Court of Queen's Bench of Alberta

Citation: East Prairie Metis Settlement v Alberta, 2021 ABQB 762

Date: 20210922
Docket: 2103 04794
Registry: Edmonton

Between:

East Prairie Metis Settlement

Applicant

- and -

Attorney General of Canada, Her Majesty the Queen in Right of Alberta, the Honourable Rick Wilson, Minister of Indigenous Relations for Alberta and the Registrar of the Alberta Metis Settlements Land Registry

Respondents

Reasons for Decision
of the
Honourable Mr. Justice John T. Henderson

I. Overview

[1] The Applicant, East Prairie Metis Settlement ("EPMS") is a body corporate created by the *Metis Settlements Act*, SA 1990, c M-14.3 (the "*Metis Settlements Act, 1990*") now the *Metis Settlements Act*, RSA 2000, c M-14, as amended (the "MSA"). EPMS is the local self-governing authority over its settlement area of approximately 33,444 hectares located near High Prairie, Alberta. Approximately 504 individuals reside in the EPMS settlement area. Some, but not all of those residents are Metis persons who are members of the EPMS.

[2] Beginning in 2019, the Minister of Indigenous Relations for Alberta advised Metis Settlements, including EPMS, of his plan to make a number of amendments to the MSA. This ultimately led to Bill 57: *Metis Settlements Amendment Act, 2021* being introduced in the Alberta Legislature on March 11, 2021 ("Bill 57"). The Bill passed Third Reading on June 13, 2021, received Royal Assent on June 17, 2021, and became the *Metis Settlements Amendment Act, 2021,* SA 2021, c 12 (the "Amendment Act").

[3] On March 31, 2021, after Bill 57 was introduced into the Legislature, but before the Bill was fully debated in the Legislature and before the Amendment Act was enacted, the present litigation was commenced by way of Statement of Claim. The action seeks broad declaratory relief in relation to issues that are unrelated to the Amendment Act. However, the action also seeks a declaration that the Amendment Act is "of no force and effect" because it was passed without "deep and meaningful consultation" with the Metis Settlements General Council ("MSGC"), the Metis Settlements and their members, and without their "informed consent".

[4] On this application EPMS seeks an "interim and interlocutory injunction" or, alternatively an "interim and interlocutory declaration" restraining Alberta from:

i. enforcing any of the provisions of the Amendment Act "without the full and informed consent of the General Council and each of the Settlements and their Settlement Members"; and

ii. ceasing to provide continued funding to the MSGC and the Settlements not less than has been provided annually since 2015.

[5] EPMS seeks both an "interim" injunction and an "interlocutory" injunction. These two terms are often loosely used by parties and by the Courts in ways that suggest that they are synonymous. However, they are not the same. The difference between the two was explained in Robert J. Sharpe, *Injunctions and Specific Performance*, (Canada Law Book, Thomson Reuters, looseleaf ed) at para 2.15 where Justice Sharpe explains:

> ... an "interim" injunction usually refers to an order made on notice, but after limited argument and only for a specific time, usually to permit the defendant to cross-examine on the affidavits filed by the plaintiffs or to file material in reply ... an "interlocutory" injunction, usually refers to an order restraining the defendant until trial or other disposition of the action...

[6] While the Application filed by EPMS says that it seeks an interim injunction, such an injunction is not appropriate in this case where there has been full argument for the interlocutory injunction. I will proceed on the basis that EPMS is seeking an interlocutory injunction.

[7] EPMS also seeks interim or interlocutory declaratory relief. This relief is sought for the purpose of complying with the *Proceeding Against the Crown Act*, RSA 2000, c P-25, section 17 which provides that an injunction may not be granted against the Crown, but where the Court concludes that an injunction would otherwise be an appropriate remedy, the Court may make an Order declaratory of the rights of the parties.

[8] The issue on this application is whether EPMS has satisfied the test for granting an interlocutory injunction. If the test has been met then the remedy available to EPMS will be an order declaratory of the rights of the parties.

[9] For the reasons that follow, I dismiss this application.

II. Background

[10] EPMS is one of eight Metis Settlements in Alberta. All Metis Settlements in Alberta are bodies corporate created by the *Metis Settlements Act, 1990*, which was passed following extensive discussions between the Government of Alberta and the Alberta Federation of Metis Settlement Associations. These discussions resulted in the Alberta-Metis Settlements Accord in 1989 (the "Accord"). The Accord documented three central Metis aspirations: (1) to secure a land base for future generations; (2) to gain local autonomy in Metis affairs; and (3) to achieve economic self-sufficiency. In 2011 the Supreme Court of Canada concluded that the provisions of the MSA are constitutional and represent an ameliorative program with the purpose and effect of enhancing Metis identity, culture and self government: ***Alberta (Aboriginal Affairs and Northern Development) v Cunningham***, 2011 SCC 37.

