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PLAINSPEAK ON THE DANIELS CASE
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What is this document?

This document has been prepared by Jean Teillet and Jason Madden for the Métis National Council ("MNC") in order to assist the Métis Nation in better understanding the Federal Court of Canada's decision in *Daniels et al. v. Canada*, [2013] FC 6 ("*Daniels*"). A copy of the full decision is available at: http://cas-ncr-nter03.cas-satj.gc.ca/rss/T-2172-99%20reasons%20jan-8-2013%20ENG.pdf. This document is not legal advice and it should not be relied upon as such. Also, the opinions expressed within it are those of the authors and not necessarily those of the MNC.

Who was involved in the *Daniels* case?

The case was initiated in 1999 by well-known Métis leader – Harry Daniels – when he was President of the Congress of Aboriginal Peoples ("CAP"). Harry is credited with being instrumental in ensuring the Métis were included in s. 35 of the *Constitution Act, 1982*. CAP claims to represent Métis, non-status Indian peoples and status Indians living off-reserve throughout Canada. Harry, CAP and Leah Gardner (a non-status Indian women from northwestern Ontario) initiated the case (the "Plaintiffs"). In 2005, after Harry's death in 2004, Gabriel Daniels (Harry's son) was added as a plaintiff to ensure a Métis representative plaintiff was maintained in the litigation. At the same time, another non-status Indian, Terry Joudrey, a Micmaq from Nova Scotia, was added to the litigation. At trial, the Plaintiffs were Daniels, Gardner, Joudrey and CAP.

The case was against the federal government as represented by the Minister of Indian Affairs and Northern Development (now known as the Minister of Aboriginal Affairs and Northern Development Canada) and the Attorney General of Canada (the "Defendants").

The case was heard and decided by Justice Phelan (the "Trial Judge") of the Federal Court of Canada (the "Court").

What was the Court asked to do?

The Plaintiffs asked the Court to grant them three declarations:

(a) that Métis and non-status Indians are "Indians" within the meaning of the expression "Indians and lands reserved for Indians" in s. 91(24) of the *Constitution Act, 1867;*
(b) that the Queen (in right of Canada) owes a fiduciary duty to Métis and non-status Indians as Aboriginal people; and
(c) that the Métis and non-status Indian peoples of Canada 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, respecting all their rights, interests and needs as Aboriginal peoples.

Litigants ask courts to make a "declaration" to get an answer to a legal question. A declaration is different from an "order." A court order forces a party to the litigation to do something – pay compensation, etc. A declaration is a remedy that is often sought in Aboriginal rights cases in order to settle a disputed legal issue in the hope that it will answer a legal question and facilitate future negotiations, accommodations or settlements between the government and an Aboriginal community or people.

Ultimately, the Trial Judge only granted the first declaration the Plaintiffs requested, and most of the judgment is focused on this issue. Judge Phelan declined to determine whether Canada owes a fiduciary duty to Métis and non-status Indians or to make any declaration with respect to consultation and negotiation. In declining to issue declarations on these other two issues, he held that this was "without prejudice" to (*i.e.*, does not effect, pre-determine or preclude) Métis and non-status Indians raising these claims in other cases.

The Trial

After 12 years of procedural wrangling and preparation, the trial finally began in May 2011. The Court heard evidence and argument for 31 days, spanning 6 weeks. In total, the Court heard from 5 experts and 5 other witnesses. The evidentiary record included 800 exhibits extracted from over 15,000 documents. The trial ended June 30, 2011. The Trial Judge released his decision a year and a half later on January 8, 2013. Over the course of the litigation, the Plaintiffs spent well over $2,000,000.00. It is not known how much the Defendants spent.

The Daniels Case in a "Nutshell"

The *Daniels* case was about whether Métis and non-status Indians are included in federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

What is section 91(24) all about?

In 1867, Canada was formed by an Act of the British legislature known as the *British North America Act*, 1867. We now call this the *Constitution Act, 1867*. This Act sets out two lists that describe which level of government – federal or provincial – is responsible for various matters. These two lists set out what we usually call the "division of powers" between these levels of government.

