

MÉTIS NATION OF ALBERTA



# MÉTIS RIGHTS UPDATE

2015



# TABLE OF CONTENTS

Overview.....	1
1. Métis Rights Related Activities .....	2
A. The Alberta Government's New Approach on Aboriginal Relations & Rights.....	3
B. Métis Harvesting Rights.....	3
C. Métis Consultation and Accommodation.....	6
D. Renewal of the MNA-Alberta Framework Agreement.....	8
E. The Alberta Métis Settlements.....	8
2. Métis Rights Related Activities (Federal).....	10
A. The Daniels Case.....	10
B. Addressing Métis Rights Claims with Canada.....	11
The Eyford Report & Recommendations.....	11
The Appointment of a Special Ministerial Representative on Métis Rights.....	12
3. Daniels v. Canada, 2014 FCA 101 Understanding the Federal Court of Appeal's Decision.....	13
Conclusion.....	27



# OVERVIEW

This past year we have seen some exciting changes and developments, both provincially and nationally, that we hope will lead to significant progress and new mandates and negotiations on Métis rights and outstanding claims here in Alberta.

From the historic election of the NDP as the new government in Alberta in May to the Government of Canada appointing a Special Ministerial Representative on Métis rights in June to the ongoing federal election, we have many exciting and new opportunities available to us that we must seize on in order to advance our Métis rights agenda.

In order to be successful though, we must work together. The MNA is the government of the Métis Nation in Alberta and has the clear mandate to deal with outstanding Métis rights and claims for all Métis in this province, including, Métis living on the Settlements. Our Locals, Regions and Provincial Council must work together to effectively represent all Alberta Métis. We are one Métis Nation, one Métis people. We must advance our rights on that basis. And, we will, by working together.

This document has been developed to provide the MNA Annual General Assembly with an update on what has happened over the last year with respect to Métis rights, what the MNA is currently working on with respect to Métis rights and what is on the horizon for the remainder of 2015 and 2016.

# 1. MÉTIS RIGHTS RELATED ACTIVITIES

## A. THE ALBERTA GOVERNMENT'S NEW APPROACH ON ABORIGINAL RELATIONS & RIGHTS



The Swearing In ceremony for newly elected Alberta Premier, Rachel Notley

Since the historic election of a new NDP government in May 2015, the MNA's leadership has met with many members of the new government, including, several calls and meetings with the Minister for Aboriginal Affairs who is also the Minister of Justice and Attorney General. All of these meetings have been extremely positive and there appears to be a real willingness to take "fresh approaches" on dealing with Métis rights.

Significantly, one of the first things the new government did was to adopt the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration"). This is an extremely positive development. The Métis Nation is recognized as one of the Indigenous peoples that emerged in the historic Northwest prior to Canada's westward expansion. In the Manitoba Métis Federation case, the Supreme Court of Canada confirmed that there were two "Indigenous peoples" on the prairies--- the Indians (i.e., First Nations) and the Métis Nation.



In order to make progress on implementing the UN Declaration in Alberta, Premier Notley has asked all of her Cabinet to bring forward “practical proposals” that advance the declaration’s goals in partnership with First Nations and Métis. The Minister for Aboriginal Affairs is then going to seek Cabinet approval on these proposals. It is anticipated that these proposals will bring in a new era of Alberta-Aboriginal relations in this province.

## A. THE ALBERTA GOVERNMENT’S NEW APPROACH ON ABORIGINAL RELATIONS & RIGHTS CONTINUED...

The MNA has identified several rights-related priorities and proposals for consideration. These include re-engaging negotiations on Métis harvesting, developing a Crown-Métis consultation policy, arriving at common understandings with Alberta on rights-bearing Métis communities, renewing the MNA-Alberta Framework Agreement with an increased focus on dealing with rights-related issues, including, negotiations with the federal government on outstanding Métis claims.

The MNA is also hoping to hear from its citizens at this Annual General Assembly about other rights-related priorities to bring forward. We hope to have some announcements on the MNA’s proposals in the fall of 2015, so renewed collaborative work on Métis rights issues can begin. We will keep MNA citizens updated on this important work.

## B. MÉTIS HARVESTING RIGHTS

While we were not ultimately successful in our appeal in the Hirsekorn case before the Alberta Court of Appeal and may not agree with the court’s conclusion, we must live with the result of the case for the time being. We must also remember that case only dealt with the area in and around Cypress Hills.

The Hirsekorn case does not mean that there are no Métis harvesting rights in all of southern Alberta. Nor does it mean that Alberta does not need to negotiate with the MNA on this issue or that Alberta’s current Métis Harvesting Policy should be maintained.

For example, it is important to highlight that the courts did make some helpful findings with respect to Métis rights in Alberta in Hirsekorn. Firstly, the Alberta Court of Appeal rejected Alberta’s arguments that Métis communities are “dots on a map” or limited to “settlements”. Specifically, the court wrote,

[63] I conclude that the historical rights bearing communities of the plains Métis are best considered as regional in nature, as opposed to settlement-based.

