distinguishes it in a real and fundamental way from the other subject heads of power.

Although the potential exists (although very unlikely in today's political climate) for Parliament to legislate policy that is harmful, negative and discriminatory (which would likely be subject to *Charter* and s. 35 challenges), such a policy of that nature may be found outside the scope of its power since such harmful legislation would be found contrary to the colour given to s. 91(24) by the court's indirect reframing of its meaning. This would be a remarkable departure from the orthodox understanding of Parliamentary supremacy because legitimacy in this context would be tested according to substantive understandings of justice and the rule of law in addition to the more accepted obligations of procedural legitimacy regarding the nature of the rule of law.

When push comes to shove, however, it is difficult to imagine a court, under a division of powers analysis, deciding that a clear legislative statement concerning Indian policy would be outside the scope of s. 91(24) regardless of how harmful such legislation would be to the "Indian" population. Parliament has in fact relied on this power in the past in initiating a reign of

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[37] *Ibid*, at para. 49. Interestingly, the court does not undertake the standard division of powers analysis that is typical of such cases except as a brief afterthought late in the judgment where it then promptly endorses cooperative federalism and the diminishing scope of interjurisdictional immunity by simply referencing *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 and *NIL/TU,O Child and Family Services v. B.C. Government and Service Employee's Union*, [2010] 2 S.C.R. 696 in the judgment. This point was no doubt made in the contemplation of pending litigation that challenges the Metis Settlements Act of Alberta as *ultra vires* the power of the province since Metis are now clearly under Federal jurisdiction.

[38] *Ibid.*

discrimination, assimilation and oppression for over 150 years.[39] Hopefully the past will not repeat itself again. Personally, I would have been more comforted had the court been more concrete and decisive in limiting the power of s. 92(24) rather than to rely on the "noblise oblige than on what is obliged by the constitution."[40] The magnanimous and colourful language of responsibility, protection and reconciliation, are simply not included in the text of s. 91(24) and open to reinterpretation in future cases.

In any event it remains difficult to reconcile Indigenous peoples as a third order of government equal to federal and provincial governments when the relationship is tainted by one government having a potentially unlimited power over the other even if it should be used for good only.[41] It conjures up images of the one group being inferior and dependent on the other. Parliament's protective power? No thanks, we can protect ourselves. It is reparation for past harms and the recognition of Indigenous political independence and authority that should be the aim of Parliament's obligations.

Metis as Ancestry: An Impoverished Definition of Indian

The definition of Metis identity for the purpose of claiming s. 35 Aboriginal rights differs from how the Supreme Court defined Metis in reference to s. 91(24). In *Daniels,* the court interpreted

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[39] The truth and Reconciliation commission characterized the period from the mid 1800s to 1960s as the period of cultural genocide against Aboriginal peoples in Canada. Truth and Reconciliation Commission, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission* (2015) at 1.

[40] *Daniels, supra* note 27 at para. 12.

[41] The Canadian government has announced in May of 2016 that it would implement UNDRIP in Canada. See CBC News: http://www.cbc.ca/news/aboriginal/canada-adopting-implementing-un-rights-declaration-1.3575272. Importantly, there existing within UNDRIP an article that requires the free, prior and informed consent by Indigenous peoples of any legislation that may impact their rights and interests. If legislated into law by Canada this would go a long way to relieving my concern.

Metis broadly in deciding that Metis are "Indians" for the purposes of s. 91(24). The court held that Metis "can refer to the historic Metis community in Manitoba's Red River Settlement or it can be used as a general term for anyone with mixed European and Indian Heritage."[42] Thus a person who can prove they have some Indian heritage can claim to be Metis and thus "Indian" for the purposes of federal jurisdiction. However, he or she would not necessarily be Metis for the purposes of s. 35 without proving that he or she was also a descendant of a historic Metis community as defined in *Powley*.