The list in s. 91 describes matters in the "exclusive Legislative Authority" or jurisdiction of the federal government, while the list in s. 92 sets out those that are in the "exclusive Legislative Authority" or jurisdiction of the provincial governments. The word "jurisdiction" comes from two Latin words: *juris* meaning "law" and *dicere* meaning "to speak." So, jurisdiction is the authority or responsibility granted to a legally constituted body to deal with specific matters. The specific matters listed in ss. 91 and 92 are often referred to as "heads of power."

It is important to emphasize that 'jurisdiction' does not mean the federal government has control or power over the Métis people. It simply means that the federal government has the authority to legislate on Métis issues. For example, the federal government could enact a *Canada-Métis Nation Relations Act*, which recognized existing Métis governance structures, provided funding to Métis governments, recognized Métis rights, etc. This type of legislation would not be like the *Indian Act* where the Minister of Aboriginal Affairs still maintains a significant amount of control over Band Councils and reserves.

In order to answer "jurisdictional" questions, the Supreme Court of Canada has developed a series of approaches and principles that the Trial Judge in *Daniels* relied on. Generally, Canadian courts use a "living tree" analysis in interpreting Canada's Constitution. This means that our Constitution is not frozen in time. Instead, the Constitution is to be interpreted in a "purposive and progressive manner" that respects our constitutional roots as a country, while also recognizing that our Constitution needs to grow and adapt in order to keep up with the times and address new issues that were not thought of in 1867.

In trying to understand the division of powers between the federal and provincial governments, one cannot rely only on the written text of the *Constitution Act, 1867*. The written text is just the beginning of the inquiry because there are many matters that are simply not mentioned in the listed "heads of power." The environment and health care are good examples of important issues that are not specifically listed in the heads of powers set out in the *Constitution Act, 1867.*

A review of the case law is necessary to determine the scope of each listed power. For example, case law has determined that labour relations are a provincial matter coming under the head of power that refers to "property and civil rights." In another example, even though the *Constitution Act, 1867* does not mention communications (*i.e.,* radio, television, the internet, etc.) the courts have held that it comes within federal jurisdiction under transportation, or interprovincial or international undertakings. The interpretation of ss. 91 and 92 by the court is ongoing. The *Daniels* case is another in a long line of cases that have sought to interpret these heads of power.

By and large, the federal list of enumerated powers in s. 91 is concerned with national matters while the provincial list in s. 92 is concerned with local matters. Provincial heads of power include: direct taxation within the 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. 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, patents, marriage and divorce, and in the 24th head of federal power, 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.

At its core, the *Daniels* case was about settling the ongoing dispute about who has legislative jurisdiction for Métis and non-status Indians – the federal government or the provinces. Métis and non-status Indians have long taken the position that they are included within s. 91(24). The federal government has always understood that "Indians" registered under the *Indian Act* are in s. 91(24), but has denied responsibility for individuals who are members of Indian communities who are not "status Indians." A previous reference case to the Supreme Court of Canada in 1939 determined that the Inuit (then referred to as "Eskimos") were within s. 91(24), even though Inuit are culturally distinct from Indians and not under the *Indian Act.* In addition to denying its jurisdiction with respect to non-status Indians, the federal government long denied jurisdiction for the Métis. Now, we have a clear answer: Métis and non-status Indians are included in s. 91(24).

Why does this jurisdiction issue matter?

This denial of jurisdiction by the federal government and the provinces has made Métis and non-status Indians the proverbial "political footballs" in the Canadian federation.[1]

The practical result of this jurisdictional avoidance was to leave Métis and non-status Indians vulnerable and marginalized. They have not had access to federal programs and services available to "status" Indians or Inuit. They have been denied access to federal processes to address their rights and claims, which are available to First Nations and Inuit. The federal government's own internal documents, which were evidence in the case, concluded that "in absence of Federal initiative in this field they are the most disadvantaged of all Canada citizens."[2]

Ultimately, the Court concluded that this situation "has produced a large population of collaterally damaged people…" because "[t]hey are deprived of programs, services and intangible benefits recognized by all governments as needed. The [Métis and Non-Status Indian] proponents claim that their identity and sense of belonging to their communities is pressured; that they suffer underdevelopment as peoples; that they cannot reach their full potential in Canadian society."[3]

How did the Court determine Métis and Non-Status Indians were in s. 91(24)?

In order to determine whether Métis and Non-Status Indian were in s. 91(24), the Trial Judge reviewed evidence spanning close to 200 years of British and Canadian history. He then applied the legal interpretation approaches for jurisdictional questions to that evidence in order to conclude that Métis and non-status Indians are within this head of power.

