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**PARADOXES OF RESISTANCE AND  
RESILIENCE: THE PITFALLS OF MÉTIS  
RENAISSANCE SINCE THE 1970S**

**Abstract**

On March 8, 2013, the Supreme Court of Canada published its decision on the case *Manitoba Metis Federation Inc. v. Canada*, according to which the Canadian government recognized the rights of the Métis to negotiate about their claims resulting from the treaty Louis Riel had established with the Crown in the context of the 1870 Manitoba Act. The Supreme Court ruled that the Crown by not fulfilling its promises under the Manitoba Act had breached its honour to the Métis. In addition, the Supreme Court recognized the Manitoba Métis Federation as a body representing the Métis as a “nation.” The court decision has been characterized as a turning point in the history of Canada and, more specifically, the history of Canadian Métis. With this paper, I will present some preliminary interpretations of this historic event and answer the following questions: What are the underlying normative and ideational concepts that inform the court decision? How can the decision be historically situated in the century-long history of Métis resistance and resilience? And to what extent and in which regard did the court decision change the situation of the Métis?

**Résumé**

Le 8 mars 2013, la Cour suprême du Canada a publié sa décision sur le cas du *Manitoba Metis Federation Inc. c. Canada*, selon laquelle le gouvernement du Canada a reconnu les droits des Métis à négocier au sujet de leurs réclamations résultant du traité Louis Riel, établi avec la Couronne dans le cadre de la Loi 1870 sur le Manitoba. La Cour suprême a jugé que la Couronne ne remplissait pas ses promesses en vertu de la Loi sur le Manitoba et qu'elle avait manqué à l'honneur des Métis. En outre, la Cour suprême a reconnu la Fédération des Métis du Manitoba comme un organisme représentant les Métis en tant que « nation ». La décision du

tribunal a été considérée comme un tournant dans l'histoire du Canada et, plus précisément, dans l'histoire des Métis du Canada. Cet article présente quelques interprétations préliminaires de cet événement historique et répond aux questions suivantes : Quels sont les aspects normatifs et conceptuels sous-jacents qui informent la décision du tribunal ? Comment la décision est-elle historiquement située dans l'histoire séculaire de la résistance des Métis et de la résilience ? Dans quelle mesure et à quel égard la décision du tribunal ne change-t-elle pas la situation des Métis ?

## INTRODUCTION

On March 8, 2013, the Supreme Court of Canada published its decision on the case *Manitoba Metis Federation Inc. v. Canada* (2013 SCC 14). With this verdict, a 32 year-long battle for the recognition of Métis rights and land claims that was initiated by John Morrisseau, President of the Manitoba Métis Federation (1976-1981), came to a conclusion. The Canadian government recognized the rights of the Métis to negotiate about their claims resulting from the treaty Louis Riel had established with the Crown in the context of the 1870 Manitoba Act. The Supreme Court ruled that the Crown by not fulfilling its promises under the Manitoba Act had breached its honour to the Métis. In addition, the Supreme Court recognized the Manitoba Métis Federation as a body representing the Métis as a collectivity, a “nation.” The court decision has been characterized as a landmark, a turning point in the history of Canada and, more specifically, the history of Canadian Métis. Métis lawyer Jason Madden commenting on the decision declared that it would start a new chapter in the history of Canada. The decision was seen as the beginning of a new era.<sup>1</sup>

The legal argument put forward in the decision of March 2013 has to be put into the context of another court ruling, the Federal Court of Canada's decision *Daniels v. Canada*, which was released three months earlier, on January 8, 2013 (2013 FC 6). The court ruling held that the Métis people and non-status Indians are “Indians” for the purpose of the Constitution Act of 1867.<sup>2</sup> This decision was confirmed by the Supreme Court of Canada in April 2016 (2016 SCC 12). As “Indians,” Métis fall within the purview of the Canadian Government. This bio-political act of turning Métis into “Indians” was a core prerequisite for the Supreme Court of Canada's recognition of

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<sup>1</sup> See an interview with Métis lawyer Jason Maden on land claim win (Maden).

<sup>2</sup> For an analysis of the development of court ruling since the Constitution Act 1982, see Patzer.

Métis rights resulting from the Manitoba Act of 1870. Only by constructing Métis as “Indians” was the Supreme Court able to accept that the honour of the Crown was involved and that therefore the Canadian Government had to fulfill its treaty obligation “faithfully.”

