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Recent Legal Developments on Métis Consultation in Alberta
A Case Summary of MNA Local #125 v. Alberta

About This Document

This is a summary of the Alberta Court of Queen's Bench's (the "Court") decision in *Fort Chipewyan Métis Nation of Alberta Local #125 v. Alberta*, 2016 ABQB 713. It 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 its Locals.

Background on the Case

For over 80 years, the MNA has represented Alberta Métis. The MNA maintains a standardized and centralized registry of Métis citizens, which is financially supported by the federal government and presently includes over 33,000 individuals. As set out in the MNA Bylaws, these citizens (also known as members) voluntarily authorize the MNA to advance their collectively-held Métis rights, interests and claims. The MNA Bylaws also establish three levels of "Métis government," which includes:

(1) Local Councils ("Locals") that include a President, Vice-President, Secretary and Treasurer who are elected by the members of the Local;

(2) Regional Councils that include regionally elected Métis leadership (who also sit on the Provincial Council) as well as the Locals from within each of the MNA's six Regions (see map); and

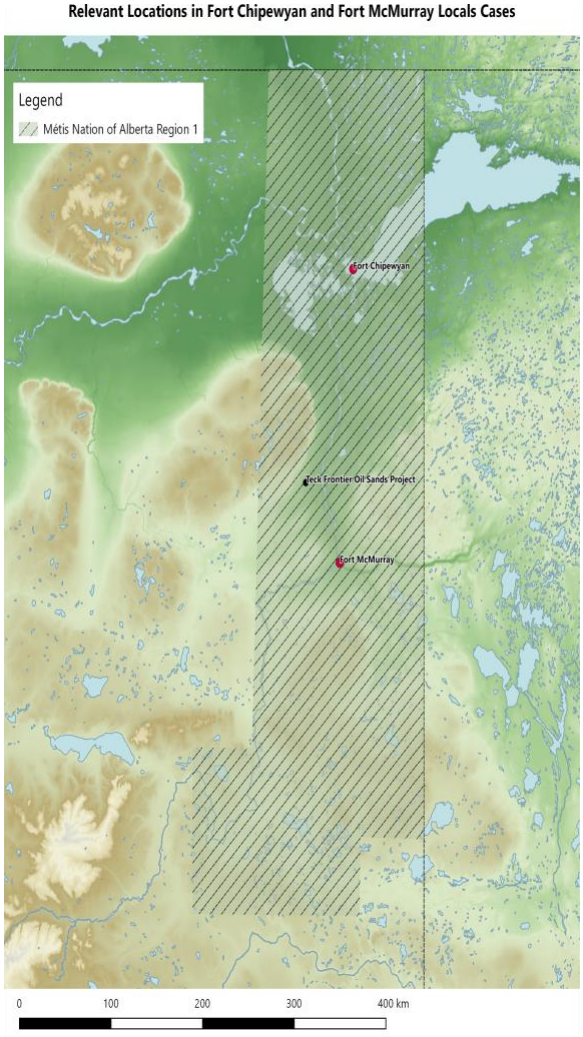
(3) A Provincial Council that includes regionally and provincially elected leadership who are elected by members every four years through ballot box elections held province-wide.

While these structures are forms of Métis self-government, they currently use Alberta's *Societies Act* in order to be recognized as separate legal entities for the purposes of accessing government funding, limiting potential liabilities, etc. Each Local is separately incorporated with their own set of bylaws, and some Locals maintain their own membership lists, which may not be the same as the MNA's membership. The Fort Chipewyan Métis Nation of Alberta Local #125 ("FCM Local" or "Local") is a part of the MNA's overall governance structure, however, the Local brought forward this litigation in its individual capacity. Neither the MNA or MNA Region 1 (the MNA Region that the Local is located) participated in the litigation. Nor were the MNA's Bylaws, membership registration system or authorization from its members *vis-à-vis* Crown consultation directly at issue in this case.

What Was the Case About?

This case involved an application for judicial review filed by the FCM Local of the decision of the Alberta Government ("Alberta" or the "Crown") that it did not owe the FCM Local a duty to consult—based on a credibly asserted Métis right—with respect to the Teck Frontier Oil Sands Mine Project (the "Project"). The Project is a proposed "truck-and-shovel" oil sands mine located about 110 kilometres north of Fort McMurray, in the Athabasca oil sands region of northeastern Alberta.

