How the *Daniels* Case Aggravates the Métis' Canada Problem
A Review of: Kermoal, N., & Andersen, C. (Eds.) (2021). *Daniels v. Canada: In and beyond the courts*. University of Manitoba Press. ISBN: 9780887559273

Reviewed by: Jonathan Anuik, University of Alberta

In Winter 2013, I taught a course on the history of Indigenous peoples' education in Canada. A student reported at the start of a class that the Métis were now status Indians for the purpose of registration under the federal Indian Act, which Parliament first passed in 1876. I probed her for detail, and she said that the Federal Court of Canada (FCC) issued the ruling earlier that day. I decided not to pursue the student's mention of the ruling in class, nor did I investigate the ruling after class. I inferred that if the decision came from the FCC, the Canadian government would appeal it to the Supreme Court of Canada (SCC).

The case to which my student referred was *Daniels v. Canada*, on which the SCC issued a ruling in 2016, and this understanding that the Métis were status Indians remained among the Canadian public, even among scholars. It is a misunderstanding among many about the Métis that needs correction and is the impetus for the edited collection *Daniels v. Canada: In and Beyond the Courts* (Kermoal & Andersen, 2021). The four purposes of this book are to (a) describe the origins of the *Daniels* complaint and the content of the decision from the SCC; (b) identify the consequences of the decision for the Métis; (c) demonstrate its limitations; and (d) locate it in the landscape of Métis Indigenous knowledge, law and governance, identity, and sources that document the Métis past. This last component, sources, is particularly important for the Métis in the 21st century and one that is relevant for educators. I shall return to this consequence later in the review.

The core issue in the *Daniels* case concerns which level of the Canadian government is responsible for negotiating with the Métis. The Canadian Constitution of 1982 recognizes two levels of government: the federal and the provincial. The Canadian government delegates some provincial government responsibilities, such as education and healthcare, to the territorial governments. The Canadian Constitution of 1982 also recognizes the Métis as one of the three Aboriginal peoples of Canada. However, Canada resists a nation-to-nation relationship with the Métis, despite the Constitutional recognition in Section 35(2) and the landmark *R. v. Powley* decision of the SCC in 2003 that recognizes a Métis Indigenous right to hunt in the historic and contemporary Métis community of Sault Ste. Marie, Ontario. The *Daniels* case says clearly that Canada has a responsibility to negotiate with the Métis, but the justices declined at both the FCC and the SCC to affirm the Métis' understandings of themselves as they articulate them through the Métis provincial and territorial organizations. In so doing, the SCC also does not recognize directly the Métis governance bodies in existence since the days of the Red River Settlement of 1810–1870, which

is now contemporary Winnipeg, Manitoba.

The authors of the book's chapters identify the consequence of this omission by the SCC. Although the justices affirmed the Métis definition of belonging, which requires one to trace one's roots to the historic Métis Nation, covering Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and the Northwest Territories, and to be accepted by contemporary Métis, they did not declare this criterion as the sole determination of citizenship. The SCC suggests that these Métis may not be the only ones and that there is room for persons who understand themselves to be of mixed ancestry to shift to become Métis. It is this problem of the prospect of one being of mixed Indigenous and non-Indigenous ancestry who may be able to claim to be Métis that makes the book especially compelling, for contributors here look at how the trend of genetic testing and genealogy has resulted in people locating ancestors who *seem* to have an Indigenous background. I emphasize *seem* because the contributors who study ancestry argue that the DNA tests take only a snapshot in time of one's ethnic background.

Thus, there is no consideration of one's contextual and familial backgrounds. One need not have an Indigenous lineage to be a member of an Indigenous community, which is a point that reverberates throughout the chapters. Additionally, the contributors note another trend taking shape alongside the DNA testing movement, which is the claim to being Métis that is rooted solely in a dubious identification with being of mixed Indigenous and European ancestry. In addition to these individuals claiming now to being Indigenous, these same people are joining together to form organizations that claim to represent Métis individuals. Investigations of their publications, mainly online, show no requirement to produce evidence of origin in a Métis community. Instead, all individuals must do is complete a registration form to become a member of the organization. Such groups exist mainly east of Ontario, where there is no historical Métis Nation. There is an especially troubling claim that originates in the literature of these organizations, which is that members frequently claim that their knowledge of their backgrounds exists solely in stories that family members have allegedly shared. In every case, there is a claim that evidence to document a Métis past is nonexistent.

