SUPREME COURT OF CANADA

CITATION: Daniels *v.* Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 S.C.R. 99

APPEAL HEARD: October 8, 2015
JUDGMENT RENDERED: April 14, 2016
DOCKET: 35945

BETWEEN:

Harry Daniels, Gabriel Daniels, Leah Gardner, Terry Joudrey and Congress of Aboriginal Peoples
Appellants/Respondents on cross-appeal

and

Her Majesty The Queen as represented by the Minister of Indian Affairs and Northern Development and Attorney General of Canada
Respondents/Appellants on cross-appeal

- and -

Attorney General for Saskatchewan, Attorney General of Alberta, Native Council of Nova Scotia, New Brunswick Aboriginal Peoples Council, Native Council of Prince Edward Island, Metis Settlements General Council, Te'mexw Treaty Association, Métis Federation of Canada, Aseniwuche Winewak Nation of Canada, Chiefs of Ontario, Gift Lake Métis Settlement, Native Alliance of Quebec, Assembly of First Nations and Métis National Council
Interveners

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

REASONS FOR JUDGMENT: (paras. 1 to 58) — Abella J. (McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ. concurring)

Harry Daniels, Gabriel Daniels,
Leah Gardner, Terry Joudrey and
Congress of Aboriginal Peoples *Appellants/Respondents on cross-appeal*

v.

Her Majesty The Queen
as represented by the
Minister of Indian Affairs and
Northern Development and
Attorney General of Canada *Respondents/Appellants on cross-appeal*

and

Attorney General for Saskatchewan,
Attorney General of Alberta,
Native Council of Nova Scotia,
New Brunswick Aboriginal Peoples Council,
Native Council of Prince Edward Island,
Metis Settlements General Council,
Te'mexw Treaty Association,
Métis Federation of Canada,
Aseniwuche Winewak Nation of Canada,
Chiefs of Ontario,
Gift Lake Métis Settlement,
Native Alliance of Quebec,
Assembly of First Nations and
Métis National Council *Interveners*

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2016 SCC 12

File No.: 35945.

2015: October 8; 2016: April 14.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Aboriginal law — Métis — Non-status Indians — Whether declaration should be issued that Métis and non-status Indians are "Indians" under s. 91(24) of Constitution Act, 1867 — Whether declaration would have practical utility — Whether, for purposes of s. 91(24), Métis should be restricted to definitional criteria set out in R. v. Powley, [2003] 2 S.C.R. 207 — Constitution Act, 1867, s. 91(24) — Constitution Act, 1982, s. 35.

Three declarations are sought in this case: (1) that Métis and non-status Indians are "Indians" under s. 91(24) of the *Constitution Act, 1867*; (2) that the federal Crown 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.

The trial judge's conclusion was that "Indians" under s. 91(24) is a broad term referring to all Indigenous peoples in Canada. He declined, however, to grant the second and third declarations. The Federal Court of Appeal accepted that "Indians" in s. 91(24) included all Indigenous peoples generally. It upheld the first declaration, but narrowed its scope to exclude non-status Indians and include only those Métis who satisfied the three criteria from *R. v. Powley*, [2003] 2 S.C.R. 207. It also declined to grant the second and third declarations. The appellants sought to restore the first declaration as granted by the trial judge, and asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the

declarations should be granted. It conceded that non-status Indians are "Indians" under s. 91(24).

Held: The first declaration should be granted: Métis and non-status Indians are "Indians" under s. 91(24). The appeal should therefore be allowed in part. The Federal Court of Appeal's conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria, should be set aside, and the trial judge's decision restored. The trial judge's and Federal Court of Appeal's decision not to grant the second and third declarations should be upheld. The cross-appeal should be dismissed.

A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties. The first declaration, whether non-status Indians and Métis are "Indians" under s. 91(24), would have enormous practical utility for these two groups who have found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution. A declaration would guarantee both certainty and accountability. Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences. While finding Métis and non-status Indians to be "Indians" under s. 91(24) does not create a duty to legislate, it has the undeniably salutary benefit of ending a jurisdictional tug-of-war.

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. “Indians” has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. Before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. Historically, the purpose of s. 91(24) in relation to the broader goals of Confederation also indicates that since 1867, “Indians” meant all Aboriginal peoples, including Métis.