Teck Resources Limited ("Teck") is the Project's proponent. As is required for a project of this nature, Teck submitted a draft Aboriginal Consultation Plan for the Project to Alberta. Teck's proposed Aboriginal Consultation Plan identified the FCM Local in a list called "Group 1," meaning that Teck proposed to consult with the FCM Local to the fullest extent provided for in the Aboriginal Consultation Plan. Alberta, through Alberta Environment and Parks, reviewed Teck's Aboriginal Consultation Plan and informed Teck that the FCM Local had no legally established rights. In response, Teck revised its Consultation Plan to state that "although Métis consultation requirements have yet to be clarified by the Government of Alberta, Teck has included potentially affected Métis communities…as a matter of best practice" (para. 11).



The FCM Local was actively involved in the environmental assessment process for the Project. Under Alberta's regulatory regime, it submitted a Statement of Concern that asserted Métis rights to hunt, fish and gather would be adversely impacted by the Project, amongst other concerns. The Local attempted repeatedly to meet with the Crown about these issues. On several occasions, 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(ies) that the Local's members claimed ancestral connections to, with a breakdown of the membership's ties to those communities. The Local made several submissions to the Crown in attempts to respond to these questions.

After considerable correspondence back and forth, the Local received two letters from Alberta (the "Letters") indicating that that it had insufficient information to determine "whether there is a credible assertion that FCM [Local] is a rights-bearing Métis community," therefore, the Crown's duty to consult was not triggered. In response, the Local brought an application for judicial review, challenging the Letters. The Court was not asked to make determinations on the existence, scope or infringement of any Métis rights in the region protected by s. 35 of the *Constitution Act, 1982*. This case was only about whether a credible assertion of rights by the FCM Local had been made, sufficient to trigger Crown consultation obligations. (para. 109)

What Did the FCM Local Ask For?

The FCM Local asked the Court to do two things:

1. declare that Alberta was incorrect in making its decisions that no Crown duty to consult was owed to the Local and that Alberta breached the honour of the Crown in making these decisions; and
2. order that Alberta be required to consult and accommodate the Local regarding the Project prior to the Project being approved or constructed.

What the Court Said

The Supreme Court of Canada's well-known three-part legal test for triggering the Crown's duty to consult (known as the *Haida* test) requires the following: (1) the Crown has knowledge of an actual or asserted Aboriginal right or claim; (2) the Crown contemplates conduct that has the potential to affect that right or claim; and (3) there is a possibility that the contemplated Crown conduct could adversely impact the actual or asserted right.

In considering the *Haida* test in relation to "claims of unorganized Aboriginal collectives," which the Court considered includes Métis communities that may not yet have their governance structures formally recognized by the Crown (para. 396), the trial judge held she needed to also determine whether there was credible evidence on two additional threshold questions:

- are the FCM Local's members part of a rights-bearing Métis community (*i.e.*, do its members meet the requirements set out in *Powley*)?
- have the members of the rights-bearing Métis community authorized the FCM Local to represent it for the purposes of Crown consultation?

In effect, the Court added to the burdens for triggering the Crown's duty to consult in relation to Métis communities by modifying the *Haida* test as follows:

1. the Crown has knowledge of an actual or asserted right of a Métis community (*i.e.,* credible evidence that a rights-bearing Métis community based on the *Powley* test can be established);
    a. there is credible evidence that the members of the organization asserting the right meet the requirements of the *Powley* test (*i.e.,* self-identify as Métis, are ancestral connection to the historic Métis community that grounds the rights assertion and they are accepted by the community); and
    b. there must be credible evidence that these Métis rights-holders authorize the organization for the purposes of Crown consultation (*i.e.,* express authorization *vis-à-vis* consultation as set out in bylaws, etc.)
2. the Crown contemplates conduct that has the potential to affect the actual or asserted right or claim; and
3. there is a possibility that the contemplated Crown conduct could adversely impact the actual or asserted right.

