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A Thunderbolt Decision on Métis Rights: *Daniels v Canada (Indian Affairs and Northern Development)*[1]

The recent Supreme Court of Canada decision in *Daniels* represents a powerful form of judicial activism. While technically pronouncing only on a single legal issue (whether the federal government can pass laws respecting Métis and non-status Indians), the Court has also firmly thrust itself into a larger political discussion about federal *responsibility* for such persons, and all the related program and spending questions this entails.

The Court's approach is clear from the opening paragraph:

> As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust. This case represents another chapter in the pursuit of reconciliation and redress in that relationship.

The language and statements that follow throughout the decision are equally extraordinary in many respects.

While the Court has a history of going forth in a bold manner in respect of aboriginal rights and title (a role thrust upon it in 1982 when section 35 was included in the *Constitution Act, 1982*), that

[1] 2016 SCC 12.

has not – until this decision – been the Court's approach to interpreting and commenting on federal jurisdiction in respect of "Indians and lands reserved for the Indians" under the 148 year-old provisions of the *Constitution Act*, *1867*.[2]

The Decision

In 1999, four individual claimants and the Congress of Aboriginal Peoples, commenced the action against the federal government seeking declarations that: (1) Métis and non-status Indians are "Indians" within the meaning of Section 91(24) of the *Constitution Act, 1982*; (2) the federal Crown owes a fiduciary duty to Métis and non-status Indians as Aboriginal peoples; and (3) Métis and non-status Indians have a right to be consulted and negotiated with by the federal government.

The trial judge at the Federal Court held that "Indians" under section 91(24) was a broad term referring to all Indigenous peoples in Canada including Métis and non-status Indians; however he declined to grant the second and third declarations on the grounds that they were vague and redundant.[3] The Federal Court of Appeal accepted the trial judge's finding that "Indians" in section 91(24) included all Indigenous peoples generally. The Court upheld the first declaration, but narrowed its scope to include only those Métis who satisfied the three criteria from *R v Powley*.[4] The Court also declined to grant the second and third declarations.[5]

In its decision, the Supreme Court of Canada agreed with the findings of the trial judge and held that all Aboriginal peoples of Canada are "Indians" as that term is used in section 91(24) – including non-status Indians and Métis (even though a narrower definition of Indian is used when referring to the aboriginal rights of Indians, Inuit and Métis protected by section 35). The Court rejected – in the section 91(24) context - the criteria in *Powley* that had been

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[2] While section 91(24) of the *Constitution Act*, *1867* was interpreted in 1939 to be broad enough to include Inuit people (*Reference whether "Indians" includes "Eskimo"*, [1939] SCR 104)[2] it has otherwise remained unclear whether or not Métis and non-status Indians were also covered by it.

[3] *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6.

[4] 2003 SCC 4 (Where the Court held that for the purposes of section 35 of the *Constitution Act*, *1982*, a person qualifies as Métis if (a) they self-identification as Métis; (b) they have an ancestral connection to an historic Métis community; and (3) they have acceptance by the modern Métis community).

[5] *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 101.

developed specifically for purposes of applying section 35. More specifically, the Court held that there was no principled reason for excluding any Aboriginal people from the federal government's authority on the basis of a "community acceptance" test as outlined in *Powley*.

In support of its decision, the Court noted that historical, philosophical, and linguistic considerations in Canada all support a finding that "Indians" in section 91(24) includes all Aboriginal peoples. The Court noted that the federal government had, at one time or another and for a variety of reasons, assumed legislative jurisdiction over both groups under their power over "Indians", especially during the expansionist period of the government after Confederation.

The Court also upheld the lower Court's decisions that the second and third declaration should not be made. In this regard, the Court noted that declarations are only to be made if they will have practical utility and settle a live controversy between the parties. While the Court recognized that the granting of the first declaration would have enormous practical utility for these two groups, it held that the second and third declarations had no practical effect as it was already settled law that the Crown is in a fiduciary relationship with Aboriginal peoples and that there is a context-specific duty on the Crown to negotiate when aboriginal rights are engaged.[6]

Implications

On a narrow and literal reading, the decision does nothing more than make clear that the federal government has the authority to pass laws dealing with Métis and non-status Indians if it wishes to do so. The division of powers in sections 91 and 92 of the *Constitution Act, 1867* deal simply with the *power* to legislate. Neither provides an *obligation* to do so, nor do they confer rights on people that might fall within the scope of such legislation or related government programs.

However, there are a number of reasons why this decision should not and will not be read so narrowly.

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[6] this is, with respect, a rather weak rationale to decline the declaration given that the Court itself, in this very case, has held that there are aspects of the relationship between the Métis and the Crown that warrant consideration from a reconciliation perspective, but do not necessarily constitute aboriginal rights for the purposes of section 35.

First, the Court itself appears, perhaps intentionally, to not draw a clear distinction between the ability to legislate and the obligation to do so or an obligation to provide programs and benefits. Instead, the judgment is replete with statements about obligations and responsibility that one would not normally find in a division of powers decision. For example, the Court makes the following comments:

> 12 ... assigning constitutional authority between the federal and provincial governments will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution....
>
> 14 This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences...
>
> 15 ... neither level of government has acknowledged constitutional responsibility...
>
> 36 The Report of the Royal Commission on Aboriginal Peoples, released in 1996... called on the federal government to "recognize that Métis people ... are included in the federal responsibilities set out in section 91(24) of the Constitution Act, 1867": vol. 2, Restructuring the Relationship, at p. 61....