As well, the federal government has at times assumed that it could legislate over Métis as “Indians”, and included them in other exercises of federal authority over “Indians”, such as sending many Métis to Indian Residential Schools — a historical wrong for which the federal government has since apologized. Moreover, while it does not define the scope of s. 91(24), s. 35 of the *Constitution Act, 1982* states that Indian, Inuit, and Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court has noted that ss. 35 and 91(24) should be read together. “Indians” in the constitutional context, therefore, has two meanings: 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, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. It would be constitutionally anomalous 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).

The jurisprudence also supports the conclusion that Métis are “Indians” under s. 91(24). It demonstrates that intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24). 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). 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.

As to whether, for purposes of s. 91(24), Métis should be restricted to the three definitional criteria set out in *Powley* in accordance with the decision of the Federal Court of Appeal, or whether the membership base should be broader, there is no principled reason for presumptively and arbitrarily excluding certain Métis from Parliament's protective authority on the basis of the third criterion, a "community acceptance" test. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights. Section 91(24) serves a very different constitutional purpose.

The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, as well as the *Report of the Royal Commission on Aboriginal Peoples* and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal.

The historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis. The first declaration should accordingly be granted.

Federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. As this Court has recognized, courts should favour, where possible, the operation

of statutes enacted by both levels of government.

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Distinguished: *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236; **considered:** *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; *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170; **referred to:** *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 S.C.R. 696; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257.

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APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal (Noël, Dawson and Trudel JJ.A.), 2014 FCA 101, [2014] 4 F.C.R. 97, 371 D.L.R. (4th) 725, 457 N.R. 347, [2014] 3 C.N.L.R. 139, 309 C.R.R. (2d) 200, [2014] F.C.J. No. 383 (QL), 2014 CarswellNat 1076 (WL Can.), setting aside in part a decision

of Phelan J., 2013 FC 6, [2013] 2 F.C.R. 268, 357 D.L.R. (4th) 47, 426 F.T.R. 1, [2013] 2 C.N.L.R. 61, [2013] F.C.J. No. 4 (QL), 2013 CarswellNat 8 (WL Can.). Appeal allowed in part and cross-appeal dismissed.

Joseph Eliot Magnet, *Andrew K. Lokan* and *Lindsay Scott*, for the appellants/respondents on cross-appeal.

Mark R. Kindrachuk, Q.C., *Christopher M. Rupar* and *Shauna K. Bedingfield*, for the respondents/appellants on cross-appeal.

P. Mitch McAdam, Q.C., for the intervener the Attorney General for Saskatchewan.

Angela Edgington and *Neil Dobson*, for the intervener the Attorney General of Alberta.

Written submissions only by *D. Bruce Clarke, Q.C.*, for the interveners the Native Council of Nova Scotia, the New Brunswick Aboriginal Peoples Council and the Native Council of Prince Edward Island.

Garry Appelt and *Keltie Lambert*, for the intervener the Metis Settlements General Council.

Written submissions only by *Robert J. M. Janes* and *Elin R. S. Sigurdson*, for the intervener the Te'mexw Treaty Association.

Christopher G. Devlin, *John Gailus* and *Cynthia Westaway*, for the intervener the Métis Federation of Canada.

Karey M. Brooks and *Claire Truesdale*, for the intervener the Aseniwuche Winewak Nation of Canada.

Scott Robertson, for the intervener the Chiefs of Ontario.

Paul Seaman and *Maxime Faille*, for the intervener the Gift Lake Métis Settlement.

Marc Watters and *Lina Beaulieu*, for the intervener the Native Alliance of Quebec.

Guy Régimbald and *Jaimie Lickers*, for the intervener the Assembly of First Nations.

Jason T. Madden, *Clément Chartier, Q.C.*, *Kathy Hodgson-Smith* and *Marc Leclair*, for the intervener the Métis National Council.

The judgment of the Court was delivered by

[1] ABELLA J. — As the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought. Many revelations have resulted in good faith policy and legislative responses, but the list of disadvantages remains robust. This case represents

another chapter in the pursuit of reconciliation and redress in that relationship.