In order to justify the need for these additional requirements in the Métis context, the Court repeatedly relied on the following proposition from the Alberta Court of Appeal,

> There is nothing ironic or improper about jealously guarding entrenched constitutional rights, and ensuring that only those truly entitled are allowed to assert those rights. Those who do enjoy such rights are entitled to expect that their rights will not be watered down by the recognition of unentitled claimants. (*L'Hirondelle v. Alberta*, para. 39)

The Court ultimately determined that, based on the evidence before it, the FCM Local had not demonstrated its members were a part of a rights-bearing Métis community, nor that it was clearly authorized on behalf of its members or by the Fort Chipewyan Métis Community (as the Court referred to it) for the purposes of Crown consultation (paras. 421-423). In arriving at this conclusion, the Court applied its modified *Haida* test as explained further below.

Question 1: Is there a Fort Chipewyan Métis Community with Credible Rights Assertions that is owed Crown Consultation?

Based on the "sparse and somewhat vague" record put forward by the FCM Local, the Court found that "the existence of an identifiable Métis community with a distinctive collective identity, living together in the same geographic area and sharing a common way of life, has not been demonstrated with a sufficient degree of continuity and stability to support a site-specific Aboriginal right." (para. 354)

After reaching this conclusion based on the Local's evidence, however, the Court went on to consider Alberta's current Métis Harvesting Policy, which references Fort Chipewyan as both a historic and contemporary Métis community. Significantly, the Court held that "I will assume that the Alberta's Métis Harvesting Policy does provide some evidence to establish on a *prima facie* basis that the Fort Chipewyan Métis Community is a rights-bearing community within a 160 km radius of Fort Chipewyan" (para. 365). Based on Alberta's *prima facie* recognition, the Court went on to assess the FCM Local's membership and whether it represented the Fort Chipewyan Métis Community for the purposes of Crown consultation.

Question 1(a): Does the FCM Local Represent Métis Rights-Holders (i.e., members of the Fort Chipewyan Métis Community)?

In *Powley*, the Supreme Court of Canada held that "as Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified … The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable." (*Powley*, para. 29)

In this case, the Court considered the evidence provided by the FCM Local about its members and membership criteria, and concluded that it did not demonstrate that the Local's members were members of a rights-bearing Métis community, however defined:

> … I have come to the conclusion that the membership criteria in the FCM Local are vague and not objectively defined. There appears to be discretion exercised by the President or Vice-President in their review of applications prior to approval, but the basis for or criteria upon which that discretion must or can be exercised is not indicated. … Overall, on the issue of identifying membership in the rights-bearing community, the information provided by the FCM Local to the Alberta Crown does not establish that membership in the FCM Local is determinable by the three *Powley* factors of ancestral connection, self-identification, and community acceptance. (paras. 358-359)

The Court went on to also make the point it did not accept FCM Local's attempts to describe itself as being interchangeable with the Fort Chipewyan Métis Community:

> I observe that in the written briefs of the FCM Local as well as the Record, there are numerous situations where the FCM Local appears to merge or blend its separate identity with the Fort Chipewyan Métis Community. In considering this judicial review application, it is important for this Court to clarify that it has treated the FCM Local as an organization registered under the *Societies Act*, which is distinctive from the Fort Chipewyan Métis Community. (para. 421)

Question 1(b): Is the FCM Local Authorized to Represent the Fort Chipewyan Métis Community for the Purposes of Crown Consultation?

The conclusion that the FCM Local was not interchangeable with the Fort Chipewyan Métis Community was not in itself fatal to the Local's case. The Court restated previous direction from the Supreme Court of Canada that Aboriginal groups, including Métis communities, can authorize "organizations" to represent them for the purposes of asserting s. 35 rights and engaging in Crown consultation. The Court, therefore, asked whether the FCM Local was so authorized and set out the test for this authorization as follows at para. 397:

> the legal entity whose *source of authority* and *nature of its representation* are demonstrably determinable would have the appropriate legal standing to speak for the Fort Chipewyan Métis Community that is the Aboriginal collective right-bearer.

The Court provided two examples of other "organizations" that had satisfied this test in other litigation: the Labrador Métis Nation ("LMN") and the North Slave Métis Alliance ("NSMA"). The Court quoted with approval from the *Labrador Métis Nation* case, stating that in that case:

> The LMN established through its memorandum and articles of association, including the preamble to its articles, that it had the authority of its 6,000 members in 24 communities to take measures to protect Aboriginal rights … The court stated that anyone becoming a member of the LMN should be deemed to know they were authorizing the LMN to deal on their behalf to pursue the objects of the LMN, including those set out in the preamble to its articles of association. This was sufficient authorization to entitle the LMN to bring the suit to enforce the duty to consult in this case. (para. 374)

