A Comment on the *Daniels* Case

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In *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, the Supreme Court issued a simple declaration meant to answer a long standing issue: Are Métis and non-status Indians "Indians" under section 91(24) of the *Constitution Act, 1867*? The Supreme Court answered "yes" and has clearly held that the federal government has the power to legislate with respect to not just status Indians, but non-status Indians and Métis.

In Canada, legislative responsibilities are split between the federal and provincial level of government. For example, the federal government is responsible for legislating over national defence, and criminal law, whereas the provinces have the power to legislate over hospitals and property and civil rights. The federal government has the power to legislate over status Indians who are individuals registered under the *Indian Act*. This registration entitles status Indians to a wide range of federal programs and services such as non-insured health benefits and tax exemptions. However, neither Métis nor non-status Indians are registered under the *Indian Act*. Because of this, neither the federal nor provincial level of government has acknowledged constitutional responsibility for these groups. This has resulted in, what the Court identified in *Daniels*, as a "legislative vacuum" where neither Métis nor non-status Indians are able to benefit from federal programs and services. It is this "legislative vacuum" that sparked the litigation and the Court's decision to rule on this important constitutional issue.

Resolving the "legislative vacuum" as it relates to Métis is the crux of *Daniels*. The Crown conceded in oral argument, and the Court confirmed in its decision, that non-status Indians are recognized as Indians under section 91(24). As such, the Court focused on whether the Métis are recognized as Indians under section 91(24). After consideration of the historical and linguistic context as to how Canada treated and referred to the Métis, the Court held that Métis are Indians under section 91(24). For example, the term "Indian" has long been used as a general term referring to all Indigenous peoples, including the Métis. In addition, before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. More recently, the Truth and Reconciliation Commission of Canada found that many Métis were sent to Indian Residential Schools in order to facilitate Canada's vision that there was no place for the Métis Nation.

The implication of *Daniels* lies predominantly in the potential impact on Métis and non-status Indians access to federal programs and benefits. For example, status Indians have access to non-insured health care benefits. Will the same benefits now apply to Métis and non-status Indians? This is a difficult question to answer and may require the federal government to reassess criteria as to who qualifies for such benefits. Under section 91(24), the federal government has the power, but is not required, to legislate. It is possible that the status quo will be maintained. However, section 15 of the *Canadian Charter of Rights and Freedoms* requires that all individuals be treated equally under the law. Now that *Daniels* has made clear that Métis and non-status Indians are Indians for the purposes of section 91(24), a failure of the federal government to extend programs and services to these groups may be in violation of section 15. The same logic can be applied to tax issues. Currently, if a status Indian works on reserve land, he or she is tax-exempt. Many non-status Indians and Métis work off-reserve which begs the question whether they should receive the same tax-exempt status that applies to on-reserve activities.

The other issue relates to the decline in the population of status Indians. As per the *Indian Act*, status is maintained by one status Indian marrying another status Indian. However, there is an increasing number of status Indians marrying non-status individuals which is reducing the overall number of status Indians in Canada. In light of *Daniels*, will the ever increasing population of non-status Indians have access to federal programs and services? The above issues and questions are ones that the federal government will either elect to consider or be forced to do so through litigation.

Finally, *Daniels* does not change the requirement for the Crown to consult with Métis people. The *Powley* case in 2003 remains the significant case regarding Métis rights and consultation. In *Powley*, the Court stated that section 35 of the *Constitution Act, 1982* requires that Métis customs and traditions be recognized and protected. Determining who is Métis for the purposes of section 35 consultation involves a three-part test which includes the criteria that an individual be accepted by the modern Métis community. However, the Court in *Daniels* makes clear that section 91(24) serves a very different purpose because it is about the federal government's relationship with Canada's Aboriginal peoples, which can include those who may no longer be accepted by their community because they were separated from them as a result of Indian Residential Schools, for example.

Daniels is a significant yet simple decision in terms of what it means for the federal government and the future of providing programs and services to Métis and non-status Indians.

DISCLAIMER

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