Background

[2] Three declarations were sought by the plaintiffs when this litigation was launched in 1999:

1. That Métis and non-status Indians are "Indians" under s. 91(24);

2. That the federal Crown 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, respecting all their rights, interests and needs as Aboriginal peoples.

[3] Section 91(24) of the *Constitution Act, 1867* states that

> **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 . . .
>
> . . .
>
> 24. Indians, and Lands reserved for the Indians.

[4] The trial judge, Phelan J., made a number of key factual findings in his

thoughtful and thorough reasons.[1] As early as 1818, the government used "Indian" as a general term to refer to communities of mixed Aboriginal and European background. The federal government considered Métis to be "Indians" in various treaties and pre-Confederation statutes, and considered Métis to be "Indians" under s. 91(24) in various statutes and policy initiatives spanning from Confederation to modern day. Moreover, the purpose of s. 91(24) was closely related to the expansionist goals of Confederation. The historical and legislative evidence shows that expanding the country across the West was one of the primary goals of Confederation. Building a national railway was a key component of this plan.

[5] Accordingly, the purposes of s. 91(24) were "to control Native people and communities where necessary to facilitate development of the Dominion; to honour the obligations to Natives that the Dominion inherited from Britain . . . [and] eventually to civilize and assimilate Native people": para. 353. Since much of the North-Western Territory was occupied by Métis, only a definition of "Indians" in s. 91(24) that included "a broad range of people sharing a Native hereditary base" (para. 566) would give Parliament the necessary authority to pursue its agenda.

[6] His conclusion was that in its historical, philosophical, and linguistic contexts, "Indians" under s. 91(24) is a broad term referring to all Indigenous peoples in Canada, including non-status Indians and Métis.

[7] He found that since neither the federal nor provincial governments acknowledged that they had jurisdiction over Métis and non-status Indians, the

[1] [2013] 2 F.C.R. 268.

declaration would alleviate the constitutional uncertainty and the resulting denial of material benefits. There was therefore practical utility to the first declaration being granted, namely, that Métis and non-status Indians are included in what is meant by "Indians" in s. 91(24). He did not restrict the definition of either group.

[8] He declined, however, to grant the second and third declarations on the grounds that they were vague and redundant. It was already well established in Canadian law that the federal government was in a fiduciary relationship with Canada's Aboriginal peoples and that the federal government had a duty to consult and negotiate with them when their rights were engaged. Restating this in declarations would be of no practical utility.

[9] The Federal Court of Appeal accepted the trial judge's findings of fact, including that "Indians" in s. 91(24) included all Indigenous peoples generally. It therefore upheld the trial judge's decision to grant the first declaration, but narrowed its scope to exclude non-status Indians and include only those Métis who satisfied the three criteria from *R. v. Powley*, [2003] 2 S.C.R. 207. While it was of the view that non-status Indians were clearly "Indians", setting this out in a declaration would be redundant and of no practical usefulness. For the same reasons as the trial judge, it declined to grant the second and third declarations.

[10] Before this Court, the appellants sought to restore the first declaration as granted by the trial judge, not as restricted by the Federal Court of Appeal. In addition, they asked that the second and third declarations be granted. The Crown cross-appealed, arguing that none of the declarations should be granted. For the following

reasons, I agree generally with the trial judge.

Analysis

[11] This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44. The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

[12] The first disputed issue in this case is whether the declarations would have practical utility. There can be no doubt, in my respectful view, that granting the first declaration meets this threshold. Delineating and assigning constitutional authority between the federal and provincial governments will have enormous practical utility for these two groups who have, until now, found themselves having to rely more on noblesse oblige than on what is obliged by the Constitution.

[13] Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one.

[14] This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences, as was recognized by Phelan J.:

> One of the results of the positions taken by the federal and provincial governments and the "political football — buck passing" practices is that financially [Métis and non-status Indians] have been deprived of significant funding for their affairs. . . .
>
> . . . the political/policy wrangling between the federal and provincial governments has produced a large population of collaterally damaged [Métis and non-status Indians]. They are deprived of programs, services and intangible benefits recognized by all governments as needed. [paras. 107-8]

See also *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, at para. 70.

