May 6, 2014

"The Feather and the Fiddle": The Meaning of 'Indian' in s 91(24)

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Cases commented on: *Daniels v Canada*, 2013 FC 6; *Canada v Daniels*, 2014 FCA 101.

A decision by the Federal Court of Appeal has largely upheld a trial judge's finding on just who exactly is encompassed by the word 'Indian' in s 91(24) of the *Constitution Act, 1867*. The section gives the federal government the power to regulate

> 24. Indians, and Lands reserved for Indians.

The argument brought by the plaintiffs is that the word 'Indian' is broad enough to include both Métis individuals and non-status Indians. The trial judge found that both of these groups were 'Indians' under s 91(24) while the Federal Court of Appeal upheld the inclusion of Métis, but it rejected the inclusion of non-status Indians. Both of these decisions will be discussed below. The trial decision was the subject of the Alberta Court of Appeal moot this year, in which I participated as co-counsel for the plaintiffs (with Dex Zucchi, who dealt with issues on fiduciary duty that will not be addressed here).

This litigation finally arrived at trial after being in the court system since 1999. Interestingly, advancement of the action over this time was largely funded by the federal government through the Test Case Funding Program, designed to fund important test cases for Aboriginal peoples that have potential to create judicial precedent. When that funding expired, the Federal Court granted an advance costs award to the applicants to enable them to continue with the litigation (see 2011 FC 230).

I should note that while 'First Nations' is a more acceptable term, I will use the term 'Indian' here because it is the term used in both s 91(24) of the *Constitution Act 1867* and the courts' discussion of that section in *Daniels*.

The Trial Decision

All references in this section are to 2013 FC 6 unless otherwise noted

It was the defendants' position that because the question being asked was a theoretical one that would only lead to further litigation the Court should refrain from making any of the declarations requested (at para 53). Neither the trial court nor the appellate court was persuaded by this argument and found that there was sufficient interest to deliver declaratory relief. This finding

was partially based on the prejudice that both parties would suffer if after 12 years of publically funded litigation, the Court refused to resolve the matter (at paras 77–80). Further, Justice Phelan found that there numerous references, both historic and current, to the jurisdictional uncertainty of the groups. The Federal government has at times accepted and at times rejected that it has jurisdiction to legislate towards the groups at issue (at para 55).

The Court then went on to determine what was meant by the terms 'non-status Indians' and 'Métis'. Justice Phelan found that non-status Indians possess two essential qualities: they are Indians and they have no status under the *Indian Act*, RSC 1985, c. I-5 (at para 116). They are people who have an ancestral connection to those considered as 'Indians', are accepted by the Indian community as such, and are individuals "to whom status could be granted by federal legislation." (at para 122).

The definition of Métis was guided largely by the findings in *R v Powley*, 2003 SCC 43. Here, a Métis person is one who has some ancestral family connection to Métis people, identifies as Métis, and is accepted by the Métis community as a Métis person (*Powley* at paras 31-33). This test was adopted by the trial judge not to decide the outer limits of Métis people, but to establish a framework for potential inclusion under s 91(24) (at para 121).

After defining the groups, Justice Phelan spent the majority of the time examining the extensive historical evidence of the groups from contact onwards. These findings are broken down into pre-Confederation (at paras 183-323), Confederation (at paras 324-354), and post-Confederation (at paras 355-422) eras and provide a fascinating examination of Aboriginal-settler relations during these periods.

The reason behind this historical examination was to allow the trial judge the contextual framework to apply the purposive approach towards interpretation (as described in para 23 of *Reference re Same-Sex Marriage*, 2004 SCC 79). Justice Phelan concluded the following:

> [566] Applying the purposive approach in light of the finding in *In Re Eskimo Reference*, above, I accept the Plaintiffs' argument supported by the opinions of Professor Wicken and Ms. Jones that the purpose of the Indian Power included the intent to control all people of aboriginal heritage in the new territories of Canada. The purpose of the Indian Power included assisting with the expansion and settlement of the West of which the building of the railway was a part. Absent a broad power over a broad range of people sharing a native hereditary base, the federal government would have difficulty achieving this goal.