The fact that the Court decision of March 2013 was celebrated as a huge victory and as the beginning of a new era in Métis history raises the curiosity of the historian. With this paper, I will present some preliminary interpretations of a “historical event” that for several reasons might have a big impact on the ongoing discussion within the broad spectrum of different Métis communities about Métis identity and Métis peoplehood or nationhood (depending on the political position of the respective Métis organization). The article tries to answer the following questions: What are the underlying normative and ideational concepts that inform the court decision? How can the decision be historically situated in the century-long history of Métis resistance and resilience? And to what extent and in which regard did the court decision change the situation of the Métis?

Following the example given by Chris Andersen, I approach legal documents as historical source material based on an analytical framework that is informed by Bourdieu’s field theory (Andersen, “*Métis*”). According to Pierre Bourdieu, juridical fields are a specific instance of social fields, which he understands as analytical spaces of hierarchically organized and internally rule-bound struggles between agents (Villegas; Bourdieu, “Force of Law”). Hence, courts are a site of struggle or contestation. The judges’ social position and training, the arguments of intervening legal actors, experts, and lay witnesses all shape and determine the discursive boundaries of any given case. They determine of what is juridically “thinkable” (Andersen, “*Métis*” 9; Bourdieu, *Outline*). Putting the Supreme Court decision in the larger realm of the existing juridical field allows to analyze the court decision as the outcome of a political struggle shaped by a powerful discursive frame that in our case reflects all the characteristics of what Laurence McFalls and Mariella Pandolfi have described as the post-liberal order. In the terminology of Michel Foucault, McFalls and Pandolfi define post-liberalism as “a governmentality.” Post-liberalism, they argue, is a “mode of government” characterized by:

[the] multiplication and radicalization of mechanisms for controlling human life . . . and the manipulation of interests. . . . [Post-liberalism] collapses the distinction between the individual and the collectivity through . . . the therapeutic government of individual bodies . . . each susceptible to its particular vulnerabilities. . . . The post-liberal subject is a composite subject, contingently pieced together genetically and socially.

McFalls and Pandolfi's characterization of post-liberalism, Foucault's concepts of discourse and governmentality (Sennelart), and Bourdieu's field theoretical conceptualization of courts as sites of (political) struggle and contestation with the power to establish new norms even before they become conceivable in the social and political fields will frame my analysis. In order to capture both—the level of discourse and the level of normative contestation and agency—my analysis is divided into two parts. First, I will very briefly recapitulate the struggle of the Métis for recognition since the 1970s with special emphasis on the master narrative of the “forgotten people.” Secondly, I will look at the court decision and discuss two core aspects of the Supreme Court's legal argumentation: for one the concept of the honour of the Crown and, secondly, the argument to prioritize reconciliation over legal equality. Since this legal argument is framed by the bio-political discourse of vulnerability, I will close my analysis with a critical discussion of the normative pitfalls and backlashes of the celebrated court decision of 2013 and the supposed “new era” for Métis in Canada that it entails.

### **MÉTIS RENAISSANCE AND THE STRUGGLE FOR RECOGNITION SINCE THE 1970S**

The 1970s were not only a turning point in the post-war economic history of the Western world with two major economic and financial crises shaking Western European and North American economies and initiating major programs to combat unemployment and ease the growing social inequality.<sup>3</sup> The 1970s were also the decade during which the Baby boomer generation started to implement the reform ideas of the 1968 movement. The student movement, the civil rights movement, the labour movement, the American Indian movement, and Quebec's Quiet Revolution formed the historical context in which Métis peoples reappeared as a social, political, and cultural factor in Canada (Pitsula). What we can observe from the 1970s onward is a renaissance of the Métis in the social and political context of Canada's policy of multiculturalism.<sup>4</sup> Métis people entered institutions of higher education and an educated Métis elite rediscovered and followed up on the idea of Métis nation-building that Louis Riel had encouraged more than one hundred years ago (Ens and Sawchuk 325-27, 361-79).

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<sup>3</sup> See Doering-Manteuffel and Raphael; Doering-Manteuffel, Raphael, and Schlemmer; Reitmayer and Schlemmer; Rosanvallon.

<sup>4</sup> For a similar development regarding New Zealand's Maori, see Meijl.