[15] With federal and provincial governments refusing to acknowledge jurisdiction over them, Métis and non-status Indians have no one to hold accountable for an inadequate status quo. The Crown's argument, however, was that since a finding of jurisdiction under s. 91(24) does not create a duty to legislate, it is inappropriate to answer a jurisdictional question in a legislative vacuum. 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. The existence of a legislative vacuum is self-evidently a reflection of the fact that neither level of government has acknowledged constitutional responsibility. A declaration would guarantee both certainty and accountability, thereby easily reaching the required jurisprudential threshold of offering the tangible practical utility of the resolution of a longstanding jurisdictional dispute.

[16] We are left then to determine whether Métis and non-status Indians are in fact included in the scope of s. 91(24).

[17] 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. '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:

> There is no one exclusive Metis People in Canada, anymore 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.

(R. E. Gaffney, G. P. Gould and A. J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (1984), at p. 62, quoted in Catherine Bell, "Who Are The Metis People in Section 35(2)?" (1991), 29 *Alta. L. Rev.* 351, at p. 356.)

[18] The definitional contours of 'non-status Indian' are also imprecise. Status Indians are those who are recognized by the federal government as registered under the *Indian Act*, R.S.C. 1985, c. I-5. Non-status Indians, on the other hand, can refer to Indians who no longer have status under the *Indian Act*, or to members of mixed communities who have never been recognized as Indians by the federal government. Some closely identify with their Indian heritage, while others feel that the term Métis is more reflective of their mixed origins.

[19] These definitional ambiguities do not preclude a determination into whether the two groups, however they are defined, are within the scope of s. 91(24). I agree with the trial judge and Federal Court of Appeal that the historical, philosophical, and linguistic contexts establish that "Indians" in s. 91(24) includes *all* Aboriginal peoples, including non-status Indians and Métis.

[20] To begin, it is unnecessary to explore the question of non-status Indians in a full and separate analysis because the Crown conceded in oral argument, properly in my view, that they are recognized as "Indians" under s. 91(24), a concession that reflects the fact that the federal government has used its authority under s. 91(24) in the past to legislate over non-status Indians as "Indians".[2] While a concession is not necessarily determinative, it does not, on the other hand, make the granting of a declaration redundant, as the Crown suggests. Non-status Indians have been a part of this litigation since it started in 1999. Earlier in these proceedings, the Crown took the position that non-status Indians did *not* fall within federal jurisdiction under s. 91(24). As the intervener Aseniwuche Winewak Nation of Canada submitted in oral argument, excluding non-status Indians from the first declaration would send them "[b]ack to the drawing board". To avoid uncertainty in the future, therefore, there is demonstrable utility in a declaration that confirms their inclusion.

[21] We are left then to consider primarily whether the Métis are included.

[22] The prevailing view is that Métis are "Indians" under s. 91(24). Prof. Hogg,

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[2] When Newfoundland and Labrador joined Confederation in 1949, for example, they brought with them many Aboriginal peoples who were obviously not — and had never been — registered under the federal *Indian Act* and were therefore non-status Indians. The federal government nonetheless assumed jurisdiction over them and many were incorporated into the *Indian Act* in 1984 and 2008.

for example, sees the word “Indians” under s. 91(24) as having a wide compass, likely including the Métis:

> The Métis people, who originated in the west from intermarriage between French Canadian men and Indian women during the fur trade period, received “half-breed” land grants in lieu of any right to live on reserves, and were accordingly excluded from the charter group from whom Indian status devolved. However, they are probably “Indians” within the meaning of s. 91(24).

(Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 28-4)

See also Joseph Eliot Magnet, “Who are the Aboriginal People of Canada?”, in Dwight A. Dorey and Joseph Eliot Magnet, eds., *Aboriginal Rights Litigation* (2003), 23, at p. 44; Clem Chartier, “‘Indian’: An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867” (1978-79), 43 *Sask. L. Rev.* 37; Mark Stevenson, “Section 91(24) and Canada’s Legislative Jurisdiction with Respect to the Métis” (2002), 1 *Indigenous L.J.* 237; Noel Lyon, “Constitutional Issues in Native Law”, in Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (rev. 1st ed. 1989), 408, at p. 430.