## B. MÉTIS HARVESTING RIGHTS CONTINUED...

Secondly, the trial judge found there was a large regional Métis community that extends throughout parts of southern, central and northern Alberta, along the North Saskatchewan river system. Specifically, the court wrote,

[115] The evidence has shown that an historical Métis community existed in the region of what is present day Edmonton and district. This group of North Saskatchewan Métis included the settlements of Fort Edmonton, St. Albert, Lac St. Anne, Victoria, Lac La Biche, and Rocky Mountain House. The Métis people in this region had a distinctive collective identity, lived together in the same geographical area and shared a common way of life.

Since the Alberta Court of Appeal's decision, Alberta has not modified its Métis Harvesting Policy. Its current policy of identifying Métis communities "settlement-by-settlement" does not square with the Alberta Court of Appeal's decision. It also does not recognize Métis harvesting rights in areas around Rocky Mountain House, Tail Creek and Edmonton.

More importantly, Alberta's current approach to granting "letters" to Métis harvesters still leaves the identification of eligible Métis harvesters in the hands of government bureaucrats not the Métis Nation. This is wrong in law and is inconsistent with the UN Declaration. This policy must change. The MNA, as the representative government of the Métis people, must play a role in the identification of legitimate Métis rights-holders.





Powley Supreme Court Decision



## C. MÉTIS CONSULTATION AND ACCOMODATION

Related to Métis harvesting is the need to make progress on Crown consultation and accommodation with Métis. These two issues are inextricably linked because where there are rights-bearing Métis communities and Métis rights, the Crown's duty to consult is owed to the rights-bearing Métis community.

Right now, the Alberta has no Métis consultation policy in place and our communities are left in the cold or to the whims of government and industry. While some Métis Locals and Regions have been making progress on this front, we all know that more successes could be achieved through a consistent policy approach.

The MNA has been in discussions with the Alberta Government to develop and undertake a community engagement process on developing a Métis consultation policy. We are optimistic that we will finalize terms of reference for this process in the very near future and those will guide our discussions with Alberta.

In order to achieve success on this file, it will be imperative that our Locals, Regions and the MNA Head Office work together. Métis rights are collectively held. They are not held by one Local or one Region and individual Métis mandate the MNA to represent their collective rights and interests through our registry.

MNA Locals and Regions are able to represent MNA citizens for the purposes of consultation by virtue of being a part of the MNA not separate and apart from it. As such, it is essential that we work in unity as the Métis Nation to achieve results and success.



## C. MÉTIS CONSULTATION AND ACCOMODATION CONTINUED...

In order to develop a “made-in-Alberta” consultation model that works for the MNA, we must look at our existing consultation policy and update it to current realities and look to “best practices” that some Locals and Regions have achieved.

The MNA must also look to what is working in other Métis jurisdictions. For example, the Métis Nation of Ontario has recently signed a consultation agreement with the federal government that recognizes their unique consultation system, which we might be able to learn from.

In order to start this discussion, the MNA will be holding a conference in the fall or winter to discuss these issues and develop a strategy on how to move forward. It is hope that by the next Annual General Assembly we will have a mutually agreeable consultation policy with the Alberta Government in place.



TransCanada Signing

## D. RENEWAL OF THE MNA-ALBERTA FRAMEWORK AGREEMENT

The MNA is currently in negotiations with the Alberta Government on the renewal of our Framework Agreement. Our existing agreement has been extended for one more year, while these negotiations continue.

By and large, our Framework Agreement has been the same for decades and funding levels have been frozen since the 1990s. The previous Stelmach/Redford governments, however, whittled down important parts of this agreement in relation to the MNA's representative role.

With the new government and its commitment to implement the UN Declaration, we see an opportunity to breathe "new life" into the language of the Framework Agreement as well as include commitments with respect to Métis rights, interests and claims.

The MNA wants to see the Framework Agreement be reinvigorated with a view to facilitating Métis self-government and self-determination in this province, as was initially envisioned. We are optimistic that with this new government, our next Framework Agreement will do just that.

## E. THE ALBERTA MÉTIS SETTLEMENTS

The Alberta Métis Settlements are a success and inheritance for all Alberta Métis. The MNA and its leadership were vital to the creation of the Settlements. They are our Settlements as Alberta Métis. They are not different "Métis communities" or "Métis people." We are one Métis Nation.

While the MNA respects the jurisdiction of the Métis Settlements to deal with issues relating to Alberta's legislation that they are under, that legislation did not and does not deal with the Métis rights we hold collectively as the Métis people. If Métis rights are engaged or impacted, the MNA must be engaged as the government for all Métis people in Alberta.

As such, the MNA has an obligation to ensure that those Métis lands continue to be governed by Métis for Métis. At various times, we have worked together with the Settlements to ensure that. For example, in 2011, the MNA, along with the Métis Settlements General Council and other Settlements, intervened at the Supreme Court of Canada in the Cunningham case to make it clear that the Métis Settlements were set aside for Métis not Indians.



