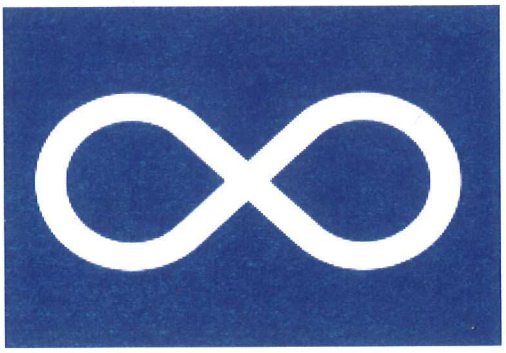


AN END TO LONG JOURNEY

Section 91(24)

Indians, and Lands reserved for the Indians

Clément Chartier QC
Métis Legal Research and
Education Foundation

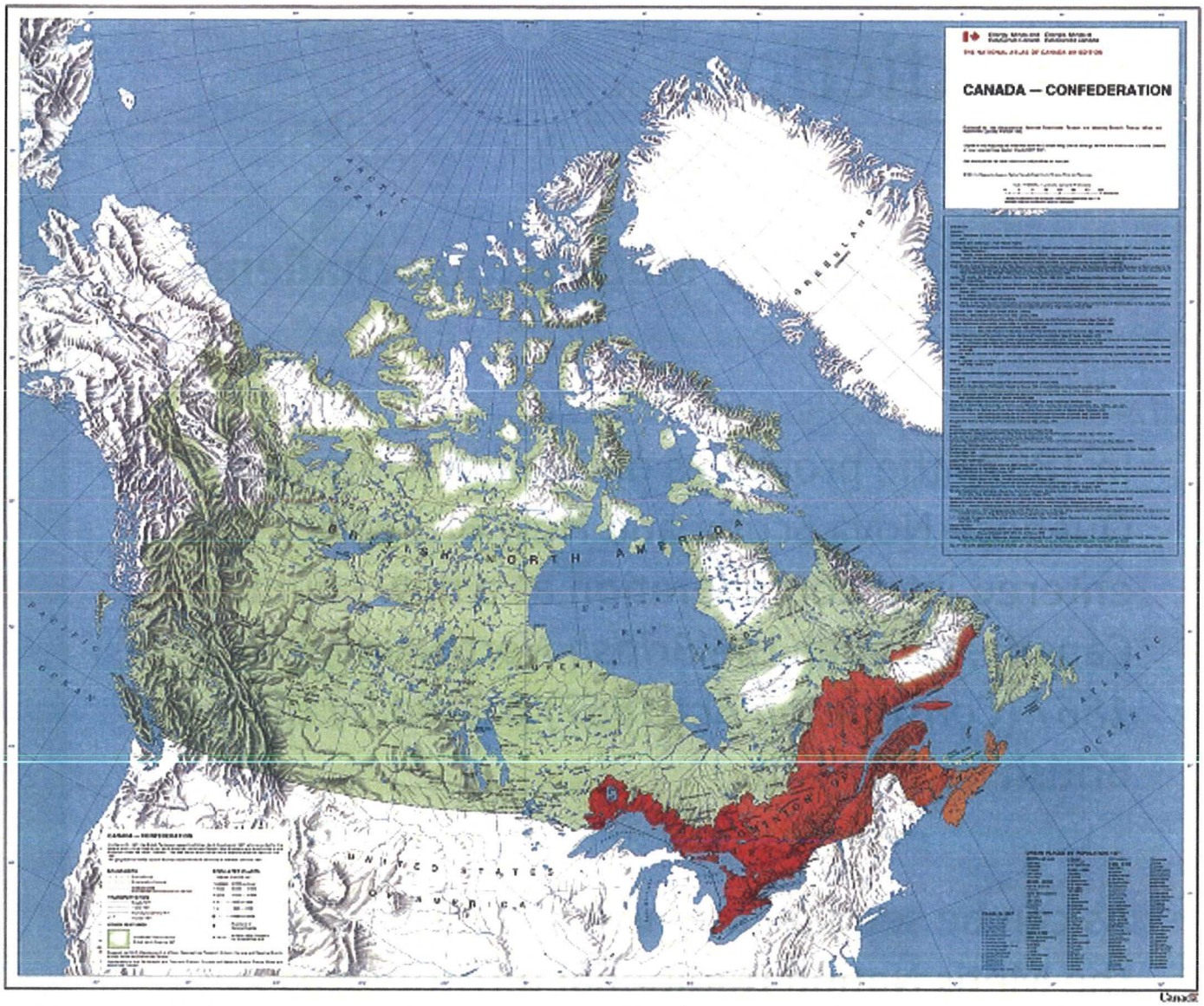
Jurisdiction

Had been a major Métis Nation challenge

In 1867, the provinces of Canada (Ontario and Quebec), Nova Scotia and New Brunswick entered into Confederation as a new country, Canada, through the *British North America Act 1867* (*Constitution Act 1867*) passed by the British Parliament.