There are serious concerns with the broad definition of Metis as including "anyone with mixed European and Aboriginal heritage" adopted by the Supreme Court in *Daniels.*[43] One relevant concern relates to whether the term "Indian" should be disconnected from the concept of Indigenous as embodying collective peoplehood experiences of colonization. The broad definition allows for "Indian" identity under s. 91(24) based simply on Metis self-declaration and proof of ancestry without showing any real connection to a distinctly Metis community or having been the victim of colonization policies of assimilation through increasingly restrictive Indigenous membership criteria or refusal to acknowledge identity. Simply declaring you are Metis because you have some distant ancestor that was Aboriginal should not result in such person, without more, being a constitutional Metis Indian under s. 91(24).

Metis identity should not be based simply on ancestry alone. This is why noted Metis lawyer Jean Teillet is so critical of the trial decision in *Daniels* and preferred the Court of Appeal's analysis.[44] The Federal Court of Appeal commented on the identity criteria needed to be Metis for the purposes of being Indian in s. 91(24).

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[42] *Daniels, supra* note 27 at para. 17. This does not mean that everyone with mixed –blood is Metis or non-status and thus Indians under federal jurisdiction. The court held at paragraph 47 that such determinations may need to proceed on a "case by case" basis.

[43] *Ibid.*

[44] Jean Teillet, *Metis Law in Canada* (Pape, Salter, Teillet, LLP, 2015) at 1-19.

> I accept the submission of the Intervener Métis Nation of Ontario that a progressive interpretation of section 91(24) requires the term Métis to mean more than individuals' racial connection to their Indian ancestors. The Métis have their own language, culture, kinship connections and territory. It is these factors that make the Métis one of the Aboriginal peoples of Canada.[45] …
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> It follows that the criteria identified by the Supreme Court in *Powley* inform the understanding of who the Métis people are for the purpose of the division of powers analysis. The *Powley* criteria are inconsistent with a race-based identification of the Métis.[46]

Professor Sebastien Grammond argues that it is obvious

> that ancestry alone is not enough to constitute indigenous identity. A person may have indigenous ancestry, but may not have been raised within an indigenous culture, may not have suffered the disadvantages and oppression flowing from the injustices suffered by the indigenous peoples and may not self-identify as indigenous. This is why acceptance by an indigenous group plays a major function in most definitions of indigenous identity.[47]

In contrast, the Supreme Court explicitly over-ruled the Court of Appeal's decision to narrow the scope of Metis by the addition of a community acceptance requirement for the purposes of s. 91(14). The court justified its decision by distinguishing the purpose of s. 91(24) from the purpose of s. 35. Section 35 is about identifying rights-holders whereas s. 91(24) is about the government's relationship with Aboriginal peoples noting that this "includes people who may no longer be accepted by their communities because they were separated from them as a result, for

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[45] *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, [2014] C.N.L.R. 139 (FCA) at para. 96.

[46] *Ibid* at para. 99.

[47] Sebastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law* (Toronto: Thomson Reuters, 2013) at 12. Or if they do self-identify, it may be for opportunistic reasons unconnected to their lived experiences (including possible intergenerational effects) and heritage as some courts have determined. See for example, *Vautour*, *infra*, note 57 and *Corneau*, *infra* note 65.

example, of government policies such as Indian Residential Schools".[48] However, this conclusion demands the hard question. Are such excluded individuals still Metis, if the exclusion is based on the Indigenous community's own criteria of membership?