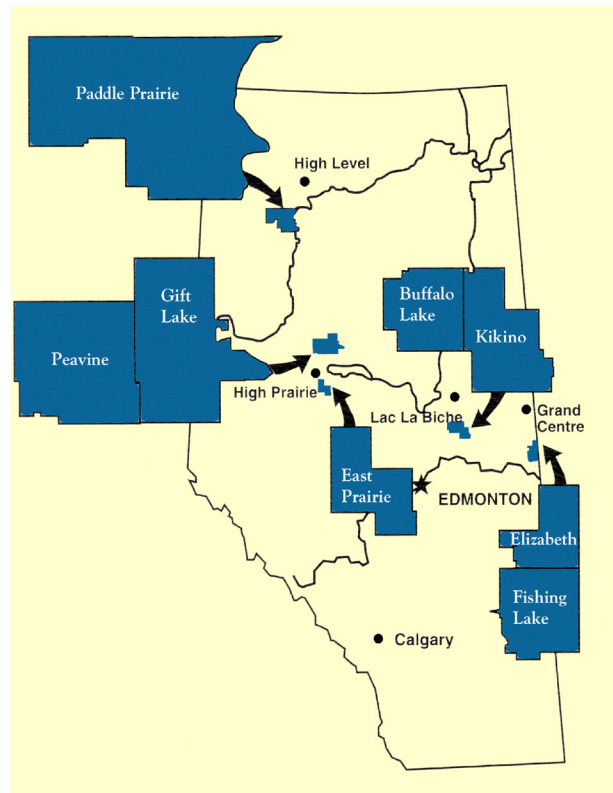
## E. THE ALBERTA MÉTIS SETTLEMENTS CONTINUED...

We were all pleased that Chief Justice McLachlin affirmed the distinct purpose of the Métis Settlements was to advance and preserve Métis identity, Métis culture and Métis self-government. Since the release of the Cunningham case, the Métis Settlements have been dealing with the ramifications of the decision.

To date, the MNA has largely allowed the Métis Settlements to work through these issues. However, the MNA's leadership is becoming increasingly concerned about what is playing out on some of the Settlements as well as some of the litigation that is being pursued, which may negatively affect Métis rights.

In order to assess the current situation, the MNA has recently asked our legal counsel to assess the situation and provide recommendations to the MNA Provincial Council on how to proceed. We will also be writing and requesting a formal meeting with the Métis Settlements General Council as well as the leadership of the current Settlements.

Based on recent discussions by the MNA Provincial Council as well as what we hear at this Annual General Assembly, the MNA may become more actively engaged on this issue in order to protect the Métis Settlements consistent with the principles articulated by the Supreme Court of Canada in the Cunningham case. We will keep MNA citizens updated on this.



A map of the Métis Settlements in Alberta

## 2. MÉTIS RIGHTS RELATED ACTIVITIES (FEDERAL)

### A. THE DANIELS CASE

The Supreme Court of Canada is scheduled to hear the Daniels case on October 8th in Ottawa. This is an extremely important case and is about whether the federal government has legislative responsibility for the Métis, in the same way it does for First Nations and Inuit.

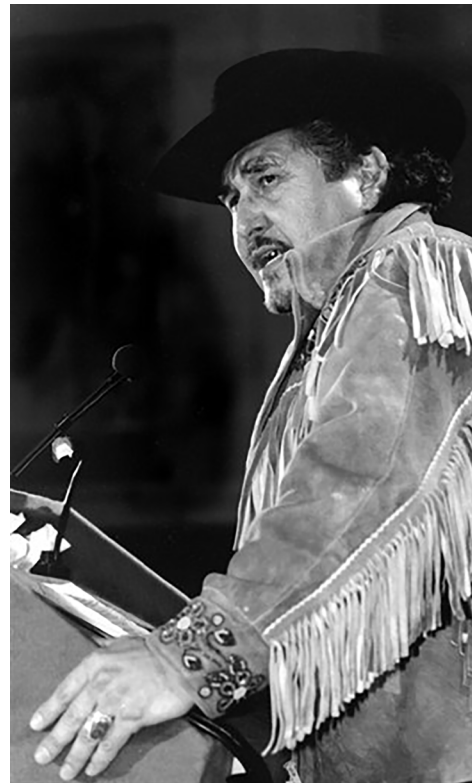
It is important to remember that the Daniels case is not about Métis becoming "Indians" under the Indian Act. It is also not about the federal government having "control" over us. It is about getting an answer to the question of what level of government has the constitutional responsibility to deal with us as a distinct Aboriginal people.

The Métis National Council ("MNC"), on behalf of the Métis Nation as a whole, has obtained intervener status at the upcoming hearing. The MNA is pleased that Jason Madden has joined the MNC's legal team and will be making arguments on behalf of the Métis Nation at the upcoming hearing. A copy of the MNC's written argument is available on the MNA's website.

The MNA has also had our lawyers, Jason Madden and Jean Teillet, prepare a summary and some frequently asked questions in relation to the Daniels case. This document has been provided to all delegates. It has also been posted to the MNA's website and circulated to Regions and Locals.

If the Supreme Court of Canada upholds the decisions of the lower courts that confirmed the Métis are included in s. 91(24), this will help us as we push forward on rights and land claim related negotiations with the federal government based on s. 35 of the Constitution Act, 1982.

The Daniels Case was heard by the Supreme Court of Canada on October 8, 2015. Judgement on the case has been reserved until later notice and is expected to be released in the autumn of 2016.



