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Recent Legal Developments on Métis Consultation in Alberta
A Case Summary of MNA Local #1935 v. Alberta

About this Document

This is a summary of the Alberta Court of Queen's Bench's (the "Court") decision in *Métis Nation of Alberta Association Fort McMurray Local 1935 v. Alberta,* 2016 ABQB 712 ("*Fort McMurray*"). This document has been prepared for the Métis Nation of Alberta ("MNA"). It is not legal advice and should not be relied on as such. It does not necessarily represent the views of the MNA, its Regions or Locals.

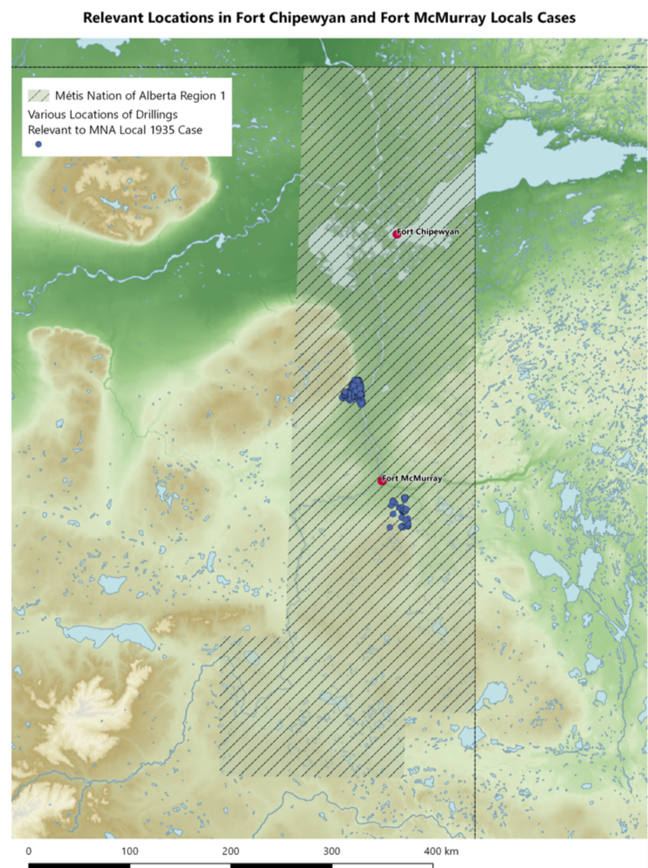
Fort McMurray was heard in conjunction with *Fort Chipewyan Métis Nation of Alberta Local #125 v. Alberta*, 2016 ABQB 713 ("*Fort Chipewyan*") and released at the same time. The Court wrote that *Fort Chipewyan* is a "jurisprudential supplement" to *Fort McMurray.* A separate case summary has been developed for *Fort Chipewyan*, which includes many of the defined terms used in this summary. These summaries should be read together.

What was the Case About?

Similar to *Fort Chipewyan*, the MNA Fort McMurray Local #1935 ("FM Local" or "Local") is a part of the MNA's overall governance structure, however, neither the MNA or MNA Region 1 (the MNA Region that the FM Local is located) participated in the case.

The FM Local initiated a judicial review (*i.e.*, a legal challenge to a decision made by government) related to the consultation process for five projects. Three are oil sands exploratory projects, one is the renewal of a water licence, and another is an *in situ* oil sands commercial development (together, the "Projects").

The FM Local was active in the regulatory process for each of these Projects, including submitting Statements of Concern. The Local asserted that the Projects had the potential to adversely impact Métis rights, and the Crown's duty to consult was owed to it regarding the Projects.



Throughout the Projects' regulatory review, Alberta continually stated that no duty to consult was triggered in relation to the FM Local because Alberta had insufficient information to show that there was a rights-bearing Métis community in the area, represented by the Local. This was communicated in three separate letters (the "Decision Letters" or "Decisions").

What Did the FM Local Ask For?

The FM Local asked the Court to quash (*i.e.*, cancel) the Decision Letters, and to direct Alberta to consult with the Local on the five Projects.