[23] In fact, “Indians” has long been used as a general term referring to all Indigenous peoples, including mixed-ancestry communities like the Métis. The term was created by European settlers and applied to Canada’s Aboriginal peoples without making any distinction between them. As author Thomas King explains in *The*

Inconvenient Indian:[3]

> No one really believed that there was only one Indian. No one ever said there was only one Indian. But as North America began to experiment with its "Indian programs," it did so with a "one size fits all" mindset. Rather than see tribes as an arrangement of separate nation states in the style of the Old World, North America imagined that Indians were basically the same. [p. 83]

[24] Before and after Confederation, the government frequently classified Aboriginal peoples with mixed European and Aboriginal heritage as Indians. Métis were considered "Indians" for pre-Confederation treaties such as the Robinson Treaties of 1850. Many post-Confederation statutes considered Métis to be "Indians", including the 1868 statute entitled *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42.

[25] Historically, the purpose of s. 91(24) in relation to the broader goals of Confederation also indicates that since 1867, "Indians" meant all Aboriginal peoples, including Métis. The trial judge found that expanding British North America across Rupert's Land and the North-West Territories was a major goal of Confederation and that building a national railway was a key component of this plan. At the time, that land was occupied by a large and diverse Aboriginal population, including many Métis. A good relationship with all Aboriginal groups was required to realize the goal of building "the railway and other measures which the federal government would have to take." With jurisdiction over Aboriginal peoples, the new federal government could "protect

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[3] *The Inconvenient Indian: A Curious Account of Native People in North America* (2013), winner of the 2014 RBC Taylor Prize.

the railway from attack" and ensure that they did not resist settlement or interfere with construction of the railway. Only by having authority over *all* Aboriginal peoples could the westward expansion of the Dominion be facilitated.

[26] The work of Prof. John Borrows supports this theory:

> The Métis Nation was . . . crucial in ushering western and northern Canada into Confederation and in increasing the wealth of the Canadian nation by opening up the prairies to agriculture and settlement. These developments could not have occurred without Métis intercession and legal presence.

(*Canada's Indigenous Constitution* (2010), at pp. 87-88)

In his view, it would have been impossible for Canada to accomplish its expansionist agenda if "Indians" under s. 91(24) did not include Métis. The threat they posed to Canada's expansion was real. On many occasions Métis "blocked surveyors from doing their work" and "prevented Canada's expansion into the region" when they were unhappy with the Canadian government: Borrows, at p. 88.

[27] In fact, contrary to its position in this case, the federal government has at times assumed that it could legislate over Métis as "Indians". The 1876 *Indian Act*[4] banned the sale of intoxicating liquor to "Indians". In 1893 the North-West Mounted Police wrote to the federal government, expressing their difficulty in distinguishing between "Half-breeds and Indians in prosecutions for giving liquor to the latter". To clarify this issue, the federal government amended the *Indian Act*[5] in 1894 to broaden

[4] *The Indian Act, 1876,* S.C. 1876, c. 18.
[5] *An Act further to amend "The Indian Act"*, S.C. 1894, c. 32.

the ban on the sale of intoxicating liquor to Indians or any person "who follows the Indian mode of life", which included Métis.

[28] In October 1899, Indian Affairs Minister Clifford Sifton wrote a memorandum that would become the basis of the federal government's policy regarding Métis and Indian Residential Schools for decades. He wrote that "I am decidedly of the opinion that all children, even those of mixed blood . . . should be eligible for admission to the schools": *The Final Report of the Truth and Reconciliation Commission of Canada*, vol. 3, *The Métis Experience* (2015), at p. 16. This policy was applied haphazardly. Provincial public school systems were reluctant to admit Métis students, as the provinces saw them as a federal responsibility: p. 26. Many Métis attended Residential Schools because they were the only educational option open to them.

[29] In some cases, the federal government directly financed these projects. In the 1890s, the federal government provided funding for a reserve and industrial school at Saint-Paul-des-Métis in Alberta, run by Oblate missionaries: *The Final Report of the Truth and Reconciliation in Canada*, vol. 3, at p. 16. The reserve consisted of two townships, owned by the Crown, and included a school for teaching trades to the Métis. As long as the project lasted, it functioned equivalently to similar reserves for Indian peoples.

