

ABORIGINAL PEOPLES

LANDS

Duty to consult — Judicial review challenging adequacy of consultation by respondent Minister of Indian Affairs and Northern Development (Minister) with members of North Slave Métis Alliance (NSMA) with respect to Northwest Territory Métis Nation Land and Resources Agreement-in-Principle (NWTMN AiP) — Applicant asserting, *inter alia*, that: final agreement negotiated pursuant to NWTMN AiP adversely affecting members of NSMA's Aboriginal harvesting rights recognized, affirmed under *Constitution Act, 1982*, s. 35(1); decision to exclude NSMA from consultations based on several errors of law, unreasonable; negotiations towards final Northwest Territory Métis Nation land, resources agreement to be stayed until meaningful consultation with NSMA occurring — Minister submitting, *inter alia*, that duty to consult not arising in this case, as members of NSMA part of group with whom Canada negotiating — Applicant saying Canada, Government of the Northwest Territories (GNWT) negotiating agreement with Northwest Territory Métis Nation (NWTMN) that is blind to constitutional distinction between "Métis", "Indian" peoples; Aboriginal ancestry just one *indicia* of being Métis; term "Métis" not encompassing all individuals with mixed Indian, European heritage — Asserting that members of NSMA ethnically "Métis", satisfying criteria established by Supreme Court in *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 (*Powley*) — In accordance with non-derogation clause in NWTMN AiP, no provision in any final agreement to be construed as affecting any Aboriginal or treaty rights of any Aboriginal People other than individuals eligible to be enrolled under final agreement — Applicant acknowledging that NSMA members sharing ancestral ties to South Slave region Dene eligible to be enrolled under final agreement, non-derogation clause only protecting rights of Aboriginal groups distinct from those with ancestral ties to South Slave region Dene — Submitting it should be open to such individuals to choose to assert *Powley*-type Métis rights through NSMA, rather than participate in NWTMN negotiation process by virtue of their Dene ancestry — Applicant having authority to commence this application by virtue of his office as duly-elected president of NSMA so as to satisfy requirements of *Federal Courts Rules*, SOR/98-106, r. 114(1)(b) — Issues whether: duty to consult with NSMA triggered; Crown properly assessing extent of its duty to consult NSMA — Duty on part of Canada to consult with NSMA triggered herein — Disagreement with respect to whether duty to consult owed to NSMA stemming from fact that Aboriginal people whose rights at stake are Métis, rather than "Indians" — Governance structures, legal status of groups of "Indians" largely governed by provisions of *Indian Act*, R.S.C. 1985, c. I-5 — No comparable legislation at federal or territorial level creating legal identities, governance structures for identifiable Métis collectives — As result, unclear who Crown must consult prior to taking action affecting Métis' Aboriginal rights — NSMA representing different constituency within Métis community than does NWTMN — Both organizations having different objectives, priorities, criteria for membership — Adverse inference drawn herein from fact NWTMN refusing to disclose its current membership numbers — This information likely not assisting NWTMN in demonstrating it was only organization entitled to be consulted — Métis communities having significant role to play in identification of membership requirements, development of organizational, governance structures — Not for Canada to decide which organization better suited to represent interests of Northwest Territories Métis community or which organization having more appealing agenda — Here, Canada, GNWT negotiating with NWTMN for historical reasons, based on its members' Aboriginal ancestry, not because NWTMN members necessarily representing s. 35 rights-bearing *Powley* Métis community — Knowledge of credible but unproven claim sufficient to trigger duty to consult, accommodate — Canada appearing to conclude having no obligation to consult with NSMA once it

determined that some NSMA members eligible for membership in NWTMN, eligible for enrollment under NWTMN AiP — Not considering differences in objects, priorities, criteria for membership between organizations, credibility of organizations as representatives of Northwest Territories Métis community — Conclusion that no duty to consult owed to NSMA lacking justification, transparency, intelligibility required of reasonable decision 9 — NSMA credible organization entitled to be consulted with respect to any actions of Crown having adverse impact on Aboriginal rights of its members — Canada failing to consult sufficiently deeply with NSMA prior to entering into the NWTMN AiP — Scope of duty to consult proportionate to preliminary assessment of strength of case supporting existence of right or title, of seriousness of potentially adverse effect upon right or title claimed — Failure of Crown to conduct preliminary assessment of strength of Aboriginal claim, to determine scope of consultation required, to discuss assessment with Aboriginal group breach of duty to consult — Preliminary assessment by Canada identifying Aboriginal right to hunt for food according to traditional practices — Stating, *inter alia*, NWTMN AiP contemplating providing harvesting rights to Métis throughout proposed agreement area — Preliminary assessment never shared with NSMA, only produced in context of present application — Crown required to provide affected Aboriginal group with opportunity to comment on preliminary assessment of strength of claim, potential impact of proposed decision on asserted rights — Nothing in document regarding Canada's assessment of strength of claims of NSMA's members to s. 35 harvesting rights as Métis — No indication as to what assessment, if any, Crown making concerning scope of its duty to consult with NSMA — Crown required to correctly identify legal parameters of content of duty to consult — Canada refusing to assess strength of claimed right of NSMA members to hunt in area north of Great Slave Lake as Métis — Preliminary assessment missing most significant potential adverse effect contemplated by the NWTMN AiP, i.e. extinguishment of Aboriginal harvesting rights in area north of Great Slave Lake of those NSMA members who had Dene ancestors from South Slave region — Canada appearing to have misunderstood extent of impact that final land, resources agreement could have on that right — Extinguishing important Aboriginal right in group's traditional territory Crown action having profound impact on asserted right, traditional way of life not readily compensable — This suggesting that consultation towards deeper end of spectrum required in this case — No final land, resources agreement between federal, territorial governments, Northwest Territories Métis to be concluded until meaningful consultation with NSMA members undertaken at mid to deep end of consultation spectrum, appropriate accommodation measures considered with respect to concerns raised by NSMA — Application allowed.

ENGE V. CANADA (INDIAN AFFAIRS AND NORTHERN DEVELOPMENT), *SUB NOM.* ENGE V. CANADA (INDIGENOUS AND NORTHERN AFFAIRS) (T-1427-15, 2017 FC 932, Mactavish J., judgment dated October 19, 2017, 78 pp.)