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Daniels vs. Canada: Origins, Intentions, Futures

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On April 14, 2016, the Supreme Court of Canada decided *Daniels v. Canada*,[2] one of the most transformative indigenous constitutional cases, if not the most transformative case, of this generation. The *Daniels* decision is the culmination of a 17-year legal odyssey that began in 1999. The case is unusual in that plaintiffs sought and obtained a declaration as to constitutional authority as a means to reconstruct the situation of Non-Status Indigenous (NSI) people in Canada.

In the pages that follow, I will describe the issues that motivated a national Aboriginal organization to seek this atypical remedy. I will explain why the plaintiffs believed that a declaration as to constitutional jurisdiction was necessary to alleviate the underdevelopment that typifies Non-Status Aboriginal people in Canada (NSI slightly outnumber Status Indians). I will then show where the declaration fits in the evolving Aboriginal constitutional landscape and elaborate on what further action will be necessary to realize the full scope of the changes the plaintiffs hoped to achieve. Lastly, I will point out what I believe to be the most promising arenas in which to carry forward the struggle out of which the *Daniels* case arose.

The *Daniels* Litigation

The plaintiffs sought three declarations: (1) that Métis and NonStatus Indians (MNSI) are "Indians" as defined in s. 91(24) of the *Constitution Act, 1867*; (2) that the Crown owes a fiduciary duty to Métis and NonStatus Indians as Aboriginal peoples; and (3) that Métis and NonStatus Indians have the right to be consulted and negotiated with by the Federal Government as to their rights, interests, and needs as Aboriginal peoples.

Notwithstanding the somewhat obscure remedies requested, the Supreme Court stated clearly at the outset of its reasoning that the *Daniels* case was a "chapter in the pursuit of reconciliation and redress" in Canada's relationship with its Indigenous peoples. That relationship had produced many "inequities" and "disadvantages."[3] The Court considered that the first declaration "will have enormous practical utility" for MNSI, as it will enable them to rely on "what is obliged by the Constitution." Lacking jurisdictional clarity, both federal and provincial governments denied having legislative authority over MNSI,

1 F.R.S.C., Professor of Law, University of Ottawa. Professor Magnet was lead counsel for the plaintiffs in all courts in *Daniels v. Canada*.

2 *Daniels v. Canada*, 2016 SCC 12.

3 *Daniels v. Canada*, 2016 SCC 12, ¶ 1.

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which "results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences." These consequences included a lack of funding for their affairs and being deprived of "programs, services and intangible benefits recognized by all governments as needed."[4]

To decide whether the first declaration should be granted, the Supreme Court considered the purpose of enshrining s. 35 in the *Constitution Act, 1982*: "the reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."[5] The Court also referred to the *Report of the Royal Commission on Aboriginal Peoples*, which stressed the importance of rebuilding the Crown's relationship with Aboriginal peoples in Canada, including the Métis, and called on the federal government to "recognize that Métis people . . . are included in the federal responsibilities set out in section 91(24)." These and other sources led the Court to conclude "that reconciliation with *all of Canada's Aborigin*al peoples is Parliament's goal."[6] Accordingly, the Court ruled that the term "Indians" in s. 91(24) must be understood broadly and "includes all Aboriginal peoples." The Court thus decided that

> there is no need to delineate which mixed-ancestry communities are Métis and which are non-status Indians. They are all "Indians" under s. 91(24) by virtue of the fact that they are all Aboriginal peoples.[7]

The Court summarily refused to grant the second and third declarations. Previous jurisprudence had accepted that the M*é*tis have a fiduciary relationship with the Crown. "As a result, the [second] declaration lacks practical utility because it is restating settled law."[8] As well, the Court's prior cases "already recognize a context-specific duty to negotiate when Aboriginal rights are engaged." For this reason too, the third declaration "would be a restatement of the existing law" and "lacks practical utility."[9]

Origins and Development of the Problem

In 1965, the Royal Commission on Bilingualism and Biculturalism reported that "Canada, without being fully conscious of the fact, is passing through the greatest crisis in its history ... a crisis which if it should persist and gather momentum could destroy Canada."[10] This widely publicized conclusion set off an intense effort by the Government of Canada

4 *Id*., ¶12-14.

5 *Id*., ¶ 34, 37.

6 *Id*., ¶ 37.

7 *Id*., ¶ 46.

8 *Id*., ¶ 53.

9 *Id*., ¶ 56.

10 Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1967), I, p. xvii.

to reform Canada's Constitution to make it better fit the new situation that had evolved in the Province of Québec during the Quiet Revolution. This effort lasted until 1992. During this time Canada created special entities[11] by which to research and learn about the unique situation of Canadian Indigenous people, including the people Canada called "Métis and Non-Status Indians."

Cabinet memos and allied materials recorded the results. My team[12] fought and won many pre-trial motions to require Canada to produce these secret materials. Once we had the documents, my team spent four years studying them, a treasure trove consisting of 150,000 pages that revealed the secret inner calculations and strategies of the Government of Canada and its colonial predecessors with respect to Indigenous peoples over two centuries. These documents were a "treasure trove" for us because we found this, for example, among them:

> The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.[13]

We also found this:

> In general terms, the Federal Government does possess the power to legislate

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11 Canada established the *Consultative Group on Métis and Non Status Indian Socio-Economic Development* in 1978, with approval of the Prime Minister of Canada. The Consultative Group held consultations with provincial governments and MNSI organizations, after which it filed two *Interim Reports* in 1979 and a *Report* (c. 1980). These reports were filed in *Daniels v. Canada* as Exhibits P145, P151, and P198. For additional research, the federal government relied on the Corporate Policy Branch of the Department of Indian Affairs, a substantial 122-person unit whose Director General was Ian Cowie. *Daniels v. Canada*, Federal Court, Trial Record, Evidence of Ian Cowie, Transcript, vol. 4, May 5, p. 441-2, 444-5: "Q. You were it, or your unit was? A. They were it in terms of generating the substantive work" (474-5).