Such persons may be legitimately Metis, but it should not be because they are caught in an indeterminate broad net of who is an Indian. Rather their inclusion as Indian may be justified because of the impact colonization has had on their identity and membership choices and the socio-political context and history of the region or territory in question. Forced identity migration due to restrictive definitions of who is Metis or Indian by federal policy may have resulted in social, cultural and family disconnection between such individuals and their ancestral roots and community. For instance, in the case of First Nation identity, the loss of Indian status due to assimilation policy in the *Indian Act,* can and does seriously impacted cultural and community connection as was noted in the *Lovelace* case.[49] Residential schools broke community connections for many Metis and First Nations children. The 60s scoop was also significant in breaking cultural and community ties. In terms of Metis, federal policies that refused to accept Metis as distinct political and social polities forced some members to become First Nations or to become White.[50] Also to avoid racism and backlash from mainstream White society, Metis to the extent they could, would go underground or integrate into White society to avoid negative social and economic discrimination and prejudice.[51] Inclusion of such

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[48] *Daniels*, *supra* note 27 at para. 49. It is not apparent to me that a Metis community or political association would necessarily exclude those who went to Residential Schools from membership within the Metis community. In any event, the example of residential schools on membership inclusion reflects more the identity marker of negative impact of colonization on the individual's ability to belong that may still justify their identification as Metis Indians under s. 91(24) even if such a person was not accepted by a Metis community as a member.

[49] *Sandra Lovelace v. Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977. The United Nations Human Rights Committee found Canada had discriminated against Sandra Lovelace because of the denial of her being able to maintain a cultural connection to her home community because of the impact of s. 12(1)(b) of the *Indian Act* which resulted in her loss of Indian status when she married a non-Indian and the right to live on the reserve where Mi'kmaq culture is most prominent.

[50] See Jacqueline Peterson, "Red River Redux: Metis Ethnogenesis and the Great Lakes Region" in Nicole St-Onge, Carolyn Podruchny and Brenda Macdougall eds., *Contours of a People: Metis Family, Mobility and History* (University of Oklahoma Press, 2012) 22 and Larry Chartrand, *supra* note 1.

[51] *R. v. Powley,* [2000] 2 CNLR 233 (Ont. SCJ). The Ontario Superior Court upheld the Provincial court's finding "that the contemporary Métis community had always existed, except that it was, until the early 1970's, an invisible

disaffected persons and communities within federal government responsibility may be appropriate as there are arguably moral and legal obligations that may exist in terms of repairing social and cultural connections and the harms that have resulted.[52]

I agree that there is a need for a boundary marker of identity, but I do not agree that it should be limited to the requirement of "community acceptance" adopted by the Federal Court of Appeal in *Daniels*. In some cases lack of community acceptance should not be a bar to falling under the protective authority of parliament. However, there needs to be some principled basis for restricting the scope of s. 91(24) so as to exclude those that have not been negatively impacted by colonial identity policies. Evidence of such negative impact is arguably an alternative valid marker of indigeneity in a colonized societal context.[53] Otherwise the gate is left wide open for ethnic fraud.[54] The adoption of the trial judge's broad definition by the Supreme Court of Canada is too simplistic. There is a need for some profundity to be attributed to the meaning of "Indian". To leave the definition open ended will cause much confusion and potential bitterness between Metis and First Nations who see limited financial resources being further divided among a growing category.[55]

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entity within the general population, an invisibility (to outsiders) caused by shame, ostracization, and prejudice. (para. 38)

[52] The Truth and Reconciliation Commission has documented the impact of losing one's connection to culture and community and has concluded that reconciliation between Indigenous peoples and Canada must involve efforts at repairing community alienation and identity. Truth and Reconciliation Commission, *supra* note 39 at 1-3.

[53] Sebastien Grammond, Isabelle Lantagne and Natacha Gagne, "Non-Status Indigenous Groups in Canadian Courts: Practical and Legal Difficulties in Seeking Recognition" in Patrick Macklem and Douglas Sanderson, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal & Treaty Rights* (Toronto: University of Toronto Press, 2016) 259.