One of the most prominent promoter of Métis peoplehood in the 1970s was without doubt John Morrisseau. A residential school survivor, he became politically active in the late 1960s. He served as president of the Manitoba Métis Federation (MMF) from 1976 to 1981 and joined the NDP government of Manitoba as an Assistant Deputy Minister and Deputy Minister (Morrisseau). Morrisseau initiated historical research on land claim issues during his presidency of the MMF and successfully applied for research funds from the Government of Canada to examine church records, the records from the Hudson's Bay Company, and governmental records. He put together a group of predominantly Métis scholars who reconstructed nineteenth-century Métis history from the historical records produced and archived by white Canadian settlers from their own specific research perspective. The historical documents retrieved from the archives were used to support the land claims lawsuit initiated by the Manitoba Métis Federation in cooperation with the Native Council of Canada against the federal government of Canada and the Government of Manitoba in 1981. The Statement of Claim *Manitoba Métis Federation v. Canada* brought forward the unfulfilled treaty promises made to the Métis people guaranteeing 1.4 million acres of land under the Manitoba Act of 1870. Looking back to the late 1970s, Morrisseau remembers: "The work to file the land claim helped to re-ignite pride in Métis. It was time to lift our heads again to feel good about ourselves and it helped us to build strong Métis communities."

During the same period, Canadian historiography witnessed a major change. The dominant Anglo-centered political history was more and more substituted by new approaches, such as Western and Prairie History, Labour History, or Native History.<sup>5</sup> Gerald Friesen from the University of Manitoba, a former president of the Canadian Historical Association, must be mentioned as one of the pioneers of these new perspectives in the history of Canada's West.<sup>6</sup> He was the general editor of the award-winning fifteen-volume series "Manitoba Studies in Native History," which already in the 1980s published research on the history of the Canadian Prairies shedding new light on Canada's settler colonial past.<sup>7</sup> The first revisionist history of the Métis, however, appeared ten years earlier, in 1975, and was written by Métis historians Bruce Sealey and Antoine Lussier. They entitled their book *The Métis: Canada's Forgotten People*. Both authors were closely associated with the Manitoba Métis Federation. Sealey founded the

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<sup>5</sup> See, for example, Stanley; Morton; McFee and Federation; Adams; Morton, Cook, and Berger.

<sup>6</sup> See, for example, Friesen, *Canadian Prairies; River Road; West; Citizens and Nation*. See also Friesen and Potyondi.

<sup>7</sup> See also Abel and Friesen; Peterson and Brown; Thistle.

Manitoba Métis Federation Press, which became an important media agent of Métis renaissance. Sealey, for example, contributed to the struggle for the recognition of Métis land rights with a scholarly study about the *Statutory Land Rights of the Manitoba Métis*.

The publication of *The Métis: Canada's Forgotten People* established a new historical narrative based on the trope “forgotten people” which addressed the interlinked practices of social marginalization and ethnic self-denial. These practices that perpetuated and petrified the post-1885 repression of the Métis as a political and social force in Canada had already been described in the first anthropological study about Canada’s Métis written by French ethnologist Marcel Giraud in 1945, *Le métis canadien*. In a foreword to his work, Giraud remembers that, in the 1930s, many Métis lived in “destitute condition” (xii). They were marginalized and lacked any sympathy among white people, whether French- or English-speaking. And he observed a denial of any Aboriginal background by those who had reached a certain social and educational level:

Among other things, I noticed that the métis who had reached a certain social and educational level had a tendency to look down upon the humbler ones and to reject any racial affiliation with them, while denying their own origins in order to avoid any possible confusion. (xii)

Only four years after the publication of Sealey and Lussier’s *Forgotten People*, in 1979, the next book on “Canada’s Forgotten People” was published by Métis leader and social activist Harry W. Daniels, from Saskatchewan (*Forgotten People*). Influenced by the labor movement and the civil rights movement, Daniels was one of the founding members of both the Métis Society of Saskatchewan (MSS) and the Native Council of Canada (NCC). He was one of Canada’s most visible and charismatic modern Aboriginal leaders. He served as vice-president of the Métis Nation of Alberta and helped to organize the Métis Association of the Northwest Territories. As the national spokesman for the Métis and non-status Indians, he was primarily responsible for negotiating the constitutional recognition of the Métis into the Constitution Act of 1982. He, together with his son, initiated the court case on the status of the Métis that was decided by the Federal Court of Canada in favor of the plaintiffs’ claims in January 2013 and confirmed by the Supreme Court of Canada in April 2016.<sup>8</sup>

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<sup>8</sup> Harry Daniels died in 2004. He spent over forty years in the national and international political arenas, fighting for the rights of Canada’s Aboriginal peoples. For further information, see Troupe.

