Review of *Daniels v Canada* (Indian Affairs and Northern Development)

Daniels v Canada (Indian Affairs and Northern Development)[1] is a 2016 Supreme Court of Canada case establishing that the federal government has the jurisdiction to legislate about Métis and non-status Indians – ethnically Indigenous people who do not have full Indian status under the *Indian Act.* The court held that Métis and non-status Indians are included in the term 'Indian' in section 91 (24) of the *Constitution*.[2]

Facts

Harry Daniels was an advocate for Métis rights, who had been actively involved in Métis governance for decades.[3] In 1999, he launched this case while serving as president of the Congress of Aboriginal Peoples.[4] He sought a declaration stating that the federal government had jurisdiction over Métis and non-status Indians.

The federal government has, at times, sought to avoid addressing issues relating to Métis and non-status Indians,[5] claiming that federal jurisdiction over "Indians and lands reserved for Indians" under section 91 (24) of the *Constitution Act, 1867*[6] is limited to "status Indians" –a designated group of people defined by the *Indian Act.* Provincial governments have also been hesitant to address the needs of these groups, arguing that they exclusively fall under the federal government's jurisdiction. This has sometimes left non-status Indians and Métis in a "legislative vacuum."[7]

The Métis people of Canada are the descendants of European fur-traders and Indigenous women. In a narrow sense, 'Métis' sometimes refers to a specific group of people who have been living on the prairies since the eighteenth century.[8] In this case, 'Métis' referred generally to people of mixed Indigenous and European descent.[9]

Non-status Indians are people of Indigenous descent who do not have Indian status under the *Indian Act* for a variety of different reasons. For example, until 1985 female status Indians lost their status if they married a non-status or non-Indigenous man.[10] Non-status Indians may or may not identify closely with an Indigenous or Métis group.[11]

Case

The court was asked to make three declarations:

1. that Métis and non-status Indians are "Indians" under section 91 (24);
2. that the federal Crown owes a fiduciary duty to Métis and non-status Indians;

3. that Métis and non-status Indians have a right to be consulted and negotiated with by the federal government on a collective basis respecting their Aboriginal rights.[12]

A court may make a constitutional declaration, which is a statement clarifying the law, where it would settle a "live controversy" between the parties.[13] Writing for the Court, Justice Abella declared that Métis and non-status Indians are "Indians" under s. 91 (24) as this was a live controversy. However, the Court declined to grant the other two declarations, as they felt that these issues had already been addressed in other cases.[14]

Analysis

To reach its decision, the Court considered what was meant by the term "Indian" when the *Constitution* was written in 1867, and whether it included non-status Indians and Métis. The Court determined that the purpose of section 91 (24) in 1867 was to give the federal government exclusive jurisdiction to negotiate treaties with Indigenous peoples, to enable settlement and national infrastructure projects such as the construction of the railroads. Along with this came exclusive authority to eventually "civilize and assimilate Native peoples."[15]

The Métis were within the category of Indigenous people with which the government historically negotiated, and were understood as "Indians" in government documents. Since then, the federal government has frequently acted as though it did have jurisdiction over Métis and non-status Indians. For example, by including them in residential school projects.[16] In fact, when it suited them to do so, the federal government typically acted as though it had this jurisdiction.[17] The federal government ultimately conceded that its jurisdiction over "Indians" included non-status Indians.[18] The court finally concluded that "Indians" should be read to mean Aboriginal peoples as defined in the *Constitution,* which includes Métis and Inuit peoples.[19]

Scholars and advocates have criticized the *Daniels* decision for defining "Indian" under section 91 (24) in racial terms.[20] In an earlier case, *R v Powley,* the Court had emphasised self-identification and acceptance by an established Métis community as criteria to prove Métis identity.[21] However, *Powley* was about proving membership in a specific Métis group in order to exercise a communal Aboriginal right protected by section 35 of the *Constitution Act, 1982*.[22] On the other hand, *Daniels* is about the original division of governmental powers between the federal and provincial governments in 1867. The Court found that in 1867, section 91 (24) was intended to enable the federal government to negotiate with and pass laws about "Indians," meaning the racially Indigenous peoples of Canada. It is for this reason that the courts could not avoid using ancestry, rather than self-identification, when including Métis in section 91 (24).

Significance

This decision establishes that the federal government has the jurisdiction to create legislation directly relating to Métis and non-status Indians. They are still under no

obligation to do so, but they can no longer argue that they do not have the power.

The decision does not add to the rights of non-status Indians and Métis. Section 91 (24) of the *Constitution* is not about rights. Both Métis and non-status Indians already hold Aboriginal rights protected by section 35 of the *Constitution*.[23] Nor does it automatically include Métis and non-status Indians in existing legislation such as the *Indian Act*.

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

[2] *Ibid* at para 57.

[3] "Biography as Submitted by the Daniels Family" Métis Nation (16 May 2016) online: <http://www.metisnation.ca/index.php/who-are-the-metis/order-of-the-metis-nation/harry-daniels>.

[4] Jean Teillet, "Plainspeak on the Daniels Case January 2013" Pape, Salter, Teillet LLP (May 16 2016) online: <http://www.metisnation.ca/wp-content/uploads/2013/02/Daniels-Plainspeak-FINAL.pdf>.

[5] *Daniels, supra* note 1 at para 15.

[6] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s. 91 (24).

[7] *Daniels, supra* note 1 at para 15.

[8] *Ibid* at para 17.

[9] *Ibid* at para 17-23.

[10] *Sawridge Band v Canada*, 2004 FCA 16 at para 3, 3 FCR 274.

[11] *Ibid* at para 18.

[12] *Ibid* at para 2.

[13] *Ibid* at para 11.

[14] *Ibid* at para 52-56.

[15] *Daniels v Canada*, 2013 FC 6 at para 353, cited in *ibid* at para 5.

[16] *Ibid* at para 28.

[17] *Ibid* at para 32.

[18] *Ibid* at para 20.

[19] *Ibid* at para 46.

[20] Chris Andersen "The Supreme Court Ruling on Métis: A Roadmap to Nowhere" Globe & Mail (May 16 2016) online: <http://www.theglobeandmail.com/opinion/the-supreme-court-ruling-on-metis-a-roadmap-to-nowhere/article29636204/>; Bruce McIvor "What Does the Daniels Decisions Mean?" First Peoples Law (May 16 2016) online: <http://www.firstpeopleslaw.com/index/articles/248.php>.

[21] *R v Powley*, 2003 SCC 43 at para 31-33, 2 SCR 207 .

[22] *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

[23] *Ibid* ("The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed … In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada"); see also *Hopper v R*, 2008 NBCA 42 (for an example of the *Powley* test being applied to non-status Indians to prove entitlement to an Aboriginal (treaty) right.)