Court of Queen's Bench of Alberta

Citation: McCargar v Métis Nation of Alberta Association, 2018 ABQB 553

2018 ABQB 553 (CanLII)

Date: 20180720
Docket: 1603 21029
Registry: Edmonton

Between:

Donald Walter McCargar

Applicant

\- and -

Métis Nation of Alberta Association and the Registrar of the Societies Act of Alberta

Respondents

Reasons for Decision
of the
Honourable Mr. Justice K.P. Feehan

I. Overview

[1] Donald McCargar, a Métis person, seeks a declaration in the course of case management, that two special resolutions of the Métis Nation of Alberta Association (the Association) passed August 7, effective September 14, 2016, are contrary to law. The first special resolution amends article 1 of the Association Bylaws by adding an additional object, and the second special resolution establishes a new oath of membership in the Association.

[2] I have determined, after consideration of what this application is and is not about, the status of the parties, the special resolutions themselves interpreted in light of the bylaws, and the

private law remedies available or not available to Mr. McCargar, that his application must be dismissed, with costs.

II. What this Application is Not About

[3] This litigation has, to date, attracted a number of Court decisions with respect to these two special resolutions, which have effectively narrowed the scope of the matters now before this Court: see ***McCargar v Métis Nation of Alberta Association***, 2017 ABCA 240, 2017 ABCA 322, 2017 ABQB 692, and 2018 ABCA 144. In light of these decisions, I will begin by identifying what this application is not about.

[4] Firstly, this is not *Charter* litigation and the issues raised do not, as claimed, engage

- s 35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11 (Rights of the Aboriginal Peoples of Canada),
- s 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 (Indians and Lands Reserved for Indians), or
- ss 2(d) (Freedom of Association), 7 (Life, Liberty and Security of the Person), or 15 (Equality Rights), of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*

(***McCargar***, 2017 ABCA 322 at paras 7-9 & 15; ***McCargar***, 2017 ABQB 692 at para 5).

[5] Secondly, this is not a judicial review, as argued, as the Association is not a public body, nor a public decision-maker exercising state authority where that exercise is of sufficient public character (***McCargar***, 2017 ABQB 692 at paras 25 & 30; see also ***Boucher v Métis Nation of Alberta Association***, 2009 ABCA 5 at paras 4-10; ***Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall***, 2018 SCC 26 at paras 2 & 12-23; ***Redfern v Qikiqtani Inuit Association***, 2018 NUCJ 13 at para 41). "Judicial review is about the legality of state decision making" (***Highwood***, para 17). On the same basis, no public law remedies are available to Mr. McCargar on this application, including, for example, *certiorari* or *mandamus* (***McCargar***, 2017 ABQB 692 at paras 25-27; see also ***Boucher*** at paras 4 & 7; ***Highwood*** at paras 7, 15 & 21; ***Trost v Conservative Party of Canada***, 2018 ONSC 2733 at paras 8, 34 & 35).

[6] Thirdly, despite lengthy argument on this point, this application does not address the process by which the special resolutions were passed, including whether persons who voted for the special resolutions were properly members of the Association, proper notice had been given to the members in advance of voting, whether the resolutions were passed by the required majority, the resolutions had been submitted for registration out of time, or generally the procedural validity of the resolutions (***McCargar***, 2017 ABCA 322 at paras 10 & 11; ***McCargar***, 2017 ABQB 692 at para 5).

III. What this Application is About

[7] What is left for this Court to consider?

[8] Mr. McCargar is entitled to seek a private law remedy against the Association, and a declaration is such a remedy. Mr. McCargar seeks a declaration that the special resolutions are unlawful.

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[9] However, even a private law remedy with respect to a private voluntary association is restricted.

[10] The Supreme Court of Canada in ***Highwood*** addressed this issue. It said there is no free-standing right to have internal decisions of a private voluntary organization reviewed on the basis of procedural fairness (paras 2, 12 & 24-31). Mere membership in such an organization, where no civil or property right is granted by virtue of such membership, "should remain free from court intervention" (para 24). Jurisdiction in the court cannot be established on the sole basis there has been an alleged breach of natural justice or that the complainant has exhausted the organization's internal processes. Jurisdiction depends on the presence of an underlying substantive legal right, and only then may a court consider an association's adherence to its own procedures and the fairness of those procedures (para 24).