The expression “Forgotten People” still finds its way into the title of publications about Métis history and identity.<sup>9</sup> With the trope of the “forgotten people,” Métis activists and writers pointed at their marginalized position within Canadian history and society and underlined their claim for political and social recognition and economic and financial support from the Canadian Government. As “Forgotten People,” Canada’s Métis deliberately became part of the rather large group of Indigenous “forgotten peoples”—like Woodland Erie, Cane River Creoles, Sami, or Maori—peoples that started to be re-discovered by historians in the wake of the global process of decolonization and the emerging post-colonial perspective that framed history and politics from the 1970s onward.<sup>10</sup>

The Métis narrative of the “forgotten people” is based on the appropriation of the “white” discourse of “social inequality.” The expression “forgotten people” was coined in 1942 by Australian Prime Minister Menzies referring to Australia’s white middle class as being effectively powerless and neglected by politics because of lack of wealth and lack of organization (Menzies; Brett). Métis activists and historians turned this narrative of marginalized or disadvantaged “white” social groups into a descriptive marker of their own social and political situation. They thereby contributed to and strengthened the evolving political dynamic within Métis communities and underlined the Métis demand for recognition of past and present injustices and reconciliation. In this way, they also implicitly addressed the problem of self-denial by establishing a political awareness within educated Métis circles. Furthermore, the publications of Métis historians contributed to the growing public awareness among Canada’s settler society that Canada’s colonial past was still part of the political, social, and cultural discourse.

Agenda-setting and the communication of new ideas are the first steps of a process initiating normative and ideational change and reframing political and social action and behavior. In our case, it took almost forty years until the normative change initiated by the renaissance of the Métis in the 1970s facilitated a Supreme Court decision that was portrayed as the beginning of a new era. The question is, however, whether this normative change that we can observe does indeed entail a reframing of the discourse about Canada’s colonial past. In order to answer this question, I will now turn to the court judgment and its hidden normative agenda.

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<sup>9</sup> See, for example, McNab and Lischke.

<sup>10</sup> See, for example, Flynt; Valkeapää; Hutchinson; Williams; Kawharu.

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***MANITOBA METIS FEDERATION INC. V. CANADA:***  
**CORE ARGUMENTS AND NORMATIVE FRAMES OF A**  
**HISTORICAL TURNING-POINT**

The Supreme Court decision of 2013, *Manitoba Metis Federation Inc. v. Canada*, has rightly been pointed out as one of the rare occasions where the complex nineteenth-century “national” history of the Métis found its way into the courts. On the first two pages of the 116-page legal document, the Supreme Court recounts this history. It thereby sets the stage for the development of an argument that diverged from previous legal reasoning and reflects a normative change in the legal treatment of Aboriginal affairs in Canada. The Supreme Court’s narrative starts with a statement referring to the British North America Act and the founding of the Dominion of Canada in 1867. It explains that settlement was a prime purpose of the Canadian Government. It mentions Métis resistance, and it describes the negotiations with Riel that became part of the Manitoba Act in 1870 as a diplomatic effort on the side of the Canadian government. It speaks of errors, breached promises, and time lags and ends by stating that, as a result of the heavy influx of European settlers, the Métis community began to unravel. The text reads as follows:

Canada embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement. . . . Canada became the titular owner of Rupert’s Land and the Red River Settlement; however, the French-speaking Roman Catholic Métis, the dominant demographic group in the Red River Settlement, viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. . . . In the face of armed resistance, Canada had little choice but to adopt a diplomatic approach. The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children . . . and to recognize existing landholdings. . . . The land was set aside, but a series of errors and delays interfered with dividing the land among the eligible recipients. . . . Initially, problems arose from errors in determining who had a right to a share of the land promised. . . . the allotment process lagged, speculators began acquiring the Métis children’s yet-to-be granted interests . . . aided by a range of legal devices. . . . the final allotment was not completed until 1880. . . . Eventually, it became apparent that the number of eligible Métis children had been underestimated. . . . the excluded children could not acquire the same amount of land granted to other children. . . . the position of the Métis in the Red River Settlement deteriorated. White settlers soon constituted a majority in the territory and the Métis community began to unravel. (*Manitoba Metis Federation Inc. v. Canada* 625)

What is striking about this narrative is the explicit official recognition of Canada's settler colonial past, including its devastating consequences for Indigenous peoples. Following the line of argument put forward by critical settler colonial studies,<sup>11</sup> the Supreme Court framed the history of the settling of the West by Euro-Canadians as a violent act forcing the Indigenous inhabitants to leave their land and to settle in other places.