[54] Chris Andersen, "Peoplehood and the Nation From: Tools for Thinking Juridically about Metis History" paper presented at Reconciliation and the Metis Conference, University of Ottawa, October, 2015 at 18. Accessed online: http://www.metistreatiesproject.ca/wp-content/uploads/2016/01/Peoplehood-and-the-Nation-Form.pdf

[55] In some cases First Nations have intervened against Metis claims for Aboriginal rights. In *R. v. Hirsekorn*, [2013] 4 C.N.L.R. 244 (Alta. C.A.) the Blood Tribe and Siksika Nation both intervened against a Metis claim to hunt in the environs of the Cypress Hills in southern Alberta.

In *Daniels*, the Supreme Court essentially reduces the definition of Indian to a question of blood quantum and consequently is therefore a race-based definition unconnected to peoplehood, culture or social belonging to an identifiable Indigenous community or to the negative impacts of past identity policies by the federal government on the indigenously disenfranchised. Fortunately, there is an identity marker that respects Indigenous community acceptance and does not prejudice those that were unable to be accepted because they were adopted out during the 60s scoop or declared non-status by operation of federal policy aimed at assimilation or separated from culture and community due to the impact of residential schools. For example, Sebastien Grammond offers an alternative marker for legitimate Metis identification that would place some appropriate boundaries around s. 91(24) and thereby minimize potential identity abuse. Grammond suggests that the hallmark of being "Indigenous" is the experience of injustice based on the European belief of Indigenous inferiority generated and reinforced by colonization processes. He said:

> Perhaps the reason that Indigenous is a relative concept, it is not only based on ancestry, it is not only based on cultural traits but on a particular history of relationships between two groups. Before the Europeans arrived in North America, there were no Indigenous peoples. There were Huron, there were Mi'kmaq, and Shashawnee and so on. But they did not feel the need to define themselves as Indigenous. It is a process, a product of a historical process and not any historical process, the process of colonization. In other words, the concept of Indigenous or Aboriginal is a reflection of a particular kind of injustice, one based on the idea that people of European origin were superior.[56]

The *Vautour* case is illustrative of how a claim for Metis status was denied by the court due to a lack of community connection to a pre-existing Metis community.[57] It may also be demonstrative of a case where there was insufficient evidence of past or present negative identity

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[56] Sebastien Grammond, "How Courts Perceive Aboriginal Communities", transcript of presentation (Reconciliation and the Metis of Canada conference, University of Ottawa, October, 2015) at 2-3.

[57] *R. v. Vautour*, [2011] 1 CNLR 283 (NB Prov. Ct). Notwithstanding that the court may have come to the correct conclusion on the facts in *Vautour*, there are still valid concerns that courts are inappropriately applying the *Powley* criteria for identifying a Metis community too strictly and may be influenced by stereotypical images of Indigenous cultures. For an insightful discussion of potential reasons why Metis identity claims are generally unsuccessful particularly in eastern Canada see Sebastien Grammond, Isabelle Lantagne and Natacha Gagne, *supra* note 53.

policy implications that would have disrupted the ability of the defendant or other similarly situated individuals to maintain a Metis identity through time in the relevant area.[58]

In *Vautour*, the defendant argued that certain fishing violations interfered with his Metis Aboriginal rights under s. 35 in an area in New Brunswick. The defendant claimed that he was Metis because he had some distant Mi'kmaq ancestry. Yet for most of Vautour's life, he identified as Acadian and only recently started to identify as Metis.[59] Vautour had to go back ten generations to find a Mi'kmaq ancestor. The court accepted Crown expert evidence that no mixed-ancestry community emerged as a distinct "Metis" community in the Maritimes, at least in this region, prior to effective European control.[60]

In the case of *Vautour*, based on the evidence, one could conclude that the long time identification of the defendant as Acadian was not the result of a federal policy interfering in the identity of the defendant as Metis.[61] Indeed the court accepts the historical expert testimony lead by the Crown that the historical factors that prevailed in the region, particularly in relation to the nature of the fur trade, did not support the ethnogenisis of a distinct self-identifying mixed-ancestry community as was the case for example in Western Canada. The testimony of the

