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Who Has Legislative Jurisdiction in Relation to the Métis? An Update on the *Harry Daniels v. Canada* Case

Overview of Document

This document provides an overview of *Daniels v. Canada (Indian Affairs)* ("*Daniels*"). It includes summaries of the Federal Court's decision (2013 FC 6) and the Federal Court of Appeal's decision (2014 FCA 101). It also provides an update on the current state of the appeal in *Daniels* at the Supreme Court of Canada as well as some frequently asked questions. This document has been prepared for the Métis National Council ("MNC"). It is not legal advice and should not be relied on as such.

The Parties in the Case

Harry Daniels started the case in 1999 when he was President of the Congress of Aboriginal Peoples ("CAP"). CAP claims to represent Métis, non-status Indians and status Indians living off-reserve throughout Canada. Harry, CAP and Leah Gardner (a non-status Indian woman from northwestern Ontario) were the original plaintiffs. Harry passed away in 2004. In 2005, Harry's son Gabriel was added as a plaintiff to ensure a Métis representative plaintiff was maintained. At the same time, another non-status Indian, Terry Joudrey (a Mi'kmaq from Nova Scotia) was added to the litigation. At trial, the plaintiffs were Daniels, Gardner, Joudrey and CAP (the "Plaintiffs"). The case was filed against the Minister of Indian Affairs and Northern Development in his capacity as a representative of the federal government (the "Respondent" or "Canada").

What is the Case About?

The Plaintiffs have asked the courts to give them three declarations:

1. that Métis and non-status Indians are "Indians" within the meaning of "Indians, and Lands reserved for the Indians" in s. 91(24) of the *Constitution Act, 1867;*
2. that the federal government owes a fiduciary duty to Métis and non-status Indians; and
3. that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice.

A declaration is a common court remedy in Aboriginal rights cases. A court declares the law in relation to a dispute between government and Aboriginal peoples. The parties are then expected to change their behavior to be consistent with the law. The main question of interest for the MNC in this case is: whether the Métis are "Indians" for the purposes of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

What is s. 91(24)?

When Canada—as a new country—was created in 1867, its Constitution set out what the federal and provincial governments would each have "exclusive Legislative Authority" for. More specifically, the *Constitution Act, 1867* sets out two lists that divide up what each level of government has legislative responsibility or jurisdiction for.

The list in s. 91 enumerates the jurisdictions of the federal Parliament, while the list in s. 92 sets out the jurisdictions of the provincial legislatures. The word "jurisdiction" comes from two Latin words: *juris* meaning "law" and *dicere* meaning "to speak." So, jurisdiction is the authority to "speak" on specific matters through law (i.e., legislation). The specific matters listed in ss. 91 and 92 are often referred to as "heads of power."

It is important to note that a finding of legislative jurisdiction does <u>not</u> mean that a government has control or power over the Métis people. It simply means that the government with jurisdiction can legislate on Métis issues, if it chooses to do so. For example, the federal government could enact legislation that gives legal force and effect to a negotiated Métis land claim agreement that recognizes existing Métis governance structures, provides funding to Métis governments, recognizes Métis rights, etc.

The provincial list of powers in s. 92 is generally concerned with more local or provincial matters that are not national or inter-provincial in scope. Provincial heads of power include: direct taxation within a province, management and sale of public lands, incorporation of companies, property and civil rights, administration of justice and all matters of a merely local or private nature in the province.

The federal list of powers in s. 91 is generally concerned with nation-wide and international matters. Federal heads of power include: unemployment insurance, postal service, the census, the military, navigation and shipping, sea coast and inland fisheries, banking, weights and measures and patents. Section 91(24)—the relevant head of power in the *Daniels* case—reads,

> s. 91 It is hereby declared that the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> (24) Indians, and Lands reserved for the Indians.

Métis and non-status Indians have long taken the position that they too are included within s. 91(24) and therefore within federal jurisdiction. The main rationale for this interpretation is that the term "Indian" in s. 91(24) was meant to include all Aboriginal peoples in Canada historically, including, First Nations, Inuit and Métis. Notably, in 1939, the Supreme Court of Canada already determined that the Inuit (then referred to as "Eskimos") were within s. 91(24). The federal government takes the position that "Indians" registered under the *Indian Act* are in s. 91(24), but has by and large denied responsibility for non-status Indians. In recent times, the federal government has steadfastly denied that the Métis—as a distinct Aboriginal people—are within s. 91(24).