12 I was retained as legal counsel to the Congress of Aboriginal Peoples in 1999. CAP is one of five national Aboriginal organizations recognized by the Government of Canada as the representatives of Canadian Indigenous peoples. CAP appointed me as lead counsel for the *Daniels* effort and also for the other Aboriginal constitutional cases that CAP initiated or in which CAP participated since 1999. I built a team for *Daniels* consisting of my brilliant co-counsel, Andrew Lokan; six junior counsel and articling students—Lindsay Scott, and, at various times, Brydie Bethell, Jean Claude Killey, Charlene Desrochers, Ryan Flewelling, and Eric Adams; 21 University of Ottawa Law students—at various times, Kristie Smith, Andrew Kaikai, Marie-Luc Seguin Lemay, Emily Racine, Bethan Dinning, Elizabeth Harding, Colin Holland, Carolyn Cornford, Kate Meyers, Kevin O'Shea, Clare Crummey, Kirsten Odynski, Alyssa Tomkins, Megan Brady, Ben Millar, Adam Nott, Sina Muscati, Keeley Holmes, Andrea Ormiston, Sunil Matthai and Giuseppe Cipriano; two historians—John Leslie and Vic Valentine; one archival researcher—Rina Simanjuntak; and three expert witnesses—Professors Sébastien Grammond and William Wicken, and Ms. Gwynneth Jones.

13 *Daniels v. Canada*, Trial Record, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals," July 6, 1972, p. 5.

theoretically in all domains in respect of Métis and Non-Status Indians under Section 91(24) of the BNA Act.[14]

We were forced to fight an additional battle to admit the secret documents into evidence at trial as reliable indicators of the truth of what the documents said, a battle which we also won.

The trial judge, as well as the judges who presided over the pre-trial motions, criticized Canada for its litigation behavior. The judges rightly saw Canada's actions as a concerted effort over 17 years to obstruct the proceeding and prevent it from being litigated. The judges censured this conduct and imposed increasingly severe adverse cost awards against the Crown for engaging in it.[15]

The secret documents were very helpful to my team to persuade the trial judge that:

- In 1980, Canada identified a core group of MNSI. In 1995, Canada counted them at precisely 198,000 Métis and 404,200 NSI.[16] Canada located their communities and produced detailed studies of their condition.[17]
- The core group is a very small subset of Canadians with Aboriginal ancestry, who number in the millions.
- The core groups of Métis and Non-Status Indians have distinct identities. They are conscious of their histories as Aboriginal people, and "can demonstrate their existence as a unique force in Canada's history."[18]

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14 *Daniels v. Canada*, Trial Record, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, p.46. The trial judge described the unusual relevance of this paper. It was, he said, "a document which formed part of Cabinet documents and has been reviewed for and considered by the highest level of government. The views expressed represented prevailing views of the highest levels of the bureaucracy and the political structure"; *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 99.

15 *Daniels v. Canada*, [2008] F.C. 823, ¶ 21 (per Hugessen, J.: "In my view this motion [Canada's *second* motion to strike out the action] should not have been brought"). *Daniels v. Canada*, [2013] 2 F.C.R. 268, ¶ 137 (per Phelan, J.: "the Defendants would not admit that a significant number of government documents were in fact government documents. The Defendants' position was wholly untenable and just a further example of the extent to which the Defendants would proceed in attempts to frustrate this litigation"). See also *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, [2002] 4 F.C. 550, ¶ 54.

16 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 107, 117–18.

17 Id, ¶ 95–7.

18 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P124 - Gérard Pelletier, Secretary of State, Confidential Memorandum to Cabinet, "Métis and Non-Status Indians - Research Proposals", July 6, 1972, p. 2. The Consultative Group concluded that "MNSI can demonstrate their existence as a unique group and force in Canada's history;" Ex. P241, p. 56.

The trial judge was convinced not only that MNSI circumstances were atrocious but also that MNSI were the worst off of all Canadian citizens.[19] He also accepted the plaintiffs' explanation for why this is so: although MNSI needs were similar to those of Status Indians, federal programming directed at Indigenous peoples' needs excluded MNSI. Consequently, MNSI were underdeveloped as peoples, even when compared with Status Indians.[20]

The secret documents show, over and over, how MNSI "must cope with severe disadvantage" and "desperate circumstances," which a Cabinet memo called "intolerable judged by the standards of Canadian society."[21]

During the constitutional reform process, Canada developed a suite of options to remediate the under-development of MNSI people. Canada conducted detailed studies on the costs of the various options. One of these options was to extend to MNSI the same panoply of government programming and services provided to Status Indians. Canada calculated the cost of full extension of Indian programs to MNSI at $4 billion per year.[22]

Like all governments, the Government of Canada "recognized that these causes and remedies [of MNSI underdevelopment] had to be addressed … on a national scale, and not by piecemeal or on a province by province basis."[23] Canada wanted to provide appropriate services to MNSI.[24] It balked only because it did not want to pay the full costs of doing this by itself.

Accordingly, Canada sought provincial participation. It reasoned with the provinces that MNSI were provincial citizens like others and that the provinces were therefore responsible to provide them with health care, education, and social services.