What the Court Said

The Case in a Nutshell

There was one main issue before the Court—whether Alberta breached the principles of procedural fairness in the process it followed to make the Decisions that the Crown's duty to consult was not triggered with respect to the FM Local's rights assertions. The Court concluded that Alberta had breached procedural fairness when making some of the Decisions. This was dealt with as preliminary issue (*i.e.*, before the Court assessed whether Alberta's Decisions were correct or reasonable). The Court directed Alberta to go back and make the successfully challenged Decisions again, ensuring procedural fairness and taking into account the Court's reasoning in *Fort Chipewyan*.

Question 1: Whether and What Level of Procedural Fairness was Owed in this Case?

Imposing procedural fairness standards upon decision-makers is intended to ensure that decisions are not made arbitrarily, and that the authority entrusted to administrative decision-makers is not abused. The Court had to assess whether and what level of procedural fairness was required.

The same level of procedural fairness does not attach to every decision made by the Crown. In weighing the relevant factors and significance of the Decisions (*i.e.*, dealing with constitutional rights), the Court found that in this situation strict requirements of procedural fairness—closer to the judicial or trial model—should be imposed on the Crown's decision as to whether its duty to consult the FM Local was triggered:

> In [the Court's] view, the circumstances that engaged the question of whether a duty to consult is triggered in relation to a constitutional Aboriginal right "require full and fair consideration of the issues, and the claimant and others who important interests are affected by the decision in a fundamental way must have meaningful opportunity to represent the various types of evidence relevant to their case and have it fully and fairly considered." (para. 178)

The Court determined that "strict" adherence to procedural fairness was required in this case and framed the question before it as follows: "did [the Crown] … provide the FM Local with adequate and meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered?" (para. 179)

Question 2: Was the Requisite Level of Procedural Fairness Met in this Case?

The short answer is "no" based on the various reasons that follow:

Alberta Failed to Provide a Promised Preliminary Assessment

The Court first dealt with a general failure of the Crown to live up to the legitimate expectations of the FM Local regarding the process that the Aboriginal Consultation Office ("ACO") would follow in making determinations on the duty of consult in relation to the Projects.

The ACO, through an email to the FM Local, pledged to provide the FM Local with a preliminary assessment of the FM Local's rights by "either late Monday or first thing Tuesday." No preliminary assessment was ever provided, until the Crown's Decision Letters that form the basis for this judicial review were issued. The Court held that this email constituted a representation to the FM Local as to the procedure that the ACO would follow, and that the ACO failed to adhere to that procedure: "it is unfair and procedurally wrong for the ACO to have reneged on a substantive promise of that nature in the context of FM Local's claim to constitutionally recognized Aboriginal rights or interests." (para. 174)

Alberta's Process Leading to the Decision Letters was Flawed

Two of the Decision Letters were found to have breached the duty of procedural fairness. These letters are referred to as ACO Decision Letter 1 and 2, as they were called in the Court's decision. Both were issued by the ACO and stated that "Alberta does not have enough information to determine whether there is a credible assertion that [the FM Local] is a rights-bearing community," and therefore, consultation with the Local was not required. (para. 47)

While the Court was not convinced that ACO Decision Letter 2 contained a reviewable decision, it said to the extent that it did so, the reasoning from ACO Decision Letter 1 applied to it. Regarding ACO Decision Letter 1, the Court concluded that procedural fairness was breached by Alberta for to three reasons:

1. it failed to provide sufficient time to respond to the information it requested;
2. it failed to provide clear deadlines within its process for making the decision; and
3. it failed to demonstrate that it fully and fairly considered the information submitted to it by the FM Local (paras. 215-216).

As part of the regulatory processes for the Projects, Alberta requested information from the Local about its membership requirements, the geographic scope of the community that the Local purported to represent, and information on the historic Métis community at issue. The Local responded to these requests by submitting additional evidence, but made clear that it was difficult to do so given the short deadlines Alberta imposed (usually of two weeks, though one five-day extension was granted with respect to one of the Projects).

The Court said the first flaw in Alberta's process was that the deadlines given to provide the requested information were "extremely short, inflexible and appeared to be arbitrarily imposed." (para. 196) The Court held that the information Alberta requested was detailed and would require "some time and expertise to answer." (para. 196) In light of this, the two weeks imposed to provide the extensive information requested by Alberta was "unjustifiable." (para. 213).