Why Does the Jurisdiction Issue Matter to the Métis?

Usually in jurisdiction disputes, the federal and provincial governments disagree over what is included in a head of power because they both want to assert their jurisdiction in a given area. This case is unique because neither level of government wants jurisdiction for Métis and non-status Indians. Some say that the denial of jurisdiction has made these groups "political footballs" in the Canadian federation. But that metaphor is not really appropriate because in football both sides want the ball. A more apt metaphor would perhaps be "hot potato."

For the Métis Nation, the practical result of this jurisdictional avoidance has been to leave Metis communities vulnerable and marginalized. Métis have not had access to federal programs and services available to "status" Indians or Inuit. They have also been denied access to federal processes to address their rights and claims (i.e., specific and comprehensive claims processes), which are available to First Nations and Inuit.

The Trial Decision

The trial judge released his decision on January 8, 2013. Based on the evidence before him and previous judicial decisions on how a head of power should be interpreted, he concluded that Métis and non-status Indians are within s. 91(24).

The historical records before the trial judge showed that in order to achieve the objects of Confederation (*i.e.,* creating a country from coast to coast, settling the Northwest, building a national railway to the Pacific coast, *etc.*), the federal government needed the "Indian" head of power in s. 91(24) so that it could deal with all of the different Aboriginal peoples it encountered along the way.

With respect to the Métis Nation, the evidence showed that the federal government used this power in many ways, by among other things, including Métis (Half-breeds) —as individuals—in the Robinson treaties in Ontario, in negotiating the Treaty 3 Half-breed Adhesion, in enacting s. 31 of the *Manitoba Act* in the old "postage stamp" province of Manitoba and in passing the *Dominion Lands Act* that established the Métis scrip system throughout present day Manitoba (outside the old "postage stamp" province), Saskatchewan, Alberta and parts of northeastern British Columbia and the Northwest Territories. The trial judge concluded that these federal actions, amongst others, showed s. 91(24) has been used historically to exercise federal jurisdiction with respect to Métis. Other evidence was provided in relation to non-status Indians.

The trial judge also noted that, historically, wherever non-status Indians and Métis were discriminated against or treated differently than non-Aboriginal peoples by the federal government (*i.e.*, residential schools, liquor laws, *etc*.), it was because non-status Indians and Métis could be dealt with under the "Indian" head of power.

The trial judge said that the distinguishing feature of both non-status Indians and Métis is that of "Indianness"—not language, religion, or connection to European heritage—which brought them within s. 91(24). He also held that the term "Indian" in s. 91(24) is broader than the term "Indian" in the *Indian Act*. While the federal government may be able to limit the number of Indians it recognizes under the *Indian Act,* that cannot have an effect on the determination of who is within s. 91(24).

The trial decision was a significant victory for Métis and non-status Indians, as it removed one of the major barriers that the federal government has used to avoid meaningfully dealing with their distinct issues, rights and socio-economic needs.

There were, however, some disconcerting issues with the trial judge's decision for the Métis Nation, specifically with his definition of Métis. The trial judge defined who is included within s. 91(24) by virtue of their "Indian ancestry" or "Indian affinity." This reduces Métis identity to Indian genealogy not "Métisness". His decision also appeared to leave open the possibility that any individual with some small amount of "Indian" ancestry and a recent claim to affinity with "Indianness" would fall within the scope of s. 91(24). This result is clearly inconsistent with the fundamental principle that the Crown's obligations and responsibilities are owing to Aboriginal collectives, as well as to the recognition that the Métis are a separate and distinct Aboriginal people with their own unique identity, language and culture "as Métis"—not as Indians.

The trial judge refused to grant the other two declarations with respect to the federal Crown's fiduciary duty and the duty to negotiate with Métis and non-status Indians.

The Federal Court of Appeal Decision

The federal government appealed the trial judge's decision. The first appeal of the *Daniels* case was heard by the Federal Court of Appeal in October of 2013. The appeal court's judgment was released on April 17, 2014.

In the appeal, several new parties intervened who were not involved at trial. In particular, representatives of the Métis Nation at the national, provincial and local levels intervened (i.e., the Métis National Council, Manitoba Métis Federation, Métis Nation of Ontario, Métis Settlements General Council and Gift Lake Métis Settlement) intervened in order to express their concerns with the trial judge's approach to defining Métis for the purposes of s. 91(24), which was largely based on CAP's submissions at trial. In addition, the Alberta Government was an intervener in the appeal.

