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Alberta Court of Queen's Bench Upholds Métis Nation of Alberta Bylaw Changes Dealing with Authorizations on Metis Rights and Claims

A Case Summary on McCargar v Métis Nation of Alberta

About This Document

This is a summary of the Alberta Court of Queen's Bench's decision in *McCargar v Métis Nation of Alberta Association*, 2018 ABQB 553 (the "Lawsuit"). Jason Madden and Nuri Frame were legal counsel for the Métis Nation of Alberta ("MNA") in the Lawsuit. This summary has been prepared at the request of the 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 its Locals.

Short Overview of the Case

In November 2016, one MNA citizen—on his own behalf and no one else's—challenged two Special Resolutions duly passed at the 2016 MNA Annual General Assembly (the "2016 MNA AGA"), which amended the MNA Bylaws. These two Special Resolutions further clarified the MNA's objectives and authorizations for advancing negotiations and achieving agreements with other governments on Métis rights, interests and claims.

On July 20, 2018, the Alberta Court of Queen's Bench dismissed the Lawsuit in its entirety based on the following reasons:

- The Court upheld previous court decisions that the Lawsuit did not engage rights protected under the *Canadian Charter of Rights and Freedoms*, section 35 of the *Constitution Act, 1982* or section 91(24) of the *Constitution Act, 1867* (paras. 3-4).

- The Court rejected Mr. McCargar's arguments that the Special Resolutions were "unlawful" based on a reasonable interpretation of the MNA Bylaws (para. 41).

- The Court rejected Mr. McCargar's arguments that he had a private legally enforceable right (*i.e.*, a right based in contract or tort) against the MNA. The Court noted that Mr. McCargar's relationship with the MNA—as an MNA citizen—did not create a contractual or commercial relationship, which would prevent the MNA from changing its Bylaws without Mr. McCargar's consent (para. 50). In fact, the Court noted that the MNA Bylaws expressly provided for how they could be amended based on the processes set out in the Bylaws (para. 51).

Based on the Lawsuit being dismissed in its entirety, the Court awarded costs to the MNA against Mr. McCargar, Over the course of this litigation, the courts had already ordered Mr. McCargar to pay over $40,000.00 in costs to the MNA.

Background on the Special Resolutions

At the 2016 MNA AGA held at Métis Crossing in August of 2016, two Special Resolutions were passed to further clarify the MNA's role and its authority to represent its citizens in relation to the advancement and recognition of Métis rights, interests and claims:

- Special Resolution #1 adopted a new MNA objective; namely, the goal of negotiating a modern-day treaty with the Crown. Specifically, the new objective states:

  > *To negotiate, on behalf of the Métis in Alberta, a modern day treaty relationship with the Crown through a "land claims agreement" or other arrangement as called for and contemplated within the meaning of section 35(3) of the Constitution Act, 1982.*

- Special Resolution #2 adopted a new MNA Oath of Membership that all new applicants applying for citizenship with the MNA need to sign. Specifically, the new oath states:

  > *I agree to the Métis Nation's Bylaws and policies, as amended from time to time, and, voluntarily authorize the Métis Nation to assert and advance collectively held Métis rights, interests and claims on behalf of myself, my community and the Métis in Alberta, including negotiating and arriving at agreements that advance, determine, recognize and respect Métis rights. In signing this oath, I also recognize that I have the right to end this authorization, at any time, by terminating my membership within the Métis Nation.*

These two Special Resolutions were passed in response to the Supreme Court of Canada's decision in *Daniels v Canada*, [2016] 1 S.C.R. 99 that was released in April 2016 as well as decisions from the courts on the Crown's duty to consult and accommodate.

Special Resolution #1 further affirmed the MNA's longstanding goal of negotiating a modern-day treaty or other type of arrangement with the Crown as contemplated by section 35 of the *Constitution Act, 1982*. MNA citizens added this aspiration to the objectives section of the MNA Bylaws in order to further mandate the MNA to secure a negotiations table with Canada.