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[11] Mr. McCargar argues his underlying right is contractual. However, membership in a religious congregation, for example, does not grant any contractual right itself (***Zebroski v Jehovah's Witnesses***, 1988 ABCA 256, 87 AR 229 at paras 22-25). Further, in order to establish jurisdiction in this context, 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 (***Ukrainian Greek Orthodox Church of Canada et al v The Trustees of Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress et al***, [1940] SCR 586 at pp 591 & 594; ***Hofer et al v Hofer et al***, [1970] SCR 958 at pp 961, 966-969 & 981-982; ***Senez v Montreal Real Estate Board***, [1980] 2 SCR 555 at pp 558-560 & 566-568; ***Lakeside Colony of Hutterian Brethren v Hofer***, [1992] 3 SCR 165 at 174; ***Highwood*** at paras 28 & 29).

[12] Where a party alleges that a contract exists, that party must show both an intention to form a contractual relationship, and that the general principles of contract law apply to that relationship (***Highwood*** at para 29). In addition, proof of some detriment or prejudice to that party's legal rights must be made out, and the detriment or prejudice must give rise to an actionable claim (***Highwood*** at para 31).

IV. The Parties

The Association

[13] The Association is a society registered in 1961 pursuant to the *Societies Act*, RSA 1955, c 315, now governed by the provisions of the *Societies Act*, RSA 2000, c S-14, as amended. By March 21, 2017 it had 32,891 members out of an estimated population of 96,870 Métis persons in Alberta. It is a private voluntary body, bound by the provisions of its bylaws.

[14] Topolniski J in ***McCargar***, 2017 ABQB 692 at paras 25-28, quoted from ***Boucher*** at paras 3-12 to that effect. In ***Boucher***, the Court of Appeal said the Association is a voluntary society. Its powers come largely from consent and implied contract. No one is forced to join the Association, nor does Alberta legislation require membership in the Association to join a Métis settlement or to obtain a land allocation. The Association is not a Métis settlement, and does not operate any Métis settlements. One can resign from the Association, still be Métis, and still have or get many of the benefits of being Métis (paras 7 & 9).

[15] Although the Association styles itself as the Métis Nation of Alberta Association, it is a society, not a "Nation" or a "Nation of Alberta". The Court of appeal said in ***Boucher*** it is true that much of the terminology of the Association's bylaw "is redolent of sovereign government

but just saying that does not make it so". It is not at the present time governmental nor sovereign, and neither the *Societies Act,* nor any other Act of Alberta purports to grant it such powers (para 10; see also ***McCargar***, 2017 ABQB 692 at paras 27 & 28).

[16] The status of the Association was explored by Goss J in ***Fort Chipewyan Métis Nation of Alberta Local #125 v Alberta***, 2016 ABQB 713. Goss J said it is inappropriate for such an organization to "announce to the world at large that its members are clothed with...constitutional rights". She said that doing so constitutes an attempt to usurp the role of the courts on a fundamental issue affecting all Canadians "including those with legitimate Aboriginal claims" (para 208).

[17] Goss J further said such an association represents its members, rather than the Métis community as a whole (paras 295, 303, 402 & 411).

[18] This is not to say the Association cannot represent a limited Aboriginal group in discussions with government, industry or other stakeholders, or before the courts, but it "must first demonstrate that it has authority to represent the group for that specific purpose" (***Fort Chipewyan*** at para 404).

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

Donald McCargar

[20] Mr. McCargar is a Métis person. He says he meets all of the Métis indicia for membership as set out in ***R v Powley***, 2003 SCC 43 at paras 29 & 30, [2003] 2 SCR 207, for the purpose of claiming Métis rights under s 35 of the *Constitution Act, 1982*: self-identification, ancestral connection, and community acceptance. He has been a card carrying member of the Association since June 10, 2008, and is a member of a Métis settlement. When he voluntarily joined the Association, he swore the oath in place at the time:

> I, [name], am a Métis.
>
> As a Métis, I honour with pride the blood of both my mother and father.
>
> As a Métis, I acknowledge the rich history of my people and the courage and dedication of our leaders.
>
> As a Métis, I pledge to preserve the spirit and enhance the identity of my people.
>
> As a Métis, I confirm my commitment to my family, my people, my Nation.
>
> As a Métis, I accept my responsibility to put service to my people ahead of self interest, and to honour the spirit and the letter of the written and unwritten laws of God, Canada, and the Métis Nation.

