DANIELS V. CANADA: THE INEVITABLE COMES TO PASS, AT LAST

IAN PEACH* AND AARON MINTZ**

I. INTRODUCTION

In 1999, the late Harry Daniels, former president of the Native Council of Canada/Congress of Aboriginal Peoples, launched an action to have the courts issue a declaration that Métis persons and those persons identified by the federal government as "non-status Indians" be considered "Indians" for the purpose of understanding the meaning of that term in section 91(24) of the *Constitution Act, 1867*.[1] The Government of Canada opposed this action quite vigorously, tying it up in procedural challenges for years. Finally, on 8 January 2013, the Federal Court of Canada decided the substantive question in issue.[2] Justice Phelan concluded that Métis persons and "non-status Indians" are, indeed, "Indians" within the meaning of that term in section 91(24) of the *Constitution Act, 1867* and granted the plaintiffs a declaration to that effect.[3]

While it took the Congress of Aboriginal Peoples and the other plaintiffs over 13 years to secure this declaration, and the federal government is appealing this decision so the legal debate on this matter is not yet at an end, the decision of the Federal Court was, to be blunt, inevitable. The federal government's policy approach towards Aboriginal peoples has long attempted to draw a bright line between "status Indians" and other Aboriginal peoples, by claiming that the federal jurisdiction contained in section 91(24) of the *Constitution Act, 1867* is limited to "status Indians" or, even more narrowly, "status Indians" residing on reserves. This interpretation of the federal jurisdiction has been reflected in policy choices, such as the limitation of which Aboriginal peoples have access to federally-delivered or federally-funded programs and services, and the federal insistence that provincial or territorial governments be parties to self-government agreements. The federal government thus treats the concept of the "status Indian" as something that is inherently distinct from other Aboriginal peoples and has attempted to claim that this distinction has been a consistent feature of the division of powers between the federal and provincial governments since Confederation in 1867.[4]

When one probes beneath the rhetoric of federal officials, however, one discovers that the law in Canada has had a highly flexible understanding of who is an "Indian" over the decades, particularly prior to the 1951 revision of the *Indian Act* and the creation of the Indian Register.[5] The federal government's interpretation of who is "Indian," and, therefore, who can be a beneficiary of the federal government's exercise of its jurisdiction, has long been a consequence of broader federal policies about the treatment of Aboriginal peoples.

---

* Associate, KTA Inc; previously Dean, Faculty of Law, University of New Brunswick.
** Student-at-Law, Timmins-Temiskaming Community Legal Clinic.

1 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

2 *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, 357 DLR (4th) 47 [*Daniels*].

3 *Ibid* at paras 600-601.

4 See e.g. *ibid* at paras 5, 69.

5 RSC 1985, c I-5.

There is no inherent difference between what we know today as "status Indians" and "non-status Indians," nor has there been a consistent definition of just who falls within each category. If there has been anything consistent in the federal government's approach to identifying some Aboriginal peoples as "Indians" and not others, it has been that these identifications have been driven by broader federal policy goals, most particularly, for much of Canadian history, the goal of assimilation.

Historically, the class of persons the federal government recognized as being within their jurisdiction was drawn in ever-narrower terms. In recent years though, some Aboriginal peoples have been added to the class of people that the federal government recognizes as "status Indians." Sometimes this is an outcome of successful equality rights challenges to the federal definition of status,[6] but it can also be a consequence of federal administrative decisions, such as the designation of the Indigenous community of Miawpukek (previously known as Conne River), previously deemed "non-status Indians," as "status Indians" in 1985.[7] Neither seems consistent with an assertion that there is an inherent distinction between "status" and "non-status Indians," nor is there any federal legislative history to support this idea. The Federal Court of Canada was therefore right to conclude that the constitutional jurisdiction of the federal government is not limited to those the federal government currently recognizes as "status Indians."

II. *RE ESKIMO* AS PRECEDENT FOR *DANIELS*

Daniels is not the first time Canadian courts have been asked to determine the extent of the class of persons who were considered "Indians" in 1867. A pivotal prior example of the importance of the definition of this term comes from the Supreme Court of Canada's decision in *Re Eskimo*.[8] In the 1930s, the Canadian government had been supporting Inuit in northern Quebec and billing the Quebec government.[9] Quebec, feeling the fiscal burden of the Depression, argued that the Inuit were "Indians" and thus a federal responsibility; the federal government opposed this, not wanting to be burdened with the cost of providing support, a position rather similar to their position on whether Métis and "non-status Indians" were "Indians" throughout the period of the *Daniels* case.[10] The Supreme Court, however, determined that the provision of services to the Inuit was a federal responsibility.

