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Case Comment: *Daniels v. Canada*, [2013] F.C.J. No. 4

By Joseph Magnet, Andrew Lokan** and Lindsay Scott****

On January 8, 2013, Justice Phelan of the Federal Court of Canada released his long-awaited decision in *Daniels v. Canada*.[1] This decision, the product of 13 years of litigation and a nine week trial in 2011, is arguably one of the most significant decisions in many years on the rights and status of Métis and non-status Indians.

The critical question posed in the litigation was: "Are Métis and non-status Indians (MNSI) considered "Indians" under s. 91(24) of the *Constitution Act, 1867*?" Justice Phelan answered affirmatively, and declared that MNSI are "Indians" for the purpose of s. 91(24), meaning they fall within the exclusive legislative jurisdiction of the federal government.

This article will briefly summarize the litigation and the trial evidence, highlight the key aspects of the 175-page decision, and note some potential implications of the decision on Aboriginal law and Aboriginal peoples in Canada.

Litigation Background

This action was an action for declaratory relief. The plaintiffs sought to establish that MNSI came within exclusive federal jurisdiction under the *Constitution Act*. This was a division of powers case, not a section 35 case.

The reason for the division of powers focus was that the federal and provincial governments disputed the issue to a standstill during the period of active constitutional revision that stretched from 1978 to 1992. Both levels of government agreed that MNSI had needs similar, if not greater than status Indians – needs that were then going unmet. The governments could not agree about the right mechanisms to provide those services, and especially disagreed about how the costs of those services should be shared. The provinces argued that as MNSI were "Indians" the federal government was responsible; Ottawa responded with a denial that MNSI were within federal jurisdiction. The result was that the services were simply not provided by either level of government – a result

[1] *Daniels v. Canada*, 2013 FC 6, [2013] F.C.J. No. 4 [*Daniels*]. On February 8, 2013, Canada filed its Notice of Appeal to the Federal Court of Appeal.

that all recognized as arbitrary and harsh. As the Federal Court states, quoting from internal Cabinet level documents:

> The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.[2]

The plaintiffs (the Congress of Aboriginal Peoples and four individuals) sought three declarations from the court, specifically that:

1. MNSI are "Indians" within the meaning of the expression "Indians and lands reserved for the Indians" in s.91(24) of the *Constitution Act, 1867*;
2. the Queen owes a fiduciary duty to MNSI, as Aboriginal peoples; and
3. the MNSI 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.

The Defendants argued that some or all of the claims in the action were statute-barred, subject to laches and equitable estoppel, and gave rise to no reasonable cause of action.

Justice Phelan summarized the more substantive aspects of the Defendants' position:

> The Defendants resist the Plaintiffs' claims on several grounds. The principal grounds are that no declaration can or should issue because there are insufficient facts and grounds for such relief; that Métis are not and were not either in fact or law or practice considered "Indians"; that there is no such group legally known as "non-status Indians"; that the allegations of deprivation and discrimination are denied and that the forms of relief required of rights to consultation and negotiation are either not available to non-status Indians and Métis or in any event, all legal obligations have been met.[3]

The Defendants argued repeatedly that the Court should not exercise its discretion to decide the matter because, "in summary, it is a theoretical matter which will resolve nothing."

The Evidence at Trial

The evidentiary themes of the parties painted very different pictures for the court of pre- and post-Confederation policy regarding Indians. Justice Phelan noted that the type of

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[2] *Daniels* at para. 84.
[3] *Daniels* at para. 5.

evidence in the trial was similar and sometimes identical to the evidence in *Manitoba Métis Federation Inc. v. Canada*.[4]

The Plaintiffs sought to establish through four weeks of expert and non-expert evidence that the purpose and intent of s. 91(24) at confederation led to the conclusion that MNSI were "Indians". Following Confederation, until at least the 1930s, the federal government often treated MNSI groups as if they were Indians subject to federal jurisdiction. The Plaintiffs demonstrated this treatment through evidence of legislation, regulation and the practices and policies of the federal government.

The Defendants, in contrast, adopted a more traditionalist approach. Over two weeks, their expert evidence was to the effect that historical evidence and cases from the Supreme Court of Canada establish that the word "Indian" in s 91(24) was not meant to include the distinct peoples and communities now known as the Métis. With respect to the question of non-status Indians, the Defendants' evidence reflected the position that legislation enacted under s. 91(24) must draw a line between those who are considered Indians and those who are not. The Defendants claimed that trying to determine the natural limits of Parliament's jurisdiction (absent actual or proposed legislation) is an impossible task, and led evidence on this front.

The Decision

Justice Phelan granted the first declaration, that MNSI are Indians for the purpose of s. 91(24), and dismissed the other two declarations regarding fiduciary duty and the duty to consult.

He held that, on the evidence of this case, MNSI are connected to the racial classification "Indian" by way of marriage, filiation and most clearly intermarriage. Justice Phelan found that MNSI were differentiated from others in Canadian society, particularly Euro-Canadians, because of their connection to this racial classification. To the extent that MNSI were discriminated against or subjected to different treatment, such as in schooling, liquor laws, land and payments, it was based on their identification with or connection to Indian ancestry. The single most distinguishing feature of MNSI is that of "Indianness", not language, religion or connection to European heritage.[5]

In dismissing the second declaration regarding fiduciary duty, Justice Phelan nonetheless stated that "the fiduciary relationship exists as a matter of law flowing from the declaration that MNSI are Indians pursuant to s.91(24). The relationship engages the honour of the Crown and applies to Métis as well as non-status Indians."[6]

The court explained it was unable to grant the third declaration in the absence of better particulars of what is at issue to consult on or negotiate.[7]

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[4] (2010) MBCA 71, 2013 SCC 14.
[5] *Daniels* at paras. 531-532.
[6] *Daniels* at para. 607.
[7] *Daniels* at para. 614.

