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Alberta Court of Queen's Bench Rejects Fort McKay "Métis" Community Association's Claim to Crown Consultation

Fort McKay Métis Community Association v Métis Nation of Alberta, 2018 ABQB 892

About this Document

This is a summary of the Alberta Court of Queen's Bench's decision in *Fort McKay Métis Community Association v Métis Nation of Alberta Association*, 2018 ABQB 892 (the "Lawsuit"). Nuri Frame, Katharine Brack, and Jason Madden 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

On April 10, 2018, a self-styled "Métis" organization called the Fort McKay Métis Community Association ("FMMCA") filed a lawsuit against the MNA. The FMMCA asked the court to declare that only it represents the Fort McKay Métis community and that it is the only entity that governments and industry should consult with on resource development projects in the Fort McKay area.

The MNA opposed the FMMCA's Lawsuit and brought a motion to strike (i.e., terminate) the Lawsuit in its entirety because it was hopeless and could not succeed. On November 22, 2019, Justice Gates of the Alberta Court of Queen's Bench agreed with the MNA on all points and dismissed the Lawsuit completely. He held that the claim "failed to meet the necessary requirements" and "the issues [raised by the MNA] are not mere weaknesses in the Local Associations' case. They are obstacles, which are plainly and obviously insurmountable."[1]

Justice Gates also awarded costs to the MNA that need to be paid by FMMCA.

Background and Context for the Lawsuit

Since the early 1900s, the MNA has represented the Métis Nation within Alberta. The MNA is the only Métis government in Alberta to maintain an objectively verifiable registry of Métis citizens who are recognized as Métis rights-holders, consistent with the Supreme Court of Canada's decision in *R v Powley*, [2003] 2 SCR 207.

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1 *Fort McKay Métis Community Association v Métis Nation of Alberta*, 2018 ABQB 892 at para 80 [*Fort McKay*].

Over the last 30 years, the MNA has negotiated a series of framework agreements with the Alberta Government that recognize the MNA's representative role and commit to working on a series of MNA-Alberta priorities, including the signing a Métis harvesting agreement with the province in March 2019.

Significantly, in June 2019, the MNA signed a Métis Government Recognition and Self-Government Agreement ("MGRSA") with Canada that recognizes "the MNA is mandated to represent the Métis Nation within Alberta," that the "Métis Nation within Alberta has an inherent right to self-government" and that "the MNA has been mandated by the Métis Nation within Alberta to implement its inherent right to self-government that is protected by sections 25 and 35 of the *Constitution Act, 1982*." A copy of the MGRSA is available at http://albertametis.com/wp-content/uploads/2019/06/2019-06-27-MNA-MGRSA-FINAL-to-be-posted-on-website.pdf.

Consistent with above-described mandates, the MNA is also authorized to engage in consultation and accommodation with the Crown on behalf of its over 40,000 citizens, Métis communities and the Métis Nation throughout Alberta. The MNA Bylaws include this express authorization from the MNA's citizens. This authorization has been considered and upheld as valid and legally enforceable by both the Alberta Court of Queen's Bench (*McCargar v Métis Nation of Alberta Association*, 2018 ABQB 553) and the Alberta Court of Appeal (*McCargar v Métis Nation of Alberta Association*, 2019 ABCA 17).

Based on its authorization from its citizens and Métis communities, the MNA has developed internal consultation protocols and processes to engage with the Crown in consultation and accommodation at the local, regional, and provincial levels. The MNA's authorization and consultation processes were recognized by Canada with the signing of a Consultation Agreement in 2018, where Canada agreed to respect and follow the MNA's own internal consultation protocols wherever possible for projects impacting the Métis Nation within Alberta. A copy of the Consultation Agreement is available at: http://albertametis.com/wp-content/uploads/2018/07/MNA_Canada-Consultation-Agreement.pdf.