As can be seen on the next slide, virtually all of the Métis Nation traditional territory was not included.

CANADA IN 1867 (IN RED)



DISTRIBUTION OF LEGISLATIVE POWERS

91 Federal Power	92 Provincial Power
• (2A)Unemployment insurance • (15)Banking • **(24)Indians, and Lands reserved for the Indians.** • (25)Naturalization and Aliens. • (26)Marriage and Divorce	• (8)Municipal Institutions • (11)Incorporation of Companies • (13) Property and Civil Rights • (14) Administration of Justice

Other Constitutional and relevant Provisions

- S. 91(24) not the first time "Indian" or related term is used by the British in its dealings with "Indians" or affecting "Indians".

  - **Royal Proclamation of 1763**

    - Uses the terms "Nations or Tribes of Indians" and "Indians"
    - Referentially incorporated into *Constitution Act 1982 by s.25*

      - **Jay Treaty of 1794**

        - Between the British and US governments being the Treaty of Amity Commerce and Navigation, proclaimed in 1796.
        - Uses the term "Indians"

Provisions continued

Manitoba Act 1870, section 31

uses the term "Indian Title" in connection to the land rights of the "half breed residents" and "half breed heads of families"

Continued

- **Rupert's Land and North-Western Territory Order 1870**
  - - referentially incorporated in *Constitution Act 1867* by s.146
  - In paragraph 14 refers to "**Indians"**
  - In Addresses of Parliament forming Schedules to the 1870 Order
    - Address A:
  - the claims of the **Indian tribes** to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the **aborigines.**

Continued

- **Indian Act 1876**
  - Provided that "no half-breed in Manitoba who shared in the distribution of half-breed lands shall be accounted and Indian"

Dominion Lands Act 1879

s.125 (e) refers to "... the Indian Title preferred by half-breeds resident in the North-West Territories outside the limits of Manitoba .... (on July 15, 1870)

- **Indian Act 1951**
  - Provided that Métis who received scrip and their descendants were excluded from the Act.

Continued

- **Natural Resources Transfer Agreements 1930 (Man, Sk + Alta)**
  - *Constitution Act 1930*
  - Uses the term "Indians"

  - In *Blais* 2003 the SCC held that Métis were not covered by the term "Indians" in the NRTA 1930 between Canada and Manitoba.

  - In an interlocutory decision in *R. v. Poitras; R. v. Myette; R.v Boyer,* three hunting and fishing Métis rights test cases now taking place in northwest Saskatchewan, based on arguments presented the trial judge will hear evidence on the NRTA 1930 between Canada and Saskatchewan.

Continued

- *CONSTITUTION ACT 1982*

- S.35(2) ... aboriginal peoples includes the **Indian**, Inuit and Métis.

Continued: Court Cases

- In various Judicial Committee of the Privy Council and the Supreme Court of Canada judgments, the terms "Indian title, Aboriginal title and Native title" are used interchangeably in the same decision.

Re Eskimos case, 1939 Supreme Court of Canada

- In Northern Quebec in the 1930s, the Inuit were experiencing difficulties and the Quebec government asked the federal government to look after them.

- The federal position was that they did not have jurisdiction or responsibility for Inuit, only for Indians.

- They jointly agreed to refer this issue to the Supreme Court of Canada in what is known as a "reference case".

Re Eskimos case, 1939 Supreme Court of Canada

- Q: " Are Eskimos, Indians for the purposes of Section 91(24)?
- A: "Yes." The term "Indians" in section 91(24) of the 1867 Act was meant to include all "Aborigines" in Confederation and those to enter into Confederation.
- As a result of this SCC decision the federal government now accepts responsibility for Inuit under 91(24).
- After the SCC *Re Eskimos* decision of 1939, Parliament amended the *Indian Act* to exclude those Aborigines known as Eskimos (Inuit).
    - **4.** (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.
- Therefore, it is clear that s.91(24) does not only include Indians as defined by *Indian Act*.