On appeal, Canada argued that the trial judge had made three errors in granting the declaration because:

a) the declaration that Métis and non-status Indians are within s. 91(24) lacked practical utility;
b) the declaration was unfounded in fact and law; and
c) the declaration defined the core meaning of the constitutional term "Indian" in the abstract.

Did the Declaration Have Practical Utility for the Métis?

Canada argued that the declaration with respect to Métis lacked practical utility on three grounds: 1) there was no actual or proposed legislation before the Court; 2) even if the declaration were granted, there would be no obligation on government to actually do anything; and 3) Canada can do whatever it wants to do under the federal spending power so it was not necessary to decide whether the Métis were within 91(24). The Federal Court of Appeal did not agree.

First, the Court held that there was no need for actual or proposed legislation in order to answer the question. The Court pointed to the Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada*, in which the Supreme Court granted the plaintiffs a declaration to assist them in negotiations with the government. The plaintiffs in that case had not challenged the constitutionality of any legislation. Nor had they sought to create an obligation on the government to enact legislation.

Second, the Court found that Canada's position was contradicted by a number of findings of fact by the trial judge (i.e*.,* the impact of jurisdictional uncertainty in creating a large population of collaterally damaged Métis, the federal government's reluctance to negotiate Métis claims to lands and resources in the absence of a higher court decision on the issue of jurisdiction, etc.). The Court further held that Canada's argument that it could extend programs and resources to the Métis under the federal spending power was undercut by the trial judge's finding that the absence of jurisdictional certainty has led to disputes between the federal and provincial governments and resulted in the Métis being deprived of many necessary programs and services.

> "Finally, the respondents' claim extended beyond a claim to programs and services available under the federal spending power. The claim put in issue, among other things, the failure of the federal government to negotiate or enter treaties with respect to unextinguished Aboriginal rights, or agreements with respect to other Aboriginal matters or interests analogous to those treaties and agreements which the federal government has negotiated and/or entered into with status Indians…
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> Related to this aspect of the claim is the evidence, referenced above, that in the absence of higher Court authority on the division of federal-provincial liability, the federal government was not prepared to negotiate Métis claims as recommended by the Royal Commission on Aboriginal Peoples."
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> — *Daniels*, FCA, para. 72

Lastly, and perhaps most significantly, the Federal Court of Appeal held that the Plaintiffs' claim was about more than programs and services available under Canada's federal spending power. The claim put in issue, among other things, Canada's failure to negotiate or enter into treaties with Métis with respect to unextinguished Aboriginal rights, or agreements with respect to other Aboriginal matters or interests analogous to those treaties and agreements which the federal government had negotiated with other Aboriginal groups.

Did the Declaration Have Practical Utility for Non-Status Indians?

The Federal Court of Appeal agreed with Canada that a declaration that non-status Indians are "Indians" for the purpose of s. 91(24) was redundant and lacked practical utility because Canada conceded it could legislate with respect to non-status Indians. It just chose not to. As a result, the appeal court overturned the trial judge and declined to make a declaration that non-status Indians are within s. 91(24).

What About the Trial Judge's Definition of Métis?

In his reasons for judgment, the trial judge described Métis as "a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status." Canada argued that this definition was inconsistent with the Supreme Court of Canada's recognition of the Métis as a distinct Aboriginal people, related to, but different from, their Indian forbearers. In Canada's view, recognition that Métis are culturally different from Indians leads to the conclusion that Métis are not "Indians" for the purposes of s. 91(24).

The Court agreed that the trial judge's definition was problematic, but didn't agree with Canada's submissions. In holding that Métis are within the term "Indians" in s. 91(24), the appeal court explained the trial judge's definition. It acknowledged that the definition lacked clarity and was open to at least three interpretations. Specifically, "Indian heritage" could mean: (1) descent from members of the Indian race, (2) First Nations heritage, or (3) Indigenous or Aboriginal heritage.

The Federal Court of Appeal held that the third interpretation was correct and that when the trial judge used the phrase "Indian heritage," he meant Indigenousness or Aboriginal heritage. The Court relied on the principle that the Constitution is a living tree, which must be interpreted in a progressive manner. Although historically s. 91(24) had been viewed as a race-based head of power, the Court found that a progressive interpretation to s. 91(24) "requires the term Métis to mean more than individuals' racial connection to their Indian ancestors."