Notably, in November 2017, the MNA and Canada signed a *Framework Agreement for Advancing Reconciliation* (the "Framework Agreement"). This Framework Agreement sets out the following objective for these negotiations:

> To renew the nation-to-nation relationship between the Crown and the Métis Nation within Alberta by jointly developing a government-to-government relationship between Canada and the MNA that advances reconciliation between the Parties

In addition, the Framework Agreement acknowledges the MNA's authorization from its citizens as well as its democratically elected governance structures (*i.e.*, Locals, Regional Councils and the Provincial Council). It states:

> AND WHEREAS the MNA, through its registry and democratically elected governance structures at the local, regional, and provincial levels, is mandated and authorized to represent the citizens who comprise the Métis Nation within Alberta, including dealing with collectively held Métis rights, interests, and outstanding claims against the Crown

Special Resolution #2 established a new Oath of Membership to provide further clarity that all new members authorize the MNA, which includes its Provincial Council, Regional Councils and Locals, to represent them for the purpose of Crown consultation and accommodation.

Since the Métis Nation and Métis communities, along with collectively-held Métis rights including Métis self-government, have historically been ignored or denied by other governments, the question of who the Crown must consult with in relation to Métis rights and claims raises unique challenges. Notably, these challenges are not of the Métis Nation's making. They flow from a history of dispossession and denial by colonial governments.

In 2013, the Supreme Court of Canada, in *Behn v Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227, provided some direction on how rights-bearing Aboriginal communities—whose self-government structures may not yet be recognized through a treaty or self-government agreement—can assert that the Crown owes them a duty to consult and accommodate:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature … But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights

In response to this decision, the MNA, along with other Métis Nation governments, have made changes to their existing Bylaws in order to provide further clarity that they are "authorized" to represent the collectively-held rights of their members, the Métis communities comprised of those members and the Métis Nation in negotiations with other governments as well as in dealing with the Crown's duty to consult and accommodate.

Within Alberta, court decisions have created additional legal hurdles for Métis in relation to the Crown's duty to consult and accommodate. For example, in *Fort Chippewyan Métis Local #125 v Alberta*, 2016 ABQB 713 ("*Fort Chip*"), the Alberta Court of Queen's Bench concluded that a MNA Local was not owed consultation because the trial judge found there was a lack of clarity as to the "source of authority and nature of [the Local's] representation" in relation to Crown consultation. A case summary prepared by our firm on the *Fort Chip* case is available at: http://albertametis.com/wp-content/uploads/2017/03/PST-LLP-Summary-MNA-125-Local-v-Alberta-Feb-2017-2.pdf

Special Resolution #2 was adopted to address the issues set out above. In addition, in order to provide clarity with respect to the MNA's "authorization" from its citizens regarding Crown consultation, a *Statement of Principles on Crown Consultation and Accommodation with Métis in Alberta* was also adopted at the 2016 MNA AGA. Based on this *Statement of Principles*, the MNA has also signed several Regional Consultation Protocol Agreements between the Provincial Council, Regional Councils and MNA Locals to provide clarity—for the Crown, proponents and others—on how Crown consultation with Métis should take place across the province.

Notably, on July 24, 2018, the MNA and Canada signed the first Consultation Agreement with a Métis Nation government in western Canada. This agreement acknowledges the MNA's authorization on behalf of its citizens and communities as well as the federal Crown's duty to consult and accommodate Métis in Alberta. Additional information, along with a copy of this Consultation Agreement is available at: http://albertametis.com/2018/07/consultation-agreement/.

Understanding Contemporary Métis Nation Self-Government

Prior to explaining the Court's decision, it is important to explain the unique history, evolution and current realities of Métis Nation self-government in western Canada. Since its emergence as a distinct Indigenous peoples in the early 1800s, the Métis Nation has held the inherent right of self-government and self-determination. This right is now recognized in international law as well as in federal policy. It is a right that inheres in all Indigenous peoples, regardless of whether it is recognized by colonial governments or the courts of those governments. Notably, the first Metis provisional government—grounded on this inherent right—was established in 1869/70 at the Red River Settlement. This right also grounded the establishment of the second Métis provisional government in 1885 in Saskatchewan.

