TOP FIVE 2016

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

DANIELS v CANADA (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99

Date Released: April 14, 2016

Full decision: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15858/index.do

Facts

When Canada became a country, different areas of responsibility were given to the federal and provincial governments under the law that formed the nation, the *Constitution Act, 1867*. Under s. 91(24) of the *Act*, the federal government was assigned exclusive jurisdiction over "Indians and Land reserved for the Indians." However, no definition of who counted as an "Indian" was offered in that legislation.

Section 91 of the *Constitution Act, 1867* sets out the powers of the federal government.

Subsection 91(24) states that:

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this *Act*) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say..,

(24) Indians, and Lands reserved for the Indians.

As a result, Canada often used the definition set forth in another piece of early legislation, the *Indian Act*. The *Indian Act* set out land reserves and granted different rights to Aboriginal individuals and groups on the basis of whether or not they were registered with the government. This established a legal distinction between "status Indians" (who were registered) and "non-status Indians" (who were not). Métis people were not included in the *Indian Act*.[1]

[1] "Non-Status Indians" commonly refers to people who identify as indigenous but who are not entitled to registration on the Indian Register pursuant to the *Indian Act*. Some may, however, be members of a First Nation band. "Métis" refers to people and communities of mixed Aboriginal and European heritage that developed through intermarriage between these groups when Europeans colonized what is now Canada. Note, though, that the term is both evolving and contentious: for a fuller discussion of its usage, please see http://indigenousfoundations.web.arts.ubc.ca/metis/.

Since Confederation, there has therefore been uncertainty as to which government holds responsibility for dealing with Métis and non-status Indian issues. When it came to legislating on Métis and non-status Indian matters, each of the federal and provincial governments would assert that they had no jurisdiction to act, and that it was the responsibility of the other government. This created an inability for claimants, and those sharing their interests, to know which government to hold politically accountable.

The applicants sought clarity on how Métis and non-status Indians fit into Canada's legal framework. They brought the case to Federal Court seeking three judicial declarations (i.e. clarifications about the meaning of the law) that:

1. Métis and non-status Indians are included in s. 91(24) of the *Constitution Act, 1867*;
2. The federal Crown owes a fiduciary duty to Métis and non-status Indians[2]; and that
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.

Procedural History

The trial judge in the Federal Court granted the declaration that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*. The trial judge did not grant the other two declarations dealing with the fiduciary obligation of the Crown and the right to consultation. He found they were vague, redundant, and would serve no practical utility because once these groups are recognized as falling within s. 91(24), the law is already clear that the Crown has these obligations. As well, the duties associated with these obligations usually arise in connection with a specific issue, such as a land claim being disputed or a traditional right being asserted, and the judge found that it was not appropriate to issue a declaration on either without there being a practical question at hand that needed a legal resolution.[3]

The Crown appealed to the Federal Court of Appeal (FCA). On appeal, the decision was modified. The FCA declared that "Indians" included all Indigenous peoples generally, but excluded both non-status Indians and Métis who did not meet a previous test (set out in *R.v. Powley*, [2003] 2 S.C.R. 207).[4] The FCA found no error in the reasons of the Federal Court judge with respect to the other declarations, and so also declined to grant the declarations regarding the fiduciary duty of the federal Crown and the right to consultation.[5]

The appellants appealed to the Supreme Court of Canada (SCC), seeking to restore the ruling of the Federal Court with respect

[2] A fiduciary relationship means a relationship in which one party has a special duty to look after the best interests of the other. Examples of such relationships in Canadian law include relationships between doctors and patients, parents and children, and solicitors and clients. In the context of the relationship between Canada and Aboriginal Peoples, the law recognizes the fiduciary obligations of the government because the government has assumed a great deal of control over the interests and resources of the latter.

[3] See *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6

[4] See OJEN's resource *Landmark Case: The Métis Hunting Rights Case – R. v. Powley*, available online at: http://ojen.ca/en/resource/landmark-case-the-metis-hunting-rights-case-r-v-powley.