The provinces rejected any responsibility for MNSI, countering that MNSI were "Indians" within federal jurisdiction according to *Constitution Act, 1867*, s. 91:24. According to the provincial view, it followed that Canada alone was responsible for Indian programming to

19 Id, ¶ 84–85, citing a 1972 Cabinet document, which shows that the GoC was well aware of this.

20 Id, ¶ 107–09.

21 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P151, *Report of the Consultative Group on Métis and Non-Status Indian Socio-Economic Development*, p. 22.

22 *Daniels v. Canada*, Federal Court, Trial Record, p. 2966, Ex. P151, Off Reserve Issues, June 6, 1995, at p. 2970: "a global solution of extending DIAND programs, policies and funding to all Aboriginal people is a non-starter. The costs would be prohibitive … in the range of $1 billion for health services and over $3 billion for DIAND programs such as social services, education and post-secondary student support." In open court, counsel for Canada stated that the cost to Canada of losing the *Daniels* case could amount to $4 billion per year.

23 *Daniels v. Canada,* 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 479.

24 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P151, *Report of the Consultative Group on Métis and Non-Status Indian Socio-Economic Development*, p. 23: "the federal government should move towards a comprehensive, well planned and co-ordinated national strategy for assisting all native people to move out of their disadvantaged circumstances."

MNSI.[25] Moreover, in the extensive federal/provincial discussions that took place on the issue, the provinces demanded that Canada reimburse them for the cost of having provided services to MNSI in the past.[26]

The Federal Court found, as a fact, that it was the cost of servicing the MNSI population that motivated Canada to deny that it had jurisdiction over Métis and Non-Status Indians.[27]

So began a dispute between Canada and the provinces about jurisdiction and responsibility for MNSI. The trial judge described the essence of the dispute as follows:

> The federal government denies that they have responsibility for Métis; the provinces take the opposite position and see the matter as a funding issue for which the federal government is primarily, if not exclusively, responsible ... The result was that services to MNSI just were not supplied while governments fought about jurisdiction—principally a fight about who bore financial responsibility.[28]

The secret documents record that the dispute was bitter and emotional. Officials had difficulty even talking to each other about solutions.[29]

The dispute has been going on for two generations. It is a dispute about cost, fought to a stalemate on the proxy issue of jurisdiction. The jurisdiction issue remained live until the day the Supreme Court of Canada decided the *Daniels* case.[30] That issue has now been decided against Canada.

The dispute became increasingly relevant to the national and provincial organizations that represented Métis and Non-Status Indians in the period of active constitutional reform. It became particularly relevant when governments proposed opening the Constitution, did open it for amendment in 1982, and continued to seek additional constitutional changes over the next 10 years, including changes concerning MNSI.[31]

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25 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P127 - "Responsibility for Aboriginal Peoples: Section 91(24) of the Constitution Act 1867", Secret Federal government document, November 7, 1984, p. 3-4: "Financial responsibility, simply put, means that, in their [the provinces'] view, the federal government is to be primarily responsible for the provision of financial resources necessary to meet both the everyday needs of the aboriginal peoples, such as programs and services, as well as the political, economic and cultural aspirations of those peoples."

26 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 100, 480.

27 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 501, 508.

28 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 86–7.

29 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P35, Constitutional Conference on Native Rights, ¶ 66: "The arguments have been so emotional that sensible solutions are difficult even to discuss."

30 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 57, 87.

31 The *Charlottetown Accord* provided specifically for an amendment to s. 91(24) of the *Constitution Act, 1867* to include all Aboriginal peoples within federal legislative jurisdiction; *Charlottetown Accord, Draft Legal Text*, Oct. 9, 1992, s. 8 online: http://www.efc.ca/pages/law/cons/Constitutions/Canada/English/Proposals/CharlottetownLegalDraft.html.

In 1983, as required by the Constitution,[32] the Prime Minister of Canada convened a conference of First Ministers and national Aboriginal leaders to discuss necessary Aboriginal constitutional reform. When that conference failed to achieve consensus, the Constitution was amended to require additional conferences.[33] Three further conferences were held, in 1984, 1985 and 1987.

At the 1984 conference, Canada's public refusal of jurisdiction was made especially clear and public. In the lead-up to the conference, Pierre Gravelle, then a senior official in the Privy Council Office, advised the Minister of Justice how to respond to various requests expected from the Native Council of Canada, including an expected request to amend *Constitution Act, 1867*, s. 91:24 in order to clarify that MNSI were within federal jurisdiction. Gravelle advised Minister Crosbie to state at an upcoming meeting with the NCC that Métis, defined as being distinct from Indians, do not come under s. 91:24.[34] Minister Crosbie did so at the meeting, and he repeated that position publically in open session at the 1984 First Ministers Conference on Aboriginal Constitutional Matters.

After Minister Crosbie's statement at the 1984 Conference, neither Canada nor any province was prepared to address the issue head on. Canada's announced position on s. 91:24 essentially put the issue of providing services to MNSI into deep freeze. Both sides agreed that it was necessary to provide services to MNSI in order to redress deep-seated under-development and discrimination; neither side was willing to do so unilaterally, or to give up any ground in their assertions that that the other side was responsible for doing it.

