“Making” Métis: Legal Constructions of Personhood and Rights

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Michif problem family among the nuclear language types one parent French the other Cree/Salteaux wintering words: sliced thin, smoke-dried, pounded fine, folded in fat and berries pemmican not pidgin or creole combining two grammatical maps paddle trade routes along waterways traverse rapids: white and dangerous with Ojibway women à la façon du pays Métis traders, speak la lawng of double genetic origin pleasure doubled twice the language twice the culture mixta, not mixed-up, nor muddled but completely FrenchCreeOjibway different tongues buffalo, a delicacy source language right from the cow’s mouth mother of all in-group conversation wintering camps dispersal neither Cree, Salteaux nor French exactly, but something else not less not half not lacking

- Marilyn Dumont, The Pemmican Eaters

**Acknowledging Positionality:**

What does it mean to be Métis in Canada? To answer such a question would be impossible. Like any identity, Métis peoples in Canada are diverse, complex, and what it means to be Métis to one person, may differ for another. As someone with Métis heritage, my “Big Idea” project has thus been grounded in exploring these topics. Before delving into the ongoing research I have done this semester however, I think it is necessary that I first acknowledge my positionality with regards to Métis issues. Though I have always known I have Métis ancestry and see vibrant threads of Métis cultures and traditions practiced among my own family, I still carry immense settler-privilege through a variety of means. Grappling with who *I am, in relation to my Métis ancestry, has been something I have critically tried to engage with over the past few years, and over the course of this semester. In discussing Métis issues - especially identity - I recognize that identity extends beyond just DNA. I have learned this (and continue to learn more) through scholars such as Chelsea Vowel and Chris Andersen; through poetry, blogs, social commentary and other platforms. Identity entails actively contributing to and participating in
your community, it entails kinship, among many other things. By that thread, in discussing my “Big Idea”, I do not claim to speak on behalf of Métis peoples in Canada. Rather, this research has been a product of active listening and learning.

**Big Idea:**

Given all of this, exploring the question of “what it means to be Métis in Canada”, has brought me to explore what this question means in terms of Canadian legalities toward Métis peoples. What does it mean in a legal sense to be Métis in Canada? What rights do Métis peoples have? This paper seeks to argue and explore the significant past and present legal rulings towards Métis peoples, while also pointing out that legal rights have largely been informed by notions of “mixed blood” within Métis identity. That is, in various historical and ongoing legal developments, the issue of Métis mixed identity has preoccupied colonial legal discourse, and this has had serious implications for what legal rights have been extended towards Métis communities. This paper will explore this topic by first addressing the politics of recognition, then a brief history of Métis legal status in Canada prior to 1982, followed by a discussion of developments following this period, up until the 2016 “Daniels Decision”.

**Shaping Colonial Identity: The Problematic Politics of Recognition**

State decisions to acknowledge and not acknowledge Indigenous peoples, including Métis peoples, is a deliberate process within the long history of colonialism, and what some scholars refer to as the “politics of recognition” (Coulthard, 1). Recognition of Indigenous peoples by the State has widespread implications on issues such as resource access, but it also can cause significant stress and trauma for individuals. To quote Glen Coulthard, “Nonrecognition or misrecognition can inflict harm, can be a form of oppression...imprisoning [a] reduced mode of being” (1). Based on this, it thus must be noted that in many ways, the
Canadian definition of “who” is Métis and their resources, is not an objective process. Moreover, how Indigenous nations understand themselves, and how they have understood themselves for thousands of years, may not necessarily overlap with State definitions of who they are (Heath Justice, 244). All of this is to say that while this paper is concerned with Canadian legal definitions of Métis peoples, these legal definitions are not definitive. Moreover, while States may not recognize the rights of Indigenous peoples generally, Indigenous groups have historically had their own intricate systems of law outside the colonial system, which has governed them for thousands of years (Valiente, 1).

Attempts to legally define and limit Métis rights is certainly not a new phenomenon. For Métis groups particularly, legal rulings pertaining to status, rights and resources have been complex. In many cases, the denial of Métis rights on behalf of the Government has been the result of the colonial contextualization of “mixedness”. The nature of Métis being a mixed Indigenous-European peoples, has allowed the Crown to deny, or limit, Métis peoples some of the same rights given to other Aboriginal groups in Canada, especially prior to the 1982 Constitution Act (Chartrand, 91). While determining if there should be a distinction between Métis legal rights (particularly regarding land rights) and the rights of other Indigenous groups in Canada can be difficult¹, it has also been used as a political tool to limit who can claim Government resources (Palmater, 1). One of the main legal documents pertaining to Aboriginal groups, status and rights in Canada for instance, the Indian Act, 1876, has historically excluded Métis and Inuit’s (Crey and Hanson, 1). The following section will thus review some of the most