[5] See *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 101

to the first question, and to issue the second and third declarations. The Crown cross-appealed, arguing that none of the declarations should be granted.

Issues

1. Are Métis and non-status Indians "Indians" under s. 91(24) of the *Constitution Act, 1867*?
2. Does the federal Crown owe a fiduciary duty to Métis and non-status Indians?
3. Do Métis and non-status Indians have the right to be consulted and negotiated with?

Decision

The appeal was allowed in part. The SCC granted the declaration that Métis and non-status Indians are "Indians" for the purposes of s. 91(24) of the *Constitution Act, 1867*. The SCC declined to grant the other two requested declarations.

Ratio

A declaration can only be granted if it will have practical utility, meaning it will settle a real controversy between the parties. Métis and non-status Indians are "Indians" for the purposes of s. 91(24) of the *Constitution Act, 1867*.

Reasons

The SCC granted the first declaration because it would have enormous practicality for the two groups. The declaration would guarantee both certainty and accountability regarding which government had the power to legislate regarding Métis and non-status Indians. On this point, Abella, J. wrote, "It is true that finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, but it has the undeniably salutary benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress."[6]

In other words, she indicated that the inclusion of these groups does not force the government to make any specific new laws, but creates certainty and accountability about where they should go for better programs, services and other policies in their interests – the federal government.

The SCC added that although the federal Crown was now responsible for Métis and non-status Indians, this does not mean that all provincial laws pertaining to them are beyond the power of the Province to make, and therefore of no effect. Instead, the SCC reminded the parties that federal and provincial laws will be read as complementary as much as possible.

The Court noted that historically the term "Indians" has been used as a short form referring to all Aboriginal Peoples, including Métis. Many programs, policies, and laws administered by the government, both before and after Confederation, did not distinguish between these groups – examples noted by the SCC included laws prohibiting the sale of alcohol, residential schooling programs, and negotiating the support of status Indians, non-status Indians and Métis people alike to ensure success in constructing the national

[6] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para. 15.

railway. The Court found that in such actions, the Crown was treating all Aboriginal people in essentially the same way, and that the meaning of "Indians" under s. 91(24) was therefore intended to include all Aboriginal Peoples of Canada. The Court held that it was in this historical context that s. 91(24) of the *Constitution Act, 1867* must be viewed.

The SCC also found a rationale for Métis and non-status Indians being "Indians" for the purposes of s. 91(24) of the *Constitution Act, 1867* by reading it together with the *Constitution Act, 1982*. The 1982 *Act* includes the *Canadian Charter of Rights and Freedoms*, which sets out the most fundamental rights and freedoms of people in Canada. Section 35 of the *Charter* lays out the rights of the Aboriginal Peoples of Canada. The SCC pointed out that s. 35 states that Indian, Inuit, and Métis people are Aboriginal Peoples for the purposes of the *Constitution*. Since ss. 35 and 91(24) should be read together, it would be in contradiction of s. 35 to exclude Métis from being considered "Indians" under s. 91(24).

Existing jurisprudence also supported the conclusion that Métis are "Indians" under s. 91(24). For example, in *Re Eskimo*, the SCC determined that Inuit were considered "Indians" under s. 91(24) of the *Constitution Act, 1867*.[7] This finding was made despite Inuit having separate language, culture, and identities from the "Indian tribes" in other parts of the country. The SCC reasoned that if Inuit could be considered "Indians" under s. 91(24), so too could other groups such as Métis and non-status Indians.

After having decided that Métis and non-status Indians are "Indians" for the purposes of s. 91(24) of the *Constitution Act, 1867*, the SCC found that the other two declarations would merely be a restatement of existing law, and would therefore serve no useful purpose.

[7] *Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104

DISCUSSION

1. Why did the appellants want a declaration on these issues?

2. What was the SCC's decision and what was the rationale?

3. What do Métis and non-status Indians have to gain by being considered "Indians" under the s. 91(24) of the *Constitution Act, 1867*?

4. How much do you think the historical usage of language or particular words (in this case, "Indians") should factor into present day decisions?