MNSI organizations were onlookers of the federal provincial dispute—powerless to affect the standoff. A secret Cabinet memo claimed, correctly, that while governments fought about jurisdiction, "the losers [were] the Indians."[35] Another Cabinet memo called Canada's policy of excluding MNSI from Status Indian programs and services "arbitrary, anachronistic & harsh."[36]

Small wonder: the secret government documents reveal that, at the same time that Canada was denying to MNSI organizations and the broader Canadian public that it had jurisdiction over MNSI, Canada's officials had concluded—and had advised the government—that Canada had all necessary jurisdiction to provide services and funding to the MNSI population and that its refusal to do so was a matter of choice, not law.[37]

After a nine-week trial in 2011, the trial judge found as a fact that the dispute between Canada and the provinces damaged MNSI. Notably, he found that the dispute caused both

32 *Constitution Act, 1982*, s. 37.

33 *Constitution Amendment Proclamation, 1983.* This added s. 37.1 to the *Constitution Act, 1982*.

34 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P151, p. 2931, Secret Memorandum for the Honourable John Crosbie, Dec. 10, 1984, at p. 2936.

35 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P32 - "Natives and the Constitution" Background and Discussion Paper, Intergovernmental Affairs, Corporate Policy, DIAND, August 1980, p. 5.

36 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P215; 1976 Cabinet Memorandum, p. 2.

37 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 499–501.

federal and provincial governments to withhold "programs, services and intangible benefits all governments recognize are needed."[38]

The judge's finding is consistent with what The Royal Commission on Aboriginal Peoples had stated 15 years earlier in its *Report*:

> The refusal by the government of Canada to treat Métis as full-fledged Aboriginal people covered by section 91(24) of the constitution is the most basic current form of governmental discrimination. Until that discriminatory practice has been changed, no other remedial measures can be as effective as they should be.[39]

The judge's finding is also consistent with the secret Cabinet memo from 1972, which (as mentioned) stated as follows:

> The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs … are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.[40]

The judge found that resolving constitutional issues would remove uncertainty, clarify the roles of the federal and provincial governments, address a dysfunction in Canada's federal system, and provide a gesture of respect and reconciliation.

This is the origin of the *Daniels* case. This is why the Congress of Aboriginal Peoples took the issue to court in 1999.

Intentions

Programs and Services

The trial judge's finding that the federal/provincial dispute caused real harm to approximately 600,000 Métis and Non-Status Indians was not news to the people I represented throughout 17 years of legal struggle. They must deal with the realities of inadequate government services every single day. The services deficit impacts each and every one of them, their children, their families, and their communities—directly, immediately and cumulatively over time.

Every reader of these pages has seen Métis and Non-Status Indian people sick and homeless on the streets of Canada's cities, under-educated in the shacks and shantytowns of Canada's rural and remote regions, wasting away in Canadian jails—their children taken away or struggling with inadequate social support. MNSI have become a persistent

38 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 87, 108. The Federal Court of Appeal agreed : 2014 FCA 101, ¶ 70.

39 *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Canada Communications Group, 1996), Vol. IV, at p. 209–10, 219–20.

40 Supra, note 4.

Indigenous underclass in Canada. The reasons why are obvious. Children cannot learn without adequate or culturally appropriate schools, teachers, programs, and supports. Children do not fully develop without adequate or culturally appropriate health care. Without the targeted economic development strategies that mainstream Canadians and Status Indians take for granted, MNSI lack a fair chance to compete or progress as individuals and communities.

This is why MNSI participate in Canada's economy and society on unequal terms. The resulting under-development of the MNSI population is a foregone conclusion. It manifests clearly in statistical profiling of MNSI communities.[41] The under-development of MNSI adults tends to reproduce itself in their children. The trial judge found that "the service deficit problem is expected to continue as the MNSI population grows. The adverse impact on the MNSI communities across Canada will also increase."[42]

This is why MNSI "are the most disadvantaged of all Canadian citizens."

Belonging and Recognition

The trial judge also found that MNSI "are deprived of … intangible benefits recognized by all governments as needed." He was referring to the plaintiff's argument that the legislative separation of MNSI communities from the larger Aboriginal community to which they are related by familial and kinship ties pressures the MNSI sense of identity, cultural belonging, and the ability to transmit these to offspring. It imposes a form of banishment from the Aboriginal community, making MNSI unable to participate with their kin in important cultural and traditional activities. It denies their recognition as Indigenous peoples.

Sharon McIvor expressed these thoughts forcefully when, in her equality challenge to the *Indian Act* requirements for granting status, she described the "exclusion, loss of cultural connection, and erosion of her identity and sense of self-worth that she had felt at a non-status Indian." She also described the difference that legislative recognition as a Status Indian made to her when she was granted status by Bill C-31:

128 Q And does having status make a - make any difference in your dealings with Aboriginal people now?

A Absolutely. It's actually this card has had a profound affect [sic] on my recognition, and it's - for me it's kind of sad, but true that I have one of these it makes a difference, not only at home, but if I go to any - I have spent time up in Haida Gwaii, for instance, and I've

41 *Daniels v. Canada*, Federal Court, Trial Record, Ex. P139, Consultative Group on Métis and non-status Indian Socioeconomic Development, Métis and non-status Indian Data Base, p. 3, summarizing detailed findings, describes the "gradual decline of community vitality and drift towards 'welfare economies' of MNSI communities and points towards "Government programs, policies and services as a major factor in the decisions of native individuals and groups, are shaping the native development process."

42 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 109.

> worked up there in their community Legal Aid clinic, and having the status card makes me more acceptable, being registered makes me more acceptable, and it's - it's really sad. I find it sad. It's quite profound that that magic number that I got actually makes me more acceptable.
>
> 129 Q Is it that you have status or that you are a band member that makes a difference in your dealings with Aboriginal people?
>
> A It's the recognition, the official recognition that I'm an Indian, and that status.[43]

MNSI will remain an underclass beleaguered in the urban, rural, and remote places of Canada until they secure fair access to the services they have been wrongfully denied since before Canada chose to blame the provinces for its inaction and until appropriate gestures of recognition and respect compensate for the non-belonging and non-recognition that accompanies "Non-Status."