Second, the Court notes, at paragraph 53, that the Crown accepted that a fiduciary relationship exists between the Crown and the Métis. The Court also cites its prior decision in *Manitoba Métis Federation Inc v Canada (Attorney General)*[7] as authority for this conclusion, but it is not easy to see this case as authority for the proposition stated. That case seems to indicate that a fiduciary duty exists only when the Crown has assumed discretionary control over specific aboriginal interests. Other cases, like *Haida Nation v British Columbia (Minister of Forests)*[8] also expressly rejected the "fiduciary" concept as the overarching basis for Crown / aboriginal relations. In *Haida* the Court said this at paragraph 18:

[7] 2013 SCC 14.

[8] 2004 SCC 73.

As explained in *Roberts*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

> ..."fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship .... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

In any case, the Court declined to make the second requested declaration regarding this fiduciary relationship, noting it "lacks practical utility because it is restating settled law". This is an incredibly powerful statement that opens up all kinds of questions as to what that fiduciary duty entails, when and how it may have been breached in the past, and who has the right to bring cases going forward regarding damages for historic breaches. It will, once again, surely spawn more litigation.

Third, the decision raises questions as to whether and to what extent governments will be required to consult and consider the interests of Métis and non-status Indians in any project permitting decisions - on the basis of a fiduciary relationship and the honor of the Crown - even in cases where that community cannot satisfy the tests for asserting an aboriginal right under section 35. While the duty to consult cases do not directly apply to non-*Powley* Métis and non-status Indians - since they deal only with circumstances involving asserted aboriginal rights – the *genesis* of that duty to consult has at times been variously grounded in whole or in part on the Crown's fiduciary duty to aboriginal peoples, the honor of the Crown and obligations to advance reconciliation. All of these elements are found in this decision and it would not be much of a further step to find a duty to consult in respect of non-*Powley* Métis and non-status Indians. Should this occur, it will be extremely difficult to know who, for the purposes of such consultation, represents the potentially affected Métis and non-status Indians.

Fourth, the decision raises very important questions about whether and to what extent the equality rights provision in section 15(1) of the *Canadian Charter of Rights and Freedoms*, and section 1(b) of the *Canadian Bill of Rights* might be invoked to require governments to extend to Métis and non-status Indians various programs and

benefits that are presently available only to status Indians. The law of equality rights is complex, and there are cases where the courts have allowed programs to provide rights or benefits to some aboriginal groups and not others, [9] but whether the same will be countenanced in respect of Métis and non-status Indians in light of the strong language of the Court in *Daniels* is something that is not at all clear. One can again fully expect such litigation to be initiated in the near future.

Fifth, from a practical perspective, there can be no doubt that the expectations of Métis and non-status Indian individuals will be increased by this decision. It will have the effect of altering the playing field for a range of discussions related to federal responsibilities and programs that will surely not be limited by suggestions that the decision is technically only about the right to *legislate*. Indeed, one doubts whether any government official will ever even have the temerity to *try* and make that point. Media attention to the decision has been entirely consistent with this increase in expectations and there has been very little commentary on the fact that the case is – technically speaking – about the *right* of the federal government to pass laws respecting Métis and non-status Indians – not an *obligation* to provide programs or benefits.

Sixth, it is important to note that the discussion of the Métis and non-status Indians in this case is not limited to individuals that meet a specific test for membership in a community. On the one hand this may not seem particularly problematic since the Court has not *directly* imposed any obligation to legislate or provide benefits in respect of any such people. But to the extent that the decision does raise further questions or demand practical change as outlined above, this issue will need to be tackled at some point. In doing so, government will inevitably need to be able to draw some distinction as to who is or is not a Métis or non-status Indian for the purposes of the legislation or the program / benefit. One can only wish them best of luck in this regard. Indeed, it is not even easy to follow the language of the Supreme Court itself, which variously refers to "Métis" (in both the *Powley* and broader sense), "non-status Indians", "mixed-ancestry communities", "communities of mixed

[9] See for example *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, and *Lovelace v Ontario*, [2000] 1 SCR 950.

Aboriginal and European background", "mixed communities" and "mixed European and Aboriginal heritage".

Finally, while it has not received a great deal of attention, the case is very important from a broader constitutional law perspective, as it furthers a significant trend in recent Supreme Court of Canada case law endorsing the overlapping ability of both provincial and federal governments to legislate in respect of the same subject matter, provided only that the "core" of the other's legislative competency is not impinged upon. In this regard, the Court specifically acknowledges the (very comprehensive and complex) provincial Métis legislation adopted by the province of Alberta through the *Métis Settlement Act*[10] and related legislation. While the Court does not specifically pronounce on the constitutional validity of this legislation, there can be little doubt that this decision suggests the Supreme Court of Canada has nary a worry about it and any party that may be interested in challenging that legislation may as well save their filing fees.

Conclusion

Given the way the Supreme Court of Canada has come at it, *Daniels* is an extremely important decision – the consequences of which have only begun to be contemplated. The case will provide a launching pad for further discussions between Métis and non-status Indians, the federal government, and to some extent industry as well. It will no doubt spawn a whole new generation of aboriginal law litigation.

While the Court's underlying commitment to advancing reconciliation in respect of Métis and non-status Indians is laudable, and while one cannot help but conclude that the Court is intending to prod the advancement of Métis and non-status Indian rights beyond the simple question of which government can legislate, one may equally wonder whether the full ramifications of the decision were apparent to the Court. No matter how one answers that question, it raises important and complex questions about the role of an unelected Court in a constitutional democracy.

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[10] RSA 2000, c M-14.

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a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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