> "… A progressive interpretation of section 91(24) requires the term Métis to mean more than individuals' racial connection to their Indian ancestors. The Métis have their own language, culture, kinship connections and territory. It is these factors that make the Métis one of the Aboriginal peoples of Canada."
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> — *Daniels,* FCA, para. 96

The appeal court noted that the Supreme Court of Canada, in several cases, including in *R. v. Powley*, [2003] 2 S.C.R. 207 ("*Powley*"), had rejected the notion that the term Métis encompassed all individuals with mixed Indian and European heritage, instead finding that the term referred to a distinctive group of people who developed separate and distinct identities. According to the Court, it did not matter that these comments had been made with reference to s. 35 of the *Constitution Act, 1982* because individual elements of Canada's Constitution are linked to one another and must be interpreted by reference to the structure of the Constitution as a whole.

> "It follows that the criteria identified by the Supreme Court in *Powley* inform the understanding of who the Métis people are for the purpose of the division of powers analysis."
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> — *Daniels*, FCA, para. 99

The Federal Court of Appeal rejected the interpretation of "Indian Heritage" as meaning "First Nations heritage." It noted that the trial judge had explicitly referred to the *Powley* test in his decision, and had used language throughout his judgment that indicated his recognition of Métis as a distinct subset of Canada's Aboriginal peoples.

Having clarified to some extent the confusion caused by the trial judge's definition, the appeal court went on to say that it did not need to define the term Métis in order to determine whether Métis people fall within the scope of s. 91(24). The Court noted that the Constitution did not define "Indian" and the Supreme Court of Canada did not define "Eskimos" when it determined that they were included in s. 91(24) in 1939. The Court held it was sufficient that it not define the term Métis in a manner that is contrary with history or the jurisprudence of the Supreme Court.

What Was the Correct Interpretative Approach to s. 91(24)?

There are two different answers to this question: (1) a progressive interpretation, or (2) a purposive interpretation. The progressive interpretation recognizes that the Constitution must be allowed to evolve over time to reflect changing social circumstances. A purposive interpretation looks to the purpose for putting the provision into the Constitution – in other words, it looks at what the provision is trying to achieve. Canada argued that a progressive interpretation had to identify what social changes require a new view of who are included in s. 91(24) of the Constitution.

The Court held that the trial judge used a purposive interpretation because he found that Métis were included in s. 91(24) at the time of Confederation. The Court held that s. 35 further confirms that the Métis were included within s. 91(24) from the time of Confederation, as it would be anomalous for the Métis to be included as Aboriginal peoples for the purpose of s. 35, and to be the only Aboriginal peoples not included within s. 91(24).

> "Counsel for the appellants also conceded that it would be anomalous for the Métis to be included as Aboriginal peoples for the purpose of section 35 of the Charter, and to be the only enumerated Aboriginal peoples not included within section 91(24). … This anomaly disappears when section 91(24) is interpreted to have included the Métis from the time of Confederation."
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> — *Daniels*, FCA, paras. 146-147

The Court concluded that a progressive interpretation was not necessary, and the trial judge had not erred by failing to address the social changes that would underlie such an interpretation. That said, the Federal Court of Appeal did apply a second layer of interpretation—progressive interpretation—when it determined that a racial analysis was inappropriate.

Would a Declaration Create Uncertainty About Jurisdiction?

Canada argued that a declaration that Métis are within s. 91(24) would make provincial legislation (*i.e.*, the *Métis Settlements Act* in Alberta) vulnerable to challenge and might also have a detrimental effect on the ability of provincial governments to legislate in the future. The appeal court disagreed, and cited a decision of the Supreme Court of Canada in which it had held that the power of one government to legislate in relation to one aspect of a matter takes nothing away from the power of the other level to control another aspect within its own jurisdiction.

What Relief Did the Court Grant?

The Federal Court of Appeal confirmed that Métis are within federal jurisdiction under s. 91(24). Based on the approach advanced by the Métis Nation interveners, the Court issued the following modified declaration "that the Métis are included as 'Indians' within the meaning of s. 91(24) of the *Constitution Act, 1867*." The Court refused to grant any declaration with respect to non-status Indians. The appeal court also declined to issue the second and third declarations requested by the Plaintiffs.

What's Happening Now?