[30] Many Métis were also sent to Indian Residential Schools, another exercise of federal authority over "Indians", as *The Final Report of the Truth and Reconciliation Commission of Canada* documents. According to the Report, "[t]he central goal of the

Canadian residential school system was to ‘Christianize’ and ‘civilize’ Aboriginal people . . . . In the government’s vision, there was no place for the Métis Nation”: vol. 3, at p. 3. The Report notes that

> [t]he existing records make it impossible to say how many Métis children attended residential school. But they did attend almost every residential school discussed in this report at some point. They would have undergone the same experiences — the high death rates, limited diets, crowded and unsanitary housing, harsh discipline, heavy workloads, neglect, and abuse . . . . [p. 4]

The federal government has since acknowledged and apologized for wrongs such as Indian Residential Schools.

[31] Moreover, throughout the early twentieth century, many Métis whose ancestors had taken scrip continued to live on Indian reserves and to participate in Indian treaties. In 1944, a Commission of Inquiry in Alberta was launched to investigate this issue, headed by Justice William Macdonald. He concluded that the federal government had the constitutional authority to allow these Métis to participate in treaties and recommended that the federal government take steps to clarify the status of these Métis with respect to treaties and reserves: *Report of Mr. Justice W.A. Macdonald Following an Enquiry Directed Under Section 18 of the Indian Act*, August 7, 1944 (online).

[32] Justice Macdonald noted that the federal government had been willing to recognize Métis as Indians whenever it was convenient to do so:

> It would appear that whenever it became necessary or expedient to extinguish Indian rights in any specific territory, the fact that Halfbreeds

> also had rights by virtue of their Indian blood was invariably recognized. . . .
>
> . . .
>
> . . . mixed blood did not necessarily establish white status, nor did it bar an individual from admission into treaty. The welfare of the individual and his own desires in the matter were given due weight, no cast-iron rule was adopted. [pp. 557-58]

In 1958, the federal government amended the *Indian Act*,[6] enacting Justice Macdonald's recommendation that Métis who had been allotted scrip but were already registered as Indians (and their descendants), remain registered under the *Indian Act*, thereby clarifying their status with respect to treaties and reserves. In so legislating, the federal government appeared to assume that it had authority over Métis under s. 91(24).

[33] Not only has the federal government legislated over Métis as "Indians", but it appears to have done so in the belief it was acting within its constitutional authority. In 1980, the Department of Indian Affairs and Northern Development wrote a document for Cabinet entitled *Natives and the Constitution*. This document clearly expressed the federal government's confidence that it had constitutional authority to legislate over Métis under s. 91(24):

> Métis people . . . are presently in the same legal position as other Indians who signed land cession treaties. Those Métis who have received scrip or lands are excluded from the provisions of the *Indian Act*, but are still "Indians" within the meaning of the *BNA Act*. . . .
>
> . . .
>
> Should a person possess "sufficient" racial and social characteristics to be considered a "native person", that individual will be regarded as an "Indian" . . . within the legislative jurisdiction of the federal government, regardless of the fact that he or she may be excluded from the coverage of

[6] *An Act to amend the Indian Act*, S.C. 1958, c. 19.

the *Indian Act*. [p. 43]

[34] Moreover, while it does not define the scope of s. 91(24), it is worth noting that s. 35[7] of the *Constitution Act, 1982* states that Indian, Inuit, *and* Métis peoples are Aboriginal peoples for the purposes of the Constitution. This Court recently explained that the "grand purpose" of s. 35 is "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship": *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 10. And in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, this Court noted that ss. 35 and 91(24) should be read together: p. 1109, cited in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623, at para. 69.

[35] The term "Indian" or "Indians" in the constitutional context, therefore, has two meanings: 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, and a narrower meaning that distinguishes Indian bands from other Aboriginal peoples. As will be noted later in these reasons, this Court in *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 ("*Re Eskimo*"), held that s. 91(24) includes the Inuit. Since the federal government concedes that s. 91(24) includes non-status Indians, it would be constitutionally anomalous, as the Crown also conceded, for the Métis to be the only Aboriginal people to be recognized and included in s. 35 yet excluded from the

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[7] **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

constitutional scope of s. 91(24).

