Daniels v Canada (Minister of Indian Affairs and Northern Development) (2013): Federal Government has Jurisdiction over Non-Status Indians and Metis

Introduction

On January 8, 2013, the Federal Court of Canada ruled[1] that "Indian" in section 91(24) of the *Constitution Act, 1867*[2] included non-status Indians and Metis. As a result of the decision, the Federal Government has jurisdiction over non-status Indians and Metis. In other words, the Federal Government has the authority to enact laws that govern non-status Indians and Metis. The decision was a significant victory for the non-status Indian and Metis communities because it prevents the Federal Government from avoiding its responsibility to legislate with respect to non-status Indian and Metis issues. Before the *Daniels* decision, the Federal Government avoided enacting laws related to non-status Indians and Metis because it claimed that it did not have jurisdiction over them. The *Daniels* decision puts an end to the jurisdictional uncertainty. The following Featured Court Ruling examines why the Federal Court of Canada concluded that non-status Indians and Metis were included in the definition of "Indian" in section 91(24) of the *Constitution Act, 1867*, [3] and it also explores some possible implications of the ruling.

Facts

The Parties

In 1999, Harry Daniels (now deceased), Gabriel Daniels, Leah Gardner, and Terry Joudrey, in combination with the Congress of Aboriginal Peoples (CAP),[4] applied to the Federal Court of Canada for a declaration that "Indians" in section 91(24) of the *Constitution Act, 1867*[5] included non-status Indians and Metis. The claimants sought a declaration because Provincial Governments believed that the Federal Government was responsible for non-status Indians and Metis, but the Federal Government denied this responsibility.[6]

The Issues

Very few pieces of legislation have been enacted pertaining to non-status Indians and Metis because neither level of government claimed jurisdiction over them. Without legislative protection, non-status Indians and Metis have been subject to historical disadvantage and

discrimination.[7] Most notably, non-status Indians and Metis do not have access to federally funded services, programs, and benefits.[8] Additionally, the population of non-status Indians and Metis greatly exceeds the population of status Indians, yet status Indians receive the majority of Federal Government funding. [9] Non-status Indian and Metis representatives claimed that because their people were denied access to federally funded services, programs, and benefits, they could not reach their full potential in Canadian society.[10]

Importantly, the *Daniels* case was not about extending federally funded services, programs, and benefits to non-status Indians and Metis. This case dealt with which level of Government had jurisdiction over non-status Indians and Metis, and could therefore enact laws pertaining to them. A declaration from the Federal Court would prevent the Federal Government from denying that it was legally capable of enacting laws related to non-status Indian and Metis issues.[11]

In addition to the jurisdiction issue, the claimants were seeking declarations concerning the Federal Government's fiduciary duty towards non-status Indians and Metis, as well as the Federal Government's duty to consult with them.

The *Constitution Act, 1867*

Canada is a federation with two jurisdictions of political authority: the Federal Government and the Provincial Governments. The powers of government were divided between the Federal and Provincial Governments in the *Constitution Act, 1867*.[12] Section 91 of the *Constitution Act, 1867* lists matters that are within the Federal Government's jurisdiction, and section 92 of the *Constitution Act, 1867* lists matters that are within the Provincial Governments' jurisdiction.[13] Section 91(24) of the *Constitution Act, 1867* states that the Federal Government has jurisdiction over "Indians and lands reserved for the Indians."[14]

The claimants in this case were seeking a declaration that "Indians" in section 91(24) of the *Constitution Act, 1867* included non-status Indians and Metis.[15] The declaration would mean that the Federal Government has jurisdiction over non-status Indians and Metis, and can therefore enact laws relating to them.