Re Eskimos case, 1939 Supreme Court of Canada

- "Indians" in 91(24) is used in a "generic" sense, i.e. broader than Status Indians.
- Indians in 91(24) = Aboriginal Peoples.
- The *Re Eskimos* 1939 case supports this interpretation.
- Métis and Inuit are not culturally "Indians", but are distinct Aboriginal Peoples with their own cultures, languages, ways of life, traditional practices, rights and histories.

Constitution Act 1982

- S.35(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.
- Indians are under 91(24).
- Inuit are under 91(24)
- Métis are "WHERE"??
    - In *Daniels*, April 2014, the Federal Court of Appeal held that Métis fell within s.91(24), but that non-status Indians did not.
    - The Congress of Aboriginal Peoples has appealed this decision to the Supreme Court of Canada, seeking a restoring of the trial judge's decision which included NSI and a broader class of Métis. The hearing date is tentatively set for Oct/15.
    - MNC succeeded in getting intervener status.

How has this affected the Métis?

Legacy of Exclusion

- Due to 91(24), the legacy of the Métis Nation is "exclusion".
- The Métis continue to be in a "jurisdictional limbo" and are treated as a "political football" between the federal and provincial governments.
- In a sense, the Métis are "orphans" in the context of the Canadian Constitutional Order of 1867, and the past practices of the federal government vis-à-vis Aboriginal peoples.
- This will change with the Supreme Court of Canada *Daniels* decision.
- At a minimum, the Daniels case will clarify what is the relationship between the three orders of government (federal/91; provincial/92; and Métis Nation (s.35).

Legacy of exclusion

Leaning on their 91(24) position the federal government has denied a raft of programs, services and rights resolution processes to the Métis.

A primary example is the provision of non-insured health benefits to Status Indians such as eye glasses, dental and prescription drugs through the First Nations and Inuit Health Branch (FNIHB) and nothing for the Métis.

Legacy of Exclusion

Another glaring example is the fact of our WWII veterans being excluded from the compensation provided to other WWII Aboriginal veterans.

- We are also excluded from the federal specific claims processes.

- We are also excluded from the Indian Residential Schools Settlement Agreement (IRSSA), the Prime Minister's June 2008 apology and the mandate of the Truth and Reconciliation Commission.

Exclusion continued

In connection to the historic assimilation policy, hiding behind their s.91(24) "jurisdiction" position the federal government only contracted religious orders to provide educational services to Status Indians through the Indian residential schools system.

- The federal government refused to fund similar residential schools for the Métis as the federal position is that Métis are a provincial responsibility.

- This continues to be their position as evidenced on the basis that the federal government provides university education funding for Status Indians but not for Métis.

What does this mean for Métis residential/ boarding schools?

- In this case the Métis have been doubly punished or assaulted:

First, the federal government did not provide financial resources for the proper care, nutrition and wellbeing of Métis children while on top of that we suffered the same physical, sexual and psychological abuse suffered by those children attending Indian residential schools. And,

Second, because they didn't provide those financial resources, the federal government now maintains they will not address the wrongs against us even though it was their national policy of assimilation that was used against us.

Exceptions

- Some Métis were admitted into Indian residential schools although the federal government did not make payments on their behalf.

- Nevertheless they are covered by the Settlement Agreement and are eligible for compensation.

- As of recent months, we are informed that 2.7 per cent of attendees were Métis based on the common experience payout.

EMERGING MATTERS

- **Jay Treaty 1794**

- Current policy of Department of Homeland Security allows for "American Indians" born in Canada to enter into the USA, but must possess "at least 50 % of the American Indian race".

- Further states that "letters or identification cards from Metis associations generally cannot be accepted, as the Metis were not an American Indian Race that was in North America prior to European contact".

- Goes on to state: "If such identification helps to establish that you are at least 50% Indian, however, it can also be included with other more conclusive evidence".

Emerging matters

- Jay Treaty 1794 – continued

- The policy provides for Inuit to take advantage of the Jay Treaty as long as they provide a genealogical heritage letter from their "authority" that indicates at least two of the applicant's grandparents were native born Band members.

- For those covered by the *Indian Act* besides the regular issued Status Card, they require an AANDC Genealogical Heritage Letter which shows that at least two of the applicant's grandparents are native born Canadian First Nations People.