[21] He has refused to take the new oath set out in the second special resolution passed August 7, 2016. However, it is admitted by the Association that as an existing member, he is not required to take the new oath, and the refusal to take that oath is not grounds for withholding his membership in the Association. Indeed, it is admitted by the Association that no existing members as at August 7, 2016 are required to take the new oath. Only members joining the Association after that date are so required.

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V. Special Resolutions

[22] The special resolutions passed by the Association on August 7, 2016 read:

1. BE IT RESOLVED THAT the following objective of the MNA be added to Article I of the MNA Bylaws as Article 1.8:

   > 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 s 35(3) of the *Constitution Act, 1982*.

2. BE IT RESOLVED THAT the following oath of membership be attached to the MNA Bylaws as Schedule "A":

   > 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.

   BE IT FURTHER RESOLVED THAT this oath of membership be a requirement for all future individuals to sign as part of their application for membership in the MNA;

   BE IT FURTHER RESOLVED THAT all existing members be provided notice of this new oath of membership.

[23] These special resolutions were filed with the Registrar of Corporations for the Province of Alberta, who is by definition the Registrar for the purposes of the *Societies Act*, and became effective September 14, 2016.

[24] To fully understand each of these special resolutions, resort must be had to the bylaws of the Association as they had read on August 7, 2016.

VI. The Bylaws

[25] The bylaws of the Association begin with a statement i) that the Métis Nation of Alberta is a distinct nation among aboriginal peoples, with aboriginal rights recognized and affirmed under s 35 of the *Constitution Act, 1982*, with an inherent right of self-determination and self - government, and ii) that the bylaws of the Métis Nation of Alberta will continue "the process of self-determination and self-government of the Métis Nation".

[26] The objectives as set out in the bylaws are to promote the development of the Métis Nation in Alberta, act as political representative of "all Métis in Alberta", pursue and defend aboriginal, legal, constitutional and other rights of the Métis in Alberta, re-establish land and resource bases, create awareness of the proud heritage of the Métis Nation of Alberta, promote the history, values, culture, languages and spiritual traditions of the Métis Nation of Alberta, develop prosperity and economic self-sufficiency within the Nation, and promote the

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participation of elders, women, youth and Métis persons with disabilities. Added to that list of objectives, as article 1.8, is the first special resolution of August 7, 2016, set out above.

[27] As indicated in ***Boucher*** (at para 10), ***McCargar***, 2017 ABQB 692 (at para 27) and ***Fort Chipewyan*** (at paras 208 & 401), this preamble and these objectives may be aspirational with respect to the Association, but do not necessarily state the current jurisdiction, authority nor ability of the Association. It may strive to obtain these objectives for and on behalf of its members. Any claim beyond those aspirations for its own members, is overstating.

[28] The key to interpretation of these bylaws is found in the definitions.

[29] "Métis" is defined as a person who self-identifies as a Métis, is distinct from other aboriginal peoples, is of historic Métis Nation ancestry, and is accepted by the Métis Nation (article 3.1). This is the 2003 National Definition for Citizenship within the Métis Nation of the Métis National Council.

[30] "Métis Nation" is defined differently in two articles of the bylaws as meaning both the Aboriginal people descended from the historic Métis Nation, now comprised of all Métis peoples and one of the aboriginal peoples of Canada within the meaning of s 35 of the *Constitution Act, 1982* (article 3.2(d)), and as meaning the Métis Nation of Alberta Association (article 4.9).

[31] "Historic Métis Nation" is defined as all aboriginal people known as Métis who resided in the Historic Métis Nation Homeland (article 3.2(b)).

[32] "Historic Métis Nation Homeland" is said to mean the area of land in west central North America used and occupied as the traditional territory of the Métis (article 3.2(c)).

[33] "Member" is defined as meaning a member of the Métis Nation of Alberta Association who has met the requirements of membership (article 4.5).