Following the Federal Court of Appeal's decision, CAP appealed to the Supreme Court of Canada to have the non-status Indian declaration reinstated as well as to revive the trial judge's expansive definition of Métis for the purposes of s. 91(24). In its appeal, it also asked to have the previously denied second and third declarations issued by the Supreme Court of Canada. Canada cross-appealed, seeking to have the declaration on Métis inclusion in s. 91(24) overturned in its entirety.

On November 20, 2014, the Supreme Court of Canada agreed to hear the appeals of both CAP and Canada in *Daniels*. Since then, both CAP and Canada have filed their written arguments with the Court and a hearing of the *Daniels* appeal is scheduled for October 8, 2015. The Supreme Court has also granted intervener status in the appeal to 12 groups, including, the MNC. The MNC, along with other interveners, have recently filed their written arguments with the Court. A copy of the MNC's factum is available at www.metisnation.ca.

As the country's highest court, the Supreme Court of Canada's decision will be the final word on these important constitutional issues. It is likely that the Court will not release a decision in *Daniels* until mid to late 2016. If the Supreme Court upholds the decisions of the lower courts that the Métis are included in s. 91(24), this will be a significant victory for the Métis Nation. It should set the stage for future discussions and negotiations between Canada and the Métis Nation on Métis rights, interests and claims as well as much needed programs and services.

Métis Are Not Indians—Why Do We Want to Be Recognized as "Indians?"

The *Daniels* case is not about Métis becoming "Indians" under the *Indian Act* or Métis being recognized as "Indians" for cultural purposes. The case is about whether the legal term "Indian" in the *Constitution Act, 1867* (which sets out federal legislative jurisdiction) is broad enough to include Métis, in the same way it is broad enough to include Inuit (who are also distinct). Métis want to be included because uncertainty about jurisdiction for Métis is used by Canada to avoid dealing with Métis rights, interests and needs.

Does Jurisdiction Mean the Federal Government Will Now Have Control Over Métis?

No, jurisdiction does not mean that the federal government will have control or power over the Métis. As the Otipemisiwak ("the people that own themselves"), the Métis Nation would never accept becoming subject to legislation like the *Indian Act*. The case simply means Canada has the jurisdictional ability to legislate with respect to Métis issues and to deal with the Métis on a nation-to-nation basis. For example, it could pass a *Canada-Métis Nation Relations Act* that recognizes the Métis Nation's governance structures, Métis rights, etc. that would fall within the scope of s. 91(24).

I'm Métis. Can I Now Get Registered Under the *Indian Act*?

No, this case is not about the *Indian Act*. It does not put Métis under the *Indian Act*. It does not make or allow Métis to become "status Indians." It also does not mean that Métis can immediately access programs and services that are currently only available to "status Indians." If ultimately successful, the case should provide a "kickstart" to the federal government to seriously deal with Métis issues through negotiations. Métis inclusion under the *Indian Act*, however, will not be the result of the case.

Does This Case Now Recognize Métis Rights Everywhere in Canada?

No, the *Daniels* case is not about Métis rights to land, harvesting, self-government, etc. It is only about answering the question of whether the federal government has legislative jurisdiction for Métis. While some groups may claim that the case recognizes Métis groups or rights outside of the Métis Nation, it does not. Further, the Federal Court of Appeal's decision limits s. 91(24) to those Métis who can meet the Supreme Court of Canada's decision in *Powley*, which requires a distinct Métis community to have emerged historically. Individuals with "mixed Aboriginal ancestry" who claim to be Métis today do not meet the *Powley* test.

Does the *Daniels* Case Affect the Métis Nation's Definition of Métis?

No, the *Daniels* case has absolutely no effect on the Métis Nation's national definition for citizenship in the Métis Nation. The Métis Nation's definition was arrived at based on its inherent right to define it own citizenship. No court decision or federal government legislation could ever change that definition.

This Case Is Mainly About the Métis, Why Is CAP Involved?

CAP received significant funding from the federal government to litigate this case. Similar funding was not provided to the Métis Nation. The Métis Nation became involved at the Federal Court of Appeal and at the Supreme Court of Canada to ensure the rights and interests of Métis communities from Ontario westward are protected.

About the Firm and the Author

Jason Madden is a partner in the law firm Pape Salter Teillet LLP with offices in Toronto and Vancouver. In the *Daniels* case at the Federal Court of Appeal, Jason was counsel for the intervener Manitoba Métis Federation. At the Supreme Court of Canada, Jason joined the MNC's legal team which includes Clément Chartier, Kathy Hodgson-Smith and Marc LeClair.

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