The Evidence

The evidence produced by the claimants and the defendants was meant to assist the Federal Court in determining whether non-status Indians and Metis were included within the meaning of "Indian" as used in section 91(24) of the *Constitution Act, 1867*.[16] The evidence produced by the claimants and the defendants spanned over 400 years and came from various sources, including historical records, court cases, and government documents.[17]

Issues

The Federal Court of Canada considered the following issues:

1. Are non-status Indians and Metis identified as “Indians” under section 91(24) of the *Constitution Act, 1867*?[18]

2. Does the Crown owe non-status Indians and Metis a fiduciary duty?

3. Is there a duty to consult with non-status Indians and Metis?

4. If non-status Indians and Metis are identified as “Indians” under section 91(24) of the *Constitution Act, 1867*, what is the legal remedy?[19]

Decision

The Federal Court of Canada ruled that “Indians” in section 91(24) of the *Constitution Act, 1867* included non-status Indians and Metis.[20] Therefore, the claimants were entitled to a declaration to that effect.[21] Additionally, the Court ruled that the Crown does owe non-status Indians and Metis a fiduciary duty and there is a duty to consult with them.[22] However, there was insufficient evidence at trial to demonstrate that there had been a breach of the fiduciary duty and the duty to consult.[23] As a result, the issue of remedy was not addressed in relation to fiduciary duty and the duty to consult.[24]

Court’s Analysis

Issue 1: Are non-status Indians and Metis identified as “Indians” under section 91(24) of the *Constitution Act, 1867*?

Sub-Issue 1: Should the Federal Court of Canada rule on this case?

The defendants, the Minister of Indian Affairs and Northern Development and the Attorney General of Canada, argued that the Federal Court of Canada should not issue a ruling. The defendants argued that a declaration would not solve the dispute between the claimants and the Federal Government, and a declaration may cause confusion and more litigation.[25] In response to the defendants’ arguments, the Federal Court ruled that it has jurisdiction over issues of federalism and that the question before the Court is real and not merely hypothetical.[26] Since the claimants had a real interest in the decision, it would not be in the public interest for the Court to refuse to decide the matter.[27]

Sub-Issue 2: What is the definition of non-status Indians and Metis?

The central issue in this case was whether non-status Indians and Metis fell within the meaning of “Indian” as it is used in section 91(24) of the *Constitution Act, 1867*.[28] It was important to identify who is a non-status Indian or a Metis in order to determine who will be impacted by the decision. Identifying and defining non-status Indians and Metis was a difficult task because several factors were considered, such as genetic and historical relations, acceptance by the community as a non-status Indian or Metis, and whether a person identifies himself or herself as a non-status Indian or Metis.[29]

The Federal Court identified two characteristics shared by all non-status Indians: they have

no status under the *Indian Act*[30] and they are Indians.[31] Accordingly, non-status Indians could acquire status if federal legislation (e.g. the *Indian Act*)[32] was amended.[33] A person is considered a non-status Indian (1) if he or she has a genetic or historical connection to people already identified as "Indians" or (2) if he or she identifies as an "Indian" and is accepted by the "Indian community."[34]

To define Metis, the Federal Court relied on *R v Powley*, a 2003 Supreme Court of Canada decision.[35] In *R v Powley*,[36] the Supreme Court created a framework to identify Metis people for purposes related to section 35 of the *Constitution Act 1982*.[37] The Federal Court adopted the following guidelines for identifying Metis people, while noting that there may be exceptions. As a general rule, a Metis is a person who satisfies three requirements: (1) has a genetic or historic connection to other Metis, (2) identifies himself or herself as a Metis, and (3) is accepted by the Metis community.[38]

Sub-Issue 3: Historical evidence showing what the term "Indian" meant as used in section 91(24) of the Constitution Act, 1867

A. Pre-Confederation Evidence

Pre-Confederation evidence assisted the Federal Court in deciding what the term "Indian" meant prior to 1867, and what it was likely to mean to the drafters of the *Constitution Act, 1867*.[39] Expert witnesses for the claimants concluded that "Indian" was a broad term that included people with "mixed blood" and people living a variety of lifestyles.[40] Expert witnesses for the defendants, however, determined that "Indian" had a narrower definition that required people to belong to a tribe.[41] The Federal Court accepted the claimants' witnesses because they were able to offer evidence that covered a greater period of time and a larger geographical region.[42]