¹ The Toronto District School Board’s decision to include Métis in land acknowledgements throughout Toronto has caused significant controversy among Indigenous scholars over the definition of legal traditional territories. Historical records indicate that Toronto was not a traditional homeland for Métis groups. Claiming it as such is harmful for groups whose ancestral lands include Toronto, and who have struggled for those lands to be acknowledged as such. Source: Jesse Thistle, http://activehistory.ca/2016/12/listening-to-history-correcting-the-toronto-metis-land-acknowledgement/
significant legal cases prior to 1982, what this meant for Métis peoples, and how they have been shaped by concepts of mixedness.

A Brief History of Métis Legal Rights and Recognition

The Manitoba Act, 1870

One of the first legal documents specifically pertaining to Métis peoples and their rights, was the *Manitoba Act* of 1870 (Peach, 279). A direct response of Métis activism at the time, the *Manitoba Act* was the outcome of the Red River Rebellion - a foremost event in Métis history. The Red River Rebellion was triggered by the transferring of Métis land in the Red River region of present day Manitoba, to the Crown, spurring a Métis uprising led by Louis Riel (Bumsted, 1). At the end of this armed conflict, the *Manitoba Act* became the first legal recognition of Métis identity - however limiting (1). Simultaneously, this Act was also informed by Métis characteristics of mixed identity. Within the Act, notions of Indigeneity and Europeanness are utilized in different ways. On one hand, Métis peoples were not considered authentically Indigenous enough to warrant extensive land rights/title, while on the other, their Indigenous links allowed the Government to rationalize a swift “agreement” to an armed conflict (Flanagan, 73-74). While the Red River area itself was to be reserved for the Métis, the Act failed to discern whether or not Métis had underlying Title - that is, inherent, pre-existing land rights that supersede European settlement - as did other Aboriginal groups in Manitoba (even if title was not legally recognized) (73). Administrators of the Act thus toiled over how land allocations would be granted, citing that since Métis were not truly “Indians” due to their European links, or at least, who the Crown considered “Indians” at the time (73). Therefore, the land protections granted to the Métis of the Red River settlement, was to be an anomaly in the Province, not afforded to other Métis outside the Red River region (73). Ultimately however, most of the rights
agreed on, including rights to land, language and education, failed to materialize (Métis Nation of BC, 1).

While the Métis were not considered authentic enough to bear Title however, they remained Indigenous enough in the eyes of the Government, to push through a peace agreement so that the newly formed Canadian Nation could continue with Confederation (74). To quote Tom Flanagan’s article:

“From the Government’s side, the motive behind the grant was to make peace in the Red River and allow Canada to take control of the land it had purchased. The linkage to Aboriginal rights was a convenient fiction designed to rationalize the grant in the eyes of Parliament. Ritchot [the agreement’s administrator]...admitted as much when he explained the deal to the Legislative Assembly…. “The Half-breed title, on the score of Indian blood, is not quite certain. But in order to make a final [decision], it was best to regard it as certain…”

The Manitoba Act thus provides a strong illustration of the extent to which Métis identity has informed Métis legal rights up until 1982 with the Constitution Act, and onwards.

**Natural Resource Rights: R vs. Laprise**

Land rights are not the only legal difficulties that Métis peoples have endured over the past centuries. Natural resources rights, particularly those tied to cultural practices, have also been limited in many ways on the basis of mixed identity. In the case of *R vs. Laprise*, colonial classifications of cultural “purity” and “authenticity” which largely only apply to those considered “Status Indian” under the *Indian Act*, are illustrated (Peach, 281). Within the case, a Saskatchewan court ruled that a Métis individual was guilty of hunting violations which otherwise were protected for those considered “Indian” under the *Indian Act* (281). This ruling was based on Canada’s *Natural Resources Transfer Agreement* of 1930, which preserved the rights of Status-Indians to hunt, fish and trap. These protections however did not extend to Métis peoples, despite hunting, fishing and trapping maintaining a significant part of Métis culture (281).
Drawing on distinctions of identity and authenticity continued on even after the 1982 Constitution Act, with similar resources cases coming before the courts. In proceedings throughout the 1990’s, cases such as *R. vs. McPherson, 1992* and *R. vs. Desjarlais, 1996* both dealt with the extent to which “Aboriginal hunting rights” should be extended to Métis (282-283). In both cases, percentages of apparent Indian blood quantum were drawn upon as one method to determine authenticity. Moreover, colonial expectations over what constitutes authenticity were used as evidence to determine whether Métis abide by “Indian modes of life” (283). In the case of *R. vs. Desjarlais*, Mr. Desjarlais (Métis) participating in the wage economy for example, was seen as contrary to living a true Indian life. This undermined the extent to which Métis peoples should enjoy the same legal rights as other Aboriginal groups (283).