When the MMF case was launched in 1981, the Manitoba Métis sought a declaration that the lands they were promised in the Manitoba Act of 1870 were not provided in accordance with the Crown's fiduciary and honour of the Crown obligations.<sup>12</sup> They also sought a declaration that certain legislation passed by the Manitoba Government that affected the implementation of the Manitoba Act was not within the jurisdiction of the province. In 2007, after twenty-six years of litigation, the MMF lost at trial. Justice Alan MacInnes of the Manitoba Court of Queen's Bench and a supporter of the Conservative Party acknowledged that there was lengthy delay in implementing the land provisions of the Manitoba Act and that the delay was due to government error and inaction. However, he found that there was no fiduciary duty or a duty based on the honour of the Crown. He argued that a fiduciary duty required proof that the Métis held the land *collectively* prior to 1870. Since the evidence showed that the Métis held their lands *individually*, he concluded the claims failed. Based on the same argument, he denied the MMF standing. While the individual plaintiffs were capable of bringing their claim to court, the MMF was not.

The Manitoba Métis Federation lost again at the Manitoba Court of Appeal in 2010. The Court of Appeal also saw no facts that would support any breach of duty and rejected any claim with respect to the honour of the Crown. It upheld the trial judge's finding that the MMF had no standing to bring the case. Only three years later, the Supreme Court of Canada headed by Chief Justice Beverley McLachlin revised this conclusion and declared: "The federal Crown failed to implement the land grant provision set out in section 31 of the Manitoba Act, 1870 in accordance with the honour of the Crown"<sup>13</sup> (Manitoba Metis Federation Inc. v. Canada 625). With two dissenting votes from Judges Rothstein and Moldaver, the Supreme Court acknowledged that the ten year

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<sup>11</sup> See Bateman and Pilkington; Elkins and Pedersen; Logan.

<sup>12</sup> The following account is based on the information about the development of the court case provided by the Center for Constitutional Studies, University of Alberta (see "Manitoba Metis")

<sup>13</sup> Section 31 of the Manitoba Act, known as the children's grant, set aside 1.4 million acres of land to be given to Métis children. Section 32 of the Manitoba Act provided for recognition of existing landholdings, where individuals asserting ownership had not yet been granted title (Manitoba Metis Federation Inc. v. Canada 640).

delay, from 1870 to 1880, in issuing the 1.4 million acres violated the duty of diligence, which forms part of the honour of the Crown. In addition, section 31 of the Manitoba Act was interpreted as “a solemn constitutional obligation to the Métis people of Manitoba” and the Métis people of Manitoba were characterized as “an Aboriginal people” (*Manitoba Metis Federation Inc. v. Canada* 628). As such, they had the right to be represented by political organizations. Hence, the Supreme Court also granted the Manitoba Métis Federation standing and gave them costs throughout. What had happened in these three years? And how can we explain this revision and, in part, even reversal of the legal argument?

According to Bourdieu’s field theory we have to acknowledge the actors involved in the court decision. The decision of 2013 was taken by the McLachlin court that has been ruling Canada in changing constellations since January 2000. The eight judges who discussed the Métis legal claims had been working together since August 2012. Chief Justice of Canada, Beverley McLachlin, and the Puisne Judges Louis LeBel, Morris J. Fish, Rosalie Abella, Thomas Cromwell, and Andromache Karakatsanis voted in favor of the Métis claims. Judges Marshall Rothstein and Michael Moldaver, the first two unilingual Judges of Canada’s Supreme Court, dissented and argued that the appeal should be allowed only in part, namely that the federal Crown failed to implement the land grant provision set out in section 31 of the Manitoba Act, 1870 in accordance with the honour of the Crown. Beverley McLachlin, the first female chief justice of a Commonwealth high court, played without doubt a crucial role in changing the former court decisions in favour of the plaintiffs’ claims.<sup>14</sup> Together with the Judges LeBel, Deschamps, and Fish she was already instrumental in bringing about the 2004 Supreme Court decision in the case *Haida Nation v. British Columbia* (2004, 3 S.C.R.) ruling that the Crown has a duty to consult Aboriginal groups prior to exploiting lands to which they may have claims. The Supreme Court held that this duty is grounded in the honour of the Crown, and applies even where title has not been proven. In May 2015, in an invited lecture at the Global Centre for Pluralism, McLachlin explained that Canada attempted to commit “cultural genocide” against Aboriginal peoples in what she called the worst stain on Canada’s human-rights record (Fine). Ken Coates, author of a study about the Idle-No-More movement, commented on this statement by declaring that the Chief Justice of Canada was “only stating what is clearly in the minds of judges, lawyers and aboriginal people across the country,” thus pointing at the fact that the acknowledgment that Canada’s settler

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<sup>14</sup> Furthermore, the ethnic and gender composition of the Court has to be taken into account. Among the supporters of the Métis claim were three female judges, one Jewish judge, and one Greek-Canadian judge. This aspect cannot, however, be further elaborated in this paper.

society and its system of settler colonialism resulted in “cultural genocide” has meanwhile become general knowledge structuring the juridical field and its legal and normative agenda (“MacLachlin”).