B. Confederation Evidence

The historical facts surrounding Confederation were agreed upon by all of the expert witnesses.[43] The claimants' witnesses and the defendants' witnesses, however, disagreed about the significance that should be attributed to the undisputed historical facts.[44]

For example, from 1858 to 1867 delegates from the Province of Canada,[45] Nova Scotia, New Brunswick, and Prince Edward Island met and debated topics relating to Confederation. The records of these discussions, however, show that the power over "Indians and Lands reserved for the Indians" was never discussed.[46] The expert witnesses for the defendants suggested that the power over "Indians" was not critical for the purposes of Confederation.[47] The expert witnesses for the claimants stated, however, that the power over "Indians" was important, but it was never discussed because it was clearly within federal jurisdiction.[48]

Again, the Federal Court agreed with the claimants' witnesses. The Court noted that the objectives of Confederation consisted of promoting westward settlement, building a railway, and developing a national economy.[49] To achieve these goals, the Court ruled that the

Federal Government needed to have control over "Indians." Otherwise, expansion would have been very difficult, if not impossible.[50]

C. Post-Confederation Evidence

Post-Confederation evidence gives some indication of the scope of the so-called "Indian power" listed in section 91(24) of the *Constitution Act, 1867*.[51] Following Confederation, the evidence tended to show that people were either considered "whites" or "others" (i.e. Indians, Metis, mixed-bloods).[52] Because of this fact, the claimants argued that "Indian" must be interpreted broadly to include non-status Indians and Metis.[53] The defendants, however, argued that the Metis did not wish to be included in the definition of "Indian."[54] The Federal Court dismissed the defendants' argument. The Court ruled that there had previously been a stigma attached to being labelled an "Indian," but this should not be determinative of the constitutional issue at hand.[55] Additionally, the Court noted that regardless of how Metis viewed themselves, the Federal Government considered them to be closely associated with "Indians."[56]

D. Federal Government's Liquor Policy

The claimants also pointed to additional evidence that demonstrated that non-status Indians and Metis were regularly grouped together with "Indians." One example is the Federal Government's liquor policy.[57] In 1894, the *Indian Act* was amended to prevent the sale of liquor to people who followed the "Indian mode of life."[58] The liquor policy demonstrated that the Federal Government exercised jurisdiction over non-status Indians and Metis regardless of their genetic relationship to "Indians."[59]

E. Government Documents

The claimants also relied on government documents to support their case. A document of particular importance, *Natives and the Constitution*, included a review of jurisdictional issues related to section 91(24) of the *Constitution Act, 1867*.[60] *Natives and the Constitution* was prepared in 1980 by several agencies, including the Federal Provincial Office and Privy Council Office.[61] The document stated that the Federal Government has the power to enact laws pertaining to non-status Indians and Metis.[62] *Natives and the Constitution* was important because it was a government document that represented the general opinion of the Federal Government.[63] The Federal Government's statements lend credibility to the claimants' position.[64]

F. Treaties

The claimants and the defendants acknowledged that Metis were occasionally offered treaty protection. This was a significant piece of evidence in favour of the claimants because only the Crown and "Indians" can enter into treaties.[65] To extend treaty protection to Metis, therefore, demonstrates that the Crown viewed Metis as "Indians," even if only in a limited sense.[66]

Sub-Issue 4: Interpretation of the Constitution Act, 1867

Whether non-status Indians and Metis were included under section 91(24) required the Federal Court to interpret the *Constitution Act, 1867*.[67] There are two approaches to constitutional interpretation: (1) the original intent approach and (2) the purposive approach.[68]