Specific claims

- Coupled with the *MMF* decision, by virtue of the Métis falling within s.91(24) will this be enough for the federal government to open its specific claims processes to the Métis?

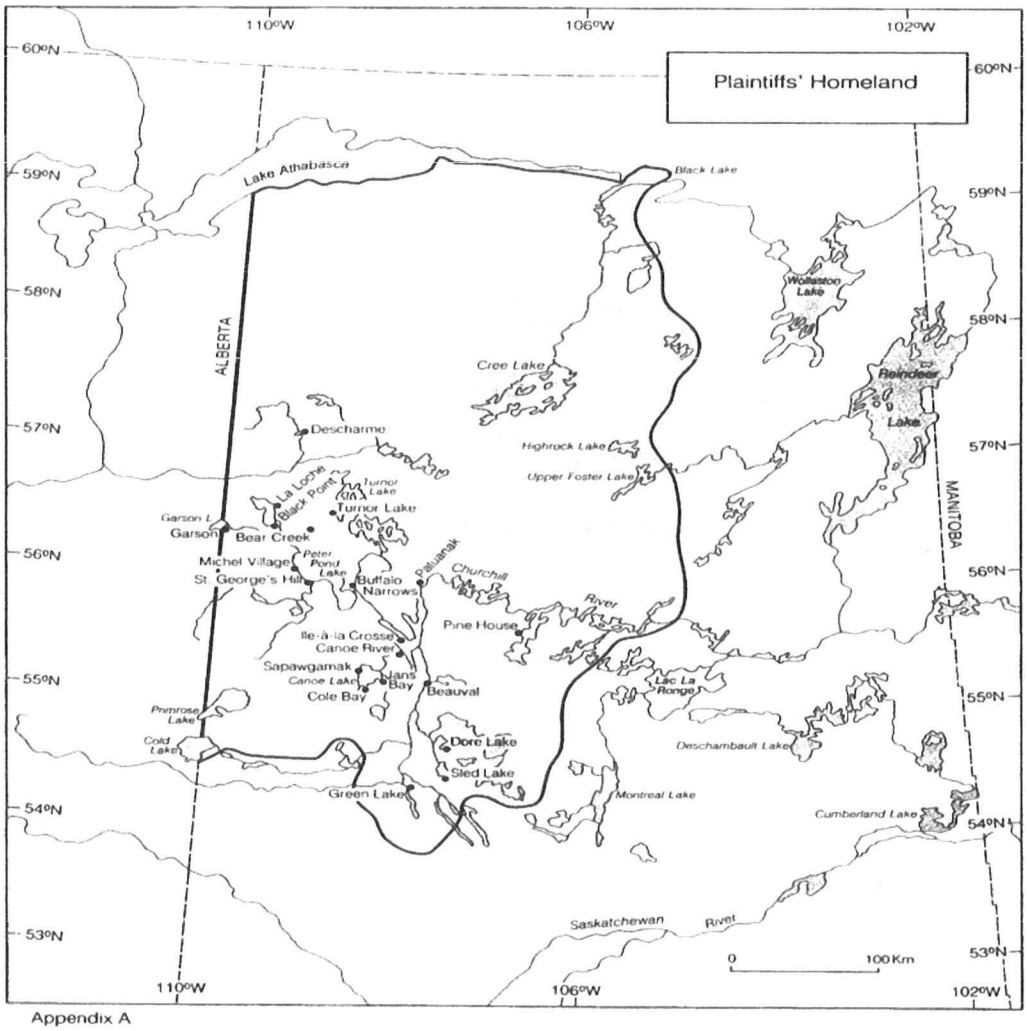
- Currently those processes are only open to Indian Bands covered by the *Indian Act*.

- Keep in mind that the SCC in *Blais* referenced that "scrip was a dark chapter in Canada's history, and in *Laliberte,* White PCJ, took judicial notice of the scrip frauds visited upon the Métis.

Other land litigation

In 1994 the MNC, MNS and Métis Locals, Elders, MNS Senators and 5 scrip recipients (1906) filed a Statement of Claim asserting Title to the lands and resources of northwest Saskatchewan.

Will the *Daniels* case have any impact on this litigation?