Beverly MacLachlin was born and raised in rural Alberta and grew up as the eldest of five children in a farming family of modest means. Her parents were fundamentalist Christians. MacLachlin has been described as a middle-of-the-road jurist. She tried to accommodate different political viewpoints and to rule by consent. She revealed the core of her judicial philosophy in a seminal article for the 2004 Saskatchewan Law Review, observing that courts can justify making substantial changes to the law if, in doing so, they are reflecting clear changes in social values. Even then, she cautioned, courts ought to embark on these changes only when legislators have failed to address an underlying, pressing problem (Makin).

Reading the legal document as a testimony of a political struggle and of a trickle-down effect of a changing discourse about Canada’s colonial past, which itself is embedded in the increasingly influential post-liberal discourse and the concomitant post-liberal government technologies, two points were striking: First, the rereading and reinterpretation of the pre-liberal colonial concept of the honour of the Crown and its entangled moral, paternalistic, and racialized pre-liberal power-political agenda in light of the Constitution Act of 1982. Secondly, the swiftness with which a core idea of classic liberalism and modern democratic governance, namely equality before the law, legal egalitarianism, was put aside with the post-liberal argument that Aboriginal people were especially vulnerable and that the goals of reconciliation and constitutional harmony must be given priority in the Aboriginal context. What are the political implications of these two normative turns?

### **HONOUR OF THE CROWN AS A POST-LIBERAL POLITICAL INSTRUMENT**

The honour of the Crown was an instrument of colonial governance or colonial *gouvernementalité*, setting the normative frame to regulate and rule “Indian”-white relations, especially the land treaties signed between First Nations and the representatives of the European colonial powers, with the respective European Monarchs acting as intermediaries (McCabe). The concept dates back to the late seventeenth century. The honour of the Crown is instituted in the Royal Proclamation of 1763, which made reference to “the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection” and declared that they, i.e. Nations or Tribes of Indians, “should not be molested or disturbed in the Possession of such Parts

of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them. or any of them, as their Hunting Grounds” (“Royal Proclamation”).

The Royal Proclamation of 1763 is regarded by First Nations as their Magna Carta or “Indian Bill of Rights.” It affirmed Native title to their lands under the sovereignty of the Crown based on a clear boundary. It forbade all settlement past a line drawn along the Appalachian Mountains.<sup>15</sup> Although not a treaty, the Royal Proclamation continues to be of legal importance to First Nations in Canada because it has remained part of the Canadian constitution. The Proclamation is the main guide for relations between the monarchy and Canadian First Nations, binding on not only the British Crown but the Canadian Crown as well. Since it is part of Canadian Aboriginal law, the honour of the Crown is still today at stake in all dealings between the Crown, and thus the Canadian Government, and First Nations (Barry 71).<sup>16</sup>

As a legal norm, the honour of the Crown is based on the European perception and treatment of Aboriginal peoples as autonomous political units, as nations, in the sense of the Westphalian order. For the settler colonial purpose of legitimizing the settlement of land inhabited by Aboriginal people, land treaties were signed in the legal and political context of a “nation-to-nation” association between Native and non-Native governments. This “nation-to-nation” association created a constitutional and moral basis of alliance (Carr 7 and 14)—in our case: between the Indigenous people of Canada and the British Crown as head of the British colonies in North America. The legal norm of the honour of the Crown created a fiduciary affiliation in which the Crown is constitutionally charged with providing certain guarantees to the First Nations (Barry 71).

As a highly moral and normative concept originating in the pre-liberal context of seventeenth- and eighteenth-century British colonialism and European settlement of North America, the honour of the Crown requires servants of the Crown to act honourably. This means that Government officials, acting on behalf of the Crown, must perform their duties fairly and in good faith, as opposed to merely conducting themselves in a manner that can be technically justified under the law. It is this implication of the concept that was stressed in the Supreme Court judgement delivered by Beverly McLachlin and Andromache Karakatsanis:

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<sup>15</sup> For an analysis of the Royal Proclamation in the context of the constitutional history of Canada, see Watson, chap. 2.

<sup>16</sup> For the general argument, see McCabe.

