SUPREME COURT OF CANADA DECISION IN THE DANIELS CASE

By George & Terry Goulet

Supreme Court Ruling: On April 14, 2016 the Supreme Court of Canada (SCC) delivered its unanimous decision in the Daniel's Case. The SCC ruled that Métis and non-status Indians are "Indians" under Section 91(24) of the *Constitution Act, 1867 (Canada*). This decision settles the tug-of-war between the Provinces and the Federal Government as to which government is legally responsible for jurisdiction with respect to Métis and non-status Indians.

The SCC definitively ruled that the Federal Government has jurisdiction with respect to ALL Métis and non-status Indians. In addition the Decision confirmed that the Federal Government has a fiduciary duty and consultation responsibility with respect to the Métis and non-status Indians.

1. "INDIANS" IN S. 91(24) INCLUDES MÉTIS AND NON-STATUS INDIANS

The prime issue in the Daniels Decision was to determine whether the Métis are "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867 (Canada).* The Supreme Court granted a declaration that Métis and non-status Indians are "Indians" under s. 91(24). The following are some of the reasons and effects of this Ruling:

The term "Indian": In the constitutional context the term "Indian" or "Indians" has two meaning (i) a broad meaning, as used in s. 91(24), that includes both Métis and Inuit and can be equated with the term "aboriginal peoples of Canada" used in s. 35 of the *Constitution Act, 1982 (Canada*): and (ii) a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. The Court stated that it would be constitutionally anomalous [abnormal] for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the constitutional scope of s. 91(24). [P.*35]

All Aboriginals are "Indians under s. 91(24): This broad understanding of "Indians" means that "there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples. The Supreme Court stated:

> "A broad understanding of "Indians" under s. 91(24) as meaning 'Aboriginal peoples', resolves the definitional concerns raised by the parties in this case. Since s. 91(24) includes **all** Aboriginal peoples, including Métis and non-status Indians, there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are **all** "Indians" under s. 91(24) by virtue of the fact that they are **all** Aboriginal peoples." (P. [46] Emphasis added)

Duty to Legislate: The Court further ruled that finding Métis and non-status Indians are "Indians" under s. 91(24) does **NOT** create a duty to legislate, but it has ….the benefit of ending a jurisdictional tug-of-war in which these groups were left wondering about where to turn for policy redress.(P. [15} Emphasis added.) However this does not prohibit the Federal Government from passing legislation, or from expanding existing programs and services for "Indians" to include Métis and non-status Indians where legislation is not required to do so.

No Consensus as to who is Métis: The Court pointed out that there is no consensus on who is considered Métis or a non-status Indian, nor need there be. Cultural and ethnic labels do not lend themselves to neat boundaries. It further quoted the following

> "There is no one exclusive Metis People in Canada, any more than there is no one exclusive Indian people in Canada. The Metis of eastern Canada and northern Canada are as distinct from Red River Metis as any two peoples can be. . . . As early as 1650, a distinct Metis community developed in LeHeve [*sic*], Nova Scotia, separate from Acadians and Micmac Indians. All Metis are aboriginal people. All have Indian ancestry." ([P. 17]).

In effect the Supreme Court decided that when it comes to Métis identity there is "no one size fits all."

Restrictive Métis Criteria of Powley Set Aside: The Supreme Court stated that the definition of who is Métis under s. 91(24) has been made broader than the restrictive definitional criteria for Métis under the *Powley Case* of 2003. (P. [47] and {58]). This restrictive criteria in *Powley* was developed specifically for purposes of applying s. 35, which the Court said was about protecting historic community-held rights. Section 91(24) serves a very different constitutional purpose, it is about the federal government's relationship with Canada's Aboriginal peoples. (P. [49]).

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* P. is the abbreviation for "paragraph" in the Supreme Court Decision in the Daniels Case.

The Court indicated that the Métis membership base should be broader and there is no principled reason for excluding certain Métis from Parliament's protective authority on the basis of the third criterion, a "community acceptance" test. P. [49]. The Court set aside the exclusion of those Métis who do not meet the Powley criteria for inclusion in s. 91(24). (P. [58]).

Ethnic Label of 'Métis': In its Decision the Court stated "There is no doubt that the Métis are a distinct people". (P. [42]). This means that under the Daniels Decision they are "Indians" for the purposes of s. 91(24), but they retain their Métis identity as a distinct people just as the Inuit do. The Court further stated:

> "Cultural and ethnic labels do not lend themselves to neat boundaries. 'Métis' can refer to the historic Métis community in Manitoba's Red River Settlement or it can be used as a general term for anyone with mixed European and Aboriginal heritage. Some mixed-ancestry communities identify as Métis, others as Indian." P. [17]

No Ruling on Marriage, Intermarriage, Mixed-Ancestry and Adoption: The Court did not provide a Ruling with respect to marriage, intermarriage, mixed-ancestry and adoption. In the case of intermarriage and mixed-ancestry it did provide guidance when it stated that there were "jurisprudential imprints that assist in deciding whether Métis are part of what is included in s. 91(24) …. intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24)." The *Eskimo* Case of 1939 "establishes that the fact that a group is a distinct people with a unique identity and history whose members self-identify as separate from Indians, is not a bar to inclusion within s. 91(24)." (P. [41])

2. FIDUCIARY DUTY OF THE CROWN TO MÉTIS AND NON-STATUS INDIANS

The second declaration sought in the Daniels Case was to recognize that the Crown owes a fiduciary duty to Métis and non-status Indians. In this Case the Court stated that prior Supreme Court decisions have determined that Canada's Aboriginal peoples have a fiduciary relationship with the Crown.