The original intent approach requires courts to determine what the framers of the *Constitution Act, 1867* intended section 91(24) to cover.[69] Evidence that establishes intent may include debates and correspondence between government officials before Confederation. The Federal Court determined that an original intent approach was the incorrect method of interpretation for a jurisdictional issue.[70] As noted above, debates related to Confederation did not include any discussion of the so-called "Indian power" in section 91(24).[71] As a result, the Federal Court ruled that a broad and liberal approach to interpretation was the better method.[72]

The "living tree" doctrine is a form of constitutional interpretation that is contrasted with the original intent approach. The "living tree" doctrine reflects the idea that the meaning of the *Constitution* is not fixed in time but can evolve over time to reflect changing social values.[73] Applying this approach, the Federal Court noted that the constitutional powers, such as the Federal Government's jurisdiction over "Indians" under section 91(24), should be interpreted in a large, liberal, and progressive manner.[74] A progressive interpretation required the Federal Court to examine a significant amount of evidence from a variety of perspectives, including historical evidence, court cases, and political documents.

After an extensive analysis of the evidence, the Federal Court interpreted section 91(24) in accordance with the principles established by the "living tree" doctrine.[75] The Federal Court ruled that both non-status Indians and Metis were included in the meaning of "Indian" as used in section 91(24) of the *Constitution Act, 1867*.[76]

Issue 2: Does the Crown owe non-status Indians and Metis a fiduciary duty?

A fiduciary duty is a relationship between two parties where one party is obliged to act in the other person's best interests.[77] It has long been recognized that the Crown and Aboriginal Peoples, including non-status Indians and Metis, have a fiduciary relationship as a result of section 35 of the *Constitution Act, 1982*.[78] Furthermore, a fiduciary duty also exists as a result of the inclusion of non-status Indians and Metis within the scope of "Indian" in section 91(24) of the *Constitution Act, 1867*.[79]

While the Court noted that a fiduciary duty exists, it declined to make a general statement regarding the fiduciary duty because the claimants did not assert that the duty had been breached.[80] A fiduciary duty is not open-ended; it must be focused on a specific interest.[81] In this case, the claimants did not have any specific interest at stake, and, therefore, a declaration would not be useful.[82] The Federal Court noted that it fully expected the Federal Government to act in accordance with its fiduciary duty in the future.[83]

Issue 3: Is there a duty to consult with non-status Indians and Metis?

The duty to consult requires the Crown to act in good faith when dealing with status Indians, non-status Indians, and Metis. Ideally, the consultation process facilitates a meaningful dialogue between the Government and status Indians, non-status Indians, and Metis. [84] However, the Government's duty to consult is largely dependent upon the subject matter and strength of the claim. [85] The Federal Court did not issue a declaration concerning the duty to consult because there was insufficient evidence before the Court to make that ruling. [86]

Issue 4: If non-status Indians and Metis are identified as "Indians" under section 91(24) of the Constitution Act, 1867, what is the legal remedy?

The claimants were entitled to a declaration that non-status Indians and Metis were included in the definition of "Indian" in section 91(24) of the *Constitution Act, 1867*.[87]

Significance of the Ruling

The Federal Court of Canada's declaration that non-status Indians and Metis were included in the meaning of "Indian" in section 91(24) of the *Constitution Act, 1867* resolved a jurisdictional question.[88] The ruling means that the Federal Government has jurisdiction over non-status Indians and Metis and can enact laws pertaining to them. While the Federal Government has the legal authority to create laws that govern non-status Indians and Metis, they are under no obligation to do so. As a result, federal legislation, such as the *Indian Act*,[89] was not directly impacted by the Daniels decision.