As a result, the two groups at issue fall under Federal jurisdiction under s 91(24) on account of their Aboriginal heritage. This heritage is both genetic and cultural and is not subject to differential jurisdiction based on degrees of kinship or degrees of cultural purity (at para 568, noting that "one can honour both the feather and the fiddle", a quote originating from the original plaintiff, Harry Daniels).

A similar result was reached almost a century ago in regards to those Aboriginals living in Northern Quebec. *Reference whether "Indians" includes "Eskimo"*, [1939] SCR 104 also came to the conclusion that "Indian" is intended to be a broad enough word to include "all the present

and future aborigines native subjects of the proposed Confederation of British North America…" (*Eskimo Reference* at p. 12).

Combining the purposive approach with the prior interpretation of the Supreme Court, Justice Phelan came to the conclusion that the two groups, Métis and non-status Indians, are 'Indians' within the meaning of s 91(24) on the basis of their Aboriginal heritage.

The Appeal

All references in this section are to 2014 FCA 101 unless otherwise noted

The Federal Court of Appeal (Justice Dawson, with Justices Noël and Trudel concurring) unanimously upheld the declaration relating to Métis but overturned the declaration made in regards to non-status Indians. The Court of Appeal found that this declaration "lacked practical utility" (at para 74).

The Court noted that there are numerous reasons that an individual may be excluded from Indian status under the *Indian Act* (besides not being of Aboriginal descent). Some lost their claim to status through errors in recording names during the treaty process. Other individuals had status but lost it for varying reasons (such as marrying-out provisions) (at para 77).

As a result, the Court found that there was no benefit to be made through the declaration requested. Because this is a group of people who the government could give status to if it wished, the matter is not advanced by the court declaring these people as 'Indians' within s 91(24). Individuals must bring their cases forward individually for a determination whether or not their specific history will classify them as an 'Indian' (at paras 78-9).

The Current Status of Métis and Non-Status Indians

While no direct relief was granted for any of the plaintiffs, the Court of Appeal decision has paved the way for how future relations can proceed. Unless the federal government appeals this aspect of the ruling, Métis individuals can now turn to the federal government with their issues on a case by case basis and the federal government is aware that they have the power to legislate in this regard (though whether they have a duty to legislate was not decided; see 2013 FC 6 at para 72).

It is likely that the plaintiffs will seek leave to appeal to the Supreme Court regarding the failure to grant declaratory relief for non-status Indians. The Federal Court of Appeal argues that a declaration determining the limits of the head of power as it relates to non-status Indians does not provide a tangible benefit (at paras 77-78). However, there may be a practical utility in declaring that non-status 'Indians' are 'Indians' within the meaning of s 91(24) outside of those granted status by virtue of the *Indian Act*. It is only logical that an individual would need to be an 'Indian' in the sense of ancestral connections in order to even be considered for status (s 2(1) of *Indian Act*, RSC, 1985, c. I-5). While the federal government has thus far not utilized its power under s 91(24) apart from the *Indian Act* (see *Attorney General of Canada et al. v Canard*, [1976] 1 SCR 170 at p. 207), at least with respect to status, it is not prohibited from doing so in the future.

If the Court was to apply a similar definition for 'Indians' as it did for Metis, then s 91(24) would extend to a group, a subset of which may qualify for Indian status under the *Indian Act*. This is analogous to the situation of the Inuit. The decision in the *Eskimo Reference* clearly includes the Inuit people as within s 91(24). At the same time, s 4(1) of the *Indian Act* explicitly excludes them from applying for status. Therefore, there exists a legal space between inclusion within s 91(24) and eligibility for status under the *Indian Act* that may apply to non-status Indians.

Regardless of an individual's ability to claim status, if they are an 'Indian' the federal government can legislate towards them. If the logic in *Daniels v Canada* and upheld on appeal is applied to the definition of 'Indian', then it would include an individual who has some ancestral family connection to an Indian people or group, identifies as Indian, and is accepted by the Indian community as an Indian person. This modified *Powley* test would set limits to who would fall under the s 91(24) head of power, which would undoubtedly be different than the requirements of status. A declaration by the court would provide greater certainty for the government and to those potentially falling under this head of power.