Appendix A

Métis Nation Accord 1992

- A companion document to the failed Charlottetown Accord.
- Paved the way for amendment to s.91(24) to include all Aboriginals peoples.
- Also provided for amendment to safeguard Alta Métis Settlements legislation.
- Does Daniels impact the Alberta legislations?
  - Does this legislation go to the core of "Métisness"?
- Does it impact the Saskatchewan *Métis Act"?*
  - Does this legislation go to the core of *"Métisness"?*

Constitutional Cure?

- Based on the Métis Nation Accord precedent, is constitutional amendment the answer?
- In 1990s, Alberta government and MSGC asked federal government to amend Constitution Act 1982 to entrench Métis Settlements lands
  - Constitution can be amended by the province and/or provinces involved and the federal government where the amendment only affects one or more provinces but not all.
  - Federal government did not cooperate.

Constitutional Cure

- The MSGC and the province of Alberta in light of Daniels and for greater certainty with respect to the legislation can once again approach the federal government, in whose interests its in, to proceed with the requested amendment.

- This amendment could now reflect the wording from the Métis Nation Accord, ensuring all current and potential future provincial government (Alberta) is covered.

- This may also be an approach taken by the Métis Nation as it would only include the five provinces of Ontario to British Columbia, and perhaps the Northwest Territories and Canada. This of course would be harder to accomplish as there are more players involved.

Métis Nation Constitution

- As part of its path on the implementation of the exercise of the inherent self-government, the Métis Nation is embarked on the adoption of a constitution and as part of this process has raised with the federal government the potential of Parliament enacting a *Métis Nation Relations Act* through which the government of Canada would recognize Métis Nation self-government as set out in the Métis Nation Constitution.

- With a win in the SCC in *Daniels*, Parliament will have the legislative authority to pass such legislation.

SO WHAT DOES A WIN IN DANIELS MEAN?

- If nothing else, it is an "opportunity" for the Métis Nation to forge a new "relationship" with Canada.

- It could usher in a new era based on a "nation-to-nation", "government-to-government" dialogue, foundation and accommodation.

- It could strengthen the distinctions-based approach to Crown-Aboriginal relations: First Nations, Inuit and Métis Nation.

- It could herald the end of the political and administrative isolation of the Métis Nation.

DANIELS LANDS IN 91(24)

- On April 14, 2016 in a unanimous decision the Supreme Court of Canada issued a declaration the all "Aboriginal peoples" fall within s.91(24) of the *Constitution Act 1867,* including those persons who do not meet the criteria for falling within the term "Métis" as set out in the *Powley* 2003 SCC decision.
- The SCC thus clarified one area of the law, and also added further confusion by the above reference to Métis and *Powley*, adding as well that they did not need to determine who was Métis or non-Status Indians, matters to be left to be determined on a case-by-case basis.
- At long last, and without a doubt, the federal government can no long use its lack of jurisdiction card when it comes to dealing with the Métis.

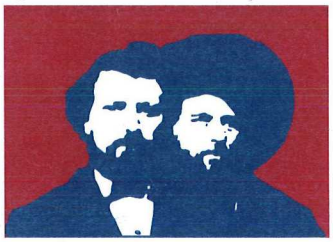
Daniels lands in 91(24)

- Landing within 91(24) does not alter the culture and distinctness of the Métis Nation, nor does it mean that the Métis will become Status Indians under the *Indian Act.*
- Neither does it mean that the Métis will automatically begin receiving federal government programs and services, such non-shared health benefits though Health Canada's First Nations and Inuit Health Branch (FINBH) and first Nation's Post-secondary benefits, etc.
- In order to determine what new federal programs and services will be made to Métis will be depending on negotiations between Métis governments and the federal government and its departments that deal with Indigenous peoples.

Daniels lands in 91(24)

- BUT the decision certainly helps as it provides the Métis Nation a much stronger base from which to negotiation, in aid of s.35(1) Métis rights, as also informed by the United Nations Declaration on the Rights of Indigenous Peoples which Canada recently fully endorsed and which will inform the nation-to-nation negotiations promised by the Trudeau Government.
- As part of the new Trudeau government policy and as indicated in his mandate letters to Ministers, they are to engage with the Métis Nation on a Métis Nation basis in the conclusion of a true and lasting reconciliation between the Métis Nation and Canada.
- We believe in this Prime Minister and his lead ministers, and trust that a true accommodation will come to fruition.

April 14, 2016, Supreme Court of Canada, Daniels vs. Canada Decision



MÉTIS NATIONAL COUNCIL
RALLIEMENT NATIONAL DES MÉTIS