

Supreme Court of Canada clarifies meaning of “Indian”

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The Supreme Court of Canada’s (SCC or Court) decision in *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, (Decision) confirms that “Indians” under section 91(24) of the *Constitution Act, 1867* includes all Aboriginal peoples, including non-status Indians and Métis. The Decision is significant because historically, the federal and provincial governments have debated which level of government has legislative authority regarding these groups. Although the SCC’s finding does not create a duty to legislate, it puts an end to a longstanding jurisdictional dispute that has perpetuated the disadvantages faced by Aboriginal peoples in Canada.

Brief facts

In 1999 when the litigation commenced, Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey and the Congress of Aboriginal Peoples (Appellants) sought three declarations: (1) that Métis and non-status Indians are “Indians” under section 91(24) of the *Constitution Act, 1867*; (2) that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and (3) that Métis and non-status Indians 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 trial judge concluded that “Indians” under section 91(24) is a broad term referring to all Aboriginal peoples in Canada, including non-status Indians and Métis. He declined to grant the second and third declarations. The Federal Court of Appeal (FCA) accepted the trial judge’s findings of fact, including that “Indians” under section 91(24) includes all Aboriginal peoples generally. However, the FCA narrowed the scope to exclude non-status Indians and include only those Métis who satisfied the three criteria set out in the SCC’s decision in *R v. Powley*, 2003 SCC 43. The FCA also declined to grant the second and third declarations. On appeal, the Appellants sought to restore the first declaration as granted by the trial judge and asked that the second and third declarations be granted.

The SCC allowed the appeal in part, setting aside the FCA’s conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria. The Court upheld the decisions of the trial judge and the FCA not to grant the second and third declarations.

SCC decision

The SCC began by considering whether granting the declarations would satisfy the practical utility threshold. Historically, neither the federal nor provincial levels of government have acknowledged constitutional responsibility over non-status Indians and Métis. The Court found that granting the first declaration would guarantee certainty and accountability and

offer the practical utility of resolving a longstanding jurisdictional dispute.

The Court held that ambiguities in the definitions of “Métis” and “non-status Indian” did not preclude a determination into whether the two groups are within the scope of section 91(24). It acknowledged that the definitional contours of “non-status Indian” are imprecise and can refer to Indians who no longer have status under the *Indian Act*, or to members of mixed communities which have never been recognized as Indians by the federal government. The Court agreed with the trial judge that the historical, philosophical and linguistic contexts establish that “Indians” in section 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis.

Section 35 of the *Constitution Act, 1982* does not define the scope of section 91(24); however, it does state that Indian, Inuit and Métis peoples are Aboriginal peoples for the purposes of the Constitution. The Court held that “Indian” or “Indians” in the constitutional context has two meanings: a broad meaning in section 91(24) that includes both Métis and Inuit and can be equated with the term “aboriginal peoples of Canada” used in section 35, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. While the federal government conceded that section 91(24) includes non-status Indians, the SCC stated that it would be constitutionally anomalous for the Métis to be the only Aboriginal peoples to be recognized and included in section 35 yet excluded from the constitutional scope of section 91(24). The Court concluded that Métis and non-status Indians are “Indians” under section 91(24) by virtue of the fact they are all Aboriginal peoples. The Court advised that determining whether particular individuals or communities are non-status Indians or Métis under section 91(24) remains a fact-driven question to be decided on a case-by-case basis in the future.

In considering the *Powley* criteria, the SCC emphasized that the constitutional purpose of section 91(24) – which relates to the federal government’s relationship with Canada’s Aboriginal peoples – is very different from that of section 35. In *Powley*, the Court relied on the criteria to determine who qualifies as Métis for the purposes of section 35(1). The SCC was unable to find any principled reason for arbitrarily excluding Métis from Parliament’s legislative authority on the basis of the test in *Powley*. The Court also made clear that Métis that qualify as “Métis” for the purposes of section 91(24) do not automatically qualify as “Métis” for the purposes of section 35. They are linked but distinct constitutional sections – one dealing with jurisdiction (section 91(24)) and one dealing with the constitutional recognition and affirmation of Aboriginal and treaty rights (section 35).

Implications

The Decision confirms that the federal government has jurisdiction over non-status Indians and Métis. However, it does not mean that all provincial legislation pertaining to non-status Indians and Métis is inherently *ultra vires*, or beyond the jurisdiction of governments. This is consistent with the approach taken by the SCC decision in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, which confirms that provincial laws of general application apply to treaty rights and associated lands, and that provincial governments can regulate and infringe treaty rights, where justified.

Further, the Decision does not affect the Crown’s duty to consult with Aboriginal groups. The SCC acknowledged that *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, and *Powley* already recognize a context-specific duty to negotiate when Aboriginal rights are engaged. The Crown’s duty to consult does not necessarily apply to every group – it still requires a case-by-case analysis and the assertion of a *bona fide* Aboriginal or treaty right.

The Decision raises the issue of the appropriate role of the federal government in funding programs and services (which would otherwise fall within provincial jurisdiction, for example in areas such as health and education on reserves) to the broader group of Indians under section 91(24) and on what basis one group of section 91(24) Indians receives federal programs and services (namely Indians living on reserve), and other groups receive no or limited services (e.g., Métis, non-status Indians, registered Indians living off-reserve, other mixed communities, etc.).

Notably, the Decision now provides a fundamental basis for the federal government, along with the provincial and territorial governments, to engage with *all* Aboriginal peoples regarding the larger issue of reconciliation.