The Métis Nation governments that currently span Canada from Ontario westward are the contemporary manifestations of this inherent right. The MNA is one of these Métis Nation governments. The MNA's true legitimacy and credibly—as a Métis Nation government—does not come from external recognition by other governments or the courts. It comes from the longstanding mandate it has received from Métis citizens, communities and the Métis Nation as a whole. For over 90 years, the MNA, including its predecessor organizations, has been supported by its citizens and has struggled to have its unique self-government recognized by other governments and the courts, in the same way as the Métis Nation's first and second provisional governments in the mid 1800s were questioned and challenged by others.

For the most part, Métis Nation governments incorporated legal entities in the 1960s, to act as the legal and administrative arms for their governments until such time as they are able to negotiate the full recognition of their self-government with Canada. These corporations were created in response to demands imposed by other governments that would not flow desperately needed funding for social services to the Métis without an incorporated legal entity being in place. In Alberta, the Alberta Métis incorporated an "association" under Alberta's *Societies Act*. In Manitoba, the Manitoba Métis Community incorporated the Manitoba Metis Federation Inc. In Saskatchewan, a society—the Métis Society of Saskatchewan—was created.

From the Métis perspective, this current legal reality does <u>not</u> diminish the legitimacy of these Métis Nation governments any more than First Nation governments are diminished because they have had the *Indian Act* and the Band Council system imposed on them by federal legislation. The current legal realities Indigenous peoples and communities face flow from a legacy of colonization, denial and neglect. They are not of their own making and it is a constant struggle for Indigenous governments to maneuver through colonial laws and systems, government policies and the courts in order to be finally recognized as Indigenous governments politically and in Canada's legal system.

In modern times, these Métis Nation governments have used the courts, as well as political advocacy, to advance their aspirations of having Métis self-government recognized. While it is easy for many, including some Métis, to attempt to diminish and insult these entities as nothing more than "associations" or "incorporated bodies," these drive-by statements ignore the history of colonialism and the never-ending obstacles that have been put before these Métis governments. It has only been through the perseverance and resilience of Métis citizens and Métis communities over many generations that these Métis governments have been built and sustained. If there was an easier way to shake off the shackles of colonialism and have Métis Nation self-government recognized, that would have been done long ago.

It is also worth noting that other Indigenous peoples, whose traditional governance structures have been historically ignored as well, have similarly used corporate structures as the legal vehicle to advance their self-government in modern times. The Indigenous people or nation can never be "incorporated." Rather, a significant number of the Indigenous group's members create a legal entity to collectively represent them and to negotiate with other governments on their behalf. The chart below includes some examples of other Indigenous groups that have successfully used or are using this strategy across Canada.

Indigenous Group or People	**Corporate Structure Used to Advance Self-Government**	**Recognized Indigenous Government**
Dene/Dogribs (NWT)	Dogrib Treaty 11 Council Inc.	Tłı̨chǫ Government
Inuit (NFLD)	Labrador Inuit Association	Nunatsiavut Government
Inuit (NU)	Nunavut Tunngavik Inc.	Nunavut Government
Métis Nation (AB)	Métis Nation of Alberta Association	To Be Determined

Of course, these corporate structures have always been an awkward fit for Indigenous governments. These corporate entities were not designed for this purpose, however, they have proven to be effective transitional vehicles to advance Indigenous peoples' rights and claims until full self-government recognition can be secured. The MNA, like other Métis Nation governments, is using these same structures and is on this same well-trodden path to having its self-government recognized.

As noted above, on November 16, 2017, the MNA and Canada signed a *Framework Agreement for Advancing Reconciliation*. This Framework Agreement, along with others signed with other Métis Nation governments, breaks Canada's longstanding position that it would only negotiate the recognition of Métis self-government south of the 60th parallel in truncated and limited forms.