In reviewing the historic record prior to 1867 as well as after, the Trial Judge determined 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) to be broad in order to deal with the different Aboriginal peoples it encountered along the way.

The evidence showed that the federal government used this power in many ways, including, allowing Halfbreeds and mixed ancestry individuals into Indian treaties at various times or establishing the Métis scrip system in the Northwest to deal with the "Indian title" of the Métis. The Trial Judge concluded that these federal actions, amongst others, showed s. 91(24) was broad enough to include Métis and non-status Indians.

The Court also noted that, historically, wherever non-status Indians and Métis were discriminated against or subjected to different treatment than non-Aboriginal peoples by the federal government (i.e., residential schools, liquor laws, etc.), it was because non-status Indians and Métis were considered to be of "Indian heredity" and could be dealt with under the "Indian" head of power.

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[1] The federal government has accepted jurisdiction for Métis and non-status Indians north of the 60th parallel. This is because the territorial governments in Yukon, Northwest Territories and Nunavut do not have the same powers as the provinces under s. 92.
[2] *Daniels v. Canada*, 2013 FC 6 (F.C.T.D.), para. 26.
[3] *Daniels, supra*, para. 108.

The Court also decided that the single most distinguishing feature of either non-status Indians or Métis is that of "Indianness" --- not language, religion, or connection to European heritage, which brought them within s. 91(24).[4]

Importantly, the Court also held that the term "Indian" in s. 91(24) is broader than the term "Indian" in the *Indian Act*.[5] Canada argued that it could define who is within s. 91(24) by legislation. The Court rejected this. It is a settled constitutional principle that no level of government can expand (or contract) its jurisdiction by actions or legislation. While Canada 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).

What's the result of the *Daniels* case?

The result of the *Daniels* decision is that <u>all</u> Aboriginal peoples in Canada, including Métis and non-status Indians, are included in federal jurisdiction under s. 91(24). This is a significant victory for Métis and non-status Indians that should ultimately result in positive and tangible results for both groups.

For the Métis, it removes one of the major barriers that the federal government has used to avoid meaningfully dealing with their distinct issues, rights and socio-economic needs. For non-status Indians, it eliminates the federal government's excuse that it only has jurisdiction for "status Indians" living on reserves. Further, the federal government can no longer use the "lack of jurisdiction" to deny Métis and non-status Indians access to programs and services made available to status Indians and Inuit.[6]

While the Court was unequivocal in its declaration that Métis and non-status Indians are within s. 91(24) of the *Constitution Act, 1867*, it did not provide direction to the federal government about what it needs to do in light of this new legal determination. It should, however, be clear to the federal government that the status quo is unacceptable and current policies and approaches to Métis and non-status Indians will need to be reviewed and potentially modified in light of the *Daniels* case. The Court set out its expectation that "the resolution of the constitutional issue will facilitate resolution on other matters."[7] This hopefully sets the stage for future discussions and negotiations.

If the federal government takes the position its jurisdiction for these groups does not require it to exercise that authority in any way, it is very likely that additional litigation will follow. We are of the opinion that an interpretation that the federal government does not need to do anything differently after the *Daniels* case is unsupportable in the face of s. 35 of the *Constitution Act, 1982*, and other constitutional duties owing to Aboriginal peoples.

While the *Daniels* case does not mean that all Aboriginal people and communities need to be treated in an identical way, the federal government can no longer justify "sitting on its hands" – for lack of jurisdiction – when the needs, rights and claims of Métis and non-status Indians require attention or action.

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[4] *Daniels, supra,* para. 532.
[5] *Daniels, supra,* para. 547.
[6] It should be noted that this does not mean the federal government will not rely on other reasons to deny Métis and non-status Indians access to these processes or programs and services.
[7] *Daniels, supra*, para. 110.

Are there any problems with the *Daniels* case?

Unfortunately, there are some problems with the Trial Judge's reasons, even though he ultimately comes to the correct legal conclusion with respect to s. 91(24). Specifically, we believe the Court's definition of who are the "Métis" for the purposes of s. 91(24) is incorrect in law.