Aboriginal and Treaty Rights

The *Daniels* case had a third objective beyond demolishing Canada's excuse for denying programs, services, and recognition to MNSI people. This concerns the Aboriginal and Treaty rights that were recognized and affirmed by s. 35 of the *Constitution Act, 1982*. These became a sharp point of contention between Canada and First Nations during the Idle No More resistance that first worked itself into Canadian consciousness during the hunger strike of Attawapiskat Chief Theresa Spence in 2012. Idle No More has grown since then into an international indigenous movement.[44]

The issues and objectives for MNSI are similar to those of the Idle No More activists: the common principle is that Aboriginal rights and Indian Treaties should be fully implemented and observed. The legal situation for MNSI is more complicated and fraught, however, as I will now explain.

Section 35 of the *Constitution Act, 1982* provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The Supreme Court of Canada has made increasingly clear that the Aboriginal rights s. 35 recognizes and affirms must be identified, defined and negotiated. This was set out specifically in *Haida Nation v. British Columbia*, and reaffirmed in *Manitoba Metis Federation Inc. v. Canada (Attorney General)*:

> [i]t is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees.[45]

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43 M*cIvor v. Canada (Registrar, Indian and Northern Affairs), 20*07 BCSC 827, ¶ 143.

44 See the Idle No More Manifesto: http://www.idlenomore.ca/manifesto.

45 *Manitoba Metis Federation Inc. v.* Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623, ¶ 69. The Court was quoting from its previous decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, ¶ 20.

While section 35 is the constitutional basis for the Crown's obligation to define the rights guaranteed in s. 35, the requirement also flows from the legal doctrines of *reconciliation* and *the honour of the Crown*. This important point has been stated repeatedly by the Supreme Court of Canada.[46]

The Supreme Court also explained that the doctrines of reconciliation and honour of the Crown stand on a higher juridical foundation than do other legal doctrines. They are constitutional principles.[47] Constitutional principles are meant to be fully enforceable.[48]

The Supreme Court jurisprudence holding that the Crown must act to define the rights guaranteed in s. 35 is consistent with what the Constitution-makersintended in 1982. Prime Minister Trudeau explained this at the 1983 First Ministers' Conference on Aboriginal Constitutional matters:

> We started in 1982 by inserting in our Constitution section 35, in which aboriginal and treaty rights were recognized and affirmed. We were aware at the time that these rights needed to be identified and further defined through a constitutional process … We will find appropriate formulations for inclusion in the Constitution when they have emerged with some precision from our ongoing discussions.[49]

The constitutional process Trudeau referred to was enshrined as section 37 of the *Constitution Act, 1982*. This provision required holding a First Ministers' Conference with an agenda that included "an item respecting the constitutional matters that directly affect the aboriginal peoples of Canada, *including the identification and definition of the rights of those people to be included in the constitution of Canada*" (emphasis mine).[50] As

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46 *Manitoba Metis Federation Inc. v.* Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623, para 69 referred to the Court's previous decision in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1109 to reaffirm that "the honour of the Crown is engaged by s. 35(1) of the *Constitution Act, 1982*." *MMF*, para. 67 explained that "The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty," before stating that "Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims."

47 *Manitoba Metis Federation Inc. v.* Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623, para 69: "Because of its connection with s. 35, the honour of the Crown has been called a 'constitutional principle'." The legal concept of reconciliation is discussed throughout the *MMF* decision. At para. 140 of *MMF* the Court stated that "The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import."

48 *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, at ¶ 50–4; *Reference Re Provincial Judges*, [1997] 3 S.C.R. 3, ¶ 104; Beverley McLachlin, *Unwritten Constitutional Principles: What is Going On*? (2006) 4 NZJPIL 147, 148, 153.

49 The Honourable Pierre Elliott Trudeau, "Opening Statement by the Prime Minister of Canada The Right Honourable Pierre Elliott Trudeau to the Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples Ottawa, March 8, 1984" (Government of Canada: Ottawa, 1984) at p. 3–5.

50 *Constitution Act, 1982*, c. 11 , Schedule B (U.K.) reprinted in R.S.C. 1985, App. II, No. 44, Schedule B at s. 37(2).

mentioned, the First Ministers' Conference required by s. 37 took place in 1983. That conference ended in failure, as the participants could not agree on the identification and definition of the Aboriginal and Treaty rights recognized and affirmed in 1982.

The Constitution was amended on June 21, 1984 to require further First Ministers' Conferences, which would also include agenda items about the rights of the Aboriginal peoples of Canada.[51] Those conferences were held in 1984, 1985, and 1987. They also failed to identify and define the rights of the Aboriginal peoples of Canada, including those of the MNSI.

Interesting situation! The constitutional procedure created to identify and define s. 35 rights proved inadequate to the task and is now spent. But, as the Supreme Court pointed out in *MMF*, para. 69, the obligation to identify and define s. 35 rights remains a constitutional principle, which has the consequence that the obligation is enforceable by the courts.

What are the implications of this situation for MNSI?

When MNSI try to exercise their rights, they are arrested, their equipment is seized, and they are prosecuted in criminal court, where they can try their luck at implementing their rights by defending a criminal charge. These prosecutions are occurring all across Canada.[52] *Powley* is a Métis example. *Marshall/Bernard* is an NSI example.[53]

Mounting a criminal defense in criminal court requires indigenous people to raise enormous resources—frequently well into 7 figures—compile huge historical records, risk fines, equipment seizures and jail—not because they are criminals, but because they are Métis or Indians trying to exercise their constitutional rights.