Chief Justice Duff, for the majority, reviewed the history of the part of Canada that was Rupert's Land in the period before, and for a time after Confederation, to determine whether Inuit were "Indians," in a manner very similar to Justice Phelan's analysis in *Daniels*. Chief Justice Duff noted that in the 1857 census of the region undertaken by the Hudson's Bay Company, "esquimaux" (Inuit) were included in the term "Indians" and, indeed, "Indians" was synonymous with Aboriginal peoples (or "aborigines," in the language of the period).[11]

---

6 See e.g. *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 306 DLR (4th) 193.

7 Miawpukek First Nation, "About Miawpukek," online: Miawpukek First Nation <http://www.mfngov.ca/about-miawpukek/>.

8 [1939] SCR 104 [*Re Eskimo*].

9 For a discussion of the background to *Re Eskimo*, see e.g. Sarah Bonesteel, *Canada's Relationship with Inuit: A History of Policy and Program Development* (Ottawa: Indian and Northern Affairs Canada, 2008).

10 *Ibid*.

11 *Re Eskimo*, *supra* note 8 at 106-107.

He also noted that historical documents made it clear that Inuit in Quebec and Labrador were also treated as "Indians."[12] Of course, Inuit were never, and still are not, subject to the *Indian Act*, which simply serves to make it clear that "Indians," for the purpose of understanding the *Constitution Act, 1867*, and "Indians," as subjects of the *Indian Act*, are not synonymous.[13]

In his concurring judgment, Justice Cannon noted that the English word "Indians" was construed as equivalent to the French word "sauvages," for example in the Quebec resolutions and the *Constitution Act, 1867* itself, and that the term included all Aboriginal peoples in British North America.[14] Justice Kerwin also wrote a concurring opinion that reviewed a number of historical documents to come to the same conclusion.[15] One lesson from this case of relevance to *Daniels* is that analysis of the historical record is critical to making rational determinations about the meaning of section 91(24) of the *Constitution Act, 1867*.

III. *DANIELS V. CANADA*

Re Eskimo gives us an analytical framework with which to analyze the decision of Justice Phelan in the current case of *Daniels*. Justice Phelan noted:

> In the absence of any record of debates or discussions concerning this Indian Power [in subsection 91(24) of the *Constitution Act, 1867*], the Court had to rely on what was done just before and for some period after Confederation to give context and meaning to the words of s 91(24).
>
> The evidence concerning non-status Indians establishes that such persons were considered within the broad class of "Indians". The situation regarding Métis was more complex and in many instances including in the Red River area, Métis leadership rejected any inclusion of Métis as Indians. Nevertheless, Métis generally and over a greater area were often treated as Indians, experienced the same or similar limitations imposed by the federal government, and suffered the same burdens and discriminations. They were at least treated as a separate group within the broad class of "Indians."[16]

He then went on to review the evidence of the historical expert witnesses and documents. As he noted,

> [g]iven the nature of this litigation, the Court was presented with over four centuries of history since first contact between European settlers and the indigenous population in what became Canada.… The pre-Confederation evidence was directed at what the term "Indian" meant at the time and thus likely was the meaning that the Framers of Confederation had in mind when it was inserted into the s 91 powers assigned to the federal government.[17]

This is consistent with how the Supreme Court of Canada used historical evidence in *Re Eskimo*, as described above. Justice Phelan undertook a thorough and careful analysis of the

---

12 *Ibid* at 109-15.
13 *Supra* note 5, s 4.
14 *Supra* note 8 at 117.
15 *Ibid* at 119-24.
16 *Daniels*, *supra* note 2 at paras 24-25.
17 *Ibid* at para 183.

historical evidence to assist him in understanding what the term "Indians" would have meant to the framers of the Constitution from 1864 to 1867. He also notes that "the Supreme Court [in *Re Eskimo*] accepted that those of mixed heritage were identified and treated differently from 'whites' and were seen as 'Indian.'"[18]

Justice Phelan also noted, "[i]n the same vein, the federal government had largely accepted the constitutional jurisdiction over non-status Indians and Métis until the mid 1980s when matters of policy and financial concerns changed that acceptance."[19] He then reviewed the history of policies for defining "Indians," both pre- and post-Confederation, the process of enfranchisement of "deserving Indians," as he notes they were described, and how "legislative and administrative events produced, by evolution, a group called Métis and non-status Indians."[20] This confirms that the distinctions the federal government has made between "status Indians" and Métis and "non-status Indians" are not based on any inherent differences, though there certainly are important distinctions,[21] but simply on policy and fiscal positions.

