

HEARD IN FRONT OF THE MÉTIS NATION BRITISH COLUMBIA'S SENATE

Appeal Name: O'Leary vs. MNBC Central Registry,
1-17-02-41-2-00066

Dates: March 30 and July 25, 2011
May 27, 2013

Senate Clerk: Thibeault
Location: Kelowna

Between:

Constance Lorraine O'Leary

Applicant

And

**Métis Nation British Columbia (MNBC)
Central Registry**

Respondent

Reasons for Decision

Residing Senators (March 2011, Kelowna):

Senator Alan Edkins

Senator Philip Gladue

Senator Margaret Penner

Senator Betty Hoogendoorn

Senator Al Desmarais

Senator Ron Snider

Senator Gerald Pope

Residing Senators (July 2011, Kelowna):

Senator Alan Edkins

Senator Philip Gladue

Senator Margaret Penner

Senator Betty Hoogendoorn

Senator Al Desmarais

Senator Ron Snider

Senator Gerald Pope

Residing Senators (May 2013, Richmond):

Senator Gerald Pope

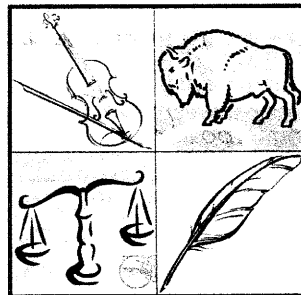
Senator Philip Gladue

Senator Margaret Penner

Senator Betty Hoogendoorn

Senator Al Desmarais

Senator Alan Edkins



MNBC Senate

Introduction

[1] On September 30, 2010 the applicant, Ms. Constance Lorraine O'Leary received a letter from the respondent, the MNBC Central Registry, indicating that her citizenship could not be validated or verified based on the qualifiers for MNBC Citizenship. Specifically, the respondent's letter highlighted:

"In regard to your application for a Métis Nation British Columbia (MNBC) citizenship card, the MNBC's Office of the Provincial Registrar must inform you that based on the definition for the Métis, ratified in September 2002 by the Métis Nation General Assembly, MNBC cannot verify your genealogical connection to the traditional Métis homeland".

However, the applicant has requested the Senate to review the applicant's citizenship application package and all related materials and decide if the process and interpretations of the registrar was consistent with the intent of the "national definition" and the **MNBC Citizenship Act**.

Summary of the Case Law and MNBC Legislation

a) Canadian Law

[2] Subsections 35(1) and (2) of the **Constitution Act, 1982**, being Schedule B to the **Canada Act 1982** (U.K.), 1982, c. 11 state:

35(1) the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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35(2) in this act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

[3] The definitive Supreme Court of Canada case setting out the requirements for establishing a Métis constitutional right is **R. v. Powley**, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1, 177 C.C.C. (3d) 193, 2003 SCC 43. At paragraph 10, the Court defined the term "Métis" as it is used in s. 35, finding that while the term does not include all individuals with mixed Indian and European heritage, it does refer to:

...distinctive people who, in addition to their mixed ancestry, developed their own customs, way of life, and a recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institution became pre-eminent.

b) MNBC Legislation, Policies and Procedures

[4] Section 61 of the **MNBC Constitution** states that a Métis means a person who self-identifies as Métis, is of historic Métis Nation Ancestry, is distinct from other Aboriginal Peoples and is accepted by the Métis Nation. The MNBC Constitution further states the following;

- a) 61.1. "Historic Métis Nation" means the Aboriginal people then known as Métis or Half-Breeds who resided in Historic Métis Nation Homeland.
- b) 61.2. "Historic Métis Nation Homeland" means the area of land in west central North America used and

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occupied as the traditional territory of the Métis or Half-Breeds as they were then known.

c) 61.3. "Métis Nation" means the Aboriginal people descended from the Historic Métis Nation, which is now comprised of all Métis Nation citizens and is one of the "aboriginal peoples of Canada" within Section 35 of the **Constitution Act of 1982**.

d) 61.4. "Distinct from other Aboriginal Peoples" means distinct for cultural and nationhood purposes.