This is not the path to reconciliation, to say the least.

The Supreme Court of Canada has said repeatedly that criminal trials are inappropriate for Aboriginal rights cases.[54] But what is the alternative?

I believe there is only one alternative. Indigenous peoples and the Crown must enter into negotiations in a common search for agreements that identify, define, and implement the rights affirmed by s. 35. There is simply no other way to fulfill the Constitution's promises.

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51 Amendment to the Constitution of Canada, June 21, 1984, Part IV.1 s. 37.1 (2) stipulates that "Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada."

52 Cases in which Métis have been found to have hunting and harvesting rights: *R. v Goodon*, 2009 CarswellMan 18, 234 Man. R. (2d) 278, 2008 MBPC 59 (Man. Prov. Ct. Jan 08, 2009) [right to hunt for food]; *R. v Belhumeur*, 301 Sask. R. 292, 2007 CarswellSask 598, [2008] 2 C.N.L.R. 311, 2007 SKPC 114 (Sask. Prov. Oct 18, 2007) [aboriginal right to fish for food]; *R. v Laviolette*, 267 Sask. R. 291, 2005 CarswellSask 483, [2005] 3 C.N.L.R. 202, 2005 SKPC 70 (Sask. Prov. Jul 15, 2005) [aboriginal right to fish for food]; for non-status Indians, see *R. v. Fowler* (1993), 134 NBR (2d) 361 (Prov. Ct.); *R. v. Harquail* (1993), 144 NBR (2d) 146 (Prov. Ct.); *R. v. Lavigne*, 319 NBR (2d) 261, [2007] 4 CNLR 268 (NB QB). These are merely the decided cases. Many more prosecutions linger, undecided, in the courts.

53 *R. v. Powley,* 2003 SCC 43; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43.

54 *R. v. Marshall*, 2005 SCC 43, at ¶ 142–144; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at ¶ 30. See also *R. v. Caron*, [2011] 1 S.C.R. 78, at ¶ 19.

This was the original constitutional vision in 1982. It is true that experience has shown that the machinery then created to accomplish this was inadequate. That it now needs to be supplemented does not mean that the enterprise should or can be abandoned. Allowing the current situation—prosecuting Indigenous people who try to enforce their constitutional rights—to drag on indefinitely into the future is a constitutional dead-end that threatens to undermine the reconciliation imperative.

The Supreme Court has said in three increasingly severe *obiter* that s. 35 negotiations are a moral and legal requirement.[55] I pressed this point forcefully on the Supreme Court in *Daniels*, requesting the Court to issue a declaration to this effect. The Court responded that its previous cases "already recognize a context-specific duty to negotiate when Aboriginal rights are engaged."[56]

Accordingly, while conceding that there is room for argument on this point, I believe that s. 35 negotiations to complete the unfinished business of the Aboriginal constitutional conferences of the 1980s—to identify and better define the aboriginal rights of the Aboriginal peoples of Canada—are now constitutionally required. I also believe that these negotiations are morally obligatory for the following reasons:

- The trial judge found that generations of neglect have damaged MNSI;[57]
- The trial judge found that Canada has arguably made inadequate efforts to negotiate rights definition;[58]
- Canada refused to negotiate rights definition during 17 years of litigation in the *Daniels* case;
- Canada and the provinces have treated MNSI all across the country as criminals for attempting to exercise their constitutionally protected rights.

Futures

I doubt that the Government of Canada will embrace the full implications of the *Daniels* case. As mentioned, the trial judge chided Canada for "the extent to which the Defendants would proceed in attempts to frustrate this litigation,"[59] actions that also drew criticism from the judges presiding at the pre-trial motions. I do not expect Canada's attitude to

55 *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at ¶ 86, 207; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at ¶ 16, 18, 20, 25; *Tsilhqot'in Nation v.* British Columbia, 2014 SCC 44, ¶ 17–18.

56 *Daniels v. Canada*, 2016 SCC 12, ¶ 56.

57 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 84–87, 108–09.

58 *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 613, 615.

59 See note 6 supra. The quoted words are the trial judge's: *Daniels v. Canada*, 2013 F.C. 6, [2013] 2 F.C.R. 268, ¶ 137.

change overnight, even given the unanimous Supreme Court decision. My reasons for this view are that the policy changes required to satisfy the spirit of the decision are potentially very costly. The changes would also be very difficult to make, as they require federal, provincial, and Indigenous co-operation and co-ordination. This has been elusive for generations. I have experienced firsthand how challenging it can be to engage with our government partners on these issues. I am sure that my government counterparts sometimes find it equally difficult to work with us on the Indigenous side. In addition, as the *Daniels* decision sought and obtained a declaration, not a coercive order, the government has a certain amount of wiggle room in interpreting what the principles of the honour of the Crown and reconciliation require.

I am reasonably certain that additional litigation and pressure at other points in Canada's extended constitutional system[60] will be necessary to bring about the kinds of changes the *Daniels* litigation intended.[61]

I also believe that the *Daniels* decision is likely to stimulate action on Canada's international human rights commitments. I expect there will be complaints about inadequate implementation of treaty commitments to various international reporting and supervisory bodies, with resulting pressure applied from the international human rights system. This is likely to be a useful, additional catalyst for action, given how difficult implementation of the *Daniels* decision is expected to be. International recourse may help overcome deficiencies in Canada's constitutional system to some extent. It may also add capacity to what are likely to be shortcomings of resources, will, and capability among the various actors—both governmental and Indigenous—who have primary responsibility for implementing the *Daniels* decision.