**Recent Legal Developments: Métis Rights and Legal Identities Post-1982**

If the 18th and 19th Centuries presented a time of legal limbo for Métis peoples, the 20th and 21st Centuries have not offered much clarification. That said, a handful of key documents, including the *Constitution Act*, the Powley Decision, and the Daniels Decision, in many ways have provided pathways for legal progress. The following sections will therefore review each of these legal developments, whilst maintaining the argument that these rulings are still very much rooted in concepts of mixedness and perceived authenticity.

**Constitution Act, 1982**

Among one of the most formative legal developments for Indigenous groups in Canada as a whole, has been the 1982 *Constitution Act*. Section 35 of the Constitution reaffirms and enshrines rights for Indian, Métis and Inuit peoples (Hanson, 1). With regards to Métis groups, the Constitution is significant in its language, as it pertains to Aboriginal rights, and includes Métis peoples in this definition of Aboriginal (1). Moreover, the Act reaffirms and recognizes
Treaty and lands claims agreement rights - providing much needed legal protection which ensures these processes cannot be extinguished (Joseph, 1). In essence, while the Act does not define Aboriginal rights in Canada, it does protect them - providing a space for further progress (Hanson, 1).

While Section 35 of the Constitution Act was a momentous achievement for all Aboriginal peoples in Canada, for Métis peoples particularly, the Act again presents challenges and opportunities regarding legal questions of identity. Though all Aboriginal groups fought for Section 35 to be in the repatriated Constitution, Métis activists under the leadership of Harry Daniels had to act swiftly and fiercely in order to be included (Joseph, 1). During negotiations, Canadian political leaders such as then Minister of Justice Jean Chretien, had originally implied that Métis peoples would not be part of the Section (1). It was only after Daniel’s insistence, and threat of more widespread Métis mobilization, that Chretien agreed to consider Daniel’s points. Moreover, even with their ultimate inclusion, the Constitution still does not recognize Métis and non-status Indians as legally “Indian” - thereby maintaining existing legal gaps that have prevented adequate legal progress for these groups (1). That said, what the Act does present, is opportunities for legal rights to be further defined in separate rulings (Hanson, 1).

**Affirming Resources: The Powley Decision**

The first major legal ruling recognizing Métis rights, known as the 2003 Powley Decision, is in many ways a direct result of the legal spaces left unsaid, but also opened, through Section 35 of the Constitution Act (Salomons and Hanson, 1). Like previous 20th Century cases, *R. vs. Powley* began as a case against two Métis hunters over hunting without licenses. Charged with an offence, the Powley’s opposed this, arguing that under Section 25 of the Constitution Act, Métis rights are protected (1). Just what these rights were however, were not defined and
neither was who qualifies to be Métis. Rather, it was now up to the Courts to define what these rights were, and who they apply to. Ultimately, the courts upheld that Métis hunting rights were indeed protected by Section 35 and therefore, the Powley’s were not in violation of any laws (1). While the Powley Decision only applies to the specific community in which it took place, it ultimately sets a legal precedent for Métis rights in Canada. Many legal experts note how this decision likely upholds that Métis peoples in Canada have the legal right to hunt, fish and harvest - thus adding a new set of natural resources rights for Métis groups (1).

Beyond establishing legal precedent for Métis hunting rights however, the courts also embarked on establishing a definition under which people could exercise their Métis rights. The Ontario Court of Justice stipulated that in order to qualify as Métis, an individual must: self-identify as Métis; have a genealogical connection to a historical Métis community; and be accepted in a contemporary local Métis community (Andersen, 3). In the wake of this decision and the Courts’ definition of who could legally be considered Métis, again the concept of “mixedness” and mixed Aboriginal blood, was at the forefront of the Decision’s development (4). During the case itself, Crown attorney’s drew on arguments of Aboriginal “purity” and Aboriginal blood quantum, to attempt to disqualify the Powley’s claims² (10). The notion of blood quantum percentiles, and marrying outside the Métis community, was associated with a perceived loss of Indigenous authenticity and culture (14). Within both this legal argument, and the Court’s stipulation that Métis individuals must be able to “prove” connection to an ancestral Indigenous community, Métis identity is once again tied to mixedness. Critics of the Decision point out how mandating that Métis peoples prove ancestral connections, draws on controversial

² It should be noted, that the Powley’s openly admitted that they did not know that they were Métis until later in their life, and questions over “low blood quantum” and authenticity became pervasive. While this in itself does not disqualify Métis identity, it does bring forth ongoing debates over the illegitimate uses of Métis identities, for perceived personal gain. Source: Christian Andersen
connections to blood quantum - rather than contemporary and ongoing connections to Métis
culture, relations and communities (10).