Rightfully, industry proponents in the Fort McKay area have engaged with the MNA on consultation. For example, the MNA has engaged with the Alberta to Alaska Railway Development Corporation ("A2A") in discussions regarding proposed development. The FMCAA objected to A2A meeting with the MNA and demanded that it stop representing MNA citizens in matters regarding the A2A project. The FMMCA claimed it was the only organization that could represent Fort McKay Métis in these discussions and brought the Lawsuit in response.

The Lawsuit

On April 10, 2018, FMMCA filed the Lawsuit seeking a declaration from the Court that:

> the Applicant, FMMCA, is the proper and duly authorized legal entity to represent the FMMCA and MNA Local 63 members in matters of consultation with industry, including but not limited to the A2A railroad project, and/or the Government of Alberta in and surrounding Fort McKay.[2]

[2] Originating Application of the FMMCA, filed April 10, 2018, at para 14.

In effect, FMMCA sought to prevent the MNA from representing its citizens for consultation and accommodation purposes in the Fort McKay area.

On June 10, 2018, the MNA filed a motion to strike, asking the Court to terminate the Lawsuit in its entirety. Because the Lawsuit on its face was fatally flawed, the MNA filed this motion as an early step to dismiss or terminate the claim before it proceeded to a full hearing. On October 18, 2018, the MNA's motion was heard before Justice Gates of the Alberta Court of Queen's Bench. Justice Gates agreed with the MNA and struck the entire Lawsuit. The reasons for the decision were released on November 22, 2019.

The Applicants

Who is Fort McKay Métis Community Association?

FMMCA is an organization that purports to represent "Métis" in the Fort McKay area. It is a "community association" incorporated under the laws of Alberta and comprised of some the members of Local #63 and other individuals who are alleged to be "of Métis ancestry," some of whom live in the Fort McKay area and some of whom do not.

There is no relationship between the MNA and the FMMCA and the FMMCA is not part of the MNA's governance structure. Any FMMCA member who is also an MNA member, however, must follow the MNA Bylaws, including the MNA's objectives and Oath of Membership.

Unlike the MNA, the FMMCA does not have a verifiable citizenship process that is supported by Canada, and there appears to be no way for it to check whether its members are actually Métis and properly reside in the area. By its own admission, many of its "members" do not live it the Fort McKay area.

Who is MNA Local #63?

The Lawsuit also included MNA Local #63 ("Local #63" or the "Local"). Local #63 is a "Local Council" of the MNA as set out in the MNA Bylaws. Local #63's membership is comprised exclusively of MNA citizens. There is only one MNA Registry and application process, and this is done at the provincial level through the MNA.

Since it is a part of the MNA governance structure and based on its bylaws, Local #63 cannot change its bylaws or pass special resolutions without the ratification of the MNA at the AGA and the registration of those bylaws by the MNA's Provincial Secretary. Local #63's bylaws confirm that "[t]hese Bylaws give authority to a body that shall be known as the 'Métis Nation of Alberta Association Local Council'" with its first objective being "[t]o further the objectives of the Métis Nation of Alberta Association in the Local Community."[3]

All MNA locals are obligated to comply with the MNA Bylaws and their own bylaws, as well as the MNA's policies, procedures, and standards. As such, the interests of the MNA are effectively the interests of the locals as well.

The individuals who are now the leadership of the FMMCA used to act as the leadership of Local #63. Notably, in September 2018, the current FMMCA President was unsuccessful in his

[3] MNA Local 63 bylaws, article 1.1.

attempt to be elected as MNA President in the MNA's democratic province-wide ballot box elections. The former leadership of Local #63 are also now attempting to dissolve the Local after lands and assets were transferred from the Local to the FMMCA. The MNA is currently in other litigation with these individuals to ensure MNA Local #63 is protected and MNA citizens in Fort McKay have a voice (see: *Métis Nation of Alberta Association Local Council #63 v Alberta (Corporate Registry) and Métis Nation of Alberta Association*). It is unclear whether the individuals advancing the Lawsuit had the authority to do so on behalf of the Local.