Daniels is likely to stimulate wide-ranging efforts at many levels by many actors to change Canada's core Indigenous people's policies. MNSI organizations would be well-advised to consider making concerted efforts to coalesce as much as possible around one or more shared visions and to work together as much as possible to garner political support

60 By "Canada's extended constitutional system," I mean a mixture of additional litigation, pressure-group politics at the local and national levels, civil society organizations at the local and national levels, governmental commissions, ombudspersons, watchdogs, and more. There is a good discussion of how this all works in David Cole's fine book, *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (New York: Basic Books, 2016).

61 My views are the result of my long experience as a lawyer with transformational constitutional litigation. For example, my victory on behalf of the *Société franco-manitobaine* in the *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721, required more than a decade and a half of litigation, civil society pressure, and negotiations to implement the constitutional requirements of the decision. While I believe one-shot litigation like *Daniels* does not solve these problems, I remain an optimist about the capacity of the extended constitutional system to transform unjustifiable situations. The transformed situation of the Franco-Manitoban minority following all this effort, stimulated by the *Manitoba Language Rights Reference*, is a dramatic example of just how much good all of these combined efforts can do. I hope *Daniels* eventually provides another example in a transformed situation for MNSI in Canada. That human perfection is not realizable does not mean we should stop trying.

for their hopes for the *Daniels* aftermath. Governments equally might consider establishing long term objectives for their efforts to develop Non-Status Indigenous peoples and trying to coalesce around shared goals both with each other and also with representatives of Non-Status Indigenous peoples.

What are the longer-term goals and objectives the *Daniels* decision implicates? I believe that *Daniels* is ultimately about settling claims, implementing rights, unlocking human potential and self-government for Métis and Indian communities outside of *Indian Act* structures.

I am hopeful that MNSI organizations will now consider using Canada's extended constitutional system and its international human rights treaty commitments to bring pressure upon the Government of Canada and the provinces for assurances and action on four fronts:

a. Claims

i. Identify and document MNSI-specific and comprehensive claims;

ii. negotiate with Canada a framework for resolving these claims within existing claims processes or in newly created targeted processes;

iii. negotiate a timetable within which Canada will make best efforts to resolve outstanding claims identified.

At present, MNSI organizations and individuals are shut out of Canada's specific claims policy, procedures, and funding and have very limited access to Canada's comprehensive claims policy.[62] Specific claims are claims "against the federal government which relate to the administration of land and other First Nation assets and to the fulfilment of Indian treaties."[63] Comprehensive claims are based on the traditional use and occupancy of land by Indigenous peoples who did not sign treaties. The courts have made clear that land and treaty rights do not depend on status; Non-Status peoples also enjoy such rights.[64] Logically, this implies that Non-Status peoples should have appropriate fora through which to seek remedies for violations of these rights equivalent to procedures offered to Status Indians.

The reality is starkly different. MNSI have no adequate forum in which to negotiate violations of their land and treaty rights. This was acknowledged during the Charlottetown

62 Canada, Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, *The Specific Claims Policy and Process Guide* (Ottawa, 2009): "The term "specific claims," generally, refers to claims made by a First Nation." A Cabinet Memorandum in 1962 proposed the creation of an Indian Claims Commission (ultimately established in 1973) but recommended that Métis be excluded from the proposed claims procedure because they fell within provincial jurisdiction. See John Leslie, "A Historical Survey of Government-Indian Relations, 1940–1970" (1993), p. 40, *Daniels v. Canada*, Federal Court, Trial Record, Exhibit P188.

63 *Id.*

64 *R. v. Powley,* 2003 SCC 43; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43; *R. v. Fowler* (1993), 134 NBR (2d) 361 (Prov. Ct.); *R. v. Harquail* (1993), 144 NBR (2d) 146 (Prov. Ct.).

Constitutional process in a memo from the Clerk of the Privy Council to the Minister of Constitutional Affairs:

> The treaty and aboriginal rights of the NCC's Metis and non-status membership are being dealt with differently from those of status Indians … There is no forum for the NCC's membership to pursue its treaty rights for land claims … There is no federal forum in which their concerns can be addressed.[65]

This issue is significant. Non-Status Indigenous people have many such claims.[66] The lack of appropriate fora for their resolution is an irritant in MNSI–government relationships and a significant contributor to MNSI poverty.

b. Rights

i. Establish tables with Canada to identify and define the aboriginal and treaty rights of MNSI communities as a means to finish the outstanding business resulting from the failed Aboriginal constitutional conferences of the 1980s;

ii. negotiate with Canada the creation of machinery for overseeing implementation of these rights;

iii. negotiate with Canada a realistic timetable for rights implementation.

I discussed above why negotiations to identify and better define the aboriginal rights of the Aboriginal peoples of Canada are constitutionally and morally required. There is a more fundamental point to make, however, which the courts have repeatedly highlighted in modern constitutional litigation. This is that the recognition and implementation of aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part.[67]

Canadians made the momentous choice in 1982 to recognize and affirm aboriginal and treaty rights in the Constitution. The courts have been very faithful to the spirit of that choice—particularly, as I have argued above, in requiring that the rights recognized and affirmed be negotiated, defined, and implemented. The *Daniels* decision is an invitation to political leaders to complete Canada's outstanding business of rights definition and

65 *Daniels v. Canada*, Federal Court, Trial Record, Exhibit P131, *AR*, Vol. 40, p. 2380, Information Memorandum for: The Right Honourable Joe Clark – meeting with Ron George April 28, 1992.