[11] The Metis Settlements were continued under the MSA. The MSA sets out the administrative framework for local governance in relation to the Metis Settlements. Membership in the Metis Settlements is determined in accordance with the criteria set out in sections 74 to 98 of the MSA. Under the MSA, elected Settlement Councils are established as decision-making authorities for each of the Metis Settlements.

[12] Elections to the Settlement Councils for each Metis Settlement are held every four years on the first Monday in October. Historically each Settlement Council has elected five Councillors. The next Metis Settlement elections will be held on Monday October 4, 2021.

[13] In addition to the eight Metis Settlements, the MSA also created the Metis Settlements General Council ("MSGC"), a body corporate that is the decision-making authority for the eight Metis Settlements as a whole. The MSGC also holds fee simple title to all Metis Settlement lands. The MSA authorizes the MSGC to pass policies that are binding on each of the Metis Settlements. The eight Metis Settlement Councils are empowered by the MSA to make bylaws with respect to a range of matters including health, safety, and welfare, public order and safety, planning, land use and development, and general governance. However, the Metis Settlements cannot pass a bylaw or take any action or undertake any development or activity that is inconsistent with the MSGC General Council Policy.

[14] All elected members of the eight Metis Settlement Councils are also members of the MSGC. The Councillors, in turn, elect the executive officers of the MSGC. Historically, the executive officers have consisted of the President, Vice President, Secretary, and Treasurer.

[15] Funding for the MSGC and the Metis Settlements has been provided from a number of sources including the following:

i. The *Metis Settlements Accord Implementation Act*, SA 1990, c M-14.5 provided funding for elements of the Accord and also provided for post-transitional funding through 2007. Pursuant to this legislation Alberta provided funding of $30 million per year for seven years ending in 1997 and a further $10 million per year between 1997 and 2007.

ii. The MSA established a Metis Settlements Consolidated Fund (the "Consolidated Fund") which has two parts, the operating fund for the Metis Settlements (the "General Fund") and a fund to serve as a means for long-term economic sustainability of the Metis Settlements (the "Future Fund"). The Future Fund was

at one time valued at $125 million but it is currently valued at approximately $25 million.

iii. Through the terms of a Co-Management Agreement made with Alberta, the Metis Settlements are able to negotiate revenues from various oil and gas royalty and equity participation structures.

iv. In 2013, Alberta entered into the Long-Term Governance and Funding Arrangements Agreement with the MSGC and the Metis Settlements. That agreement provided for $85 million in funding to the Metis Settlements over a 10-year period. The agreement will expire on March 31, 2023.

[16] On March 11 2021, Bill 57 was introduced in the Alberta Legislature. After being debated in the Legislature on 13 separate days, it passed Third Reading on June 13, 2021, received Royal Assent on June 17, 2021, and became the Amendment Act. Some portions of the Amendment Act came into force on June 17, 2021, and other portions of the Amendment Act will come into force between now and April 1, 2023.

[17] The foundation of the application for injunctive relief sought by EPMS is that the Amendment Act violates its rights and the rights of its members as well as the rights of the other seven Metis Settlements and the MSGC because Alberta failed to engage in "deep and meaningful" consultation prior to amending the MSA.

III. The *RJR* Test

[18] The well-known test for an interlocutory injunction is as described by the Supreme Court of Canada in ***RJR-MacDonald Inc v Canada (Attorney General),*** [1994] 1 SCR 311 and in ***R v Canadian Broadcasting Corp***, 2018 SCC 5. Before an interlocutory injunction can be granted the applicant must meet its onus to show that:

a) There is a serious issue to be tried; although where a mandatory injunction is sought, the applicant must show a strong *prima facie* case;

b) Irreparable harm will be suffered if the injunction is not granted; and

c) The balance of convenience favours granting the injunction.

[19] Even in cases where the applicant seeks interlocutory relief enjoining the operation of apparently validly enacted legislation, the test remains as stated by the Supreme Court in ***RJR*** and ***CBC***: ***AC and JF v Alberta***, 2021 ABCA 24 at paras 35-37.

IV. Proposed Injunction to Restrain Enforcement of Amendment Act

a) <u>*RJR* Stage One – Serious Issue to be Tried</u>

[20] When assessing the first stage of the *RJR* test the threshold is deliberately low. The test is adopted from the decision of the House of Lords in ***American Cyanamid Co v Ethicon Ltd***, [1975] AC 396 where Lord Diplock noted at pp 407-408 that "the court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried" or that the applicant must show a "real prospect of succeeding in his claim for a permanent injunction at the trial": cited in ***AC and JF*** at para 21.

[21] EPMS argues that Alberta enacted "significant amendments" to the MSA without the full and informed consent of the MSGC, the Metis Settlements and the Settlement members and also without "deep and meaningful consultation". It argues that a duty to engage in this type of consultation arises because of the historical context, including the extensive negotiations that resulted in the Accord in 1989 and the original MSA and the representations by representatives of Alberta in the years following the Accord. EPMS argues that Alberta failed to engage in such a consultation and therefore it has breached various duties to EPMS and this meets the low threshold on the first stage of the *RJR* test.

[22] In support of its position, EPMS notes that the MSA and other related legislation contain provisions demonstrating that consultation was a critical element that had been agreed to as part of the Accord. For example:

- Section 239 provides that the Minister can only make, amend or repeal regulations after consultation with the MSGC.
- Section 240 provides that the Minister can only make, amend or repeal regulations after consultation with the Metis Settlements.
- The *Constitution of Alberta Amendment Act, 1990*, RSA 2000, c C-24 was part of the package of legislation implemented to give effect to the Accord. Section 5 of that legislation specifically prohibited the Alberta Legislative Assembly from passing any Bill that would:
    - Amend or repeal the *Metis Settlements Land Protection Act*;
    - Alter or revoke letters patent granting Metis settlement land to the MSGC; or
    - Dissolve the MSGC or result in it being composed of persons who are not settlement members.

[23] Alberta argues the even though the test at this stage is low, EPMS has not met the threshold and, on this basis the application should be dismissed.

[24] Most fundamentally, Alberta argues that, as a matter of settled law, a duty to consult applies only to the executive function of government and has no application to the legislative process. For this reason, Alberta argues that no duty to consult was owed to EPMS during the legislative process leading to the passage of the Amendment Act.

[25] This is an issue that was specifically decided by the Supreme Court of Canada in ***Mikisew Cree First Nation v Canada (Governor General in Council)***, 2018 SCC 40. In ***Mikisew*** a First Nation brought an application for judicial review of the enactment of federal legislation related to environmental protection, seeking among other things, a declaration that they were owed a duty to consult. The majority of the Supreme Court concluded that no aspect of the law-making process from the development of the legislation to its enactment triggers a duty to consult. The rationale for this statement of law was provided by Justice Karakatsanis (for herself, the Chief Justice and Gascon J). At paragraphs 38 and 39 she said:

> Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-

making processes. Directly transposing such *executive* requirements into the *legislative* context would be an inappropriate constraint on legislatures' ability to control their own processes.

The administrative law remedies normally available for breach of a duty to consult would further invite inappropriate judicial intervention into the legislature's domain. The Crown's failure to consult can lead to a number of remedies, including quashing the decision at issue or granting injunctive relief, damages, or an order to carry out consultation prior to proceeding further with the proposed action (*Carrier Sekani*, at paras 37 and 54; *Clyde River*, at para 24; K Roach, *Constitutional Remedies in Canada* (2nd ed (loose-leaf)), at ¶15.820 to 15.980). Thus, if a duty to consult applied to the law-making process, it would require the judiciary to directly interfere with the development of legislation...

(*Emphasis in **Mikisew***)

[26] Justice Brown expressed this principle even more strongly at paras 102 and 103:

Further, the separation of powers and parliamentary privilege apply to parliamentary proceedings and to the process leading to the introduction of a bill in the House of Commons. The development, drafting and introduction of the omnibus bills are immune from judicial interference. In addition, none of the actions taken in relation to the development, drafting and introduction of the omnibus bills can be characterized as "Crown conduct" which triggers the duty to consult. In this case, the impugned conduct is, in its entirety, an exercise of legislative power (that is, part of the law-making process) and is therefore not executive conduct, to which the duty to consult applies.

While my colleague Karakatsanis J appears to accept that parliamentary privilege and the separation of powers preclude judicial imposition of the duty to consult (paras 2 and 38-50), her conclusions are, with respect, less than categorical on this point (para 2: "courts should *exercise restraint*"; paras 2, 32 and 41: "the duty to consult doctrine is *ill-suited*"; para 29: "whether the duty to consult is *the appropriate means*"; para 32: "courts should *forebear* from intervening in the law-making process"; para 35: "this *reluctance* to supervise the law-making process"; para 38: "an *inappropriate* constraint"; para 40: "an *enormously difficult* task"; emphasis added throughout). For the reasons which follow (under the heading "II. C. The Development, Introduction, Consideration and Enactment of Bills is Not 'Crown Conduct' Triggering the Duty to Consult"), whether a court may impose a duty to consult upon the process by which legislative power is exercised is not a question of mere "restraint", "forbearance", "reluctance", or of deciding whether imposing a duty to consult would be an "ill-suited" or "inappropriate" constraint upon that exercise of power. Rather, it is a question of constitutionality going to the limits of judicial power, which should receive from a majority of this Court a clear and constitutionally correct answer.

(*Emphasis in **Mikisew***)

[27] Justice Rowe, in separate reasons, writing for himself, Moldaver J and Côté J, concurred with the reasoning of Justice Brown on this point.

[28] Therefore, the three sets of majority reasons in ***Mikisew*** make it clear that the entire law-making process, from initial policy development to and including royal assent, is an exercise of legislative power which does not give rise to a duty to consult and is immune from judicial interference.

[29] EPMS's argument that sections 239 and 240 of the MSA demonstrate that the parties specifically contemplated the need for consultation prior to making any changes to the MSA is not supportable. Sections 239 and 240 of the MSA explicitly require consultation prior to the amendment or repeal of regulations. There is no similar provision in the MSA or in any other legislation that requires consultation in relation to amendments to the MSA. This is a critical distinction and emphasises the difference between the obligations that arise from the exercise of an executive function (by, for example, amending regulations) and the legislative function that was exercised in passing the Amendment Act.

[30] Similarly, the fact that s 5 of the *Constitution of Alberta Amendment Act, 1990* prohibits the repeal of, or amendments to the *Metis Settlements Land Protection Act* is of no assistance to EPMS in the context of the present arguments. The *Constitution of Alberta Amendment Act, 1990*, while prohibiting amendments to one piece of Metis legislation does not cast a broader net. There is no legislative provision that prohibits the Legislature from amending the MSA. If that had been the intention, then specific provision would have been made. Since it was not, it follows that the Legislature did not give up its right to amend the MSA and the constitutionality of the Amendment Act cannot be challenged on this basis.

[31] The Court in ***Mikisew*** emphasized that even though there is no duty to consult in the legislative process, where Parliament or a Provincial Legislature passes legislation that violates rights guaranteed by s 35 of the *Constitution Act, 1982*, Aboriginal rights holders have a remedy through the process established in ***R v Sparrow***, [1990] 1 SCR 1075, and ***Tsilhqot'in Nation v British Columbia***, 2014 SCC 44, [2014] 2 SCR 257. This was explained by Justice Rowe at para 154 of ***Mikisew***:

> Legislation said to infringe an Aboriginal or treaty right can be challenged under the infringement/justification framework in *Sparrow*. To establish a s 35 violation, a party must first demonstrate that it holds an Aboriginal right that remains unextinguished as of the enactment of the *Constitution Act, 1982* (*R v Van der Peet*, [1996] 2 SCR 507; *R v Sappier*, 2006 SCC 54, [2006] 2 SCR 686), or a treaty right (*R v Badger*, [1996] 1 SCR 771; *Delgamuukw*) ...

[32] At this stage of the litigation and for the purpose of this application, I assume (without deciding) that EPMS has the capacity to assert claims on behalf of the members of the EPMS and that some or all of those members have Aboriginal rights under s 35. However, it should be noted that the MSA did not convey Aboriginal or treaty rights to EPMS or to anyone else. The rights conveyed by the MSA are statutory rights that are fully defined in the legislation. Whatever Aboriginal rights members of the EPMS had prior to the Accord in 1989 and prior to the *Metis Settlement Act, 1990* continue to exist. None of the *Metis Settlement Act, 1990*, the MSA, nor the Amendment Act detract from those rights. As a result, there are no grounds on which the Amendment Act can be constitutionally challenged on the basis of an alleged breach of s 35.

[33] Similarly, the argument that the honour of the Crown in some way invalidates the Amendment Act because of an alleged absence of a duty to consult, or otherwise, is not sustainable. It is correct that the duty to consult with Indigenous peoples and (if appropriate) accommodate their interests is grounded in the honour of the Crown: ***Haida Nation v British Columbia (Minister of Forests),*** 2004 SCC 73 at para 16; ***Mikisew*** at para 1. However, the core issue in ***Mikisew*** as stated by Justice Karakatsanis at para 29 was "whether the honour of the Crown gives rise to a justiciable duty to consult when ministers develop legislation that could adversely affect the Mikisew's treaty rights" and whether "the duty to consult is the appropriate means to uphold the honour of the Crown". The majority of the Supreme Court concluded that the exercise of legislative powers did not engage the duty to consult, and the honour of the Crown did not give rise to this duty. For the same reasons, the honour of the Crown was not engaged in relation to the role of the Legislature in developing and passing the Amendment Act.

[34] Furthermore, the honour of the Crown speaks to how governments must act when dealing with Indigenous peoples. It does not give rise to an independent cause of action: ***Manitoba Metis Federation Inc v Canada (Attorney General)***, 2013 SCC 14 at para 73.

[35] EPMS also argues that the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") supports its claim for injunctive relief. However, the UNDRIP has no legal force in Canada or Alberta. It is an aspirational document that is not part of the law of Alberta and even if the Amendment Act violated the UNDRIP (on which I express no view), this would form no basis to constitutionally challenge the Amendment Act or to provide support for injunctive relief.

[36] For these reasons, I conclude that Alberta had no duty to consult in the context of the exercise of legislative powers by the Legislature of Alberta in developing, debating and passing the Amendment Act. I have no jurisdiction to interfere with the exercise of these legislative powers.

[37] Furthermore, I conclude that EPMS has offered no evidence or argument raising a serious issue that the Amendment Act is unconstitutional because of the alleged failure to consult, or otherwise. I therefore conclude that the claims of EPMS do not meet the very low threshold at the first stage of the *RJR* test. There is no legal basis to conclude that the implementation of the Amendment Act should be enjoined pending trial.

[38] In coming to this conclusion, I observe that this is not one of those cases where at a preliminary stage of the litigation the Plaintiff has not been able to fully develop and marshal the entire panoply of evidence that it may be able to develop for the purpose of trial. The conclusion that EPMS has not demonstrated a serious issue to be tried is based on legal principles rather than facts that might be developed or discovered. No amount of additional investigation, disclosure or preparation will change the law as stated by the Supreme Court in ***Mikisew.*** As a matter of law, no duty to consult existed in relation to the development and enactment of the Amendment Act. Thus, there is no foundation on which EPMS can advance its claim for injunctive relief.

[39] In relation to the first stage of the *RJR* test, Alberta argued that EPMS does not have standing to bring the present claims. This is an argument that has much broader implications for this litigation than simply the application for the interlocutory injunction. Given the conclusions I have expressed regarding the absence of a duty to consult and the absence of a basis to challenge

the constitutionality of the Amendment Act, it is unnecessary to determine the question of standing on this application.

b) *RJR* Stage 2 – Irreparable Harm

[40] When assessing whether an applicant for an interlocutory injunction will suffer irreparable harm, it is necessary to make the assessment from the perspective of the person who will benefit from the interlocutory relief. In this case EPMS argues that it will suffer irreparable harm because of the amendments to the MSA. The suggested irreparable harm is described in para 76 of the Affidavit of Harry Supernault, filed June 8, 2021. To summarize, Mr. Supernault deposes that the Amendment Act will:

i. severely and substantially adversely affect its financial viability;

ii. severely undermine and substantially adversely affect the preservation of historical cultural practices;

iii. force EPMS members to abandon a traditional Metis aboriginal lifestyle;

iv. increase the annual costs of EPMS by having to comply with further mandatory reporting requirements;

v. undermine the co-operative and cohesive nature of the EPMS Settlement Council by limiting Councillors to remuneration of at most 50% of the remuneration of the Chair, thus effectively making them part-time Councillors;

vi. allowing the concentration of power in the largest extended families in the Settlement by permitting a majority of the present Councillors to determine the size of the next council;

vii. severely undermining and adversely affecting the objects and purposes of the MSA to enhance and preserve the identity, culture and self governance of the Metis people;

viii. severely undermining and adversely affecting the ability of EPMS to develop and recommend their own culturally appropriate forms of governance institutions and procedures;

ix. violating and abandoning the “spirit of consultation and co-operation”; and,

x. treating EPMS and other Settlements and the MSGC like municipalities and forcing them to adopt governance styles like municipalities and comply with financial sustainability and self-reliance measures like municipalities.

[41] These particulars of irreparable harm are repeated in para 58 of the Application and in para 104 of the EPMS Brief of Argument. In addition, the EPMS Brief of Argument asserts one further particular of irreparable harm, namely, that the Amendment Act constitutes an “act or the implementation of a plan of cultural genocide and irreparable damage to the human dignity and the basic human rights of and towards Metis People and members of EPMS...”: EPMS Brief of Argument at para 105.

[42] Alberta argues that none of the particulars of irreparable harm are supported by evidence. Instead, the particulars are simply generalities that do not satisfy the degree of proof required to establish irreparable harm. Alberta argues that the particulars of alleged irreparable harm are simply assertions, not evidence. In response to these arguments, EPMS argues that the particulars of irreparable harm are sworn to in the affidavit of Harry Supernault and thus constitute evidence that is properly before the Court. Furthermore, EPMS argues that Alberta did not cross-examine on the affidavit and thus the evidence before the Court is unchallenged.

[43] EPMS does however acknowledge that some of the particulars of irreparable harm consist of conclusions of law or argument or alternatively opinion. EPMS asks that I consider any offending portions of the affidavit as argument.

[44] Even where an affidavit is not the subject of cross-examination the Court has an obligation to assess the quality of the evidence and to determine what, if any, weight can be given to the evidence. It is therefore necessary to assess the whole of the evidence to determine whether irreparable harm has been established.

[45] In conducting the inquiry to determine whether irreparable harm is established, it is first important to clearly understand the scope of the Amendment Act. The most significant amendments to the MSA can be summarized as follows:

- Compensation for Metis Settlement Councillors – Section 6 of the Amendment Act adds s 11.1 to the MSA. This is an amendment that requires each Metis Settlement Council to determine the amount of compensation payable to the Chair of the Metis Settlement Council and mandates that the other Councillors can receive compensation to a maximum of 50% of the Chair's compensation. However, neither the MSA nor the Amendment Act fix the amount of compensation payable to the Chair or to Councillors. That is within the exclusive jurisdiction of the Metis Settlement Councils.
- Potential Reduction in Number of Councillors – Whereas previously s 8 of the MSA required that each Metis Settlement have a five-person Council, s 4 of the Amendment Act now permits each Metis Settlement Council to pass a resolution to have three, four, or five Councillors. As it turns out, all of the eight Metis Settlement Councils have passed resolutions requiring that five Councillors constitute the Metis Settlement Council. As a result, the Amendment Act has not reduced the number of Councillors. The resolution passed by EPMS was done under protest.
- Reduction in Number of MSGC Executive Officers – Whereas previously s 216 of the MSA required that MSGC have four executive officers, s 25 of the Amendment Act modifies that requirement and now permits only one or two executive officers.
- Control Over Expenditures from General Fund and Future Fund – Section 27(c) of the Amendment Act eliminates the s 224 Ministerial veto in relation to policies and bylaws relating to the use of the General Fund and the Future Fund. Furthermore, unanimous approval from all eight Metis Settlements is now required for any expenditure from the Future Fund and expenditures from the General Fund require the approval of 75% of the eight Metis Settlement Councils.
- Bylaws for Essential Services – The Amendment Act, s 13, amends the MSA to add a new provision, s 51.1 that requires individual Metis Settlements to make and enforce

bylaws in relation to fees for essential services like water, water waste and road maintenance. However, the amendment does not mandate the amount of the fees or charges in relation to those services. Those decisions remain in the hands of the Metis Settlement Councils.

- Requirement to Balance Operating Budgets – Sections 21 and 22 of the Amendment Act require that, commencing on April 1, 2023, each Metis Settlement Council produce a balanced annual operating budget for each fiscal year. The amendments further provide that if a deficit arises, it must be fully covered in subsequent budgets within three years.
- Requirement to Publish Salaries and Expenses of Councillors – Section 23 of the Amendment Act adds s 159.2 to the MSA and requires for the first time that all Metis Settlement Councils publish, on or before September 30 of each year, reports of all remuneration and expenses of all Councillors.

[46] What is noticeably absent from the Amendment Act is any provision that reduces any type of funding to any of the Metis Settlements or to the MSGC. As a result, any suggestion that there are direct financial implications arising from the Amendment Act are not warranted. Thus, the assertion that the financial viability of EPMS is endangered by the Amendment Act is simply not warranted. Mr. Supernault has deposed that this is the result of the Amendment Act but he fails to explain how this is so. This portion of his evidence is deserving of no weight.

[47] Furthermore, some of the particulars of irreparable harm are simply instances of harm that can be compensated through damages if EPMS is successful in the action. For example, the additional costs incurred by EPMS to comply with the mandatory annual reporting of Councillor compensation is easily quantified and can be awarded as damages. Similarly, any reduced compensation to Councillors is also easily calculable. These items cannot amount to irreparable harm.

[48] Some of the particulars of irreparable harm are simply bald conclusions that are not supported by reliable evidence or argument and are not tied to any specific provision in the Amendment Act. For example, the suggestion that historical cultural practices will be diminished is not tied to any provision of the Amendment Act, nor is there any explanation for why this would be so. Similarly, the suggestion that Metis identity, culture and self-governance will be adversely affected is not supported by any facts. Mr. Supernault's evidence on these points is deserving of no weight.

[49] Some of the particulars of irreparable harm in Mr. Supernault's affidavit are broad generalities and are so vague that they cannot amount to irreparable harm. For example, the suggestion that the Amendment Act undermines and adversely affects the ability of the EPMS to develop and recommend its own culturally appropriate forms of governance is not supported by the facts. Nothing in the Amendment Act prevents EPMS or any other Metis Settlement Council or the MSGC from making such recommendations. The same can be said for the alleged irreparable harm arising from the Metis Settlements being treated like municipalities and the suggestion that the Amendment Act violates and abandons the "spirit of consultation and co-operation". None of these particulars can amount to irreparable harm.

[50] Mr. Supernault deposes that members of EPMS will lose their traditional way of life as a result of the Amendment Act. This is said to be connected with the portion of the Amendment Act that requires Metis Settlement Councils to pass and enforce bylaws in relation to fees for essential services, apparently because members may need to devote time, or more time, to financially gainful pursuits in order to pay increased or new mandatory fees. However, the Amendment Act does not dictate the amount of fees that must be charged for each service. It is entirely speculative as to what impact fees for essential services will have on the traditional way of life. This does not amount to irreparable harm.

[51] The provision of the Amendment Act that permits Metis Settlement Councils to have three, four or five members does not give rise to irreparable harm because all of the Metis Settlements have passed resolutions keeping the number of councillors at five.

[52] Finally, the argument at para 105 of the EPMS Brief that the Amendment Act amounts to an "act or the implementation of a plan of cultural genocide" is not supported by any evidence. Such an aggressive assertion without evidentiary support is simply not helpful.

[53] I conclude that the Amendment Act makes a number of changes to the MSA that are relatively minor modifications and are intended to modernize the legislation and to promote accountability and transparency. None have a material impact on the EPMS. None can give rise to harm that cannot be compensated in damages in the event that EPMS is ultimately successful in this litigation.

[54] It is inescapable that the true concerns of EPMS are not with respect to the Amendment Act but are, instead, concerns that may arise after March of 2023 when the current funding agreement comes to an end. At its core, EPMS's submission is that the Amendment Act is the first step in an attempt by Alberta to abandon its financial obligations to Metis People in Alberta. This was explained at para 194 of EPMS's Brief:

> The Alberta Government is stepping away from its involvement in the financial aspects of their relationship with the Metis and forcing financial and economic self-sufficiency on the Settlements and General Council. The Amendment Act removes the power of the Minister to approve or veto Financial Allocation Policies only but not other forms of General Council Policies. This is in conjunction with the Minister's advice to the Federal Minister that the 2013 LTA [*the Long-Term Governance and Funding Arrangements Agreement that provided for $85 million in funding to the Metis Settlements over a 10-year period ending in March 2023*] will be the last extraordinary funding provided by Alberta to the Metis Settlements and the General Council...

[55] EPMS argues that the Amendment Act is the first step that Alberta has taken to ultimately achieve its goal to abandon the financial obligations to the Metis People. However, the Amendment Act does not change any financial obligations that Alberta has to the Metis People. The Long-Term Governance and Funding Arrangements Agreement is currently in place and will not expire until March 2023. The Amendment Act does not change this in any way.

[56] What may or may not happen in March 2023 when the Long-Term Governance and Funding Arrangements Agreement expires is entirely speculative, and in any event is unrelated to the Amendment Act which is the subject of the present injunction application.

[57] I conclude that EPMS has failed to establish that it will suffer any irreparable harm if the Amendment Act continues in place until trial.

c) Balance of Convenience

[58] The third stage of the *RJR* analysis requires the Court to weigh and balance the harm that may be suffered by the applicant if the injunction is not granted against the harm to the respondent if the injunction is granted.

[59] Balance of convenience is typically of fundamental importance in cases involving challenges to legislation and requires a consideration of the public interest component. When considering the public interest, two competing interests are engaged. First, if the interlocutory injunctions are granted too easily in cases where a suspension of legislation is sought, the orderly function of government and the application of laws enacted by democratically elected legislatures for the common good could be disrupted: ***AC and JF*** at para 57. The second and competing interest is that an applicant for an injunction may claim to represent one vision of the public interest and furthermore, the public interest may not always gravitate in favour of enforcement of existing legislation: ***AC and JF*** at para 60.

[60] When considering the public interest, a private applicant such as EPMS "must convince the court of the public interest benefits which flow from the granting of the relief sought": ***RJR*** at para 73. However, there is no need for the public authority to provide proof that the law will produce public good because that is presumed. For this reason, only in "clear cases" will interlocutory injunctions against the enforcement of a law on the grounds of alleged unconstitutionality succeed: ***Harper v Canada (Attorney General),*** 2000 SCC 57 at para 9; ***AC and JF*** at para 61.

[61] EPMS argues that neither Alberta nor the public interest will suffer greater harm than EPMS if an interlocutory injunction is granted. It argues that even if EPMS is not ultimately successful, the implementation of the Amendment Act will only be delayed until the Court finally rules on the validity of the legislation. Conversely, if no injunction is granted EPMS and its members will feel the full effect of the legislation, to their detriment.

[62] Alberta argues that the Amendment Act is in the public interest. The amendments to the MSA were made to modernize the MSA and to provide for improved autonomy, transparency and financial stability. Alberta argues that these are worthy goals and the legislature is entitled to the deference implied in the public interest presumption.

[63] The three stages of the *RJR* analysis are not "water tight compartments" and they take colour from the circumstance of the individual case. Thus, the relative strength of the plaintiff's claim is a relevant consideration in the overall assessment of whether to grant the injunctive relief, as is the nature of the harm the applicant will suffer if the interim relief is not granted: ***AC and JF*** at para 27.

[64] For the reasons given earlier, I conclude that EPMS has not demonstrated a serious issue to be tried. I have also concluded that EPMS has not demonstrated that irreparable harm will result if the injunction is not granted.

[65] In these circumstances, I conclude that the public interest in the enforcement of the Amendment Act weights heavily in the balance and outweighs any harm that EPMS may suffer as a result of the amendments. This is not one of those clear cases in which the Court should intervene to suspend validly enacted legislation.

[66] For these reasons, I conclude that the balance of convenience does not favour granting the interlocutory injunction sought by EPMS to suspend the enforcement of the Amendment Act.

V. Proposed Injunction to Prevent Alberta from Ceasing Funding

[67] The *RJR* analysis must also be applied to this injunctive relief sought by EPMS.

[68] EPMS seeks injunctive relief to require Alberta to continue funding the Metis Settlements. Alberta argues that while styled as a prohibitive injunction this is in fact a mandatory injunction because, if granted, it would require Alberta to fund the Metis Settlements into the future. Alberta argues that because this is a mandatory injunction, the higher standard of strong *prima facie* case must be met.

[69] Regardless of the threshold that must be met at the first stage of the *RJR* analysis, EPMS cannot succeed in establishing an entitlement to an injunction for two fundamental reasons:

i. Relief Not Sought in Statement of Claim – An interlocutory injunction, if granted, would stay in effect until the final right to the relief can be determined at trial. In this case the Statement of Claim does not seek any relief that would permit the trial judge to order Alberta to make continuing payments to Metis Settlements. In those circumstances there is no basis on which an interlocutory injunction can be granted. See Robert J. Sharpe, *Injunctions and Specific Performance*, (Canada Law Book, Thomson Reuters, looseleaf ed) at para 2.15

ii. No Evidence of Failure to Pay – The Long-Term Governance and Funding Arrangements Agreement is currently in place and will not expire until March 2023. There is no evidence that Alberta is in default in making any of the payments under that arrangement. There is no evidence that Alberta intends to default in its obligations at any time between now and the termination of the agreement in March 2023. What, if anything, Alberta will do after March 2023 regarding continuing funding is entirely speculative at this time. This cannot form the foundation for injunctive relief.

[70] As a result, I conclude that even if properly pleaded, EPMS has not demonstrated a serious issue to be tried and certainly has not demonstrated a strong *prima facie* case.

[71] Furthermore, there is no irreparable harm demonstrated. There is nothing to suggest that the required payments will not be made until March 2023. Therefore, there can be no harm suffered until at least March 2023, if at all.

[72] Finally, even if the claim had been properly pleaded, the balance of convenience would favor declining the injunctive relieve because no harm has been demonstrated. Thus, there is nothing to balance on EPMS's side of the ledger.

[73] In these circumstances, it is simply not possible to grant injunctive relief to require Alberta to make future payments.

VI. Conclusion

[74] The application for the interlocutory injunctive relief is dismissed.

[75] If the parties are not able to agree on costs they may provide me with brief written submissions within 60 days from delivery of these reasons.

Heard on September 8 and 9, 2021.
Dated at the City of Edmonton, Alberta this 22nd day of September, 2021.

John T. Henderson
J.C.Q.B.A.

Appearances:

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