Issues Raised in the Lawsuit

The FMMCA took issue with the fact that the MNA was consulting on behalf of its citizens with industry in the Fort McKay area. The Applicants were attempting to get a court declaration that the FMMCA was entitled to consultation, and further that the FMMCA was the only group to consult with in this area.

The MNA opposed the Lawsuit and brought a motion to strike based on the fact that the claims in the Lawsuit were fatally flawed and the Lawsuit had no reasonable prospect of success.

The Decision

Justice Gates dismissed the Lawsuit and agreed with the MNA entirely. He found many fundamental errors and irreparable problems with the Lawsuit.

Justice Gates held that the FMMCA had not properly brought a claim based on the duty to consult. The duty is owed to rights-bearing Aboriginal communities by the Crown (i.e. the government), and any allegation of a breach of this duty should be directed toward the Crown, not the MNA.

Further, the Lawsuit was framed in a broad, hypothetical way, and courts can only make determinations regarding the duty to consult if a specific right is impacted by specific Crown conduct. A court cannot make vague and sweeping determinations at large. The FMMCA failed to raise any specific issue in this Lawsuit that a court could properly determine.

Justice Gates concluded that any dispute between the FMMCA and the MNA was not one that could be resolved by the courts. The MNA is free to continue its work advocating on behalf of Métis in the Fort McKay area and consulting with both industry and government.

What the Court Said

Justice Gates agreed with the MNA that the Lawsuit had no reasonable legal basis to proceed and struck, or dismissed, the claim in its entirety. Justice Gates held that the FMMCA had an "overly simplistic approach to the issue of consultation,"[4] because:

1. they failed to recognize the role of the Crown in consultation matters, directing the Lawsuit only against the MNA;

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4 *Fort McKay* at para 23.

2. consultation cases are highly fact specific and can only be addressed on a case-by-case basis: "[t]here must be facts and specific rights in question to support the contextual nature of the duty to consult inquiry;"[5] and

3. they misunderstood the legal test from the Supreme Court of Canada's decision in *Powley* which requires "the identification of specific Métis rights held by a specific rights-bearing community in clearly identified circumstances"[6] and were "not entitled to an analysis 'at large.'"[7]

The FMMCA' Lawsuit was fatally flawed and could not succeed. They were missing critical information and the Lawsuit was much too broad and vague for the Court to find that the FMMCA's case had a reasonable prospect of ever succeeding.

Justice Gates concluded that "the issues identified above are not mere weaknesses in the Local Associations' case. They are obstacles, which are plainly and obviously insurmountable."[8]

Justice Gates also held that the Crown was the proper party to oppose the Lawsuit, not the MNA. The FMMCA, however, had failed to name the Crown as a party. Any declaration issued by the Court regarding the duty to consult would directly impact the Crown and the proper way to determine that issue is through a specific case-by-case approach where the Crown is a party to the litigation.

It is also noted that the role of the courts is not to grant declarations based on hypothetical or theoretical concerns. There must be a real, specific, issue raised, and the declaration must settle a live controversy. "A court will not declare the law generally or to give an advisory opinion; there must be contested legal rights about which the court can make a decision."[9] A declaration "should not be used to settle political disagreements."[10]

Because the FMMCA did not bring a proper Lawsuit, Justice Gates dismissed it. He held that the Lawsuit had "no reasonable prospect of success" and concluded that "it is plan and obvious, and beyond a reasonable doubt that the claim will fail."

Conclusion

The MNA continues to represent its citizens for consultation with the Crown and industry in the Fort McKay area. The Court did not make a legal determination affecting the rights of Métis in Alberta or the ability of the MNA to conduct its affairs.

About the Authors

This summary was written by Nuri Frame, Katharine Brack, and Jason Madden. Additional information about the authors and Pape Salter Teillet LLP is available at www.pstlaw.ca.

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5 *Fort McKay* at para 78.
6 *Fort McKay* at para 84.
7 *Fort McKay* at para 21.
8 *Fort McKay* at para 80.
9 *Fort McKay* at para 69.
10 *Fort McKay* at para 69.