Harry Daniels



## B. ADDRESSING MÉTIS RIGHTS CLAIMS WITH CANADA

The Daniels case, combined with our inclusion in Section 35 of the Constitution Act, 1982 and cases like Powley, Cunningham and Manitoba Métis Federation v. Canada, all point to the need for the federal government to begin to negotiate modern day land claims agreements with Métis governments.

For many years, Canada has been negotiating with Métis in the Northwest Territories on these issues, but they completely exclude Métis south of the 60th parallel from all land claim negotiations. This exclusion from Canada's Comprehensive Land Claims Policy must end or a unique Métis-specific claims policy must be developed.

### The Eyford Report & Recommendations

Based on our efforts inside and outside the courts, we have slowly been getting the federal government's attention. For example, last year, the MNA provided a presentation to Doug Eyford who was appointed by Canada to review its Comprehensive Land Claim Policy, which arbitrarily exclude Métis.

Mr. Eyford, as an independently-appointed Special Ministerial Representative, saw just how wrong and unfair this ongoing federal exclusion towards the Métis is. In his final report that was released in May 2015, he made the following two recommendations:

1. Canada should develop a reconciliation process to support the exercise of Métis section 35(1) rights and to reconcile their interests.
2. Canada should establish a framework for negotiations with the Manitoba Métis Federation to respond to the Supreme Court of Canada's decision in Manitoba Métis Federation v. Canada, 2013 SCC 14.



Special Representative, Tom Issac; Métis Nation of Alberta President, Audrey Poitras and Minister of Aboriginal Affairs, Bernard Valcourt

## The Appointment of a Special Ministerial Representative on Métis Rights

In June 2015, in response to the Eyford report recommendations, the federal Minister for Aboriginal Affairs appointed an independent Ministerial Special Representative (Tom Isaac) to engage with the MNA as well as other Métis Nation governments on issues related to the Section 35 rights. Mr. Isaac is a well-regarded lawyer and an expert in Aboriginal law.

More specifically, Mr. Isaac is mandated to meet with Métis Nation governments as well as provinces and territories “to map out a process for dialogue on Section 35 Métis rights.” This engagement will occur over the next few months and he will provide a written report to Canada in December 2015 (which might now be delayed due to the federal election call).

Mr. Isaac’s appointment represents an important ‘breakthrough’ for the Métis Nation. The MNA Provincial Council met in July to develop a strategic approach for this engagement and our meeting with Mr. Isaac, which was scheduled to be held on August 5th in Edmonton. This meeting, unfortunately, along with all of Mr. Isaac’s meetings, have been cancelled until after the federal election. It is likely this meeting will now be held in November.

The MNA’s submission to Mr. Isaac will be that meaningful land claim negotiations with the MNA must begin. Similar to the Manitoba Métis, Alberta Métis have claims against Canada flowing from the failure of the Métis scrip system. These must be negotiated and reconciled through negotiations and ultimately a just and lasting settlement.

The MNA will continue to keep its citizens updated on the Isaac engagement process over the next few months. We are optimistic that Mr. Isaac’s final report will set out a process that finally allows reconciliation with the Métis to begin.



# DANIELS V. CANADA, 2014 FCA 101

## UNDERSTANDING THE FEDERAL COURT OF APPEAL'S DECISION

### Overview of Document

This document provides an overview of the Federal Court of Appeal's decision in *Daniels v. Canada (Indian Affairs)*, 2014 FCA 101 ("Daniels"). It also provides a brief update on the current status of the case and answers some frequently asked questions. It has been prepared for the Métis Nation of Alberta ("MNA").

### The Parties in the Case

Harry Daniels started the case in 1999 when he was President of the Congress of Aboriginal Peoples ("CAP"). CAP claims to represent Métis, non-status Indians and status Indians living off-reserve throughout Canada. Harry, CAP and Leah Gardner (a non-status Indian woman from northwestern Ontario) were the original plaintiffs. Harry passed away in 2004. In 2005, Harry's son Gabriel was added as a plaintiff to ensure a Métis representative plaintiff was maintained. At the same time, another non-status Indian, Terry Joudrey (a Mi'kmaq from Nova Scotia) was added to the litigation. At trial, the plaintiffs were Daniels, Gardner, Joudrey and CAP (the "Plaintiffs"). The case was filed against the Minister of Indian Affairs and Northern Development in his capacity as a representative of the federal government (the "Respondent" or "Canada").

### What is the Case About?

The Plaintiffs have asked the courts to give them three declarations:

1. that Métis and non-status Indians are "Indians" within the meaning of "Indians, and Lands reserved for the Indians" in s. 91(24) of the Constitution Act, 1867;
2. that the federal government 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.



A declaration is a common court remedy in Aboriginal rights cases. A court declares the law in relation to a dispute between government and Aboriginal peoples. The parties are then expected to change their behavior to be consistent with the law. The main question of interest for the MNA in this case is: whether the Métis are “Indians” for the purposes of federal jurisdiction under s. 91(24) of the Constitution Act, 1867.