Even though the Federal Government is under no obligation to extend legislation to include non-status Indians and Metis, the declaration from the Federal Court of Canada will undoubtedly create social and political pressure on the Government to do so. Presumably, the Congress of Aboriginal Peoples, the Metis National Council,[90] and individual non-status Indians and Metis will be at the forefront of future lobbying efforts. If the Federal Government is unwilling to address the current situation regarding non-status Indians and Metis, the *Daniels* decision paves the way for organizations and individuals to launch court cases. For example, non-status Indians and Metis could potentially argue that the Federal Government's refusal to extend the benefits listed in the *Indian Act*[91] to include non-status Indians and Metis violates their right to equality guaranteed in section 15 of the *Canadian Charter of Rights and Freedoms*.[92]

Additionally, the *Daniels* decision may have direct implications for the province of Alberta because Alberta has enacted the *Metis Settlements Act*[93] which recognized Metis as being within provincial jurisdiction. The *Act* reserved certain areas of land, known as Metis Settlements, for Alberta Metis.[94] It is possible that this piece of legislation will be challenged on the basis that the Federal Government has exclusive jurisdiction over non-status Indians and Metis.[95]

The ruling from the Federal Court of Canada will not be the last word on the constitutional status of non-status Indians and Metis. On February 6, 2013, John Duncan, the Minister of Aboriginal Affairs and Northern Development, stated that the *Daniels* decision has been

appealed to the Federal Court of Appeal.[96] The appeal process will probably take several years. In the meantime, the Government will likely avoid acting on the Federal Court of Canada's declaration until a higher court issues a judgment.[97]

---

[1] *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6 < http://cas-ncr-nter03.cas-satj.gc.ca/rss/T-2172-99%20reasons%20jan-8-2013%20ENG.pdf>.

[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5 < http://laws-lois.justice.gc.ca/eng/Const//page-4.html#docCont>.

[3] *Ibid*.

[4] The Congress of Aboriginal Peoples (CAP) is a group that offers representation to non-status Indians and Metis across Canada. CAP's main goal is to advance Aboriginal people by promoting their common interests through collective action.

[5] *Constitution Act, supra* note 2.

[6] *Daniels, supra* note 1 at para 86.

[7] *Ibid* at paras 84, 87-88.

[8] *Ibid* at para 108.

[9] *Ibid* at para 107.

[10] *Ibid* at para 108.

[11] *Ibid* at para 110.

[12] *Constitution Act*, supra note 2, ss 91-92.

[13] *Ibid*.

[14] *Ibid*, s 91(24).

[15] *Daniels*, *supra* note 1 at para 3; *Constitution Act*, *supra* note 2.

[16] *Ibid*.

[17] *Daniels*, *supra* note 1 at para 2.

[18] *Constitution Act*, supra note 2.

[19] *Ibid*.

[20] *Daniels*, *supra* note 1 at para 20; *Constitution Act*, *supra* note 2.

[21] *Daniels*, *supra* note 1 at para 20.

[22] *Ibid* at paras 607, 615; A fiduciary duty is a relationship between two parties where one party is obliged to act in the best interests of the other person. A duty to consult requires the Government to negotiate with Aboriginal people on issues that impact Aboriginals.

[23] *Daniels*, *supra* note 1 at para 617.

[24] *Ibid*.

[25] *Ibid* at para 53.

[26] *Ibid* at para 82.

[27] *Ibid* at para 80.

[28] *Constitution Act*, supra note 2.

[29] *Daniels*, supra note 1 at para 111.

[30] *Indian Act*, RSC 1985, c I-5 (a piece of federal legislation that contains the legal rights and obligations of "Indians") < http://laws-lois.justice.gc.ca/eng/acts/i-5/>.

[31] *Daniels*, supra note 1 at para 116.

[32] *Indian Act*, supra note 30.

[33] *Daniels*, *supra* note 1 at para 122.

[34] *Ibid*.

[35] *Ibid* at para 127.

[36] *R v Powley*, 2003 SCC 43 < http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2076/index.do>.

[37] *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 < http://laws-lois.justice.gc.ca/eng/Const//page-16.html#docCont>.

[38] *Daniels*, supra note 1 at paras 127-29.

[39] *Ibid* at para 183; *Constitution Act*, *supra* note 2.