Second, the Court highlighted the lack of clarity and guidance provided by the ACO to the Local throughout the process, particularly with respect to applicable deadlines, holding that "the ACO should have been clearer at a very early stage about its procedure, including the deadlines it has imposed and any extensions granted." (para. 211)

Third, the Court highlighted the ACO's failure to demonstrate that it had fully and fairly considered all the information submitted by the FM Local. An ACO staff member noted in internal correspondence, for example, that she had not had time to look at all the evidence submitted by the Local. There was no further reference to whether Alberta had actually reviewed this evidence. After the date of this internal correspondence, the Local submitted additional information on December 10, 2014 at 11:49 am and 1:57 pm. It was on this same day, less than two and a half hours after the Local's last submission, that ACO Decision Letter 1 was issued.

Finally, the ACO Decision Letter 1 did not disclose the information on which Alberta had relied to deny its duty to consult. The duty of fairness requires decision makers in the ACO's position to disclose the information they rely on (paras. 200-201). Related to this, the Court wrote:

> … the ACO has failed to satisfactorily demonstrate that the entirety of the information provided to it by the FM Local was reviewed, prior to its decision of December 10, 2014 as far as all the projects impacted by this decision are concerned. A situation where, in respect of Decision Letter 1, FM Local submits the requested information on December 10, 2014 and the ACO released its decision on the same day (December 10, 2014) is unacceptable. That evidence does not demonstrate that the ACO exercised its discretion to review evidence provided by the FM Local in a manner consistent with procedural fairness; and in fact, opens the door for the conclusion that it did not. (para 202)

Take-Aways and Conclusions

While the Court's decision in *Fort McMurray* does not direct Alberta to alter its decision with respect to whether a duty to consult is owed to the FM Local, it does require that Alberta engage in better and more transparent decision-making processes when making such determinations in the future. This judicial guidance is helpful given the fact that Alberta continues to use a "case-by-case" approach to assessing Métis consultation assertions and ongoing challenges Alberta Métis have in dealing with the ACO. This guidance may also be helpful to Métis in other jurisdictions. In particular, the following principles flow from the case:

- The Crown's assessment process regarding whether a Métis group is owed consultation based on its assertions demands strict procedural fairness given the interests as stake (*i.e.*, constitutional rights and duties).

- If procedural commitments are made to a Métis group in a consultation assessment process (*i.e.*, providing a preliminary assessment, etc.), the Crown must follow through on those commitments, or its process may be determined to be defective, requiring it to do it again.

- The Crown must provide clarity about its deadlines in the decision-making process as well as providing a reasonable amount of time for additional information to be gathered and submitted, along with providing clarity around extensions.

- The Crown must demonstrate that it has fully considered all the information provided by the Métis group making the consultation assertion prior to making its decision.

While these are procedural rather than substantive protections, they at least provide Métis groups with a sense of some of the safeguards they can ask for and rely on in having their consultation assertion assessments considered by governments.

As already highlighted in our *Fort Chipewyan* summary, these cases reinforce the urgent need for Alberta to work with the MNA, which includes its Regions and Locals, to develop and implement a Métis consultation policy. More specifically, this case also highlights some of the process related challenges the ACO's "case-by-case" approach to Métis consultation creates.

Collectively, these cases should be seen as a call to action for all governments to work with the legitimate representatives of Métis communities to sort out consultation issues, not as a way to identify new strategies and roadblocks to limit Métis from accessing the constitutional rights and duties owed to them.

About the Authors

This summary was prepared by Jason Madden, Zachary Davis and Megan Strachan of the law firm Pape Salter Teillet LLP, which represents the MNA and other Métis communities from Ontario westward. Over the last decade, Mr. Madden has been involved in much of the Métis rights litigation advanced in western Canada, including the *Goodon*, *Laviolette*, *Belhumeur* and *Hirsekorn* cases, and, has represented various Métis groups in all of the Métis rights related cases decided by the Supreme Court of Canada. Additional information about the authors and the firm is available at www.pstlaw.ca.

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