[34] The use of the term "Métis Nation" in article 3.2 is clearly distinct from the use of the same term in article 4.9 and throughout the bylaws. The use of the term in article 3.2 is a description of the entire Métis peoples, one of the three recognized aboriginal peoples, in west central Canada, including Alberta, and is equivalent to Historic Métis Nation. This is an appropriate definition when discussing proof of Métis status, but is not to be confused with the use of the term "Métis Nation" throughout the rest of the bylaws, which by definition must be limited to the Association and its members.

[35] As a result, a fair and reasonable interpretation of the bylaws would be to read the phrases "Métis Nation", "Métis Nation of Alberta" and "Métis in Alberta" as referencing the Association and members of the Association, and no more. The bylaws can set out whatever definitions the membership thinks appropriate, but the reader must keep in mind that the actual scope of the bylaws is restricted to the Association and members of the Association, and no reading of the bylaws extending outside the four corners of the Association is either reasonable or appropriate.

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[36] Other bylaw articles of importance include:

> 5.1: No Métis person who has been recognized as a Métis member (of the Association) may lose his or her membership rights by reason of suspension of certain rights in the Métis Nation (meaning the Association);
>
> 10.7: Any Métis who has been accepted as a member must sign and take an oath of membership to the Métis Nation (meaning the Association) [emphasis added];
>
> 10.8: The oath of membership is as attached [sic] Schedule "A" to the bylaws;
>
> 10.9: The oath of membership shall be a requirement for all future individuals to sign as part of their application for membership in the Métis Nation of Alberta (meaning the Association), and
>
> 10.10: All existing members shall be provided notice of the new oath of membership.

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VII. Interpretation of the Special Resolutions

[37] Given the principles set out above, and in particular the definitions set out in the bylaws, the oath, to which Mr. McCargar objects, is far more limited and specific than he alleges. The new oath, read in the context of the legal principles above and the bylaws, is properly interpreted to read:

> I agree to the Association's Bylaws and policies as amended from time to time and voluntarily authorize the Association to assert and advance collectively-held Métis rights, interests and claims on behalf of myself, my community and the Association, 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 Association.

[38] This 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.

[39] This oath clearly attempts to answer the question posed in ***Fort Chipewyan*** as to whether the organization on a court application is in fact the legal representative of the members it purports to represent (para 391).

[40] In like fashion, the new objective set out in special resolution 1, now article 1.8, is properly interpreted in light of the above law and the bylaws to read:

> To negotiate, on behalf of the members of the Association, 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 s 35(3) of the *Constitution Act, 1982*.

[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.

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VIII. Contract as an Underlying Legal Right

[42] Although the reasonable and proper interpretation of the special resolutions, in the context of the above law and bylaws of the Association, addresses most of the objections of Mr. McCargar, it is still necessary to determine whether Mr. McCargar's membership in the Association constitutes contract, whether that contract has been breached, and whether such breach invites the private law remedy of a declaration of invalidity.

[43] In ***Highwood***, the Supreme Court of Canada said there is no freestanding right to procedural fairness in a private voluntary organization, without an underlying legal right, such as a provable breach of contract (paras 2, 12-23).

[44] In ***Ukrainian Greek Orthodox Church***, Crocket J addressed the question of excommunication of a priest by a church court. The church was incorporated by Special Act of Parliament in 1929 and the trustees were a body corporate registered under Manitoba's 1913 *Church Lands Act*. He said "it is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order". He therefore sought a legal basis for the assertion of civil or temporal jurisdiction (p 591), but after finding no underlying commercial contract, he dismissed the plaintiff's claim (p 594). Hudson J agreed that no property rights were involved in this dispute, so that it "amounts to no more than a claim to have the Court enforce what is a purely ecclesiastical decree" (p 615).

[45] In the following cases where a right of review of a decision of a private voluntary organization were held to exist by right of contract, the terms and indicia of the contracts were clear, and the contracts contained rights of property or commerce.

[46] In ***Hofer***, the applicants had signed the Articles of Association of a colony of the Hutterian Brethren. Cartwright CJ, Spence J, and Pigeon J (otherwise in dissent) held that the colony operated as a communal farm, and was to be treated as a commercial undertaking (pp 961 & 981-982). The decision by certain members of the colony to leave the Hutterian faith and join the Radio Church of God was therefore a breach of a commercial contract to operate the communal farm: "the appellants...remain free to change their religion, but they have contracted that if they do so and leave the colony voluntarily or by expulsion, they will not demand any of its assets". Ritchie, Martland and Judson JJ, although not agreeing fully with that reasoning, found all of the real and personal property of the colony was held for the colony as a whole on the principle of community of property (pp 966-967).

