Case Brief - Daniels v. Canada,
2016 SCC 12

Daniels represents a significant development for the rights of Métis and non-status Indians in Canada.

Fundamentally, *Daniels* establishes that Métis and non-status Indians are "Indians" within the legislative authority of the Federal Crown pursuant to s. 91(24) of the *Constitution Act*.[1] The Supreme Court of Canada's decision sets aside the Federal Court of Appeal's ruling that this distinction applies only to the Métis and excludes non-status Indians.

The appellants sought three declarations in *Daniels:* 1) that Métis and non-status Indians are "Indians" pursuant to s. 91(24) of the *Constitution Act, 1867*; 2) that the Federal Crown owes a fiduciary duty to Métis and non-status Indians; and 3) that Métis and non-status Indians have the right to consultation and negotiation.[2] The Supreme Court dismissed the second and third requests, but granted the first.

Test for granting a declaration met

The Supreme Court held that a declaration concerning jurisdictional authority over Métis and non-status Indians easily met the test for granting a declaration in *Canada (Prime Minister) v. Khadr*.[3] This declaration would settle a "live controversy" that would be of practical utility in providing the benefit of certainty and accountability in delineating jurisdictional boundaries with respect to Métis and non-status Indians.[4] In doing so, the Supreme Court acknowledged the historical disadvantages the Métis and non-status Indians have faced living in jurisdictional limbo as Federal and Provincial governments have failed to establish legislative authority.[5]

Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act*

In resolving the jurisdictional debate, the Supreme Court held that s. 91(24) encompasses all Aboriginal peoples, including Métis and non-status Indians.[6] In coming to this conclusion, the Court noted that the federal government had legislated over Métis and non-status Indians frequently and over time and according to the belief that it was acting within its constitutional authority.[7]

The Court also commented that while s. 35 of the *Constitution Act, 1982* does not define the scope of s. 91(24), it is noteworthy that the provision states that "Indian, Inuit *and* Métis people are Aboriginal peoples for the purposes of the Constitution.[8] The Supreme Court echoed prior jurisprudence that the 'grand purpose' of s. 35 is '[t]he reconciliation of aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship.'"[9]

Relying on the reports of historical commissions, the Supreme Court determined that "Indian", in the Constitutional context, has two meanings: a broad meaning (s. 91(24) and s. 35), and a narrower meaning that distinguishes Indian Bands from other Aboriginal peoples.[10] The Supreme Court stated:

> *The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the Report of the Royal*

> *Commission on Aboriginal Peoples, and the Final Report of the Truth and Reconciliation Commission of Canada, all indicate that reconciliation with all of Canada's Aboriginal peoples is Parliament's goal.*[11]

The Supreme Court further noted that since s. 91(24) includes non-status Indians it would be "constitutionally anomalous" for the Métis to be the only Aboriginal people recognized under s. 35, but excluded from the scope of s. 91(24).[12]

The Supreme Court also pulled analysis from its recent Métis jurisprudence. Relying on *Alberta v Cunningham*, the Court referred to its comments on the unique history of the Métis and noted they are "widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities." [13] Drawing from the *Manitoba Métis Federation* case, the Court referred to the finding that Canada had a fiduciary relationship with Métis and an obligation to uphold the honour of the Crown in the promise to implement the land grant. The Court stated that "[t]his created a duty of diligent implementation."[14]

Defining Métis and non-status Indians

The Supreme Court declined to establish definitional criteria for Métis and non-status Indians, stating that a consensus on the matter is unnecessary.[15] The court elucidated that this determination is a fact-driven analysis to be decided on a case-by-case base in the future.[16] At the same time, the Supreme Court clarified, this analysis should not be restricted by the criteria in *R v. Powley*, where the court considered the definition of Métis as it relates to s. 35 of the *Constitution Act*.[17] The Supreme Court noted that the *Powley* criterion of community acceptance is particularly problematic.[18]

The Supreme Court distinguished the case at hand from *Powley*, explaining that s. 91(24) "serves a very different constitutional purpose" than s. 35(1), which is about protecting historic community-held rights. Section 91(24), on the other hand, is about Parliament's protective authority over all Aboriginal peoples. Accordingly, community acceptance is not required to establish Métis identity under s. 91(24).[19]

Second and third declarations sought

The request for the second declaration that the Crown owes a fiduciary duty to Métis and non-status Indians was not granted because it was "settled law" that the fiduciary relationship exists.[20]

The third request for a declaration that the Métis and non-status Indians have a right to be consulted and negotiated with in good faith was also not granted as it would be a restatement of existing law.[21]

Devlin Gailus represented the Métis Federation of Canada who intervened to support the late Harry Daniels and other appellants on this appeal.

Some Implications

The Court made it clear that there is no one exclusive Métis People in Canada, anymore than there is no one exclusive Indian people in Canada. This may represent a judicial rejection of the "one Métis nation"

theory advanced by some after the *Powley* decision in 2003. The Court appears to recognize Métis people from all parts of Canada for the purposes of s.91(24) and it does not preclude the eastern or northern Métis from asserting s.35(1) rights either, so long as they can meet the *Powley* test. The implications for national Métis organisations could be profound.

Also, notwithstanding that the Court did not accept the "community acceptance" part of the *Powley* test when defining Métis under s.91(24), there is a practical issue arising from this decision. How does a Métis individual assert that he or she is Métis in order to receive federal programmes and services? Unless and until the federal government responds with a Métis status card, the answer will be that such an individual will produce a membership card from a credible Métis provincial or national organisation.

[1] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 46.

[2] *Daniels*, para 2.

[3] *Daniels*, para 15.

[4] *Daniels*, para 15.

[5] *Daniels*, paras 14-15.

[6] *Daniels*, para 46.

[7] *Daniels*, para 33.

[8] *Daniels*, para 34.

[9] *Daniels*, para 34.

[10] *Daniels*, para 35.

[11] *Daniels*, para 37.

[12] *Daniels*, para 35.

[13] *Daniels*, para 42.

[14] *Daniels*, para 43.

[15] *Daniels*, para 17.

[16] *Daniels*, para 47.

[17] *Daniels*, para 49.

[18] *Daniels*, para 49.

[19] *Daniels*, para 49.

[20] *Daniels*, para 53. See *Delgamuukw v British Columbia,* [1997] 3 S.C.R. 1010 and *Manitoba Métis Federation Inc. v Canada (Attorney General)* 2013, SCC 14.)

[21] *Daniels*, para 56. See *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, 2004 SCC 73 and *Nation v British Columbia,* 2014 SCC 44, [2014] 2 S.C.R. 256 and *R v Powley [2003] 2 S.C.R*.