Indeed, Justice Phelan notes that, "[t]he evidence establishes the diversity of people and degree of aboriginal connection which fell under the word 'Indian' [among the Mi'kmaq in the 19th century]."[22] He also comments, "[i]n what is now known as the Quebec-Windsor corridor, by the mid 1860s, … [t]he extent of the intermarriage was such that there were few 'pure blood' natives left."[23] Later, Justice Phelan notes, "[i]t was [the plaintiff's historical witness William] Wicken's opinion that prior to Confederation the term 'Indian' was understood, at least by the Framers, to include half-breeds. In coming to that conclusion … Wicken relied on the pre-Confederation Indian statutes or statutes in relation to Indians."[24] He reiterates this point stating, "Wicken, on the basis of this understanding, concluded that the Framers would have intended the word 'Indian' in the constitution and the power which went with it, to be a broad power to be able to deal with the diversity and complexity of the native population whatever their percentage mix of blood relationship, their economies, residency or culture."[25] While Justice Phelan noted that both Alexander von Gernet and Stephen Patterson, the Crown's historical witnesses, were of the view that "the Framers would have had no interest in dealing with half-breeds who were not acknowledged as members of a band or who lived as 'whites,'"[26] he also noted that Gwynneth Jones, another historical expert witness, observed that "because so much of 'Indian' relations were policy driven, the Framers wanted and needed a broad power to ensure maximum flexibility."[27] Such an approach would certainly have been logical in the circumstances that confronted the Framers of the Constitution in the 1860s.

---

18 *Ibid* at para 558.
19 *Ibid* at para 27.
20 *Ibid* at paras 92, 94.
21 *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207, clearly identified that the Métis were a distinct community.
22 *Daniels*, *supra* note 2 at para 218.
23 *Ibid* at para 240.
24 *Ibid* at para 265.
25 *Ibid* at para 273.
26 *Ibid* at para 274.
27 *Ibid* at para 275.

Justice Phelan also identified several other instances in legislation, government reports, and pre-Confederation treaties in which "half-breeds" were defined as "Indians," even if they did not live on a reserve. At one point in his judgment, for example, he notes, "[William] Robinson counted half-breeds in the population subject to the treaties for purposes of calculating overall annuities owed."[28] The Robinson-Huron and Robinson-Superior treaties provided "the model for the post-Confederation numbered treaties in Western Canada."[29] He concludes, "[t]his experience and recognized need speaks to the requirement for and understanding that the s 91(24) power had to be sufficiently broad that the federal government could address a wide range of situations, in a wide range of ways covering a diverse composition of native people."[30]

The historical evidence makes this conclusion rather obvious. This is really the only basis on which one can understand the meaning of the word "Indian" in the *Constitution Act, 1867* as there was no discussion of the term or the extent of the "Indian power" at either the Charlottetown or Quebec Conferences of 1864 or the London Conference of 1866.[31] Justice Phelan also notes that in the Northwest in the period after Confederation, "the aboriginal population was mixed, varied, and interrelated. It was not possible to draw a bright line between half-breeds/Métis and Indians."[32] He later, notably, comments that "the early post-1867 evidence shows that half-breeds were considered as at least a subset of a wider group of aboriginal-based people called 'Indians.'"[33] He also cites several examples of post-Confederation legislation and notes, "[t]he foregoing examples established that the federal government exercised jurisdiction over a broad range of persons with native ancestry who did not have status as Indians under the *Indian Act*."[34]

Justice Phelan also correctly notes that the federal government's assertion that it can define for constitutional purposes who is an "Indian" by its own legislation would allow "the federal government to expand and contract their constitutional jurisdictions over Indians unilaterally."[35] While it would be appropriate to alter the extent of federal jurisdiction by agreement of the relevant parties, including the Aboriginal people(s) concerned, through something such as a self-government agreement, unilateral actions of the federal government, either asserting or denying jurisdiction, are not appropriate. Justice Phelan notes:

> It is a settled constitutional principle that no level of government can expand its constitutional jurisdiction by actions or legislation.… The federal government may wish to limit the number of Indians for which it will grant recognition under the *Indian Act* … but that does not necessarily disqualify such other Indians from being Indians under the Constitution.[36]

---

28 *Ibid* at para 311.
29 *Ibid* at para 306.
30 *Ibid* at para 318.
31 *Ibid* at paras 332-36.
32 *Ibid* at para 381.
33 *Ibid* at para 420.
34 *Ibid* at para 467.
35 *Ibid* at para 112.
36 *Ibid* at para 113.

Justice Phelan thus comes to the following conclusion:

> Both in principle and in practice, one of the essential elements of the Indian power was to vest in the federal government the power to legislate in relation to people who are defined, at least in a significant way, by their native heredity. As said earlier, the factor which distinguishes both non-status Indians and Métis from the rest of Canadians … is that native heritage – their "Indianess."[37]

Later, he expands upon this conclusion and connects it specifically to the Supreme Court of Canada's decision in *Re Eskimo*, stating:

> Applying the purposive approach in light of the finding in *In Re Eskimo Reference*, above, I accept the Plaintiffs' argument supported by the opinions of Professor Wicken and Ms. Jones that the purpose of the Indian Power included the intent to control all people of aboriginal heritage in the new territories of Canada.… Absent a broad power over a broad range of people sharing a native hereditary base, the federal government would have difficulty achieving this goal.[38]

In the end, Justice Phelan decides that:

> The case for inclusion of non-status Indians in s 91(24) is more direct and clear than in respect of Métis. The situation of the Métis is more complex and more diverse and must be viewed from a broad perspective. On balance, the Court also concludes that Métis are included in s 91(24).
>
> Therefore, the Plaintiffs will be entitled to a declaration in their favour and to that effect.[39]

IV. EARLY DEFINITIONS OF "INDIAN"

Given the historical record of Indigenous-Crown relations, this really is the only logical conclusion one could come to. Settler-state governments did not seek to define who was an "Indian" for some time after contact; even when they did, their initial legislative definitions were quite broad and effectively recognized Aboriginal authority to define their citizens and members. The first legislative definition of "Indian" was contained in *An Act for the better protection of the Lands and Property of the Indians in Lower Canada* in 1850.[40] This definition was a broad one, and it included all persons of "Indian blood" who were "reputed to belong to the particular Body or Tribe" and their descendants, all persons intermarried with this first group and residing among them, and their descendants, all persons residing among the "Indians" whose parents on either side were "Indians," and all persons "adopted in infancy by any such Indians" and their descendants.[41] This broad definition did not last long, however; the legislation was amended the following year to exclude those adopted in infancy and non-Indian men married to Indian women.[42]

---

37 *Ibid* at para 544.
38 *Ibid* at para 566.
39 *Ibid* at paras 600-601.
40 (UK), 13 & 14 Vict, c 42.
41 *Ibid*, s 5.
42 *An Act to repeal in part and to amend an Act, intituled, An Act for the better protection of the Lands and property of the Indians in Lower Canada, 1851,* (UK), 14 & 15 Vict, c 59, s 2.

Post-Confederation, an "Indian" was a male person of "Indian blood" belonging to a band, or his wife and children, and a band was defined as a grouping of "Indians" who have an interest in a reserve or Indian lands in common, with the legal title in the Crown, or share alike in the distribution of money with governmental responsibility.[43] Running opposite to this was a "non-treaty Indian"; they lacked a relationship with the Crown, though they had "Indian blood" and lived the "Indian mode of life" or were members of an "irregular band," which itself was simply a grouping of people with "Indian blood" that had no treaty, or an interest in land or money from the Crown.[44] These definitions are not very precise; there is no clear understanding of what an "Indian mode of life" is, nor of how much blood one requires to have "Indian blood."

There are a number of good critiques of the construction of the "Indian mode of life," so we will refrain from giving it a lengthy discussion.[45] Two points, however, are worth noting. First, it was generally accepted that there was a clear definition of what it meant to be living an "Indian mode of life." This was not a contentious term. Second, the entire definition of "Indian" in the early days was based on an individual's relationship with the Crown. Distinctions were made between otherwise equivalent people based on whether they lived on a reserve or shared in the distribution of government money.