[47] In ***Senez***, the appellant was expelled from membership in the Montreal Real Estate Board. The directors of the Board were found to have contravened their bylaws with respect to the expulsion procedure and to have violated the principles of natural justice (pp 558 & 559). The Court held the "legal basis of the appellant's action against the Board is the latter's breach of contractual obligations" (p 560). The contract consisted of the member paying entrance fees and

annual dues, being listed on the Board's multiple listing service, membership with the Board providing the required prerequisite for membership in at least five other real estate associations, and allowing the use of the title, FRI, which made Mr. Senez a qualified appraiser (pp 564 & 565). The Court found that the Board was a voluntary association, the bylaws of which affected and applied only to its members. It said:

> When an individual decides to join a corporation like the Board, he accepts its constitution and the bylaws then in force, and he undertakes an obligation to observe them. In accepting the constitution, he also undertakes in advance to comply with the bylaws that shall subsequently be duly adopted by a majority of members entitled to vote, even if he disagrees with such changes. Additionally, he may generally resign, and by remaining he accepts the new bylaws. (p 566-567)

[48] The decision of the Court therefore rested on an underlying breach of a commercial contract as it found "the rules and bylaws infringed by the Board are contractual in nature" (p 568).

[49] In ***Lakeside Colony***, a dispute arose after one of the members refused to stop manufacturing a hog feeder, the subject of a patent held by another Hutterite colony, as a result of which the member was expelled from the colony. The Supreme Court of Canada determined the colony was a "voluntary association" operating a farming enterprise, whose members had all agreed to articles of association (p 172). It acknowledged that "courts are slow to exercise jurisdiction over the question of membership in a voluntary association...[but] have exercised jurisdiction where a property or civil right turns on the question of membership" (p 173). It found there was a "property right at stake" arising from joint ownership of property, the right to live on the colony, and be supported by the colony. The Court said "these rights to remain are contractual in nature" and "susceptible of enforcement by the courts" (p 173).

[50] Nowhere in the bylaws of the Association is there any reference to membership in the Association being contractual or commercial in nature. There are no terms of contract set out in the bylaws: there is no formal offer, acceptance or consideration, nor any express intention to create legal relations. As the Supreme Court of Canada and the Court of Appeal of Alberta have said, membership in and of itself does not constitute a contract (***Highwood*** at para 24; ***Zebroski*** at paras 22-25).

[51] Further, there is no promise that the bylaws of the Association would not be changed without his consent at any time after Mr. McCargar joined the Association. In fact, provision for amending the bylaws is specifically set out in articles 39.1 and 39.2, and the process of amendment by special resolution is specifically addressed in articles 4.11 and 24-28.

[52] Likewise, there is no provision in the bylaws that the oath taken by Mr. McCargar when he joined the Association would never be changed. Article 10.7 provides that a Métis person who has been accepted as a member of the Association must sign and take "an" oath of membership, not necessarily protecting that oath from future amendment. While the current oath of membership effected by special resolution 2 is attached as Schedule "A" to the bylaws, it only need be taken "for all future individuals to sign as part of their application for membership" (article 10.9). Existing members are provided notice of (article 10.10), but are not required to swear the new oath. Mr. McCargar, in particular, is not required to swear the new oath.

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[53] I find, under the particular circumstances before me, none of the indicia of commercial contract apply to Mr. McCargar's past or continuing membership in the Association. As a result, I find, according to ***Highwood*** , there is no private law remedy available to Mr. McCargar.

IX. Conclusion

[54] Mr. McCargar's application for a declaration that the special resolutions passed by the Association on August 7, 2016 and filed with the Registrar of Corporations on September 14, 2016 are invalid, is dismissed.

X. Costs

[55] Costs are awarded to the Association on column 1 of Schedule C of the *Alberta Rules of Court*. If counsel are unable to agree upon the calculated figure, I will be prepared to hear argument in that regard.

Heard on the 29th day of June, 2018.
Dated at the City of Edmonton, Alberta this 20th day of July, 2018.

K.P. Feehan
J.C.Q.B.A.

Appearances:

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