**The Daniels Decision: Jurisdictional Breakthroughs?**

The most recent major legal development with regards to Métis legal rights in Canada, has been the long anticipated Daniels Decision, released in April 2016. While this case is a complex one, at the heart of its content is yet another attempt to consolidate Métis identity and mixedness (Macdougall, 1). Brought in front of the Supreme Court of Canada, Daniels vs. Canada seeks to further clarify where Métis and non-Status Indians fit into the Canadian Constitution; if the Crown owes Métis and non-Status Indians a fiduciary duty; and whether Métis and non-Status Indians have the rights to be collectively consulted on issues related to their rights/interests, by the Federal Government (Daniels v. Canada, 3). Much of the media coverage of this case has suggested the Métis peoples will now be included in the Indian Act, and thus receive access to the same resources afforded to status Indians. This however, is misleading. As Métis legal expert Chelsea Vowel notes, in some ways it is easier to understand this case in terms of what it does not do. It does not: allow Métis to become Status Indians, it does not establish that Métis are now governed by the Indian Act, and it does not lay out any new funding opportunities or land claim opportunities (Vowel, 1). As Bruce McIvor points out, “[the Decision] does not order the Federal Government to do anything” (McIvor, 1). Amidst all of this, much of the hope surrounding the Daniels Decision thus lays in its symbolic significance, and the doors in which it leaves open. Legal declarations such as this one are generally made when it is believed that they can have a practical effect on addressing “live controversies” (McIvor, 1). So what does it do? The Decision essentially clarifies that the Federal Government, versus the Provincial Government, has a duty of care owed to Métis peoples (1). This provides Métis
advocates with further clarification on where legal developments should be directed in the future. Moreover, if the Federal Government decides to act on this, it could mean the assumption of partial financial responsibility for things such as Métis organizations, employment training programs and so forth (Andersen, 1).

While some in the Métis community saw this decision as the end to a long legal battle, others remain disconcerted with the Decision’s preoccupation with defining Métis peoples according to their “mixedness” - in various senses of the word. During the Case, much of the discourse by members of the Supreme Court attempts to correct historic wrongs which have defined Métis peoples as “not Indian enough” or not “authentic” enough to be considered Aboriginal peoples. The Court stated that “there is no exclusive Métis peoples in Canada” and “Métis’ can refer to the historic Métis community in Manitoba’s Red River Settlement or it can be used as a general term for anyone with mixed European and Aboriginal heritage” (Daniels vs. Canada, 2016). In engaging with this discourse, the Canadian legal system effectively replaces past fictions of mixedness, with new ones (Macdougall, 3). These statements continue to contribute to settler discourses that anyone with Indigenous mixed ancestry is Métis (4). In doing so, this erases distinct Métis identities which are not based solely on mixedness, but on unique Métis cultures, language, economies and socio-political structures (4).

To Conclude: Resisting Colonialism and Ongoing Métis Activism

Based on what has been said about the current status of Métis legal rights, and how Métis communities interact with the legal system, where does this leave us? This essay sought to explore on one hand, the historical and present aspects of what it means to be Métis in the “legal” sense. On the other, it sought to emphasize the problematic nature of defining Indigenous identities within colonial institutions - and how legal Métis identity continues to be rooted in
colonial expectations of “mixedness”. Despite this, it is clear that the fight for Métis legal rights and recognition must continue in order to advance rights, and address historical wrongs.

Before wrapping up this discussion however, it is important to note that in light of all of this, Métis communities continuing to define themselves is an important act of resilience and resistance. While legal systems have attempted to locate Métis identities, and thereby their legal rights, on the basis of colonial expectations of what it means to be Indigenous, through situating Métis identity in reference to the past - Métis peoples continue to exist in the present and will into the future. Ongoing discussion within Métis communities regarding what it means to be “big ‘M’ Métis” and “small ‘m’ métis”, as well as the co-option of Métis identity within White settler communities, frequently accompany discourse on new legal developments (Vowel, 1). In doing so, communities actively are empowered to define what it means to be Métis on their own terms, through their own understandings of themselves and their histories, relations and cultures.
Works Cited