#### What is s. 91(24)?

When Canada as a new country was created in 1867, its Constitution set out what the federal and provincial governments would each have “exclusive Legislative Authority” for. More specifically, the Constitution Act, 1867 sets out two lists that divide up what each level of government has legislative responsibility or jurisdiction for.

The list in s. 91 enumerates the jurisdictions of the federal Parliament, while the list in s. 92 sets out the jurisdictions of the provincial legislatures. The word “jurisdiction” comes from two Latin words: *juris* meaning “law” and *dicere* meaning “to speak.” So, jurisdiction is the authority to “speak” on specific matters through law (i.e., legislation). The specific matters listed in ss. 91 and 92 are often referred to as “heads of power.”

It is important to note that a finding of legislative jurisdiction does not mean that a government has control or power over the Métis people. It simply means that the government with jurisdiction can legislate on Métis issues, if it chooses to do so. For example, the federal government could enact legislation that gives legal force and effect to a negotiated Métis land claim agreement that recognizes existing Métis governance structures, provides funding to Métis governments, recognizes Métis rights, etc.

The provincial list of powers in s. 92 is generally concerned with more local or provincial matters that are not national or inter-provincial in scope. Provincial heads of power include: direct taxation within a province, management and sale of public lands, incorporation of companies, property and civil rights, administration of justice and all matters of a merely local or private nature in the province.



The federal list of powers in s. 91 is generally concerned with nation-wide and international matters. Federal heads of power include: unemployment insurance, postal service, the census, the military, navigation and shipping, sea coast and inland fisheries, banking, weights and measures and patents. Section 91(24) the relevant head of power in the Daniels case reads,

**s. 91 It is hereby declared that 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.**

Métis and non-status Indians have long taken the position that they too are included within s. 91(24) and therefore within federal jurisdiction. The main rationale for this interpretation is that the term "Indian" in s. 91(24) was meant to include all Aboriginal peoples in Canada historically, including, First Nations, Inuit and Métis. Notably, in 1939, the Supreme Court of Canada already determined that the Inuit (then referred to as "Eskimos") were within s. 91(24). The federal government takes the position that "Indians" registered under the Indian Act are in s. 91(24), but has by and large denied responsibility for non-status Indians. In recent times, the federal government has steadfastly denied that the Métis as a distinct Aboriginal people are within s. 91(24).

### Why Does the Jurisdiction Issue Matter to the Métis?

Usually in jurisdiction disputes, the federal and provincial governments disagree over what is included in a head of power because they both want to assert their jurisdiction in a given area. This case is unique because neither level of government wants jurisdiction for Métis and non-status Indians. Some say that the denial of jurisdiction has made these groups “political footballs” in the Canadian federation. But that metaphor is not really appropriate because in football both sides want the ball. A more apt metaphor would perhaps be “hot potato.”

For the Métis Nation, the practical result of this jurisdictional avoidance has been to leave Métis communities vulnerable and marginalized. Métis have not had access to federal programs and services available to “status” Indians or Inuit. They have also been denied access to federal processes to address their rights and claims (i.e., specific and comprehensive claims processes), which are available to First Nations and Inuit.

### The Trial Decision

The trial judge released his decision on January 8, 2013. Based on the evidence before him and previous judicial decisions on how a head of power should be interpreted, he concluded that Métis and non-status Indians are within s. 91(24).

The historical records before the trial judge showed that in order to achieve the objects of Confederation (i.e., creating a country from coast to coast, settling the Northwest, building a national railway to the Pacific coast, etc.), the federal government needed the “Indian” head of power in s. 91(24) so that it could deal with all of the different Aboriginal peoples it encountered along the way.

With respect to the Métis Nation, the evidence showed that the federal government used this power in many ways, by among other things, including Métis (Half-breeds) as individuals in the treaties negotiated with Indians in and around the Upper Great Lakes, in negotiating the Halfbreed Adhesion to Treaty Three in northwestern Ontario, in enacting s. 31 of the Manitoba Act in the old “postage stamp” province of Manitoba and in passing the Dominion Lands Act that established the Métis scrip system throughout present day Manitoba (outside the old “postage stamp” province), Saskatchewan, Alberta and parts of northeastern British Columbia and the Northwest Territories. The trial judge concluded that these federal actions, amongst others, showed s. 91(24) has been used historically to exercise federal jurisdiction with respect to Métis. Other evidence was provided in relation to non-status Indians.



The trial judge also noted that, historically, wherever non-status Indians and Métis were discriminated against or treated differently than non-Aboriginal peoples by the federal government (i.e., residential schools, liquor laws), it was because non-status Indians and Métis could be dealt with under the “Indian” head of power.

The trial judge said that the distinguishing feature of both non-status Indians and Métis is that of “Indianness”—not language, religion, or connection to European heritage— which brought them within s. 91(24). He also held that the term “Indian” in s. 91(24) is broader than the term “Indian” in the Indian Act. While the federal government may be able to limit the number of Indians it recognizes under the Indian Act, that cannot have an effect on the determination of who is within s. 91(24).

The trial decision was a significant victory for Métis and non-status Indians, as it removed one of the major barriers that the federal government has used to avoid meaningfully dealing with their distinct issues, rights and socio-economic needs.