Importantly, the Framework Agreement establishes a formal negotiations process to "jointly develop a government-to-government relationship" between the MNA and Canada through negotiating a self-government agreement that "recognizes the role, functions, and jurisdictions of the MNA, including its relationships with other governments." This process will also include the development of a MNA constitution. A copy of the Framework Agreement is available at: http://albertametis.com/wp-content/uploads/2017/02/MNA-GOC-Framework-Advancing-Reconciliation_SIGNED.pdf.

In addition, the Framework Agreement recognizes the MNA's authorization to represent its citizens and the Métis Nation within Alberta:

> AND WHEREAS the MNA, through its registry and democratically elected governance structures at the local, regional, and provincial levels, is mandated and authorized to represent the citizens who comprise the Métis Nation within Alberta, including dealing with collectively held Métis rights, interests, and outstanding claims against the Crown;

With that said, until the MNA has developed and ratified a constitution and these self-government negotiations are completed, the MNA's legal and administrative arm remains an "association" under the *Societies Act*. As noted above, the MNA's current legal reality does not diminish it as a Métis Nation government. However, until such time as the MNA is recognized as an "Aboriginal government" in the Canadian legal system (even though it is a government already in the opinion of its citizens and the Métis Nation), most Canadian courts will simply look at its current corporate structure and not comment on these larger issues.

The Lawsuit

Following the passage of the two Special Resolutions at the 2016 MNA AGA, the MNA Bylaws were amended to add the new objective and Oath of Membership. The updated MNA Bylaws were filed and registered with Alberta's Corporate Registry on September 14, 2016. The new MNA Bylaws took effect that day.

On November 28, 2016, Mr. McCargar filed an Originating Application with the Alberta Court of Queen's Bench seeking various remedies, including, a declaration that the Special Resolutions are "contrary to law," that the Corporate Registrar strike the registered Special Resolutions and that the MNA, as a whole, be dissolved. He also sought an interim injunction stopping the Special Resolutions from being in force, which was denied.

After cross-examinations on the affidavits filed by Mr. McCargar and the MNA were completed and following an appeal on procedural matters that Mr. McCargar was unsuccessful on as well, the hearing of the matter was held on June 29, 2018 in Edmonton.

What the Court Said

What the Lawsuit Was Not About

Prior to dismissing Mr. McCargar's claim in its entirety, the Court set out what the case was **not** about (para. 4):

- the case did not engage section 35 of the *Constitution Act, 1982*, including Métis rights;
- the case did not engage the Canadian *Charter of Rights and Freedoms*, including any rights to equality, freedom of association or life, liberty and security of the person;
- the case did not engage section 91(24) of the *Constitution Act, 1867*.

The Court also held that, based on the previous decision of the Alberta Court of Appeal in *Boucher v MNA* (2009) ("*Boucher*"), the MNA is not subject to judicial review. The Court cited a recent Supreme Court of Canada decision (*Highwood Congregation of Jehovah's Witnesses v Wall*, 2018 SCC 26) that clarified that judicial review is only available against "state actors" or a decision-maker exercising "state authority." The MNA is not—in its current form—a "state actor" or exercising a "state power," therefore, it is not subject to public law remedies (para. 5).

The Court also held that the case was not about reviewing the internal processes the MNA followed in relation to the passage and registration of the Special Resolutions (*i.e.*, whether the Special Resolution were duly passed, whether proper notice was given, *etc*.). In order for the Court to review the internal processes of the MNA, Mr. McCargar had to first establish that he had an underlying substantive legal right at issue that would require judicial intervention into the internal affairs of the MNA. As further explained below, the Court found that Mr. McCargar had no such underlying legally enforceable right against the MNA (para. 6), therefore, the Court did not have jurisdiction to review these matters (paras. 10-12).

The Special Resolutions Were Not "Unlawful"

In assessing Mr. McCargar's claim that the Special Resolutions were "unlawful," the Court first looked at the nature of the MNA as an association incorporated under the *Societies Act*. The Court held that the MNA, in its present legal form, is a private organization whose powers come from its members through the authorities set out in its Bylaws. This reaffirmed the Alberta Court of Appeal's previous decision on this issue in *Boucher*.