The Supreme Court stated in the Daniels Case with respect to the second declaration that the Crown owes a fiduciary duty to Métis and non-status Indians and that this declaration was restating "settled law". Consequently the declaration was not granted by the Court because it was restating "settled law" (P. [53] and [57].)

With respect to the fiduciary relationship that the Federal Government has with Métis and non-status Indians, all parties may look for guidance, in part, to a paper titled "The Crown's Fiduciary Relationship with Aboriginal Peoples" (Parliamentary Research Branch, Aug. 2000; Rev. Dec. 2002). This paper states that a "fiduciary relationship is one in which someone in a position of trust has 'rights and powers which he is bound to exercise for the benefit' of another".

3. GOVERNMENT DUTY TO CONSULT AND NEGOTIATE WITH MÉTIS AND NON-STATUS INDIANS

The third declaration sought in the Daniels Case was 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. With respect to this third declaration, the Court stated that prior Supreme Court decisions recognized a context-specific duty to negotiate when Aboriginal rights are engaged.

The Supreme Court stated in the Daniels Case the third declaration with respect to consultation and negotiation by Métis through representatives of their choice would be a restatement of the "existing law". As a result the third declaration was not granted by the Court because it was a restatement of "existing law" (P. [2]; [54]; [56] and [57].)

WHAT THE DANIELS DECISION MEANS FOR THE MÉTIS

We are providing our analysis with respect to the Decision, and not a legal opinion. However this Case has opened up great opportunities for the future benefit of the Métis. It does not mean that the Métis are Indians for any other purposes. They continue to be a separate and distinct people with their own history, heritage and culture. They are not status Indians, and are not entitled to benefits under the *Indian Act*. For example they are not entitled to live on a reserve, have tax-free status and are not entitled to other benefits and laws flowing from that Act.

The Daniels decision has ruled that the Federal Government has jurisdictional responsibility for all Métis. Consequently pursuant to this Supreme Court decision it has a fiduciary duty and is obligated to consult and negotiate, in good faith, with **all** Métis through representatives of their choice respecting all their rights, interests and needs. The Federal Government has a fiduciary duty to expand and implement its existing programs and services for Aboriginals to include

all Métis where applicable. We are of the opinion that this would also be consistent with equality rights in s. 15 of the Canadian *Charter of Rights and Freedoms*.

Since the Constitution is binding on both the Federal Government and the Provinces, this decision must also be followed by the Provinces, and by Federal and Provincial employees. Consequently, the Federal Government has an obligation to inform its employees and the Provinces of the Daniels Decision.

The Federal Government has the fiduciary duty to provide programs, services, and intangible benefits to all Métis not only on the federal level but also to ensure the implementation and funding, where applicable, of programs, services, and other benefits for Aboriginals peoples that are managed on their behalf at the Provincial level.

Examples of programs, services, and benefits that need to be extended by the Federal Government to all Métis are education, health, housing, heritage, culture, employment, children and family services, and other appropriate items.

The Daniels Decision does not in any way change the responsibility and requirements that Métis and Métis organizations have with respect to obeying and following applicable Provincial laws. An exception to this is if a conflicting Provincial law significantly adversely affects Métis rights and privileges under the Constitution. In that event the Constitutional rights of the Métis will override conflicting Provincial laws since the Constitution is supreme.

The Court did not deal with some potential future issues. Although the Decision with respect to s. 91(24) applies to ALL Métis, the Court did not give precise guidance with respect to who qualifies as Métis nor was it precise in tying it to any specific connection to Métis culture and heritage. However if a dispute occurs, the Court did state that "Determining whether particular individuals or communities are non-status Indians or Métis and therefore "Indians" under s. 91(24), is a fact-driven question to be decided on a case-by-case basis in the future." (P [47]) This would be very expensive.

The Federal Government has a duty to meet and negotiate with the Métis to implement the requirements of the Daniels Case. This duty is not only existing law. It is also grounded in the honour of the Crown, which is always at stake in dealing with Aboriginal Peoples. This is especially necessary with respect to Métis individuals and organizations that have been denied programs, services and benefits due to restrictive membership requirements by existing Métis organizations. However it is necessary for these excluded Métis to be represented. In order to do so they must take the initiative to have representatives of their choice meet with the appropriate Government officials.

The Court also pointed out that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal. (P. [37]; see also P. [1]). In addition the current Government has announced its intention to implement the recommendations contained in the ***United Nations Declaration on the Rights of Indigenous Peoples***.

Legacy of Harry Daniels: There are only two men in the history of the Métis People who were the prime instrumental forces in having the Métis enshrined in Canada's Constitution - Louis Riel in section 31 of the federal 1870 *Manitoba Act* and Harry Daniels in section 35 of the *Constitution Act, 1982,* and now in section 91 (24) of the *Constitution Act, 1867*.

LONG LIVE THE MÉTIS.
LONG LIVE THE MEMORY OF LOUIS RIEL AND HARRY DANIELS.

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