There were, however, some disconcerting issues with the trial judge’s decision for the Métis Nation, specifically with his definition of Métis. The trial judge defined who is included within s. 91(24) by virtue of their “Indian ancestry” or “Indian affinity.” This reduces Métis identity to Indian genealogy not “Métisness”. His decision also appeared to leave open the possibility that any individual with some small amount of “Indian” ancestry and a recent claim to affinity with “Indianness” would fall within the scope of s. 91(24). This result is clearly inconsistent with the fundamental principle that the Crown’s obligations and responsibilities are owing to Aboriginal collectives, as well as to the recognition that the Métis are a separate and distinct Aboriginal people with their own unique identity, language and culture “as Métis” not as Indians.

The trial judge refused to grant the other two declarations with respect to the federal Crown’s fiduciary duty and the duty to negotiate with Métis and non-status Indians.

### The Federal Court of Appeal Decision

The federal government appealed the trial judge's decision. The first appeal of the Daniels case was heard by the Federal Court of Appeal in October of 2013. The appeal court's judgment was released on April 17, 2014.

In the appeal, several new parties intervened who were not involved at trial. In particular, representatives of the Métis Nation at the national, provincial and local levels intervened (i.e., the Métis National Council, Manitoba Métis Federation, Métis Nation of Ontario, Métis Settlements General Council and Gift Lake Métis Settlement) intervened in order to express their concerns with the trial judge's approach to defining Métis for the purposes of s. 91(24), which was largely based on CAP's submissions at trial. In addition, the Alberta Government was an intervener in the appeal.

On appeal, Canada argued that the trial judge had made three errors in granting the declaration because:

- a) the declaration that Métis and non-status Indians are within s. 91(24) lacked practical utility;
- b) the declaration was unfounded in fact and law; and
- c) the declaration defined the core meaning of the constitutional term "Indian" in the abstract.

### Did the Declaration Have Practical Utility for the Métis?

Canada argued that the declaration with respect to Métis lacked practical utility on three grounds: 1) there was no actual or proposed legislation before the Court; 2) even if the declaration were granted, there would be no obligation on government to actually do anything; and 3) Canada can do whatever it wants to do under the federal spending power so it was not necessary to decide whether the Métis were within 91(24). The Federal Court of Appeal did not agree.

First, the Court held that there was no need for actual or proposed legislation in order to answer the question. The Court pointed to the Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada*, in which the Supreme Court granted the plaintiffs a declaration to assist them in negotiations with the government. The plaintiffs in that case had not challenged the constitutionality of any legislation. Nor had they sought to create an obligation on the government to enact legislation



Second, the Court found that Canada's position was contradicted by a number of findings of fact by the trial judge (i.e., the impact of jurisdictional uncertainty in creating a large population of collaterally damaged Métis, the federal government's reluctance to negotiate Métis claims to lands and resources in the absence of a higher court decision on the issue of jurisdiction, etc.). The Court further held that Canada's argument that it could extend programs and resources to the Métis under the federal spending power was undercut by the trial judge's finding that the absence of jurisdictional certainty has led to disputes between the federal and provincial governments and resulted in the Métis being deprived of many necessary programs and services.

Lastly, and perhaps most significantly, the Federal Court of Appeal held that the Plaintiffs' claim was about more than programs and services available under Canada's federal spending power. The claim put in issue, among other things, Canada's failure to negotiate or enter into treaties with Métis with respect to unextinguished Aboriginal rights, or agreements with respect to other Aboriginal matters or interests analogous to those treaties and agreements which the federal government had negotiated with other Aboriginal groups.

"Finally, the respondents' claim extended beyond a claim to programs and services available under the federal spending power. The claim put in issue, among other things, the failure of the federal government to negotiate or enter treaties with respect to unextinguished Aboriginal rights, or agreements with respect to other Aboriginal matters or interests analogous to those treaties and agreements which the federal government has negotiated and/or entered into with status Indians...

Related to this aspect of the claim is the evidence, referenced above, that in the absence of higher Court authority on the division of federal-provincial liability, the federal government was not prepared to negotiate Métis claims as recommended by the Royal Commission on Aboriginal Peoples."

— Daniels, FCA, para. 72

### Did the Declaration Have Practical Utility for Non-Status Indians?

The Federal Court of Appeal agreed with Canada that a declaration that non-status Indians are “Indians” for the purpose of s. 91(24) was redundant and lacked practical utility because Canada conceded it could legislate with respect to non-status Indians. It just chose not to. As a result, the appeal court overturned the trial judge and declined to make a declaration that non-status Indians are within s. 91(24).

### What About the Trial Judge’s Definition of Métis?

In his reasons for judgment, the trial judge described Métis as “a group of native people who maintained a strong affinity for their Indian heritage without possessing Indian status.” Canada argued that this definition was inconsistent with the Supreme Court of Canada’s recognition of the Métis as a distinct Aboriginal people, related to, but different from, their Indian forbearers. In Canada’s view, recognition that Métis are culturally different from Indians leads to the conclusion that Métis are not “Indians” for the purposes of s. 91(24).