The Court also cited the *Enge* case, in which a similar conclusion was reached:

> In *Enge*, the court was satisfied that there was some evidence that the NSMA's Constitution limited membership in the NSMA to Indigenous Métis who are descendants of the Métis people of the Northwest Territories who emerged prior to the Crown taking effective control of their traditional lands … It also stated that the NSMA's purposes and objects included promoting the recognition of the Aboriginal rights and title and treaty rights of the community … and advancing and supporting their constitutional, legal, political, social, and economic rights. (para. 375)

In reviewing the facts of this case, however, the Court was unable to come to a similar conclusion with respect to the FCM Local. As noted above, the Court was unable to conclude that the Local represented Métis rights-holders (*i.e.,* the members of the Fort Chipewyan Métis Community). Further, it was unable to conclude that the Fort Chipewyan Métis Community had authorized the FCM Local for the purpose of conducting consultations on its behalf:

> … although an incorporated society may be able to represent an Aboriginal group, it must first demonstrate that it has authority to represent the group for that specific purpose. That authority, regarding the representation of Fort Chipewyan Métis Community, has not been established by the FCM Local on this Record. (para. 403)

The Court suggested that one way the FCM Local could have shown that it was properly authorized to conduct consultations would have been for such authorization to be explicit in its bylaws (para. 422). In this case, the Local's bylaws were not even included in the evidence.

In order to bolster its conclusion that the FCM Local was not properly authorized by the Fort Chipewyan Métis Community, the Court noted the apparent gap between the actual membership of the Local and the estimated population of the rights-bearing Métis community (an population estimate that the FCM Local itself provided):

> … it is difficult for this Court to accept (or reconcile) the claim by the FCM Local, having a membership that currently stands at 173 members, with the fact that the corporate entity purports to represent the Fort Chipewyan Métis Community, with a potential population of between 350 to 1000 individuals. In other words, a corporate entity with a membership of less than one-fifth of the total population of Fort Chipewyan Métis Community cannot claim to be representative of the entire Aboriginal community for the purpose of asserting Aboriginal rights and seeking consultation. (para. 411)

It also noted that the uncertainty resulting from the presence of other groups (*i.e.,* the MNA, Regional Councils, other Locals, etc.) who, from time to time, purport to represent the same rights-bearing community was another reason that the Local's claim to representativeness had not been made out:

> Finally, the lack of clarity and apparent conflict between the FCM Local and the MNA Region 1 as to representation of the Fort Chipewyan Métis Community regarding the community's Aboriginal right to consultation leads me to conclude that the issue of the FCM Local's authority to act on behalf of that community is far from clear or well established. (para. 423)

Related to this uncertainty, the Court accepted Alberta's argument "that it would amount to a waste of resources for the Alberta Crown to potentially have to consult with several separate organizations who state that they represent smaller or larger subsets of the same group in respect of the same interests and in the same project" (para. 408). The Court seems to suggest that the need for consultation efficiency can be a justification for not consulting with multiple groups claiming to represent the same rights-holders or community.

Other Issues the Court Addressed

The FCM Local's Judicial Review Application was not Premature

Despite the fact that the regulatory process in relation to the Project was ongoing, the Court held that the judicial review application by FCM Local was not premature. Rather, the Local had received notice from Alberta that "confirmed" no consultation with FCM Local would be required regarding the Project, which was "incapable of being described as an 'interlocutory' decision. A decision that the duty to consult is not triggered might as well be an 'effective end point' for the Fort Chipewyan Métis Community…" (para. 139)

Engagement does not Equate to Recognition for Crown Consultation Purposes

The FCM Local alleged that Alberta had led it to believe that the duty to consult had already been triggered, and that Alberta would deal with it as the representative of the Fort Chipewyan Métis Community. The Court held that it was not the case that recognition was conferred on the FCM Local through "estoppel," that is, through Alberta's meetings with the Local and the acceptance of its Statement of Concern filed in relation to the Project, the government agreed that the Local was owed consultation. The Court held that these actions were not conclusive of FCM Local's standing as an authorized representative of the rights-bearing Métis community (paras. 412-416).