The Court noted that while the MNA Bylaws described the association as representing the Métis Nation and that it is a Métis government, "[i]t is not at this time governmental nor sovereign, and neither the Societies Act, not any other Act of Alberta purports to grant it such powers" (para. 16). As discussed above, this is one of the reasons why the MNA is in self-government negotiations with Canada. Moreover, as noted above, issues with respect to Métis section 35 rights or whether the MNA is a Métis Nation government based on Indigenous law and Métis legal traditions (as opposed to Canadian law) was not before the Court.

With respect to the MNA's authorities as an association, the Court concluded that the MNA represents its citizens on the terms set out in its Bylaws and may represent those citizens for the purposes included in the objectives, including negotiating a modern-day treaty:

> [19] In sum, the Association represents its registered members on the terms and for the purposes set out in the bylaws.

This is a helpful statement from this Court because, as noted above, in *Fort Chippewyan Métis Nation of Alberta Local #125 v Alberta*, 2016 ABQB 713, the court found that a lack of clarity and confusion about the MNA Local's membership criteria and authorization undermined its claim to being owed Crown consultation.

The Court found that, when reading the MNA Bylaws as a whole, in their proper context, the Special Resolutions were reasonable and proper:

> [38] The oath of membership is properly limited to the Association and members of the Association, and allows the Association to assert a representative capacity on behalf of the members of the Association; it does not impede other Métis groups from also asserting representative capacity for other Métis persons, for other purposes, at other times.

The Court further held that, given the above findings, the complaints raised by Mr. McCargar with respect to the special resolutions could not stand and the claims that the Special Resolutions were unlawful were dismissed.

> [41] This reasonable and proper interpretation of both special resolutions puts to rest almost all of the objections made by Mr. McCargar. These special resolutions do not purport to take away his rights as a member of other Métis communities, associations and organizations, to interfere with the role of the Métis National Council or the Métis Settlements, Settlement Councils, Métis Settlements General Council, and Métis Settlements Appeal Tribunal pursuant to the Métis Settlement Act, RSA 2000, c M-14.

There Was No Underlying Legal Right At Issue To Warrant Judicial Intervention in MNA Affairs

After the Court dismissed Mr. McCargar's claims that the Special Resolutions were "unlawful," the Court then assessed whether he had an underlying substantive legal right that was enforceable against the MNA, which would warrant the Court's consideration of whether the MNA adhered to its own procedures in relation to the passage of the Special Resolutions. The Court held that Mr. McCargar has no such legal right (paras 10, 43).

In order for a court to intervene in the private affairs of the MNA, or any other voluntary association, an individual must demonstrate they have a substantive underlying legal right that would allow a court to review the internal processes followed by that private entity. This legal right must be a property or civil right, such as a contractual right (paras 10-11, 44, 49):

> [11] … in order to establish [the ability of the Court to review the MNA's decision to pass the Special Resolutions], a court must find the terms of membership in a voluntary association are contractually binding, in that civil and property rights must be formally granted by virtue of membership."

Mr. McCargar argued that he had contractual rights as between him and the MNA, and that these rights were violated. This meant that he was required to prove to the Court that a contractual relationship existed. The test for proving such a contractual relationship would require:

1) demonstrating an intention by both the MNA and the MNA member (Mr. McCargar) to form a contractually binding relationship;

2) that the general principles of contract law apply to the relationship; and

3) proof of some harm to the MNA member's legal rights that is the kind of harm the Court can step in to remedy. (paras 12, 50-52)

The Court found that the relationship between the MNA and Mr. McCargar did not meet this test and there was no contractual right at issue. The MNA Bylaws do not create terms of membership that are "contractual or commercial in nature," and that "membership in and of itself does not constitute a contract" (para 50).