[36] The *Report of the Royal Commission on Aboriginal Peoples*, released in 1996, stressed the importance of rebuilding the Crown's relationship with Aboriginal peoples in Canada, including the Métis: see vol. 3, *Gathering Strength*. The Report called on the federal government to "recognize that Métis people . . . are included in the federal responsibilities set out in section 91(24) of the *Constitution Act, 1867*": vol. 2, *Restructuring the Relationship*, at p. 66. The importance of this reconstruction was also recognized in the final report of the Truth and Reconciliation Commission of Canada: *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), at p. 183; see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 1, and *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 S.C.R. 535, at para. 12.

[37] The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal.

[38] The jurisprudence also supports the conclusion that Métis are "Indians" under s. 91(24). There is no case directly on point, but by identifying which groups have already been recognized as "Indians" under this head of power and by establishing principles governing who can be considered "Indians", the existing cases provide

guidance.

[39] In *Re Eskimo*, this Court had to determine whether the Inuit were "Indians" under s. 91(24) of the *Constitution Act, 1867*. Relying on historical evidence to determine the meaning of "Indians" in 1867, the Court drew heavily from the 1858 *Report from the Select Committee on the Hudson's Bay Company*. Acting on behalf of the federal government, the Hudson's Bay Company had conducted a survey of Rupert's Land and the North-Western Territories in which the Inuit were classified as Indians. The Court found that while the Inuit had their own language, culture, and identities separate from that of the "Indian tribes" in other parts of the country, they were "Indians" under s. 91(24) on the basis of this survey. It follows from this case that a unique culture and history, and self-identification as a distinct group, are not bars to being included as "Indians" under s. 91(24).

[40] In *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170, this Court traced the outer limits of the "Indian" power under s. 91(24). An Indian couple lived on a reserve most of the year except for a few weeks each summer during which they lived off the reserve and the husband worked on a farm. The husband died during one of the weeks he was away from the reserve. This resulted in the superintendent in charge of the Indian district (which included their reserve) being appointed as administrator of his estate, pursuant to s. 43 of the *Indian Act*.[8] His wife challenged s. 43 on the grounds that it violated the *Canadian Bill of Rights*, S.C. 1960, c. 44. While the Court held that s. 43 of the *Indian Act* did not violate the *Bill of Rights*, Beetz J. concluded that in determining who are "Indians" under s. 91(24), "it would not appear

[8] R.S.C. 1970, c. I-6.

unreasonable to count marriage and filiation and, unavoidably, intermarriages": p. 207.

[41] These two cases left jurisprudential imprints that assist in deciding whether Métis are part of what is included in s. 91(24). As stated above, *Canard* shows that intermarriage and mixed-ancestry do not preclude groups from inclusion under s. 91(24). And *Re Eskimo* 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).

[42] There is no doubt that the Métis are a distinct people. Their distinctiveness was recognized in two recent cases from this Court — *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, [2011] 2 S.C.R. 670, and *Manitoba Metis Federation*. The issue in *Cunningham* was whether Alberta's *Metis Settlements Act*, R.S.A. 2000, c. M-14, violated s. 15 of the *Canadian Charter of Rights and Freedoms* by terminating the membership of Métis who voluntarily registered as Indians under the *Indian Act*. The Court concluded that the *Metis Settlements Act* was justified as an ameliorative program. In commenting on the unique history of the Métis, the Court noted that they are "widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities": para. 7.

[43] And in *Manitoba Metis Federation*, this Court granted declaratory relief to the descendants of Manitoba's Red River Métis Settlement. The federal *Manitoba Act, 1870*, S.C. 1870, c. 3, promised land to the children of the Métis. Errors and delays resulted in many of them receiving inadequate scrip rather than land. The Court held that Canada had a fiduciary relationship with the Métis, and that the Crown's promise

to implement the land grant engaged the honour of the Crown. This created a duty of diligent implementation. In so deciding, the Court stated that the Métis of the Red River Settlement are a "distinct community": para. 91.