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[58] This analysis assumes that Canada enjoys full and legitimate sovereignty over the territory in which the Metis community emerged as a distinct community after the fact of sovereign control over the territory by the French and subsequently the English. This assumption of full and complete sovereignty is the subject of debate and reassessment within Aboriginal rights law in Canada. Relying on cases such as *Haida Nation v. British Columbia,* [2004] 3 SCR 511 it can be argued that the Mi'kmaq still retain *dejure* sovereignty over the territory. The peace and friendship treaties did not involve the surrender of land and this remains an outstanding issue in the Maritimes. In such a case, arguably we should look to Mi'kmaq law to determine the legal status of mixed-blood communities emerging in the territory and not just British or French law that is relevant only because the colonizer has the defacto power to assert itself regardless of dejure validity.

[59] *Vautour, ibid* at para. 80.

[60] This sweeping conclusion regarding the lack of distinct Metis communities in the Maritimes may not be accurate. Reference was made, for example, in the *Daniels* case to historical accounts of a distinct Metis presence in Nova Scotia at LeHeve as early as 1650. *Daniels supra* note 27 at para. 17.

[61] A different conclusion may have been reached by the court had the defendant argued that he was Mi'kmaq instead of Metis because there is Mi'kmaq presence before European contact and that the *Indian Act* and other assimilation policies may have severed his cultural connections to the Mi'kmaq community.

defendant's expert witness did, however, argue that a Metis "shadow community" did exist. Unfortunately, there was insufficient evidence of this shadow community according to the court. Moreover, this argument was likely tainted by the expert's own evidence that supported an understanding of Metis identity as being based simply on having mixed ancestry because of the expert witness's heavy reliance on genealogy to establish Metis identity. According to the court, there must be evidence of a distinct Metis community. Mixed ancestry genealogy is simply insufficient.

However, as Sebastien Grammond et. al., notes, the court may have been inappropriately bound to a Eurocentric understanding of "community" which coloured the judge's assessment of the evidence.

> After all, the dislocation and dispersion of Indigenous communities was one of the consequences of the assimilationist and paternalistic policies of the Canadian state. As Justice Todd Ducharme puts it, we must not forget "the broader historical reality that Aboriginal assimilation and cultural displacement is the result of conscious policies pursued by past Canadian governments."[62]

In other words, we need to ask the question whether, if it was not for colonial policy denying Metis indigenous identity and the influences of negative social attitudes and the pressure of assimilation whether Vautour's lineage and others with similar mixed ancestry experiences would have generated a separate and distinct Metis identity and community in the area? In the case of *Vautour*, given the very tenuous connection to mixed ancestry descendants, it may be appropriate to conclude that Vautour was not Metis since there was no evidence of a distinct Metis community in the area or the kind of colonial engagement or coercion that contributed significantly to Metis identity denial. The expert evidence concluded that there was simply no evidence of a Metis community having existed in the area and that the socio economic conditions of the fur trade did not, in the court's opinion, lend themselves to the necessary conditions for a

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[62] Grammond et. al., *supra* note 53 at 283.

mixed-ancestry community to form as an independent distinct community from either their Mi'kmaq or Acadian/French identities.[63]

In other cases, individuals may be re-asserting Metis identity and community where there is a well-documented history of distinct Metis presence in an area and that there is evidence of denial of this distinct Metis community by federal policy makers and that this occurred without choice.[64] In this context, it can be argued that such a reassertion of Metis identity could very well be a profound act of decolonization. In the *Vautour* decision, the ethnic mobility choice from Acadian to Metis seemed opportunistic and not necessarily the result of imposed colonial policies to justify the inclusion of Vautour as a Metis Indian.[65] Likewise there was no direct historical evidence of a Metis community having existed and thus no evidence of the community having experienced the negative impact of colonization or identity denial.[66] In other words, the community identified as Acadian for most of its history and has not experienced the negative

