**Case Brief: Daniels v. Canada, 2014 FCA 101**

[May 2, 2014 at 10:27am](https://www.facebook.com/notes/devlin-gailus-westaway-law-corporation/case-brief-daniels-v-canada-2014-fca-101/699300120108210)

The recent decision in *Daniels* involved the question of whether non-status Indians and Métis people are “Indians” for the purpose of s. 91(24) of *Constitution Act, 1867.* Sections 91 and 92 set out the division of legislative powers between the federal and provincial governments in Canada, and s. 91(24) places “Indians” within the purview of the federal government.  The Federal Court had concluded that Métis and non-status Indians were included in that category, giving them access to a number of benefits that were previously only available to status Indians.[1] On appeal, the Federal Court of Appeal narrowed that interpretation to include only the Métis.

The Federal Court of Appeal found that the Métis people of Canada are indeed Indians for the purposes of section 91(24).[2] The court held that section 91(24) is not a race-based head of power. Unlike the trial judge, the Federal Court of Appeal interpreted section 91(24) to require that "Métis" mean more than mere racial connections to Indian ancestry. Rather, it is the specific ethnic and cultural ancestry that defines the Métis people separately from Indian peoples, per the jurisprudence from the Supreme Court of Canada starting in *R. v. Powley*.[3] The *Powley* criteria are inconsistent with a race-based definition of Métis.[4] Instead, Métis Aboriginal heritage or indigenousness is based upon self-identification and group recognition as Métis, not First Nations.[5] The court found that the Métis have their own language, culture, kinship connections and territory, all of which make the Métis one of the Aboriginal peoples of Canada.[6] In this respect, the Federal Court of Appeal reconciled the interpretation of section 91(24) of the *Constitution Act, 1867* with section 35(1) of the*Constitution Act, 1982* which explicitly refers to three Aboriginal peoples of Canada – Indians, Inuit and the Métis.

However, the Federal Court of Appeal did not declare that non-status Indians were also Indians under section 91(24), overturning the decision of the trial judge on this point. The Federal Court of Appeal held that the declaration sought with respect to the non-status Indians would be too generic to have "utility". The court did not rule out that some non-status Indians could be Indians under section 91(24) but held that such a declaration would require an analysis of the reason why each particular group of non-status Indians was excluded from the *Indian Act* on a case by case basis in order to determine if that exclusion was invalid due to section 91(24).[7]

While this case represents a huge victory for Métis people in Canada (and links together previously unrelated streams of jurisprudence into a unified theory of constitutional interpretation for the Métis), it is likely a profoundly disappointing result for non-status Indians in Canada.  Having mounted a very long and difficult challenge (starting in 1989) to be recognized as Indians under section 91(24), non-status Indians now face the prospect of bringing multiple separate lawsuits in order to challenge the lawfulness of their exclusions as Indians under the status provisions of the *Indian Act*. Based on recent challenges to section 6 of the *Indian Act*,[8] it seems more likely that there will be an appeal to the Supreme Court of Canada by the non-status Indian litigants in *Daniels* rather than several new pieces of litigation.

[1] See the lower court decision at2013 FC 6

[2] *Daniels*, paras 130-147

[3] See *R. v. Powley*, 2003 SCC 43

[4] *Daniels*, para. 99

[5] *Daniels*, para. 108

[6] *Daniels*, paras. 96-97

[7] *Daniels*, paras. 78-79

[8] See, for example, *McIvor v. Canada*, 2010 BCCA 338, which was a twelve year litigation process for Sharon McIvor seeking status as an Indian on the basis that her status was denied due to sex discrimination inherent to the status provisions of the *Indian Act*.