[40] *Daniels*, *supra* note 1 at para 319; The claimants' witnesses did not find that the term "Indian" only applied to people who lived in a tribe and followed a traditional way of life.

[41] *Daniels*, *supra* note 1 at para 319.

[42] *Ibid* at paras 155, 323.

[43] *Ibid* at para 324.

[44] *Ibid*.

[45] The Province of Canada was a British Colony from 1841 to 1867. After Confederation, the Province of Canada was divided into Ontario and Quebec.

[46] *Daniels*, supra note 1 at para 336.

[47] *Ibid* at para 338.

[48] *Ibid*.

[49] *Ibid* at para 340.

[50] *Ibid* at paras 353-54.

[51] *Ibid* at para 360; Constitution Act, supra note 2.

[52] *Daniels*, supra note 1 at para 376.

[53] *Ibid* at paras 381-84.

[54] *Ibid* at para 392.

[55] *Ibid* at paras 393, 565.

[56] *Ibid* at para 412.

[57] *Ibid* at para 445.

[58] *Indian Act*, supra note 30; Daniels, supra note 1 at para 447.

[59] *Ibid* at para 451.

[60] *Constitution Act*, supra note 2.

[61] *Daniels*, *supra* note 1 at para 490.

[62] *Ibid* at para 492.

[63] *Ibid* at para 491.

[64] *Ibid* at para 500.

[65] *Ibid* at para 513.

[66] *Ibid*.

[67] *Constitution Act*, *supra* note 2.

[68] *Daniels*, *supra* note 1 at para 534.

[69] *Ibid* at para 535; *Constitution Act*, supra note 2.

[70] *Daniels*, *supra* note 1 at para 535.

[71] *Ibid* at para 336; *Constitution Act*, supra note 2.

[72] *Daniels*, supra note 1 at para 538.

[73] *Ibid*.

[74] *Ibid* at para 540; *Constitution Act*, supra note 2.

[75] *Daniels*, *supra* note 1 at para 538; *Constitution Act*, supra note 2.

[76] *Daniels*, *supra* note 1 at para 619; *Constitution Act*, supra note 2.

[77] Legal Information Institute, Fiduciary duty, online: Cornell University Law School < http://www.law.cornell.edu/wex/fiduciary_duty>.

[78] *Daniels*, *supra* note 1 at para 604; See R v Sparrow, [1990] 1 SCR 1075 ; *Constitution Act*, *1982*, *supra* note 37.

[79] *Daniels*, *supra* note 1 at para 607; *Constitution Act*, *supra* note 2.

[80] *Daniels*, *supra* note 1 at paras 602, 609.

[81] *Ibid* at para 606.

[82] *Ibid* at para 608.

[83] *Ibid* at para 609.

[84] *Ibid* at para 611.

[85] *Ibid* at para 614.

[86] *Ibid* at para 617.

[87] *Ibid* at para 619; Constitution Act, supra note 2.

[88] *Ibid*.

[89] *Indian Act*, *supra* note 30.

[90] The Metis National Council is an organization that represents the interests of Metis nationally and internationally.

[91] *Indian Act*, *supra* note 30.

[92] *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" s 15(1)) < http://laws-lois.justice.gc.ca/eng/Const/page-15.html>.

[93] *Metis Settlements Act*, RSA 2000, c M-14 < http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-m-14/latest/rsa-2000-c-m-14.html>.

[94] Ibid.

[95] Shawn Denstedt et al, "Federal Court Extends Federal Jurisdiction to Metis and Non-Status Indians: No Impact to Resource Developers" (14 January 2013), online: Osler.

[96] Aboriginal Affairs and Northern Development Canada, *Statement from Minister Duncan: Daniels Court Decision*, online: Aboriginal Affairs and Northern Development Canada.

[97] Metis Nation, *The Daniels case: frequently asked questions*, online: Metis Nation < http://www.metisnation.ca/wp-content/uploads/2013/02/THE-DANIELS-CASE-FAQS.pdf>.