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[63] This question necessitates a consideration of whether the natural evolution towards a distinct and self-conscious Metis social identity of a community in a given area can be legally disrupted by the assertion of Crown sovereignty or whether once the process has begun it should be allowed to continue and have legal significance in terms of being recognized as an Aboriginal people even if Indigenous peoplehood existence emerges after colonization and effective control. For an interesting discussion of the pattern of ethnogenisis and identity see Darren O'toole, "From Entity to Identity to Nation: The Ethnogenesis of the Wiisakodewiininiwag (Bois-Brule) Reconsidered" in in Christopher Adams, Gregg Dahl and Ian Peach, eds., *Metis in Canada: History, Identity, Law and Politics, 2nd Edition* (Edmonton: University of Alberta Press, 2013) 143.

[64] For example, the Red Sky Metis were originally beneficiaries of the Robinson Superior Treaty of 1850. At the time of treaty, the Metis wished to join as a Metis band, but were denied. Colonial officials said they can only benefit if they joined the Saulteaux bands which they had relations with. The Chief accepted them but several years later, the "Metis" descendants were excluded from the treaty annuity lists because they were ironically Metis and since being excluded, they now have re-formed as a distinct Metis community. See Larry Chartrand, *supra* note 1.

[65] The Superior Court of Quebec in the *Corneau* case came to a similar conclusion. In *Corneau*, the respondent asserted Aboriginal rights to occupy a hunting camp based on his Montagnais (Inuu) ancestry. The evidence did not support the existence of a historic Metis collective in the territory in question. In terms of Metis identity, "[t]he court found his self-identification to be primarily a recent phenomena driven by opportunism." *Québec (Procureur général) (Ministère des Ressources naturelles) c. Corneau,* 2015 QCCS 482. English summary available online at: https://www.usask.ca/nativelaw/news/2015/qu%C3%A9bec-c.-corneau.php

[66] Grammond, *supra* note 47.

impact of colonization and assimilation to justify identifying the community as Metis in the Aboriginal sense notwithstanding the existence of mixed-ancestry in the defendant's lineage.[67]

Arguably, even apart from whether courts have failed to fully account for federal assimilation policy and its impact on Indigenous identity, is the question of which Indigenous identity is appropriate? What is more problematic for the defendants in my opinion is that both Mr. Vaurtour and Mr. Corneau showed genealogical evidence of either Mi'kmaq ancestry or Montagnais ancestry yet argued that because of this ancestry they were therefore "Metis". If they were supporting their claims based on Metis identity, would they not be claiming Metis ancestry instead of Mi'kmaq or Montagnais ancestry? What the defendants (or their lawyers) likely fail to realize is that being Metis is not reducible to whether you have some First Nation ancestry. Instead, the defendants should be claiming Aboriginal rights based on their belonging to the Mi'kmaq or Montagnais communities.[68] Chris Andersen would characterize these claims as misrecognition of who the Metis are as a distinct people by attributing Metisness to a hollow empty construct based on mere mixedness.[69]

There may be cases where certain ethnically Indigenous individuals have been excluded from their communities. These exclusions may have been the choice of the First Nation Band or

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[67] It may be fair to argue, given the concerns raised by Grammond et. al. *supra* note 53 that there may be valid reasons for a presumption in law that colonization has impacted identity formation negatively and that recognition of Metis /Mi'kmaq identity should be provided to Vautour unless proof can be shown by the Crown that the defendant was not affected by colonization in this regard. It is difficult for me to be entirely confident given the history of colonization that it is fair or just to deny Vautour's Aboriginal identity even if Indigenous identity is a recent assertion.