[44] The Crown, however, submits that including Métis as "Indians" under s. 91(24) is contrary to this Court's decision in *R. v. Blais*, [2003] 2 S.C.R. 236. With respect, I think *Blais* can be easily distinguished. The issue in *Blais* was whether a provision of Manitoba's *Natural Resources Transfer Agreement*, which allowed "Indians" to hunt out of season, included Métis. It is true that the Court concluded that "Indians" in the *Natural Resources Transfer Agreement* did not include Métis, but what was at issue was a constitutional agreement, not the Constitution. This, as this Court noted in *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, is a completely different interpretive exercise:

> . . . it is submitted that the intention of the framers should be determinative in interpreting the scope of the heads of power enumerated in ss. 91 and 92 given the decision in *R. v. Blais*, [2003] 2 S.C.R. 236, 2003 SCC 44. That case considered the interpretive question in relation to a particular constitutional agreement, as opposed to a head of power which must continually adapt to cover new realities. It is therefore distinguishable and does not apply here. [para. 30]

[45] While there was some overlapping evidence between *Blais* and this case, the interpretation of a different record in *Blais* directed at different issues cannot trump the extensive and significantly broader expert testimony and the findings of Phelan J. Of most significance, however, is the fact that this Court itself expressly stated in *Blais* that it was *not* deciding whether s. 91(24) included the Métis. Far from seeing *Blais* as dispositive of the constitutional scope of s. 91(24), the Court emphasized that it left "open for another day the question of whether the term 'Indians' in s. 91(24) of the

Constitution Act, 1867 includes the Métis — an issue not before us in this appeal": para. 36.

[46] 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.

[47] 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, but it brings us to whether, for purposes of s. 91(24), Métis should be restricted to the definitional criteria set out in *Powley* in accordance with the decision of the Federal Court of Appeal, or whether, as the appellants and some of the interveners urged, the membership base should be broader.

[48] The issue in *Powley* was who is Métis under s. 35 of the *Constitution Act, 1982*. The case involved two Métis hunters who were charged with violating the *Game and Fish Act*, R.S.O. 1990, c. G.1. They claimed that the Métis had an Aboriginal right to hunt for food under s. 35(1). The Court agreed and suggested three criteria for defining who qualifies as Métis for purposes of s. 35(1):

1. Self-identification as Métis;
2. An ancestral connection to an historic Métis community; and
3. Acceptance by the modern Métis community.

[49] The third criterion — community acceptance — raises particular concerns in the context of this case. The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights: para. 13. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s. 35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.

[50] The first declaration should, accordingly, be granted as requested. Non-status Indians and Métis are "Indians" under s. 91(24) and it is the federal government to whom they can turn.

[51] But federal jurisdiction over Métis and non-status Indians does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*. This Court has recognized that courts "should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government": *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 37 (emphasis in original). Moreover, this Court has been clear that federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the "Indian" power: *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*,

[2010] 2 S.C.R. 696, at para. 3.

[52] I agree, however, with both the trial judge and the Federal Court of Appeal that neither the second nor third declaration should be granted.

[53] The second declaration sought is to recognize that the Crown owes a fiduciary duty to Métis and non-status Indians. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, accepted that Canada's Aboriginal peoples have a fiduciary relationship with the Crown and *Manitoba Metis Federation* accepted that such a relationship exists between the Crown and Métis. As a result, the declaration lacks practical utility because it is restating settled law.

[54] The third declaration sought is 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.

[55] The claim is that the First Ministers' conferences anticipated by ss. 37 and 37.1 of the *Constitution Act, 1982*[9] did not yield the hoped-for results in identifying

[9] **37.** (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

and defining Aboriginal rights. The subsequent lack of progress implies that the federal government has not fulfilled its constitutional obligations.

[56] However, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, and *Powley* already recognize a context-specific duty to negotiate when Aboriginal rights are engaged. Because it would be a restatement of the existing law, the third declaration too lacks practical utility.

[57] For the foregoing reasons, while I agree with the Federal Court of Appeal and the trial judge that the second and third declarations should not be granted, I would restore the trial judge's decision that the word "Indians" in s. 91(24) includes Métis and non-status Indians.

[58] The appeal is therefore allowed in part and the Federal Court of Appeal's conclusion that the first declaration should exclude non-status Indians or apply only to those Métis who meet the *Powley* criteria, is set aside. It follows that the cross-appeal

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37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

is dismissed. The appellants are entitled to their costs.

Appeal allowed in part and cross-appeal dismissed, with costs.

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