Métis and Non-status Indians: Out of the Jurisdictional Wasteland

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On April 14, 2016, the Supreme Court of Canada released its decision in *Daniels v Canada (Indian Affairs and Northern Development)*[1]. In this landmark decision, the SCC upheld the decision of a trial judge to issue a declaration that non-status and Métis persons are "Indians" who constitutionally fall under federal jurisdiction.

The SCC found that Métis and "non-status Indians" (persons of Indigenous decent who do not qualify for status under the *Indian Act*) fall under federal jurisdiction through section 91(24) of the *Constitution Act, 1867*. The SCC recognised that Métis and non-status Indian communities have been in a "jurisdictional wasteland". This decision provides certainty, and effectively ends a jurisdictional tug-of-war between the provincial and federal governments, both of whom at various times have declined responsibility to provide services to non-status Indians and Métis.

The SCC did not make a declaration that the federal Crown owes a fiduciary duty to Métis and non-status Indians. The SCC similarly declined to make a declaration that Métis and non-status peoples have a right to be consulted and accommodated. The SCC stated that no purpose would be served by making these declarations because there is no need to restate what is already settled law.

Who is a Métis or non-status Indian?

The SCC found that determining whether an individual or community are non-status Indians or Métis should be a fact-driven process decided on a case-by-case basis. For the purposes of establishing whether an individual or community will be found to be Métis, the SCC considered whether the definition in *R v Powley* should apply.

In the *Powley* decision, the SCC found three criteria to define who qualifies as Métis for the purpose of protecting community held Constitutional (section 35) rights.: 1) self-identification as Métis, 2) an ancestral connection to a historic Métis community and 3) acceptance by the modern Métis community. The SCC, in *Daniels*, rejected the third criterion in *R v Powley*, for the purposes of establishing whether the federal Crown can pass legislation under the Constitutional power over "Indians".

The SCC found that acceptance by a Métis community to be problematic factor in the analysis of whether an individual is under federal jurisdiction. For many reasons, a Métis person may have been separated from a Métis community.

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[1] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.

Impact on Duty to Consult

Not all persons who self-identify as Métis or non-status Indians will be eligible to assert section 35 rights. The three *Powley* factors, including acceptance by a modern Métis community, are still relevant for assessing the strength of rights asserted pursuant to section 35, and therefore, the scope of the duty to consult and accommodate. As with other Aboriginal groups, the depth of consultation with Métis communities or non-status Indians will depend on the strength of claim. Over the coming years, the momentum of *Daniels* may result in new claims and settlements with the Crown. Any depth of consultation analysis will need to consider these developments.

In practice, in Ontario proponents already negotiate with Métis, either through Métis Nation of Ontario or directly with Métis communities. The province already identifies Métis for consultation as an established practice.

Impact on Availability of Services

The SCC decision does not create a duty to legislate. The decision is simply a declaration that the federal government holds the authority to legislate, and the corresponding financial responsibility for services. This does not exclude provincial legislation applying to the Métis and non-status Indians.

Conclusions

Going forward, this decision will have significant implications for Métis and non-status Indians. Federal programming will likely be adjusted to accommodate the SCC's decision, although the federal government has refrained from announcing any changes to date. In Ontario, where consultation with Métis is already common practice, there is likely to be little immediate change for proponents and their projects as a direct result of this decision. Over the long term, however, with the likely emergence of new claims for section 35 rights, the duty to consult could be engaged more often, or more deeply.

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