The Court further held that "there is no promise that the [MNA Bylaws] would not be changed without [the Applicant's] consent" and the MNA was clearly allowed to change the Bylaws through the passage of special resolutions (para 51). In effect, neither Mr. McCargar—nor any individual MNA member—has a veto over decisions made by the MNA AGA through the passage of special resolutions. The Court also noted that Mr. McCargar was not being forced to swear the new oath (para 52).

The Court concluded that because no contractual relationship or enforceable right between Mr. McCargar and the MNA was established, there was no legal remedy available to Mr. McCargar that could ground either a review of the MNA's internal processes or a declaration of relief (para 53).

Frequently Asked Questions

In a nutshell, what is this case about?

This case upholds the two Special Resolutions passed at the 2016 MNA AGA that were challenged by one individual MNA member through a Lawsuit. In effect, the case upholds the right of the MNA to amend its Bylaws without a single individual having a veto over decisions made by the MNA AGA. It also confirms that the MNA is authorized by its members to deal with their collectively-held rights, interests and claims, including negotiating a modern-day treaty or agreement with the Crown.

Does this case mean that the MNA is just a "club" and not a Métis Nation government?

No. The Métis Nation, as an Indigenous people, has an inherent right to, and long tradition of, self-government. Over the last 90 years, the Métis Nation within Alberta has built the MNA as their government. While this government is recognized by its citizens and the Métis Nation as a Métis government, Canadian law has historically not recognized Indigenous self-government structures outside of the *Indian Act* or modern-day, self-government agreements or treaties. In 1961, the MNA registered an "association" under provincial legislation. This was done to gain access to much needed funding for the Métis in Alberta. In practical terms, the MNA's registered "association" acts as its legal and administrative arm while the MNA continues its quest to have its unique form of Métis self-government recognized through negotiations with other governments, and ultimately in a modern-day self-government agreement or agreements. Until that goal is achieved, the MNA is using an association under the *Societies Act* as a transitional vehicle. This case was about the association, MNA's legal and administrative arm, not broader Métis rights and self-government issues. For a more detailed explanation of this issue, read the section above: Understanding Contemporary Métis Nation Self-Government.

Is this case about Métis rights and was it helpful to the MNA?

This Lawsuit was not about Métis rights or self-government in any way. The Court clearly says that in its decision. This case was about a technical interpretation the MNA's Bylaws. While the Court held that the case was not about section 35 of the *Constitution Act, 1982*, or Métis rights, the Court did affirm that the "[MNA] represents its registered members on the terms and for the purposes set out in the bylaws." The MNA Bylaws now expressly provide the MNA with a mandate to negotiate a modern-day treaty with the Crown. They also provide the MNA, which includes the Provincial Councils, Regional Councils and Locals, the authorization to deal with Métis rights related issues, including, the Crown's duty to consult. The additional clarity from the Court will be helpful to the MNA in its negotiations with Canada and Alberta, however, it was not really needed because both levels of government were already negotiating with the MNA on these issues. This case does not add to the development of the case law on Métis rights or self-government in a significant way. It also will likely have no effect on the negotiations the MNA is pursuing with Canada or Alberta.

Do all MNA citizens have to sign the new Oath of Membership?

All MNA citizens who registered after the new Oath of Membership was incorporated into the Bylaws on September 14, 2016 must sign the new Oath of Membership. MNA citizens who registered prior to September 14, 2016, however, do not need to sign the new Oath. MNA citizens who registered prior to September 14, 2016, have been provided notice of the new Oath.

About the Authors

This summary was written by Jason Madden with the assistance of Nuri Frame, Zachary Davis and Katie Brack of the law firm Pape Salter Teillet LLP. Jason is a Métis lawyer and represents the MNA as well as other Métis governments from Ontario westward in their negotiations with Canada and provincial governments. Over the last decade, Jason 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 governments in all of the Métis rights related cases decided by the Supreme Court of Canada, including, *R. v Powley*, *Manitoba Métis Federation Inc. v Canada* and *Daniels v Canada*. Additional information about the authors and the firm is available at www.pstlaw.ca.