. . . the trial judge and the Court of Appeal did not focus on what we take as the central issue in the case: whether the government's implementation of s. 31 comported with the duty of the Crown to diligently pursue implementation of the provision in a way that would achieve its objectives. The question is whether the Crown's conduct, viewed as a whole and in context, met this standard. We conclude that it did not. . . . Canada was aware that there would be an influx of settlers and that the Métis needed to get a head start before that transpired, yet it did not work diligently to fulfill its constitutional promise to the Métis, as the honour of Crown required. The Métis did not receive the intended head start, and following the influx of settlers, they found themselves increasingly marginalized, facing discrimination and poverty. . . . (Manitoba Metis Federation Inc. v. Canada 670, 689)

With this interpretation of the honour of the Crown and the concomitant court ruling, the Supreme Court established a case that defined a new governmental duty deriving from the historic legal norm and its moral implications, namely the duty to diligently fulfill solemn obligations. In addition to acknowledging that the Canadian Government did not act diligently and faithfully, the Supreme Court also recognized, again with reference to the honour of the Crown and the historical assumption that treaties were signed between autonomous political units: "nation-to-nation," that "communal" or "national" Aboriginal interests were involved.<sup>17</sup> The recognition of the Métis as a "nation" in the sense of an autonomous political unit, i.e. a "nation state," implies, according to the understanding of the concepts of "nation" and "state" in modern constitutional law,<sup>18</sup> the approval of the fact that the land claimed is an integral part of the "nature" of the Métis community. Although arguing on legal terms, the Supreme Court discursively followed a line of argument put forward by historians and Métis activists and politicians alike, namely that the Métis have a distinct relationship to land and that this relationship constitutes an important element of Métis culture and collective identity. It did so, however, by framing it with post-liberal assumptions.

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<sup>17</sup> The "honour of the Crown" argument is also used in other settler colonial contexts in which treaty obligations exist, like in New Zealand, where a Maori legal scholar published a study about the concept of the honour of the Crown and its effects on the Treaty of Waitangi in 2014 with a direct reference to the Canadian Supreme Court decision of 2013. See Carr 44.

<sup>18</sup> See Georg Jellinek who, in 1900, defined "state" as having three conceptual elements: state power, people, and territory. Translated into the language of modern "Staatslehre," the "state," according to Jellinek, is defined by the physical (political) power over a territory and over a population (Jakab 309).

## **“INEQUALITY” AS A POST-LIBERAL LEGAL NORM IN ABORIGINAL AFFAIRS**

In its decision, the court pointed out the specific vulnerability and the issue of unequal power positions in the negotiations of land claim issues and therefore argued for a different and special treatment of Aboriginal claims when it comes to the question whether existing statutes of limitations have to be applied. With reference to arguments put forward by Harley I. Schachter, counsel for the Manitoba Métis Federation in 2001, the Chief Justice explained that “in the aboriginal context, reconciliation must weigh heavily” in balancing the protection of the defendant with fairness to the plaintiffs regarding the limitation issue (*Manitoba Metis Federation Inc. v. Canada* 685). “The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail” (686). Furthermore, the claims of the Métis were characterized as a “fundamental constitutional grievance” arising from an “ongoing rift in the national fabric” (710). They therefore demand special legal treatment, including an exception from the enacted limitations statutes adopted by the legislature.

In a similar vein, the Court argued that the equitable doctrine of laches, referring to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, does not bar the Métis’ claim, because “[a]cquiescence depends on knowledge, capacity and freedom” (*Manitoba Metis Federation Inc. v. Canada* 688), implying that the Métis as a result of their marginalized position within Canadian society and the power political effects of a settler colonial societal context were in a disadvantageous and vulnerable position:

In the context of this case – including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants – delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver. (688)

Hence, the Supreme Court, in addition to constructing a new constitutional duty based on the honour of the Crown, also departed from the liberal principle of legal equality. Instead, the court established an argument legitimizing a specific legal treatment of the Métis (legal inequality) based on social, economic, and racial markers of difference. The Supreme Court pointed at the lack of “knowledge, capacity and freedom” (731) and at the status of the Métis as an Aboriginal people, both constituting a specific vulnerable situation demanding special attention and special treatment.

## COLONIAL DISCOURSE AND PRACTICES OF SELF-RACIALIZATION

While the Supreme Court decided in favour of the Métis, it affirmed their fundamental socio-racial difference. In this sense, the Court decision parallels other moves towards the racialization of the Métis, like the introduction of the category “Métis population” in the Canadian census that, according to Chris Andersen, is a further step towards “a racialized construction of Métis at the expense of an indigenously national one” (“*Métis*” 30-36; “From Nation to Population” 352).<sup>19</sup> Andersen argues:

Canadian citizenship is strongly tethered to powerful and seemingly natural conceptions of *race* which granted certain citizenship rights to some Métis as ‘white’ or classified them as ‘status Indians’ (often based additionally on lifestyle criteria), all the while marginalizing their distinctiveness *as Métis*. In doing so, they naturalized in legal and administrative discourse a racial legibility of Métis as merely denoting indigenous people living outside of treaty and/or off-reserve, rather than signifying allegiance to a geo-politically situated nationhood *contra* that of the Canadian state. (“From Nation to Population” 352; emphasis in orig.)