Provincial and Federal Crowns Can Come to Different Conclusions on Consultation

The FCM Local was advised by the federal Crown, through the Canadian Environmental Assessment Agency, which was also reviewing the Project, that it had done a preliminary assessment that showed potential adverse impacts on the FCM Local's Aboriginal rights, and as such, the duty to consult was triggered with respect to the Project (para. 18). The Court held that the duty to consult is divisible between the federal and provincial Crowns, that is, decisions on consultation made by one level of government does not deprive the other level of government of the ability "to conduct an independent evaluation as to whether or not the duty to consult … is triggered." (para. 475)

Take-Aways and Conclusions

Fort Chipewyan provides several new considerations related to how the authorization to represent rights-bearing Métis communities for Crown consultation purposes will be considered by the courts. While the case is largely driven by the evidence (or lack thereof) on key issues, there are some key take-aways for Métis groups advancing consultation claims:

- Courts will accept that organizations can be authorized to advance collectively-held Métis rights, however, evidence that the group's membership is objectively verifiable (*i.e.,* membership requirements must follow a standardized process, membership determinations must not be susceptible to political interference, etc.) and that members are actually rights-holders (*i.e.,* members self-identify as Métis, ancestrally connect to the historic Métis community grounding the right and are accepted by the community) will be required.

- If a group is planning on advancing Crown consultation claims on behalf of its members, it should obtain clear authorization to that effect (*i.e.,* include the authorization in the organization's bylaws, etc.). Related to this, Métis groups with multiple levels of governance must ensure there is clarity on who is authorized to do what in relation to consultation. Uncertainty on these issues and internal disputes may be used by governments to deny consultation.

- Courts will consider the representativeness of a Métis group asserting a consultation obligation (*i.e.,* does the group represent a significant percentage of the total Métis community). In this case, the Court indicated that the Local's representation of less than 1/5th of the total estimated population was not enough. As such, relying on Census numbers or over-exaggerating a community's potential population may be unhelpful. For example, many individuals that identify as "Métis" in a Census may not meet the requirements of the *Powley* test, so these numbers should not be accepted as the starting points.

While this case is helpful in providing some judicial clarity on Métis consultation issues, it is also disconcerting in relation to the additional burdens being placed on Métis communities in their struggles to advance their rights and claims. It is a fact that most Métis communities receive little to no funding from either the federal or provincial governments to support their governance structures at the local, regional and provincial levels. Moreover, these Métis-created governance structures are often ignored or undermined by governments when their rights assertions become inconvenient. In effect, these new legal requirements become new judicially-created barriers to Métis successfully asserting their rights, which invoke constitutional obligations.

For example, while the Court tacitly acknowledges that there is very likely a rights-bearing Fort Chipewyan Métis Community (based on Alberta's own Métis Harvesting Policy), it does not seem overly concerned that there is no process in place to ensure this community is *actually* consulted by Alberta. In effect, there may be credible Métis rights assertions, but no remedy (*i.e.*, consultation) because of government neglect or indifference. Such an approach flies in the face of upholding the honour of the Crown. Moreover, while the Court is quick to point out the Local's failings in dealing with consultation properly, it seems unconcerned about Alberta's corollary duty to negotiate with the Métis on these issues, as recently reaffirmed by the Supreme Court of Canada in *Daniels v. Canada* that based on *Haida*, *Tsilhqot'in Nation* and *Powley* "a context-specific duty to negotiate when Aboriginal rights [is] engaged." (para. 56)

It's also worth noting that in *Powley* the Supreme Court of Canada rejected arguments from the Ontario Government that recognizing Métis rights and identifying Métis rights-holders was too difficult because of competing organizations claiming to represent Ontario Métis. The Supreme Court held, "the difficulty of identifying members of the Métis community [for the purposes of Crown consultation] must not be exaggerated as a basis for defeating their rights under the Constitution of Canada" (*Powley*, para. 49). In the same way, challenges in setting up effective and legally sound Métis consultation processes cannot justify constitutional duties being completely denied or ignored. Presently, Alberta has only implemented a consultation policy with the 8 Alberta Métis Settlements, which is not based on the recognition of Métis rights.

In the authors' opinion, this case re-affirms the urgent need for Alberta to work with the MNA, which includes its Regions and Locals, to develop and implement a Métis consultation policy. Clearly, any consultation approach must be consensual amongst the MNA's component parts. It will also need to be grounded on the MNA's objectively verifiable registry system as well as the express authorization the MNA obtains from its members *vis-à-vis* consultation. This case 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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