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INDIGENOUS PEOPLES

DUTY TO CONSULT

Applications for judicial review of *Métis Nation within Alberta Self-Government Recognition and Implementation Agreement* (Agreement) between Canada, Métis Nation of Alberta (MNA) to recognize self-government of collectivity called "Métis Nation within Alberta" — MNA, founded in 1932, securing land base for Alberta Métis, then known as "colonies", now as "Settlements" — Representing its membership politically, in particular in their relations with governments of Canada, Alberta — *Metis Settlements Act*, R.S.A. 2000, c. M-14 setting aside land for eight Métis Settlements — Each Settlement represented in applicant Metis Settlements General Council (MSGC) — Applicant Fort McKay Métis Nation Association dissociated from MNA — Métis Nation within Alberta including not only members of MNA (or Citizens), but all persons considered Métis — MNA, MSGC negotiations with Canada leading to Memorandums of Understanding — MNA, Canada signed Agreement in 2023 — Agreement binding contract — Recognizing certain aspects of Métis Nation within Alberta's right to self-determination, self-government — Definition of Métis Nation within Alberta in Agreement including not only registered Citizens of MNA, but also "Métis communities", comprised of Citizens, non-Citizens — Agreement, s. 6.06 granting Métis Government (or MNA) right of exclusive representation of Métis Nation within Alberta, with respect to self-government generally, consultation, accommodation regarding *Constitution Act, 1982*, s. 35 rights and "outstanding collective claims", in particular those related to scrip system — Applicants argued that Canada did not consult them before entering into Agreement — Asserted *Constitution Act, 1982*, s. 35 rights independently of MNA — Main issue whether Canada consulted applicants when negotiating Agreement with MNA — Canada did not consult applicants — Three elements of test for finding that duty to consult exists are (1) Crown's knowledge of potential Aboriginal claim or right; (2) contemplated Crown conduct; (3) potential that contemplated conduct may adversely affect Aboriginal claim or right — Canada conceded having knowledge of applicants' asserted rights — First, second parts of test met — Determinative issue for third prong of test whether Agreement having potential effect on applicants' s. 35 rights — Agreement potentially affecting applicants' s. 35 rights, because Canada binding itself contractually to recognize MNA as sole representative of Indigenous group that includes applicants, for purposes of these rights — This accomplished through combination of two elements — First, s. 6.06 granting MNA monopoly on representing Métis Nation within Alberta with respect to self-government, duty to consult, collective historic claims in any negotiations or discussions with Canada — Second, Métis Nation within Alberta defined in way that includes applicants — Breadth of monopoly of representation provided by Agreement hinging upon definition of Métis Nation within Alberta — Definition not limiting scope of Métis Nation within Alberta to those communities who have chosen to be represented by MNA — Agreement providing no objective mechanism for ascertaining which communities have chosen to be represented by MNA or to become part of Métis Nation within Alberta — Nothing in Agreement suggesting that parties contemplated that rights-holding Métis communities could exist outside Agreement — Applicants included in Métis Nation within Alberta as defined in Agreement — Impact of Agreement on applicants' rights most obvious, far from speculative — Canada granted someone else exclusive right to "represent, advance, and deal with" applicants' constitutionally-protected rights — Agreement recognizing MNA to exclusion of applicants — Recognition that s. 6.06 grants MNA, withholds from applicants key to practical enjoyment of broad array of rights that s. 35 affording to Indigenous

peoples — Applicants' rights not explicitly extinguished, but applicants subsumed the Métis Nation within Alberta against their will, barring them from asserting their rights in their interactions with Canada — This having significant impact on their rights, triggering duty to consult — Monopoly granted by s. 6.06 to MNA effectively shutting applicants out from preferred venue for reconciliation — S. 6.06 amounting to commitment that Canada will not consult anyone other than MNA when contemplating conduct that has potential impacts on s. 35 rights of Métis Nation within Alberta — Impacts alleged by applicants on exercise of their s. 35 rights not speculative — Duty to consult triggered by "strategic, higher-level decisions" having downstream impact on future, more specific decisions — Agreement's non-derogation clauses not constituting bar to applicants' case — Canada cannot "unilaterally declare" that provisions contained in Agreement sufficient to safeguard applicants' rights — Offending provisions of Agreement, i.e. definition of "Métis Nation within Alberta", Chapter 6 as whole, quashed — Respondent Minister can renegotiate offending provisions of Agreement after having consulted applicants, after having accommodated their concerns if warranted — Applications allowed.

METIS SETTLEMENTS GENERAL COUNCIL V. CANADA (CROWN-INDIGENOUS RELATIONS) (T-611-23, T-589-23, 2024 FC 487, Grammond J., reasons for judgment dated March 28, 2024, 67 pp.)