

Métis and Non-Status Indians as Indians: Daniels v. Canada

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Section 91 of the Canadian Constitution (the *Constitution Act, 1867*) gives the Parliament of Canada (i.e., the federal government) exclusive jurisdiction over “Indians and Lands reserved for the Indians”. Sounds simple, right? But since the drafting of the Constitution, governments and Indigenous peoples have had to wrestle with a number of questions. Who are Indians? What about other groups of Indigenous peoples who have been variously referred to throughout Canada’s history as the Métis “half-breeds”, and non-status Indians? Who are the Métis? How does this all tie into the recognition of aboriginal and treaty rights of the “aboriginal peoples of Canada” under section 35 of the *Constitution Act, 1982*, which forms the basis for consultation with groups affected by government action. Section 35 defines the Aboriginal peoples of Canada to include the Indian, Inuit and Métis peoples of Canada.



In the Supreme Court of Canada decision in *Daniels v. Canada (Indian Affairs and Northern Development)* delivered April 14, 2016, the Court was asked to deliver the following declarations:

1. That Métis and non-status Indians are “Indians” within the meaning of section 91;
2. That, as Indians, Métis and non-status Indians are owed a fiduciary duty by the federal government; and
3. That, as aboriginal peoples, Métis and non-status Indians have the same right to consultation and negotiation in circumstances where government actions may impact their aboriginal and treaty rights.

Madam Justice Abella agreed with the conclusions of the courts below that non-status Indians and Métis are Indians within the meaning of section 91(24) of the *Constitution Act* and are therefore under the jurisdiction of the federal government. As a precondition of granting the declaration, the Court considered whether the declaration would have any practical utility. It found that by declaring Métis and non-status Indians as Indians, it would resolve a

longstanding jurisdictional issue in which both provincial governments and the federal government have denied legislative responsibility in respect of Métis and non-status Indians, leaving them in a jurisdictional wasteland “with significant and obvious disadvantaging consequences”.

The Court moved away from any neat definitions as to who would be considered to be Métis and who might be considered to be a non-status Indian. It recognized that the term “Métis” could refer to the historic Red River Métis community and its descendants or as a general term for persons with mixed aboriginal and European ancestry. The Court pointed out that some mixed-ancestry groups identify themselves as Indians as opposed to Métis and that there are communities who identify themselves as Métis who were never associated with the Red River settlement.

Similarly, a “non-status Indian” could be someone who no longer has status under the *Indian Act* or to someone who is a member of a community with mixed ancestry. Further, the Court found no need to distinguish between which mixed-ancestry communities are Métis and which are non-status Indians, since they all fall within the definition of “Indians” under section 91(24) simply because they are all Aboriginal peoples.

The Court went on to confirm that just because a group has been identified as Indian, it did not mean that they are entirely beyond the legislative control of the provinces. Provincial laws will continue to apply to all Indians (as defined under section 91(24)) so long as the provinces do not interfere with the core of the federal Indian power.

The Court did not grant the second and third declarations on the basis that it was already settled law that the Crown has a fiduciary duty to all Aboriginal peoples, including Métis and non-status Indians, and that it is already established that the Crown has a duty of consultation and accommodation in circumstances where there may be an impingement upon aboriginal or treaty rights.

The decision does not grant any new rights to the Métis and non-status Indian peoples. It does not make them subject to the *Indian Act*. It does not obligate the federal government to legislate or to provide programs.

What it will do, however, is put these groups firmly under the federal umbrella. It removes the ability of the federal government to say to these groups that they are not under its jurisdiction. It will make it difficult for the federal government to refuse to provide programs and benefits at least comparable to those provided to Indians as defined under the *Indian Act*. It will, at the very least, trigger negotiations in that regard.

From the perspective of natural resource development, the decision reaffirms what has already become common practice. When identifying Aboriginal groups with whom consultation must be carried out, it is now usual to consider the interests of Métis and non-

status groups that might be impacted by the project or resource allocation decision. This is not something that will change. What may be more difficult is the identification of the limits of the rights and interests that these groups may assert for the purposes of identifying whether and to what extent their interests may be compromised through the granting of a particular approval or the development of a particular project. All of this goes to the nature of the consultation process and the extent to which mitigation or compensation may be required in any given circumstance.

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