The Trial Judge's error starts when he defines who is included within s. 91(24) by virtue of their "Indian ancestry" or "Indian affinity," rather than recognizing that the individuals who may be "Indians" within s. 91(24) are a part of distinct Indian, Inuit and Métis collectives. Put another way, it is our opinion that Aboriginal communities or peoples, and by extension the members of those collectives, are included within s. 91(24) – not just any individual who may simply have some small amount of "Indian" ancestry and a recent claim to affinity with "Indianness."

The fundamental principle that the Crown's obligations and responsibilities are owing to Aboriginal collectives (not simply individuals) dates back to the *Royal Proclamation, 1763*.[8] This principle has been a constant in Canada's ongoing history with Aboriginal peoples. It was reaffirmed in 1982 with s. 35 of the *Constitution Act, 1982*.[9] It has been central to the decisions of the Supreme Court of Canada over the last fifty years. While it is acknowledged that different parts of Canada's Constitution do not need to have the same meaning, we do not believe that one of the fundamental tenets of Crown-Aboriginal relations (that Canada's constitutional obligations are owed to Aboriginal collectives) can be discarded in defining the Métis for the purposes of s. 91(24).

This overarching error leads the Trial Judge to attempt to expand the term "Métis" from its generally understood application to members of rights-bearing Métis communities who meet the requirements of *R. v. Powley*, [2003] 2 S.C.R. 207, to include all individuals who have some "Indian" blood or have recently (and we think mistakenly) taken to using this term to describe themselves.[10] Specifically, at paragraph 117, the Trial Judge defines Métis for the purposes of s. 91(24) as "a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status."[11]

This attempt to cast Métis within the framework of a 'national net' is an error. This approach ignores the constitutional fact that the Métis are a separate and distinct Aboriginal people with their own unique identity, language and culture "as Métis" – not as Indians. Moreover, in *Powley*, the Supreme Court of Canada held that "[t]he Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry" and "[t]he Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots."[12] Even though s. 91(24) is not about Métis rights protected in s. 35, the Trial Judge's current definition of "Métis" for s. 91(24) is incompatible with *Powley*, which was binding authority on the Court.

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[8] The *Royal Proclamation* acknowledges the Crown's obligations owing to "several Nations or Tribes of Indians with whom We are connected, and who live under our Protection …" and not merely individuals with Indian blood.

[9] Section 35 recognizes and affirms the Aboriginal and treaty rights of "Aboriginal peoples", which includes the "Indian, Inuit and Métis peoples" and not merely individuals with Aboriginal ancestry.

[10] It is worthy to note that the "Labrador Métis," which the Trial Judge refers in his decision as an example of a "Métis community", no longer consider themselves "Métis" and identify as Inuit. See *Nunatukavut Community Council v. Nalcor*, 2011 NLTD 44.

[11] At the time of writing this document, the authors understand that legal counsel for the Plaintiffs and Defendants have written to the Court for clarification on whether the Trial Judge meant to refer to paragraph 127 for the definition of Métis for the purposes of s. 91(24) instead of paragraph 117.

[12] *R. v. Powley*, [2003] 2 S.C.R. 207, paras. 8, 11.

The Métis Nation, whose communities have established Métis harvesting rights in *Powley* as well as other cases from Ontario westward, cannot be defined for the purposes of s. 91(24) based on their "Indian ancestry" or "strong affinity for their Indian heritage" because they don't have any. The members of these communities have Métis ancestry and an affinity to their Métis heritage. Clearly, while the Trial Judge's definition may work for non-status Indians, it is incompatible with *Powley* and the realities of the only known Métis 'people' in Canada – the Métis Nation.

Similar to the Inuit who are included in s. 91(24) as "Indians," while being culturally distinct from Indians, the Métis Nation is a culturally distinct Aboriginal people. While it is recognized that the *Daniels* case is not about a Métis claim under s. 35 of the *Constitution Act, 1982*, we are of the opinion that the Trial Judge's reasons on this issue are incorrect in law. A workable definition of the Métis for the purposes of s. 91(24) cannot destroy the long-standing recognition that the Métis have a culture – distinct from Indians – and maintain a strong affinity to their unique Métis heritage – not "Indianness".

Ultimately, we are of the opinion that the Trial Judge in the *Daniels* case gets to the correct legal conclusion that Métis and non-status Indians are "Indians" for the purposes of s. 91(24), but there are inconsistencies and contradictions throughout the Trial Judge's reasons that are unhelpful in properly understanding the Métis Nation, as a distinct Aboriginal people. In some parts, as outlined above, it leads to legal errors. In other parts, it leads to unhelpful ambiguity or confusion on Métis legal issues that can hopefully be addressed if the case is appealed.