66 For example, at a meeting between the Federal-Provincial Relations Office, the Department of Justice, and the Métis National Council, p. 2, Yvon Dumont, of the Manitoba Métis Federation stated that both federal and provincial governments would not negotiate on the Métis land claims, as "there was no basis for negotiation," *Daniels v. Canada*, Federal Court, Trial Record, Exhibit P425. The 'Métis land claim' was the underlying issue that gave rise to *Manitoba Metis Federation Inc. v.* Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623.

67 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶ 161; *Tsilhqot'in Nation v.* British Columbia, [2014] 2 S.C.R. 256, ¶ 16.

implementation in the spirit of reconciliation of Aboriginal societies with the broader Canadian community.

c. Human Development

i. Using existing Indigenous Affairs programming as a model, supplemented by the *Kelowna Accord* commitments,[68] survey the major programming needs of each MNSI community;

ii. Establish tables with Canada to negotiate community-specific programming models and delivery methods acceptable to each community;

iii. Negotiate a realistic timetable for progressive implementation.

Daniels established as facts that MNSI people and communities are the worst-off of all Canadian citizens, that the reason for this is an absence of governmental services targeted to MNSI needs, that the services-deficit problem will worsen as the MNSI population grows, and that the condition of MNSI people and communities will worsen as time goes on.[69]

Because the result of the *Daniels* case is a declaration as to jurisdiction—rather than coercive orders to provide services—federal and provincial governments are likely to continue to dispute about which should provide what and which should spend how much on what. *Daniels* compromises Canada's position in this dispute in at least two ways. First, the following question was referred to the Supreme Court of Canada in 1939:

> Does the term "Indians," as used in head 24 of section 91 of the British North America Act, 1867, include Eskimo inhabitants of the Province of Quebec?

The Court answered the question in the affirmative.[70] Following that decision, Canada created programs for Inuit people roughly similar in content and dollar amounts to those provided to Status Indians. One would expect honourable dealing to conclude in a similar result concerning Canada's programming to MNSI people and communities following the Supreme Court's decision in *Daniels*. Second, if this result does not flow voluntarily, equality challenges to Status Indian programming based on under-inclusivity for excluding MNSI are highly likely to produce similar results through coercive court orders.

d. Self-government

i. negotiate with Canada the creation of a Commission to investigate models of self-government that could be applied to MNSI communities;

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68 Canada, *Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005* (Lisa L. Patterson) http://www.lop.parl.gc.ca/content/lop/researchpublications/prb0604-e.htm. See, generally, *Kelowna Accord*, https://en.wikipedia.org/wiki/Kelowna_Accord.

69 *Daniels v. Canada*, 2013 F.C. 6, ¶ 84–5, 107–109.

70 *Reference whether "Indians" includes "Eskimo"*, [1939] S.C.R. 104.

ii. begin this process by building the capacity of MNSI organizations and communities to evolve into self-governmental roles;

iii. negotiate with Canada a timetable for capacity-building processes that will allow existing MNSI organizations to assume these responsibilities.

Will Kymlicka correctly observed in 2007 that all of the liberal democracies with sizable indigenous populations "accept, at least in principle, the idea that indigenous peoples will exist into the indefinite future as distinct societies within the larger country, and that they must have the land claims, cultural rights, and self-government rights, needed to sustain themselves as distinct societies."[71] Canada has been working towards implementing various models of self-government for Indigenous peoples for a long time. Since the *Calder* decision in 1973, four self-government agreements and eighteen comprehensive land claims agreements containing self-government provisions for specific communities have been implemented.[72] An important implication of the *Daniels* decision is that this effort should now be extended to MNSI communities.

I believe *Daniels* holds great promise for MNSI communities. I also believe that *Daniels* is very important for Canada, as it has the potential to improve our human capital dramatically and to build stable pathways to reconciliation with Indigenous communities. I acknowledge that the potential costs are high. I also recognize that it will be difficult for Canada to collaborate and coordinate with the provinces and representatives of Indigenous peoples concerning programs and policies. I do not think that these costs and difficulties pose insuperable obstacles to making real, durable progress on an important Canadian constitutional imperative.

The efforts required, costly and difficult as they may be, are likely to uplift large numbers of Canadian Indigenous people and enable them and their communities to develop their potential as self-governing peoples within the Canadian federation. Such is the hope that motivated the plaintiffs to bring the case and embodies the larger significance of the *Daniels* decision. I hope this becomes the legacy of the *Daniels* case because, if it does, our hard-fought constitutional odyssey will have opened the way to a future that will benefit everyone.

I am honoured to have been entrusted to lead the 17-year litigation campaign that resulted in the *Daniels* decision and am very proud of the unanimous result we achieved. Our joint efforts removed a serious obstacle to the development of the majority of Canada's Indigenous peoples.

I believe MNSI organizations will have to continue my team's efforts within Canada's extended constitutional system and the international human rights legal order in order to realize the full extent of the hoped-for changes to Canada's Indigenous policies. Canada's constitution, together with international legal norms, contain significant potential to enable

71 Will Kymlicka, *Multicultural Odysseys* (Oxford: OUP, 2007), 67.

72 *Calder v. B.C. (A.G.)*, [1973] S.C.R. 313. See Canada, Indigenous and Northern Affairs Canada, *Comprehensive Claims,* https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578.

Métis and Non-Status Indian peoples to find their rightful place as Indigenous peoples and polities within a diverse and ultimately welcoming Canadian society.

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