Put into the context of the lingering settler colonial discourse in Canada, the establishment of a principle of legal inequality in dealing with Aboriginal affairs based on socio-racial markers of difference points to the other, highly problematic side of the same coin. It shows how powerful the colonial discourse and colonial worldviews still are and demonstrates the potential for a radicalization through a conflation with the emerging post-liberal bio-political normative order and its governance techniques. Although the new principle of legal inequality was meant to “protect” the Métis and their specific vulnerability, and although it was described as an instrument to promote reconciliation and constitutional accommodation, with the acknowledgement of Métis’ absolute socio-racial difference, the Supreme Court followed the lines of the racialized discourse about Métis identity that has framed legal and political decision-making in Canadian governance institutions as well as in institutions of Métis self-governance since the late 1970s. It were the Métis themselves who triggered this discourse through practices of self-racialization. Racialization has been a constitutive—however, controversial—element of Métis’ fight for constitutional recognition as being “Aboriginal” since the early 1980s. The claims put forward in the case *Daniels v. Canada* are one example. Another example is the “proof of aboriginal ancestry” policy of the Canadian Métis Council who defines Métis in the following way:

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<sup>19</sup> See also Andersen “Underdeveloped Identities”; Ens and Sawchuk 3-5).

“Métis are persons of mixed blood – European/Aboriginal blood (Indian ancestry); Someone who is distinct from Indian and Inuit, someone who has genealogical ties to Aboriginal ancestry” (“Qualifying as a Métis”).

Although the Canadian Métis Council did not establish a racial hierarchy based on a specified blood quantum, blood has become a constitutive element of the approval procedure and the identity verification process established by some Métis organizations of self-governance. During the last fifteen years, self-identification as Métis as a prerequisite to be accepted as Métis has been slowly but steadily substituted by a “blood certificate” proving Indian ancestry. With this bio-political turn, Métis organizations adopted practices of racialization that are typical for the immigration regimes of settler societies or their census-taking policies. These racialized constructions of Métis difference have, however, an immediate impact on the ongoing efforts of the Métis to come to terms with the problem of Métis identity and Métis peoplehood (Andersen, “*Métis*,” chap. 3).

## CONCLUSION

With the slogan “forgotten people,” Métis pointed at their marginalized and disempowered position within Canadian society and politics by framing their narrative with a well-established concept associated with social inequality among “white” (settler) societies. The appropriation of the political language of the white majority population supported the Métis struggle to regain political voice. However, in order to be recognized as “forgotten people” and in order to claim justice within the Canadian legal and normative framework, the Métis had to establish themselves as an essentially different group, as Aboriginal people, as “Indian.” Only as “Indians” were the Métis able to claim their constitutional rights. Vice versa, the assertion of difference was a necessary prerequisite for the government to accept political responsibility for Métis’ well-being and the restitution for past dispossession by invoking the normative concept of the honour of the Crown and by accepting unequal power positions, lack of knowledge, capacity, and freedom.

While the recognition of Métis’ fundamental cultural and racial difference enabled the Métis to fight for social justice, it might produce unforeseen backlashes in the ongoing debate about Métis identity and “Métis Nationhood.”<sup>20</sup> The Supreme Court decision of 2013 is just one example of the possible discursive backlashes and pitfalls of the strategy of self-racialization

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<sup>20</sup> See also Andersen, “*Métis*,” chap. 3; Ens and Sawchuk 394-404; St-Onge, Podruchny, and Macdougall.

that was invoked in the 1970s, without doubt, also as a subversive political instrument to gain voice in a situation of social marginalization and political disempowerment and to counteract the established practice of ethnic denial among the Métis elite. Meanwhile, this instrument of modern resistance has developed agency even among the increasing number of Métis organizations that often compete with regard to their political mandate and power to represent Métis communities. The “blood certificate” has developed into a legal instrument of some Métis self-government institutions leading to and enabling exclusionary practices within these institutions based on racial markers of difference. It remains unclear how the racialized construction of Métisness (Ens and Sawchuk 490), which after forty years has become an undisputed element of social knowledge, action, and behavior, together with the bio-political power mechanisms of the new post-liberal order, will impact the efforts of Métis scholars and intellectuals to establish Métis peoplehood based on an Indigenous understanding of national identity.<sup>21</sup>

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<sup>21</sup> See also Andersen, “Métis”; Ens and Sawchuk; Logan; McNab and Lischke.

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