[5] Articles 2, 3 and 4 of the **MNBC Citizenship Act** further define the **MNBC Constitution** definition of Métis as stated above and more specifically the process in identifying citizens.

[6] Articles 6, 7 and 8 of the **MNBC Citizenship Act** highlight the roles and responsibilities of the Central Registry, Registry Office and the Registrar. It further states in 8.0 that the registrar must adhere to all policies and procedures developed by the MNBC. This includes the MNBC Guidebook, Central Registry Policy and Procedures and the Senate Policy and Procedures.

[7] Section 6.2 of the **Senate Policies and Procedures ver. 3.2** highlights the process utilized when conducting a citizenship and/or central registry appeal.

Privacy Consent to Release

[8] On October 7, 2010, Ms. O'Leary supplied a signed and witnessed "Consent to Release Confidential Information" form. This form provided the Senate with the following consents:

- i. Utilization of the documentation supplied to the MNBC Central Registry for the purpose of the

applied for appeal.

- ii. To send the contents of Ms. O'Leary's Citizenship application file to a third-party for a second professional genealogical opinion.
- iii. To utilize all the information supplied or demanded, for the purpose of writing this MNBC Senate decision.

Second Genealogical Opinion

a) Société historique de Saint-Boniface

[9] Ms. Janet La France of the genealogical department of the Société historique de Saint-Boniface supplied a second professional genealogical opinion on December 7, 2010. Ms. La France indicated;

"The information supplied by your client, Ms. Constance O'Leary (née Bell) has been reviewed. We were able to confirm the information submitted but are faced with a dilemma. The ancestor in question, Margaret McAuley/Hankin/Loring undoubtedly has native ancestry. What is interesting is that while she has appropriate ancestry, originates through fur-trade connections, (her father being an HBC man) and even identifies as a "Tsimshian Scotch Breed" on the 1901 Canadian Census; she does not, nor does her aboriginal ancestor appear to fall within the parameters of what is believed to be the Métis Homeland.

Typically, when someone is listed as a "Breed" of any kind, this form of cultural identification on a census is usually honoured as proof of a Métis lineage in lieu of scrip affidavits or other official documentation. It indicates that Margaret may have

seen herself as culturally distinct from both her father and her mother. . .enough to identify as such. However, Margaret's father hailing from Scotland and her mother originating from Alaska, we are left asking ourselves whether or not the client truly meets all criteria set forth by the Métis National Council. These obscure findings aside, the decision of course is yours."

Senate Ordered Research

[10] On March 30, 2010, the Senate adjourned the *O'Leary vs. MNBC Central Registry* (Senate File Number 1-17-02-41-2-00066). The adjournment was to demand additional research, by both the MNBC Central Registry (the Respondent) and the Senate Clerk in regard to better definition on the aspects of historic Métis communities.

a) Other Research

[11] Ms. O'Leary had also had additional research carried out in regard to her family genealogy during 2008 and 2009. The information provided by her researcher indicated the following;

"The aboriginal ancestry through Margaret SNAACH appears to originate in the Fort Simpson area of British Columbia. The marriage of Donald MACAULEY and Margaret SNAACH took place in Fort Simpson in 1839 where Donald was employed by the Hudson's Bay Company as a Middleman and Interpreter from 1837 to 1841. Unfortunately no written record could be found to support the marriage or Margaret's birth which is not unusual considering the time and location.

Their daughter Margaret MACAULEY was born on 15 Mar 1855 in Victoria and she and her children are identified in the 1901 Canadian Census as red in Column 5 Colour and in Column 14 Racial or Tribal Origin, it is difficult to read as words have been crossed out but "O.B." does stand out - other breed. Unfortunately the Census does not provide any additional detail on racial origin.