[68] There are cases where non-status Indians have been found to possess Aboriginal rights. In *R. v. Lavigne* [2005] 3 C.N.L.R. 176 the court found a non-status Mi'kmaq to have a "sufficient and substantial connection with a tribe" (para. 59). The court expressly choose not to apply *Powley* because the defendant was not Metis. Instead the court applied the *R. v. Fowler*, (1993) 134 N.B.R. (2d) 361 test which requires a "sufficient and substantial connection with a tribe". Yet, more recent cases of non-status claimants have been applying *Powley* by requiring evidence of "community acceptance". In *R v Acker*, [2004] N.B.J. No. 525 (N.B. Prov. Ct.) and *R. v. Vienneau,* [2014] N.B.J. 222 (N.B.Q.B.) there was evidence of Mi'Kmaq ancestry, but insufficient evidence of community acceptance and only recent evidence of Mi'kmaq self-identity.

[69] Chris Andersen, *Metis: Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014) at 176-179.

Metis community in exercising their limited membership powers under the *Indian Act* or membership codes of Metis political authorities. What status do these First Nation Indian and Metis refugees have in Canada? Should the limited resources allocated to Indians under federal policy be provided to those that the communities themselves do not accept as members? I would argue that they should not unless such refugees can show that their alienation from membership is due to the negative policies of assimilation and colonization (whether internalized by the communities themselves or directly impacted by federal policy).[70] As discussed above, identity for the purposes of s. 91(24) should not be solely dependent on community acceptance since many communities over many decades may have experienced federal interference with First Nation or Metis identity.

Adopting a broad open-ended definition gives the impression that Metis are those that are in the "reject pile where you throw all the people who lost their Indian status. We are not a garbage can, and we are not the leftovers."[71] Yet the Supreme Court of Canada adopted Hogg's analysis which implies just that. According to Hogg, Metis are those who were "excluded from the charter group from whom Indian status devolved."[72] This is a very empty and insufficient understanding of the Metis peoples of Canada and must be rejected.

Conclusion

Defining Metis as anyone with Indian ancestry seriously diminishes the social and political dimensions of Metis and renders these essential characteristics of Indigenous peoplehood

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[70] Indigenous community authorities may have internalized definitions of identity based on colonial objectives as opposed to internal political decisions of the community untainted by federal policy. Pamela Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2011) at 39. In *Lavigne, supra* note 68 for example, the court noted that the enfranchisement provisions of the *Indian Act* caused the loss of Indian status of past relatives and had the present day *Indian Act* been applied in the past, that the same impact would not have occurred.

[71] Jean Teillet, Submission to Senate Standing Committee on Aboriginal Peoples, Issue 16, Evidence, May 2, 2012.

[72] Peter Hogg, *Constitutional Law of Canada* (5th ed. Supp.) at 28-4.

meaningless. One cannot be Metis without an attachment to community. Alternatively such attachment may have been disrupted by colonial policies and therefore such individuals are justified in re-asserting a Metis identity notwithstanding lack of formal connection to a present Metis community and should be recognized as such justifying inclusion as Indian under 91(24). On the other hand, one may have some Metis ancestry without any connection to a present day Metis community and moreover may not have been negatively impacted by federal policies that did not recognize distinct Metis communities. Many Canadians likely have some First Nation ancestors if they search far enough back into their genealogy. Does that make half the Canadian population all of a sudden Metis and therefore Indians under federal jurisdiction?

According to a broad read of *Daniels*, Vautour and Corneau could arguably be classified as Metis even though they were unable to prove that they were accepted by a distinct Metis community or were negatively affected by federal policy denying or severing their Metis identity and heritage. Yet they may be found to be Indians under s. 91(24) because of distant Indian ancestor. Are such individuals now entitled to Indian programs (assuming the federal government expands the scope of beneficiaries beyond status Indians to all Indians)? Federal policy makers can obviously adopt a narrower category of Indian that relates to the experiences of Indigeneity in Canada and thus be more tailored to addressing the needs of those that have experienced the negative impacts of colonization because of their indigeneity. However, these restrictions run the risk of being declared under-inclusive from a *Charter* equality perspective because of the irresponsibly broad definition adopted by the Supreme Court of Canada in *Daniels.*