SCC to hear *Daniels* this fall

Government appeals last year's landmark Federal Court of Appeal ruling

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The question of whether the federal government has a constitutional responsibility for Métis and non-status Indians will be before the Supreme Court of Canada this fall in an appeal that could affect hundreds of thousands of people across the country.

The Federal Court of Appeal ruled last year in *Canada (Indian Affairs) v. Daniels* that Métis are "Indians" within the meaning of s. 91(24) of the Constitution Act. However, it also decided that this recognition doesn't extend to non-status Indians as it overturned that part of the trial court decision.

Both aspects of the Federal Court of Appeal ruling will be before the Supreme Court in a hearing scheduled for October.

A number of aboriginal organizations have already sought intervener status in the appeal. Alberta, though, is the only province to date to seek to be an intervener and it argued in support of the federal government's position in the lower courts.

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The declaration issued by the Federal Court of Appeal has broad and positive implications, says Jean Teillet, who represented the Métis Nation of Ontario as one of the interveners in the case. "This is a big question for aboriginal people," she says. A declaration that s. 91(24) includes Métis means the federal government must act in their best interests, says Teillet, a partner at Pape Salter Teillet LLP in Vancouver.

The federal government has consistently held that Métis come within provincial jurisdiction. The decision to take the case to the Supreme Court is "political," according to Teillet. "Fundamentally, the federal government doesn't want to take this on," she says.

The road to the Supreme Court has been lengthy for the Métis organizations that began the court challenge for greater recognition 16 years ago along with Métis activist Harry Daniels, who died in 2004. The organization he headed, the Congress of Aboriginal Peoples, is one of the plaintiffs in the case.

In addition to the appeal filed by the federal government, the congress is cross-appealing the finding that non-status Indians don't come within s. 91(24). As well, it's asking the Supreme Court to go beyond the conclusion that the federal government is in a fiduciary relationship and find that it has a fiduciary duty towards Métis and non-status Indians.

"The second declaration is necessary because Canada has shown a persistent willingness to damage Metis and non-status Indians in a manner inconsistent with the fiduciary relationship to which the Crown and Metis and non-status Indians are bound," its lawyers, Joseph Magnet and Andrew Lokan, write in the factum filed with the Supreme Court.

The jurisdictional issue isn't just symbolic but "affects real people in real ways," wrote Magnet, a University of Ottawa law professor, and Lokan, a partner at Paliare Roland Rosenberg Rothstein LLP. Governments have long treated the issue of Métis and non-status Indians as a "political football" with "buck passing" between the federal and provincial levels, according to the lawyers.

For her part, Teillet says a more appropriate description might be "jurisdictional hot potato" for both levels of government. The purpose of the legal challenge is to require the federal government "to sit down and negotiate" on issues of importance to the Métis, she notes.

"At the heart of this case, we ask a very simple question: If I am Metis or non-status Indian, whose door do I knock on?" says Lokan.

"Which government do I ask to address my rights, needs, and interests as an aboriginal person?"

The Métis National Council estimates there are about 500,000 people who legitimately can be considered Métis. In terms of non-status Indians, Teillet suggests it's more difficult to find an "ascertainable group" for the purposes of the case before the Supreme Court. At the same time, one of the "undercurrents" of the court challenge "that nobody talks about is the systemic racism that still goes on in Canada and gets ratcheted up when it is about people who are of mixed race," she says.

In reaching its conclusions, the Federal Court of Appeal considered a significant amount of historical evidence. It found that at the time of Confederation in 1867, the term "Indian," as interpreted by the federal government, had a broad meaning in regards to the ethnicity of an aboriginal person.

The court also accepted the arguments of the Métis Nation of Ontario that an analysis of the issue requires an inquiry into more than the nature of a connection to Indian ancestors.

"The Metis have their own language, culture, kinship connections and territory. It is these factors that make the Metis one of the Aboriginal peoples of Canada," wrote Federal Court of Appeal Justice Eleanor Dawson for the three-judge panel.

The decision of the Federal Court of Appeal "is not that radical," says Signa Daum Shanks, a professor at Osgoode Hall Law School in Toronto. A declaration provides "very strong symbolism" to generate "more positive communications between the parties," says Daum Shanks, who has taught in the areas of aboriginal self-government and Canadian legal history.

While the issues before the Supreme Court are very significant, it's not a "floodgates decision" in terms of the financial impact of what it will decide, she says.

"It will stimulate discussion on how social programs are provided, not necessarily increasing costs," says Daum Shanks.

"It means Canada will have to be more responsible than it has been before," she adds. LT