These associations of mixed-ancestry individuals with a contemporary Métis nation are a threat to the integrity of the Métis in the post-*Daniels* era because the SCC leaves open the prospect for those with mixed backgrounds to claim that the federal government has a responsibility to negotiate with them as members of mixed-blood communities. The ruling did not automatically register the Métis in the Indian Act, but it did assert that the Métis are a responsibility under Section 91(24) of the British North America Act (1867), which identifies the Crown as represented by the Canadian government as responsible for "Indians and lands reserved for Indians." This detail matters because the SCC read Métis into "Indians" but did not read Métis as recognized by the Métis National Council and its constituent provincial and territorial organizations into "Indians." Instead, the judges cast a wide net, defining Métis as mixed and thus making those who do not meet the criteria for citizenship in the Métis Nation organizations now eligible for negotiation with the Crown. Canada has to negotiate but does not have to recognize Métis Indigenous self-government structures because it can turn to these mixed ancestry individuals who now claim to be Métis.

The intention of the SCC was to honour the Indigenous peoples whose lives Canada disrupted through legislation such as the Indian Act, which through its application since 1876 legislated an Indigenous identity onto some and cast others aside. Despite attempts by the Canadian government to rectify these losses, there are still many Indigenous people who lack official recognition as Aboriginals in Section 35(2) of the Canadian Constitution of 1982. It is this opening through identification of the *mixed* individuals as Métis that *Daniels* makes. For the Métis, this ruling is a setback because it reduces the authority of its self-governance structures built up over 200 years through dilution of its membership criteria. The Métis have a Canada problem.

However, the authors of the book's chapters see a way for the Métis to assert their Indigenous rights. In addition to the United Nations Declaration on the Rights of Indigenous Peoples (United Nations [General Assembly], 2007), there is a way to combat the drift to Métis by those who see themselves as mixed. Brenda Macdougall, a historian of the Métis community of Île à la Crosse, Saskatchewan, latches onto the frequently stated claims by mixed-ancestry individuals that they lack proof of their Indigenous pasts or have solely genealogical or genetic evidence of their ancestry. She counters their claims to Indigenous belonging through the argument that although the stories, the charts, and the genetic evidence provide a picture of family history, they do not on their own depict one's belonging in a Métis community. Mac-

dougall illuminates the old adage that "evidence of absence is not absence of evidence." She identifies half a dozen digitization projects completed over the past 30 years where one can now locate and trace online one's family through records of churches, fur traders, voyageurs, and private citizens in religious institutions, universities, and Métis organizations. All these records are available free to the public. One is now able to investigate with greater ease their families and communities to put together a complete past, which can provide evidence to support stories, genealogies, and genetic tests.

However, there is still the concern that although the Métis and their allies know the limitations of identity drift, their requirements to provide a comprehensive contextual story of one's Métisness are not ones that the SCC respects as the sole criterion for being Métis. Although the current Canadian government recognizes the Métis Nation in a nation-to-nation relationship, the lack of a firm recognition by the court means that there is no guarantee that such relationships will continue into the long term. For educators, there are legal and ethical considerations. Importantly, the opportunity to identify exists, but the terms for identification remain controversial. One needs only to consider recent controversies involving faculty who identify as Indigenous at the University of British Columbia (Mason, 2023), the University of Saskatchewan (Leo, 2022), and Memorial University of Newfoundland (Kelland, 2023) to see that one cannot rely solely on an individual declaration. However, the promise that the *Daniels v. Canada* book makes to educators is that there are now resources for investigating one's Métis past, and we can guide students on how to use them to effectively locate their family roots and contexts.

References

Constitution Act, 1982, § 35(2), being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11.

Daniels v. Canada (Indian Affairs and Northern Development), 1 S.C.R. 99 (2016). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do

Indian Act, R.S.C., 1985, c I-5. https://laws-lois.justice.gc.ca/eng/acts/i-5

Kelland, A. (2023, April 6). *Vianne Timmons removed as president of Memorial University*. CBC News. https://www.cbc.ca/news/canada/newfoundland-labrador/vianne-timmons-mun-1.6803740

Kermoal, N., & Andersen, C. (Eds.) (2021). *Daniels v. Canada: In and beyond the courts*. University of Manitoba Press.

Leo, G. (2022, June 1). *Carrie Bourassa, who claimed to be Indigenous without evidence, has resigned from U of Sask*. CBC News. https://www.cbc.ca/news/canada/saskatchewan/carrie-bourassa-resigns-1.6473964

Mason, G. (2023, January 8). To no one's surprise, UBC botches Mary Ellen Turpel-Lafond's departure. *The Globe and Mail*. https://www.theglobeandmail.com/canada/british-columbia/article-to-no-ones-surprise-ubc-botches-mary-ellen-turpel-lafonds-departure

R. v. Powley, 2 S.C.R. 207 (2003). https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2076/index.do

The British North America Act, 1867, § 91(24), 30–31 Victoria (U.K.), c. 3. https://www.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/p1t11.html

United Nations (General Assembly). (2007). *Declaration on the Rights of Indigenous Peoples*. https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples