PAPE SALTER TEILLET LLP BARRISTERS AND SOLICITORS

Métis Nation of Ontario Registry Review Process Upheld

Court Strikes Legal Claim Filed By Citizens with "Incomplete" Files

Green v. Métis Nation of Ontario

About this Document

This is a summary of the decision by the Ontario Superior Court of Justice ("**Court**") in *Green v. Métis Nation of Ontario Secretariat*, 2021 ONSC 5808 ("***Green v. MNO***"). It has been prepared for the Métis Nation of Ontario ("**MNO"**). Jason Madden and Alex DeParde of the law firm Pape Salter Teillet LLP acted as legal counsel for the MNO in this matter and prepared this summary. It is not legal advice and should not be relied on as such. It may also not necessarily represent the views of the MNO or its citizens.

What was this Case About in a Nutshell?

Five MNO citizens—Russell Green, Hailey Green, Tracy Green, Joshua Green, and Tristan Nixon ("**Green Family**")—brought an application against the MNO ("**Application**").

The Application challenged the legality of the MNO Registrar's assessment that their citizenship files were "incomplete" based on the MNO's current citizenship requirements as set out in the MNO Bylaws and Registry Policy. The MNO Registrar's determination was made pursuant to the Registry and Self-Government Readiness Review ("**Registry Review**") that was directed by way of a 2017 resolution passed by the Provisional Council of the Métis Nation of Ontario in order to prepare for self-government negotiations with Canada as well as to advance Métis rights and claims.

The Green Family sought a Court declaration that the Registry Review breached the MNO Bylaws and asked the Court to declare that they were citizens of the MNO "without condition, restriction or limitation" and that the MNO had to recognize them as such. The Green Family also sought damages against the MNO.

In response to a preliminary motion to strike brought by the MNO, the Court dismissed the Green Family's litigation against the MNO in its entirety. The MNO is also eligible for costs to be awarded against the Green Family. The issue of costs has not yet been resolved as of the date of this summary.

Relevant Background to the Registry Review and *Green v. MNO*

In 1993, the MNO was created. Through the MNO, a distinct group of Ontario Métis—as described in the MNO Statement of Prime Purpose—established a Métis-specific body whose "aim and objectives" included "maintain[ing] a registry," "establish[ing] democratic institutions based on our inherent right of self-government," and "ensuring that Métis can exercise their Aboriginal and Treaty rights."

To advance the "collective will" of its citizens and the Métis communities it represents, the MNO incorporated a Secretariat under provincial law to act as its corporate and administrative arm until its self-government is formally recognized in Canadian law. The Secretariat has by-laws (i.e., the MNO Bylaws) and related documents that set out the MNO's current citizenship requirements and its governance structures and institutions.

In the 1990s, Ontario denied the existence of any Métis rights in the province. In response, the MNO successfully advanced *R. v. Powley*, 2003 SCC 43 ("***Powley***"), as the first case to be decided by the Supreme Court of Canada ("**SCC**") to affirm Métis rights protected by section 35 of the *Constitution Act, 1982* ("**Métis Section 35 Rights**").

In *Powley*, the SCC affirmed that Métis Section 35 Rights flow from the emergence of distinct Métis communities in a given region prior to effective Crown control, along with the continuation of those communities into the modern day. To be a beneficiary of Métis Section 35 Rights, an individual must: (i) self-identify as Métis, (ii) ancestrally connect to a historic Métis community, and (iii) be accepted by the modern community.

The SCC also provided the following directions to Métis groups like the MNO who seek to assert or claim Métis Section 35 Rights in the future:

> [29] … 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. …
>
> [33] … Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a contextual understanding of the membership requirements of the organization and its role in the Métis community. …
>
> [34] It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

In 2004, in response to *Powley* and other factors, the MNO changed the definition of "Métis" in its by-laws to require Métis ancestry, not just mixed Aboriginal ancestry. Since 2009, the MNO has also had a Registry Policy in place that the MNO Registrar must interpret and follow based on her authority set out in section 67(i) of the MNO Bylaws.

Over the last 17 years, the MNO has continued to adjust and refine its citizenship registration processes to align with the "collective will" of its citizens as well as the requirements of *Powley* in order to assert Métis Section 35 Rights and to ultimately negotiate the recognition of Métis rights and self-government with Canada and Ontario.

In October 2017, in anticipation of self-government negotiations with Canada, the MNO initiated the Registry Review to determine the 'completeness' of each of the MNO's over 20,000 citizenship files based on the MNO's current citizenship requirements.

In June 2019, the MNO and Canada signed a *Métis Government Recognition and Self-Government Agreement* ("**MGRSA**"). The MGRSA sets out a process for the MNO's self-government to be recognized in Canadian law and its implementation is ongoing.

The Green Family's Litigation Against the MNO

On July 8, 2019, as a part of the Registry Review, the MNO Registrar wrote to the Green Family to advise that their citizenship files were "incomplete" because "the location where your "Métis Ancestor" was documented as "half-breed", is over 400 kilometers outside of the Métis Nation Homeland borders as defined by [the] current MNO Registry Policy."

After several back-and-forth letters, the Green Family filed the Application against the MNO on November 24, 2020. The Application alleged that the MNO Registrar's determination that their citizenship files were "incomplete" placed their Métis Section 35 Rights in "limbo" and curtailed "their democratic rights to stand for office and participate in the [MNO's] processes," thereby violating various parts of the MNO Bylaws.

In particular, the Green Family complained that they would be ineligible to stand for elected office within the MNO, "ineligible to vote on any future Métis Constitution or self-government agreement," and will "not be citizens of the future Métis Government unless they can meet the criteria set out in the future Citizenship Law."

What Did the MNO Ask the Court To Do?

Rather than proceed to a hearing of the Application on its merits, the MNO brought a preliminary motion to strike the Application asking the Court to:

1. dismiss the Application in its entirety; or
2. convert the Application to an action, which would be required to determine the Green Family's Métis Section 35 Rights claims and any damages they suffered.

On a motion to strike, a Court does not to assess whether the facts alleged in the Application are true. Instead, a Court assesses whether "it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action." In other words, the Court assesses whether the claim has no "reasonable prospect of success" and is "bound to fail."

What the Court Said

The Court began by setting out the Green Family's claim, the MNO's legal positions, and the relevant sections of the MNO Bylaws (paras. 1-23).

The Court noted that the MNO's "written submissions provide a helpful summary of its history … [and] speaks at some length about the Supreme Court's decision in [*Powley*]." Based on the MNO's evolution of its citizenship criteria over its 25+ year history and "the test set out in *Powley*," the MNO acknowledged that there may be MNO citizens who are not Métis Section 35 Rights-holders. This was one of the reasons for the MNO undertaking the Registry Review in the first place (para. 13).

The Court highlighted this aspect of the MNO's submissions to note that the MNO's changing citizenship criteria over the years were not "intended to … target specific individuals or families but to advance [its] collective "aims and objectives" so as to better position itself to establish Métis s. 35 rights and ultimately negotiate a self-government agreement" (para. 13). Simply put, if the MNO wanted to assert and claim Métis Section 35 Rights, it needed to ensure it represented Métis Section 35 Rights-holders. This was the purpose of the Registry Review.

The Court described the MNO's position as follows: "For the [MNO] the bottom line is, if it did not represent what is calls 'rights bearing' Métis as defined by *Powley*, the Crown would not negotiate and agree upon a self-government arrangement, which requires that it constantly review and, if necessary, adjust its citizenship criteria" (para. 15).

> "The purpose of the [Registry Review] was to ensure that [the MNO] was representing folks who meet criteria that would satisfy the *Powley* test. Again, this was necessary to ensure [the MNO] was properly positioned to negotiate a self-government agreement, and is a process that is ongoing."
>
> – *Green v. MNO*, para. 16

The Court then set out the Green Family's positions. They argued that because the MNO Statement of Prime Purpose refers to the historic Métis Nation as including "west central North America," the more limited geography applied by the MNO Registrar based on the Registry Policy breached the MNO Bylaws (para. 19). They also argued that they have "unlimited" and "unrestricted" rights based on being an MNO citizen (paras. 5, 22).

The Court noted the Green Family's main concern was that the MNO Registrar's decision "appears to be based on criteria that they will assuredly be unable to satisfy which, they say, means this was but a prelude to their citizenship either being suspended or revoked" (para. 21). They also argued that having their files determined as "incomplete" was not an "inconsequential decision" because "while still citizens, no new citizenship cards will be issued to them; those with incomplete files will not be permitted to run for office; and those with incomplete files will not be permitted to vote on any future Métis Constitution or self-government agreement" (para. 21).

The MNO Bylaws Were Not Breached by the Registry Review

The Court first determined that several of the Green Family's claims—with respect to the MNO Bylaws being breached—had no reasonable prospect of success (para. 27).

a. The MNO Bylaws Authorized the MNO Registrar to Make Her Determination

The Court found that questions with respect to the interpretation and application of the MNO's citizenship criteria fall "squarely at the feet of its Registrar" based on "s. 67(i) of the by-laws and the *Registry Policy* and its Guidelines" (para. 27).

As such, the determination that the Green Family's citizenship files were "incomplete" was authorized based on the express terms in the MNO Bylaws and had no prospect of ultimately being successfully challenged.

The Court went on to emphasize that the Green Family were still citizens, but that the designation that their citizenship files were "incomplete" did not breach the MNO Bylaws:

> [31] The issue is not whether the [Green Family] or I agree with what the [MNO] has done, but whether it had the authority, under its governing rules, to make the decision it did. And on that question, apart from my determination that this was a decision it was authorized to make, and despite the real consequences of the decision, two things remain true: First, the [Green Family's] citizenship has not been suspended or revoked, and second, there is otherwise no violation of the [MNO's] by-laws.

b. Section 3 of the MNO Bylaws Was Not Breached

The Court found that the Green Family's claim that section 3 of the MNO Bylaws was breached had no prospect of success because that section deals with the commitment of individual MNO citizens to uphold the MNO Statement of Prime Purpose. As such, this section could not ground a cause of action against the MNO (para. 31).

c. Sections 4 and 5 of the MNO Bylaws Were Not Breached

Section 4 of the MNO Bylaws "sets out the criteria [for citizenship] (i.e. self-identification, interest in furthering the [MNO's] objectives, distinction from other Aboriginal groups)" (para. 31), whereas section 5 "requires that those entitled to be registered as a citizen provide "sufficient documentation" that they are indeed Métis within the meaning of s. 4" (para. 31). The Court found "that these provisions specifically authorize the [MNO] to do as they did here" with respect to the MNO Registrar determining the Green Family's citizenship files were "incomplete" (para. 31).

d. Section 10 of the MNO Bylaws Was Not Engaged or Breached

Section 10 of the MNO Bylaws provides procedural protections for limitations on citizenship, which the Court found "do not apply to the present circumstances" (para. 28). They apply where (1) limitations have been imposed under MNO Policy #2015-001 *Policy on Conditions for Limitations that May Apply to MNO Citizenship*; or (2) an individual is applying to become an MNO citizen, but has been denied citizenship (i.e., non-citizens).

> "I accept and adopt the [MNO's] position that s. 10(a) of its by-laws do not apply in the present circumstances. Section 10(a) does apply to actions taken pursuant to the [MNO's] *Limitation Policy* – but that is not what we are talking about here. It also applies to an appeal of decisions made on those seeking to become citizens, which does not capture the [Green Family], who are already citizens."
>
> – *Green v. MNO*, para. 28

Declaratory Relief Based on Hypothetical Situations is Unavailable

With respect to the declaratory relief sought by the Green Family based on the claim that the MNO had created a "new class" of citizenship contrary to section 61 of the MNO Bylaws, the Court found that none of the situations that the Green Family complained of had even happened yet (as acknowledged in their own pleadings). They currently remain MNO citizens. They had not been denied candidacy in an MNO election. A ratification vote on an MNO constitution or self-government agreement has not yet been set.

Courts cannot "grant declaratory relief for something that might happen in the future" (para. 33). As a result, the Green Family's claims based on section 61 of the MNO Bylaws "must still fail, at least at this point, because declaratory relief is not available in these circumstances" (para. 32). The striking of the Green Family's current claim does not mean that they could not advance a future claim if the above-noted circumstances were to occur. The Court, however, was not commenting on the merits or ultimate success of those potential future claims, but on whether those situations would at least survive a motion to strike (para. 32). Likewise, the Court's comments do not preclude the MNO from bringing a motion to strike on some other litigation that may be advanced in the future based on the MNO Bylaw's authorizing its actions. The Court's comments also do not pre-judge whether a claim that would survive a motion to strike would be successful.

It is important to highlight that the Court went out of it way to emphasize that it also should not be weighing into what the MNO may do in the future, as the Green Family had urged:

> [36] … The court has no authority to speculate on what a future citizenship law or constitution might look like, which would be the net-effect of doing what the [Green Family] suggest should be done now. Consider also the impact on the [MNO's] negotiations with Canada, where one of the primary questions is surely whether the [MNO's] elected leadership and members are *all* s. 35 rights-holders. …

It is also apparent in the Court's decision that any attempt to actually remove MNO citizens who have "incomplete" files would require a special resolution (i.e., an amendment to the MNO Bylaws) (paras. 24, 32). Notably, the MNO has agreed with this proposition in its public communications materials related to the Registry Review.

The Green Family Had No Claim for Damages Against the MNO

The Court found the Green Family pleaded no cause of action that entitled them to any damages against the MNO (para. 37).

Proof of Métis Section 35 Rights Cannot Be Addressed in an Application

The Court declined to address all aspects of the Green Family's claims with respect to Métis Section 35 Rights because "[a]n application is an entirely improper procedure for s. 35 questions to be answered" (para. 34).

The Green Family alleged that the MNO had placed their "s. 35 *Charter* rights in limbo". First, s. 35 rights are not *Charter* rights. Second, the Court held that it had "no ability to, on this record, weigh in on (even indirectly) the [Green Family's] rights under s. 35 and, while it is necessary context, the way in which this has been pleaded raises my suspicion that the [Green Family] are indeed attempting to do at the backdoor what they cannot do at the front" (para. 30).

> "On the issue of s. 35, I agree with the [MNO] that the [Green Family] seem to be sucking and blowing at the same time. That is, they appear to be simultaneously taking the position that [they] do not rely upon or seek a affirmation of their s. 35 rights; and that the [MNO's] decision on citizenship has impeded their ability to benefit from and exercise their s. 35 rights.
>
> – *Green v. MNO*, para. 29

The Court reaffirmed that Métis Section 35 Rights flow from the pre-existence of distinctive Métis communities, and those rights are collectively held by the modern day descendants of those communities. The MNO Bylaws do not create these pre-existing rights. Nor does s. 35 itself. As such, if the Green Family wanted to establish a claim to Section 35 Métis Rights they would have to advance an action, not an application, to do so. The Court provided the following cautions to the Green Family:

> [39] The only other word of caution I provide to the [Green Family] is, and this is I suppose rather trite, but s. 35 Métis rights are held by collectives, and not individuals; see *Powley* and specifically that part of the '*Powley* Test' which requires the demonstration of ties to a "Historic Métis Community". This is a constitutional question and not one that has to do with the [MNO's] by-laws. More importantly, any litigation that seeks clarity on who is a s. 35 rights-holder, even if indirectly, must involve the Crown.

Conclusions and Key Take-Aways

- The Court dismissed the Application in its entirety because the Green Family's claims had no reasonable prospect of success (paras. 33, 38).
- The MNO is eligible for its legal costs against the Green Family (para. 40).
- The Court acknowledged that the MNO's ongoing changes to its citizenship requirements are not about targeting specific individuals or families, but enables the MNO to be able to negotiate on Métis rights and self-government based on the directions in *Powley* (paras. 13, 15-16, 24, 27, 32, 35-36, 39).
- Courts are reluctant to weigh in—through litigation advanced by individuals—to pre-determine the outcomes of internal governance issues as well as ongoing negotiations between the Crown and the MNO (i.e., directing what a Métis constitution, citizenship law, etc. should look like) (paras. 12, 32-33, 36).
- With that said, while this "transitional" process is ongoing, the MNO must ensure that its actions are authorized by the MNO Bylaws or other governance documents, processes, and policies (paras. 13, 26-27, 32).
- If an individual wants to prove Métis Section 35 Rights, they must be authorized to do so on behalf of a rights-bearing Métis community and advance an action (not an application) in litigation that includes the Crown (para. 39).
- Métis Section 35 Rights are not the same as or dependent on the interests that an individual may have under the MNO Bylaws. As such, there is nothing in the MNO Bylaws that guarantees that all current MNO citizens have a right to vote on a future Métis constitution or citizenship law established for Métis rights-holders (para. 35).