The 1906 *Indian Act* brought no significant changes to the definitions found in the 1876 *Act*, but it began defining a number of other concepts.[46] Foremost is that of enfranchisement, which was practically restricted to treaty Indians, since it was based on the enfranchised Indian receiving a portion of the reserve.[47] The exception to this restriction shows the emphasis on the reserve status: section 122 of the 1906 *Indian Act* allowed that an Indian who was not a member of a band in question (including a "non-treaty Indian" in general) but who has been allowed to live on the reserve was treated as effectively the same as any member of that band in terms of their right of access to the enfranchisement process.[48]

Thus, enfranchisement was focused on land rights and was meant to be applied on a case-by-case basis to particular reserves. Most importantly, enfranchisement acted to erase the individual from the class of "Indian."[49] This fit with the general purpose of the *Indian Act*, with its focus to protect the Indians and to "uplift" them into the proper, settler lifestyle. To ensure that it achieved this policy purpose effectively, the enfranchisement rules in the *Indian Act* varied over time. Voluntary enfranchisement was provided for under various amendments to the *Indian Act*, but enfranchisement was also mandatory under certain circumstances, and these circumstances varied over time. Indeed, 1920 amendments to the *Indian Act* included a provision that allowed "Indians" who were not band members (who today would be defined as "non-status Indians" and therefore not "Indians" at all by the federal government) to be enfranchised.[50] This provision does raise the question of whether

---

43 *An Act to amend and consolidate the laws respecting Indians, 1876*, (UK) 43 Vict, c 28, s 3.
44 *Ibid*.
45 See e.g. Constance MacIntosh, "From Judging Culture to Taxing 'Indians': Tracing the Legal Discourse of the 'Indian Mode of Life'" (2009) 47:3 Osgoode Hall LJ 399.
46 *Indian Act*, RSC 1906, c 81.
47 *Ibid*, s 2(h).
48 *Ibid*, s 122.
49 *Ibid*, s 119.
50 *An Act to Amend the Indian Act*, 10-11 George V, c 50, s 3.

the federal government consistently took the view that those who were not band members and did not live an "Indian mode of life" were not "Indians"; if they were not, according to the federal government's definition of that term, there would be no need to provide them with a means to enfranchise.

There is one final provision of the 1906 *Indian Act* that demonstrates the evolving nature of reserves and of Indian status: the provision that established "special reserves." A special reserve was:

> [A]ny tract or tracts of land, and everything belonging thereto, set apart for the use or benefit of and held in trust for any band or irregular band of Indians, the title of which is vested in a society, corporation or community legally established, and capable of suing and being sued, or in a person or persons of European descent.[51]

Functionally, this special reserve was similar to a reserve, but was not set up by treaty. We can see in this a parallel to the division between "status Indians" (at the time known as "treaty") and "non-status Indians" ("non-treaty").

This system, too, fits with the assimilationist policy of the time. An "irregular band" was nomadic or semi-nomadic, which did not fit in well with the settler culture and its conception of private property. By forming a treaty and its associated reserve, the band would be pinned down in one location, and could be more easily convinced to accept the adoption of settler culture. The final stage of that acceptance would be full enfranchisement.

Ironically, then, according to the conception at the time, the "non-treaty Indians" were the most purely "Indian." By not being considered "treaty Indians," however, they were denied a number of rights that were granted to the further-assimilated "treaty Indians." This culminated in the overhaul of the *Indian Act* in 1951, which abolished the concept of the irregular bands entirely.[52] As Robert Groves puts it, the 1951 *Act* "ended the presumption that a reasonable number of Indian people remained to be brought into regular relations with the Crown."[53] Those "Indians" who had not partially assimilated by concluding a treaty with the Crown were left out in the cold, redefined as not being "Indian" at all.

V. THE RATIONALE FOR HAVING AN "INDIAN" DESIGNATION

It is impossible to understand the changes in the definition of "Indian" as a set of coherent policy choices without an understanding of the uses to which those definitions were put. The definition of "Indian" in place periodically was not a reflection of any understanding of who was inherently an Indigenous person; simply put, defining "Indian" was an exercise to advance the desire of the federal government to "elevate" (otherwise known as assimilate) Aboriginal peoples and bring them into the dominant, settler culture. By having a definition of "Indian," and of various related concepts such as "non-status Indian," "Indian living off-reserve," "landless band" or "irregular band," and "enfranchisement," the government could

---

51 *Indian Act*, *supra* note 46, s 2(j).

52 *Supra* note 5.

53 Robert K Groves, "The Curious Case of the Irregular Band: A Case Study of Canada's Missing Recognition Policy" (2007) 70:1 Sask L Rev 153 at 166.

track the progression of individuals from "Indian" to full assimilation over a large population.

Beyond the general desire to assimilate Aboriginal peoples, the federal policy was also driven by a desire to contain the federal cost of providing services to Aboriginal peoples. By setting out just who is an "Indian," the federal government could further set out its own requirements for any social programs it enacted to benefit "Indians." Throughout the history of the *Indian Act*, and persisting into the present day, is the fear that benefits earmarked for "Indian" people are used by those who do not "deserve" it, because they do not act like a stereotypical "Indian." For example, during the debates on amendments to the *Indian Act* in 1920, W.A. Boys, MP from North Simcoe said: "Personally I see no reason why Indians who leave the reserve and work in the shops of Montreal, Brantford or other cities should have the protection to which an Indian is entitled to under the Act … many of them are professional men, doctors and lawyers, and should not be treated as wards.… They are in just the same position as white men."[54]

Boys' concern was for an "Indian" man to be liable for debts. Today, the equivalent debates are those over educational funding for "Indians" and the *lack* of taxation of "status Indians." Thus, both the assimilationist policy driver and the fiscal driver have continued to push the federal government in the same direction: Aboriginal peoples are wards of the state and beneficiaries of Crown largesse, rather than parties to historical agreements with the Crown designed to establish a positive relationship with Aboriginal peoples, that would facilitate the settlement of North America by European powers. Justice Phelan's decision in *Daniels* is one step in the direction of bringing an end to the idea that Aboriginal peoples are simply the beneficiaries of Crown largesse, and that it is, therefore, legitimate for the Crown to decide, unilaterally, who it wishes to benefit with its largesse from among Aboriginal peoples generally.

VI. CONCLUSION: ASSESSING THE *DANIELS V. CANADA* DECISION

Justice Phelan's decision in *Daniels* is thus a valuable contribution to our understanding of Aboriginal law, Canadian constitutional history, and the division of powers in the *Constitution Act, 1867*. The most obvious feature of this case, of course, is that it is very long — 619 paragraphs to be precise. Justice Phelan, however, had a reason to write such a long decision; with its length is a seriousness and thoroughness of analysis. His decision addresses the testimony of each expert witness and assesses the wealth of sometimes-competing interpretations of the historical record to attempt to understand who the Framers of the Constitution would have understood to have been included in the term "Indians" when they proposed to provide the federal government with a constitutional jurisdiction over "Indians and lands reserved for the Indians." His analytical approach is also consistent with that of the Supreme Court of Canada in its decision in *Re Eskimo*.

Beyond this, it is also simply necessary to address the issue. Under the division of powers, either the federal or provincial governments is vested with jurisdiction over every

[54] *House of Commons Debates*, 13th Parl, 4th Sess, Vol 5 (23 June 1920) at 4030-31 (WA Boys).

governmental activity. The fact that section 91 of the *Constitution Act, 1867* gives the federal government jurisdiction over "Indians" makes the question of just who is included within the scope of this federal jurisdiction inevitable. It is true that a self-government agreement that vests jurisdiction over an Aboriginal people in an Aboriginal government, separate from either the federal or provincial governments, would make the question of whether the federal or provincial governments have jurisdiction over that Aboriginal people effectively irrelevant. Until such self-government authority is negotiated or otherwise recognized by the federal and provincial governments, the question about the meaning of the term "Indians" in section 91 of the *Constitution Act, 1867* is necessarily with us.

Given the thoroughness of Justice Phelan's analysis of the historical record and the logic of the conclusions he draws from it for both Métis and "non-status Indians," it seems difficult to challenge his result as ill-considered. Nonetheless, the federal government has appealed the decision and, no doubt, this case will not be resolved until decided upon by the Supreme Court of Canada. Still, it is difficult to imagine a logically and legally sound set of reasons for the higher courts to overturn Justice Phelan's decision. The inevitable result has, indeed, come to pass after many years of litigation.