The Court agreed that the trial judge’s definition was problematic, but didn’t agree with Canada’s submissions. In holding that Métis are within the term “Indians” in s. 91(24), the appeal court explained the trial judge’s definition. It acknowledged that the definition lacked clarity and was open to at least three interpretations. Specifically, “Indian heritage” could mean: (1) descent from members of the Indian race, (2) First Nations heritage, or (3) indigenous or Aboriginal heritage.

The Federal Court of Appeal held that the third interpretation was correct and that when the trial judge used the phrase “Indian heritage,” he meant indigenesness or Aboriginal heritage. The Court relied on the principle that the Constitution is a living tree, which must be interpreted in a progressive manner. Although historically s. 91(24) had been viewed as a race- based head of power, the Court found that a progressive interpretation to s. 91(24) “requires the term Métis to mean more than individuals’ racial connection to their Indian ancestors.”



“... A progressive interpretation of section 91(24) requires the term Métis to mean more than individuals’ racial connection to their Indian ancestors. The Métis have their own language, culture, kinship connections and territory. It is these factors that make the Métis one of the Aboriginal peoples of Canada.”

— Daniels, FCA, para. 96

The appeal court noted that the Supreme Court of Canada, in several cases, including in *R. v. Powley*, [2003] 2 S.C.R. 207 (“Powley”), had rejected the notion that the term Métis encompassed all individuals with mixed Indian and European heritage, instead finding that the term referred to a distinctive group of people who developed separate and distinct identities. According to the Court, it did not matter that these comments had been made with reference to s. 35 of the Constitution Act, 1982 because individual elements of Canada’s Constitution are linked to one another and must be interpreted by reference to the structure of the Constitution as a whole.

The Federal Court of Appeal rejected the interpretation of “Indian Heritage” as meaning “First Nations heritage.” It noted that the trial judge had explicitly referred to the Powley test in his decision, and had used language throughout his judgment that indicated his recognition of Métis as a distinct subset of Canada’s Aboriginal peoples.



“It follows that the criteria identified by the Supreme Court in *Powley* inform the understanding of who the Métis people are for the purpose of the division of powers analysis.”

– Daniels, FCA, para. 99

Having clarified to some extent the confusion caused by the trial judge’s definition, the appeal court went on to say that it did not need to define the term Métis in order to determine whether Métis people fall within the scope of s. 91(24). The Court noted that the Constitution did not define “Indian” and the Supreme Court of Canada did not define “Eskimos” when it determined that they were included in s. 91(24) in 1939. The Court held it was sufficient that it not define the term Métis in a manner that is contrary with history or the jurisprudence of the Supreme Court.

#### What Was the Correct Interpretative Approach to s. 91(24)?

There are two different answers to this question: (1) a progressive interpretation, or (2) a purposive interpretation. The progressive interpretation recognizes that the Constitution must be allowed to evolve over time to reflect changing social circumstances. A purposive interpretation looks to the purpose for putting the provision into the Constitution – in other words, it looks at what the provision is trying to achieve. Canada argued that a progressive interpretation had to identify what social changes require a new view of who are included in s. 91(24) of the Constitution.

The Court held that the trial judge used a purposive interpretation because he found that Métis were included in s. 91(24) at the time of Confederation. The Court held that s.35 further confirms that the Métis were included within s. 91(24) from the time of Confederation, as it would be anomalous for the Métis to be included as Aboriginal peoples for the purpose of s. 35, and to be the only Aboriginal peoples not included within s. 91(24).



“Counsel for the appellants also conceded that it would be anomalous for the Métis to be included as Aboriginal peoples for the purpose of section 35 of the Charter, and to be the only enumerated Aboriginal peoples not included within section 91(24). ... This anomaly disappears when section 91(24) is interpreted to have included the Métis from the time of Confederation.”

– Daniels, FCA, paras. 146-147

The Court concluded that a progressive interpretation was not necessary, and the trial judge had not erred by failing to address the social changes that would underlie such an interpretation. That said, the Federal Court of Appeal did apply a second layer of interpretation progressive interpretation when it determined that a racial analysis was inappropriate.

#### Would a Declaration Create Uncertainty About Jurisdiction?

Canada argued that a declaration that Métis are within s. 91(24) would make provincial legislation (i.e., the Métis Settlements Act in Alberta) vulnerable to challenge and might also have a detrimental effect on the ability of provincial governments to legislate in the future. The appeal court disagreed, and cited a decision of the Supreme Court of Canada in which it had held that the power of one government to legislate in relation to one aspect of a matter takes nothing away from the power of the other level to control another aspect within its own jurisdiction.

### What Relief Did the Court Grant?

The Federal Court of Appeal confirmed that Métis are within federal jurisdiction under s. 91(24). Based on the approach advanced by the Métis Nation interveners, the Court issued the following modified declaration “that the Métis are included as ‘Indians’ within the meaning of s. 91(24) of the Constitution Act, 1867.” The Court refused to grant any declaration with respect to non-status Indians. The appeal court also declined to issue the second and third declarations requested by the Plaintiffs.