Implications

In the days following the release of *Daniels*, the media coverage was dominated by the question of what the decision means – to MNSI, to status Aboriginal Canadians, and to non-Aboriginal Canadians. What is clear is that the federal government's major justification for withholding significant Aboriginal programming from MNSI has been undermined. It is likely that a significant shift in federal Aboriginal policy will be the consequence.

From a legal perspective, MNSI are now considered "Indians" in the constitutional sense and they fall within the exclusive jurisdiction of the federal government. Flowing from this recognition of Indianness and jurisdiction (and notwithstanding the court's dismissal of the second declaration), MNSI become part of the special fiduciary relationship Canada has with Indians. The decision has expanded "Indians" in Canada by at least 600,000 people.

While the plaintiffs in *Daniels* did not claim a right to specific legislation or access to specific programs, the clear implication is that enhanced Aboriginal specific services should be provided to them. What those specific services will be, how they will be delivered, how they might depart from programming directed to status Indians is likely to be decided by negotiations, with further litigation occurring (hopefully) at the margins. The decision is now currently under appeal, so Canada is unlikely to take any drastic measures to respond to *Daniels* until the case is finally resolved.

Daniels may also have significant implications for Aboriginal Canadians on a personal level.

First, MNSI, formerly "political footballs" being punted from one level of government to another, now have a clear understanding of where to go for programs and services related to their needs as Indians. Justice Phelan clarified this long-standing question, which will undoubtedly simplify and focus the efforts of MSNI groups in obtaining the services they require.

Second, Justice Phelan directly addressed the harsh consequences that the jurisdictional buck-passing has had on MNSI. The individual plaintiffs each testified at trial about the tangible and intangible effects of not being formally recognized by either level of government. Rather than shying away from the past and present suffering of thousands of MNSI across Canada, Justice Phelan acknowledged the "collaterally damaged MNSI" directly:

> As the Defendants' documents reveal […] the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged MNSI. They are deprived of programs, services and

> intangible benefits recognized by all governments as needed. The MNSI proponents claim that their identity and sense of belonging to their communities is pressured; that they suffer undevelopment as peoples; that they cannot reach their full potential in Canadian society.[8]

The effect of this statement could have tremendous impact on individual MNSI in terms of recognition and reconciliation. Justice Phelan acknowledged that MNSI have needs related to their Indianness and that they have been deprived of this recognition, with detrimental effect.

Justice Phelan also acknowledged the complexity and multi-faceted nature of Aboriginal identity. On the evidence, there were no discrete silos of Aboriginals, nor are Aboriginals in Canada a monolithic whole. There is no need to further separate Aboriginals into categories, as Justice Phelan described:

> As referred to earlier, s. 91(24) is a race-based power. There is no principled reason to make that race based constitutional jurisdiction more balkanized by emphasis on degrees of kinship or degrees of cultural purity. As described by Harry Daniels Jr. – one can honour both the feather and the fiddle. Indeed as will be seen later, there are Métis who are also registered Indians.[9]

Given that the decision is under appeal, and could be further appealed to the Supreme Court of Canada, it may be years before the logic of this landmark decision drives renovation of Aboriginal policy. It is clear that Justice Phelan hopes his decision will lead to an increase in collaboration, discussion and reconciliation between MNSI and Canada:

> The recognition of Métis and non-status Indians as Indians under s.91(24) should accord a further level of respect and reconciliation by removing the constitutional uncertainty surrounding these groups.[10]

That is a hope many share.

** Joseph Magnet is a law professor at the University of Ottawa. He has acted as counsel in more than 200 constitutional cases in the Supreme Court of Canada and the trial and appellate courts of Ontario, Quebec, and Manitoba. He has been advisor to the Canadian Federal, Provincial and Territorial Governments on constitutional matters, a frequent invited expert before Senate and House of Commons Committees; counsel to individual Senators and Members of the House of Commons; counsel for First Nations, minority*

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[8] *Daniels* at para. 108.
[9] *Daniels* at para. 568.
[10] *Daniels* at para. 568.

groups, corporations and others. He is General Counsel to the Congress of Aboriginal Peoples with responsibility for all constitutional, treaty and Aboriginal rights litigation and Chief Negotiator and Lead Counsel for First Nations in Land Claims Processes. He was elected to the Royal Society of Canada in 1998.

***Andrew Lokan practices in the areas of constitutional law, appeals, administrative law, labour and employment law, and pension litigation. He has appeared in more than 20 cases before the Supreme Court of Canada, and regularly appears before a wide range of other courts and tribunals. He has published widely on subjects relating to public law, and is a frequent speaker on these subjects at seminars and conferences. Since 1992 he has acted as Special Counsel to the Canadian Civil Liberties Association on a pro bono basis, and since 1998 he has been an Adjunct Professor at Osgoode Hall Law School, where he teaches constitutional litigation.*

****Lindsay Scott has a varied litigation practice, including constitutional litigation, commercial litigation, employment law and insolvency. In her two years of practice, she has appeared before all levels of court in Ontario and in the Federal Court of Canada.*