Frequently Asked Questions

What happens next?

The federal government has 30 days in order to decide whether it will appeal the decision. This means that we will know by early February 2013. If it is appealed, the case will go to the next level of court, – the Federal Court of Appeal. The next appeal level after that would be the Supreme Court of Canada. If the federal government does not appeal the decision, it should initiate discussions with the MNC and its Governing Members to discuss potential implications from the decision on the Métis Nation.

Métis are not Indians – why are we happy about a case that says we are Indians?

The *Daniels* case does not say that Métis are culturally Indians. It simply says that the term "Indian" in the *Constitution Act, 1867* (which sets out federal jurisdiction) is broad enough to include Métis, in the same way it is broad enough to include Inuit (who are also not culturally Indians). Think of it as similar to how the term "Aboriginal" is used as today. While First Nations, Inuit and Métis people are all "Aboriginal" that does not make them the same. Historically, the term "Indian" was used in the same way "Aboriginal" is used today (*i.e.*, includes all Aboriginal peoples). Métis are happy about the decision because it removes the "lack of jurisdiction" excuse the federal government has long used in order to avoid dealing with Métis rights, interests and needs.

Now that Canada has jurisdiction for Métis, does that mean they control or have power over Métis?

No. Jurisdiction does not mean that the federal government has control or power over the Métis. It simply means the federal government has the jurisdictional mandate to legislate with respect to Métis issues as well as deal with the Métis on a nation-to-nation basis and work towards the reconciliation of Métis rights and claims. For example, the federal government could pass a *Canada-Métis Nation Relations Act* or some other piece of legislation that recognizes Métis Nation governments.

I'm Métis. Does this mean Métis can get registered under the *Indian Act*?

No, this case was not about the *Indian Act*. This decision 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 access programs and services that are currently only available to "status Indians".

Does this case now recognize Métis rights everywhere in Canada?

No, the *Daniels* case was not about Métis rights such as land, harvesting or self-government rights. It was only about answering the constitutional question of whether the federal government had legislative jurisdiction for Métis.

What benefits (i.e., non-insured health benefits, education, etc.) does this decision win for Métis?

This case was not about winning financial benefits or additional programs and services for Métis. It was only about answering the constitutional question of whether the federal government had legislative jurisdiction for Métis. It does not mean that Métis are now entitled to all the same benefits as status Indians or other Aboriginal peoples, but it should open the door for future discussions between the federal government and the Métis Nation on the distinct needs of its citizens as well as Métis rights and claims.

Does this case affect or recognize Métis harvesting rights?

No, this case has absolutely no effect on the Métis Nation's harvesting rights. The case also does not recognize or affirm Métis harvesting rights outside of areas where litigation has been successful or where Métis harvesting agreements have been negotiated between Métis governments and other governments.

Does the *Daniels* case effect the Métis Nation's definition of Métis?

No, the *Daniels* case has absolutely no affect 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 could ever change that definition.

Does the Daniels case mean that the Métis Nation's Homeland is now Canada-wide?

No, this case does not change the Homeland of the Métis Nation, which encompasses the three Prairie Provinces and extends into Ontario, British Columbia, the Northwest Territories and the northern United States. While the Court developed a definition of Métis for the purposes of s. 91(24) that is national in scope, this does not change the identity, history or territory of the Métis Nation in any way. It also does not make communities that claim to be "Métis", and which are outside of the Métis Nation Homeland, a part of the Métis Nation.

This case was about Métis, why was CAP involved?

Litigation is expensive and CAP received significant funding from the federal government to litigate this case. Similar funding was not provided to the MNC. The MNC and its Governing Members have been focusing limited litigation resources on establishing Métis rights from Ontario westward and advancing Métis land claims. Since the MNC and its Governing Members represent the Métis Nation, it will have to be these Métis governments that will be engaged in relation to implementing the *Daniels* case. Notably, the Trial Judge recognized that the CAP is not the representative of the Métis Nation.

If the case is appealed, will the Métis Nation get involved?

Yes, if the case is appealed, the MNC will become involved in the case to ensure the Métis Nation is properly represented.