### What Happened Following the Federal Court of Appeal's Decision?

Following the Federal Court of Appeal's decision, CAP appealed to the Supreme Court of Canada to have the declaration with respect to non-status Indians reinstated and to have the second and third declarations issued by the highest court in Canada. Canada cross-appealed, seeking to have the Métis declaration overturned.

On November 20, 2014, the Supreme Court of Canada agreed to hear the appeals of both CAP and Canada in the Daniels case. Since then, both CAP and Canada have filed their written arguments with the Supreme Court. The Supreme Court has granted intervener status to the Métis National Council, Métis Settlements General Council and Gift Lake Métis Settlement to bring forward the Métis perspective in the appeal. It has also granted intervener status to First Nation and non-status Indian groups from across Canada to address the appeal court's denial of the non-status Indian declaration.

The Daniels appeal is tentatively scheduled to be heard by the Supreme Court of Canada on October 8, 2015. It is likely a decision will not be released until mid-2016.

If the Supreme Court upholds the decisions of the lower courts that Métis are included in s. 91(24), this will be a significant victory for the Métis Nation. It should set the stage for future discussions and negotiations between Canada and the Métis Nation through the Métis Nation of Alberta and other Métis governments on Métis rights, claims as well as programs and services. It is also hoped that the Supreme Court of Canada's decision will reinforce the clarity provided by the Federal Court of Appeal about “who are the Métis” within s. 91(24). This is likely given the Supreme Court of Canada's consistent recognition over the last 15 years that the Métis are a distinct Aboriginal people not to be defined by their “Indianness” culturally or ancestrally.



### Métis Are Not Indians - Why Do We Want to Be Recognized as "Indians?"

The Daniels case is not about Métis becoming "Indians" under the Indian Act or Métis being recognized as "Indians" for cultural purposes. The case is about whether the legal term "Indian" in the Constitution Act, 1867 (which sets out federal legislative jurisdiction) is broad enough to include Métis, in the same way it is broad enough to include Inuit (who are also distinct). Métis want to be included because uncertainty about jurisdiction for Métis is used by Canada to avoid dealing with Métis rights, interests and needs.

### Does Jurisdiction Mean the Federal Government Will Now Have Control Over Métis?

No, jurisdiction does not mean that the federal government will have control or power over the Métis. As the Otipemisiwak ("the people that own themselves"), the Métis Nation would never accept becoming subject to legislation like the Indian Act. The case simply means Canada has the jurisdictional mandate to legislate with respect to Métis issues and to deal with the Métis on a nation-to-nation basis. For example, it could negotiate an agreement with the MNA that recognizes its governance structures, Métis rights, etc., and be able to pass legislation that gives legal force to that agreement.

### I'm Métis. Can I Now Get Registered Under the Indian Act?

No, this case was not about the Indian Act. It does not put Métis under the Indian Act. It does not make or allow Métis to become "status Indians." It also does not mean that Métis can immediately access programs and services that are currently only available to "status Indians." If ultimately successful, the case should provide a "kickstart" to the federal government to seriously deal with Métis issues through negotiations. Métis inclusion under the Indian Act, however, will not be the result of the case.

### Does This Case Now Recognize Métis Rights Everywhere in Canada?

No, the Daniels case is not about Métis rights to land, harvesting, self-government, etc. It is only about answering the constitutional question of whether the federal government has legislative jurisdiction for Métis. While some groups may claim that the case recognizes Métis groups or rights outside of the Métis Nation, it does not. Further, the Federal Court of Appeal's decision limits s. 91(24) to those Métis who can meet the Supreme Court of Canada's decision in Powley, which requires a distinct Métis community to have emerged historically. Individuals with mixed Aboriginal ancestry who claim to be Métis today do not meet the Powley test.

### Does the Daniels Case Affect the Métis Nation's Definition of Métis?

No, the Daniels case has absolutely no effect on the Métis Nation's national definition for citizenship in the Métis Nation or the MNA's registry process. The Métis Nation's definition was arrived at based on its inherent right to define its own citizenship. No court decision could ever change that definition.

### This Case Is Mainly About the Métis, Why Is CAP Involved?

CAP received significant funding from the federal government to litigate this case. Similar funding was not provided to the Métis Nation. The Métis Nation became involved at the Federal Court of Appeal and the Supreme Court of Canada to ensure the rights and interests of Métis communities from Ontario westward are protected.

### About the Firm and the Authors

Jason Madden and Jean Teillet are both partners in the law firm Pape Salter Teillet LLP with offices in Toronto and Vancouver. In the Daniels case, Jason was counsel for the intervener Manitoba Métis Federation and Jean was counsel for the intervener Métis Nation of Ontario at the Federal Court of Appeal. For additional information about the firm, please visit [www.pstlaw.ca](http://www.pstlaw.ca).

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This document is not legal advice and should not be relied upon as such. A full copy of the Federal Court of Appeal's decision is available at: <http://canlii.ca/t/g6kgv>.



## CONCLUSION

As you can see, the MNA has a lot on its plate in advancing our rights agenda here in Alberta. The MNA remains committed to making sure our rights are first and foremost as we move forward. We are hopeful that some of the seeds we have planted last year will begin to bear fruit and we will keep MNA citizens updated on progress.





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