Since Donald MACAULEY was a Middleman and Interpreter with the Hudson's Bay Company it is possible the Margaret SNAACH could have come from a wide area of northern British Columbia, Alberta or the Yukon. Since B.C., Ontario and some of the northern United States fall into grey areas it is sometimes difficult to establish whether or not a person's ancestry meets the definition."

b) Further Case Law

[12] The Senate Clerk researched further definition of the aspects of community for Métis citizenship and rights. As mentioned earlier, **R. v. Powley**, [2003] 2 S.C.R. 207, 230 D.L.R. (4th) 1, 177 C.C.C. (3d) 193, 2003 SCC 43 is the definitive Supreme Court of Canada case setting out the requirements for establishing a Métis constitutional right.

[13] **R. v. Powley** provides reference to the importance of connection to a Métis community. In paragraph 23, the Court provided that:

... Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the

present community...

Additionally, at paragraph 12, the Court provided some definition of community as:

...Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life...

[14] At paragraph 32, the Court spoke on the need to be connected to a historic Métis community:

...must present evidence of an ancestral connection to a historic Métis community...

and at paragraph 33:

...demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed...core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about...

And further in **R. v. Powley**, at paragraph 34:

*... important to remember that...only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right
...individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community...*

[15] The Office of the Central Registry also carried out

additional research in regard to the family history and the aspect of historic Métis communities and presence in the province of British Columbia. The Registry found that the family history as Métis was focused primarily in the Victoria area.

[16] It was also found that the mother of Constance Hankin was Margaret Snaach (variation of Saanich) and on another record found by the Registry was recorded as Margaret Todd and as "half-breed." It was also found that there was a record of a family history of serving as interpreters for anthropologists and others, which was a typical role of Métis in many situations.

[17] Thus, there was a record of the family as being Metis before locating to northern British Columbia, and having been Metis, they retained that when they located to an area of Tsimshian families.

The Standard of Review

[18] The Senate's role is to ensure that all legislation, policies and procedures were adhered to and that the applicant has received a fair decision during the application review period. Since this appeal involves a question around the genealogical interpretation of the respondent, the Senate has ordered a second professional opinion to assist in their review. Furthermore, the Senate will adhere to the citizenship and/or central registry appeal process highlighted in Section 6.2 of the **Senate Policies and Procedures, version 3.2**. The Senate further understands that the onus to prove citizenship is the responsibility of the applicant, Ms. O'Leary not the

respondent, the MNBC Central Registry.

[19] The Senate has based this decision on the evidence supplied by the applicant and respondent, in addition to the further requested research, and weighed this to the summary of case law at the time of the two hearings.

Analysis

a) MNBC Policy and Procedure Adherence

[20] The applicant did request that a review of the policies and procedures be conducted. However, the Senate, upon review, found that the MNBC Central Registry did not violate or over-look any policies or procedures.

b) Genealogical Interpretation

[21] Initially both the MNBC Central Registry and the *historique de Saint-Boniface* indicated uncertainty in regard to the applicant fully meeting the criteria set forth by the Métis National Council and MNBC for citizenship in that the applicant's ancestral lines could not be validated and verified as genealogically connected to the traditional Métis homeland and the founders of the First Métis Nation.

[22] The MNBC Central Registry continued to carry out further research in regard to the genealogical information supplied and the historical aspect of Métis communities and Métis presence in British Columbia.

[23] At the May 2013 hearing, the MNBC Central Registry reported that based on the research carried out, they were going to reverse the initial citizenship decision and issue a citizenship card to Ms. O'Leary

[24] Based on the information supplied, testimony and the genealogical opinions (MNBC Central Registry and the historique de Saint-Boniface) the Senate affirms its agreement with the revised decision of the MNBC Central Registry.

c) MNBC Legislative Adherence

[25] Ms. O'Leary has complied with the requirements for the issuance of an MNBC citizenship card as specified in the ***MNBC Citizenship Act.***

Decision

[26] The MNBC Senate finds in favour of the revised decision of Métis Nation British Columbia's Central Registry.

[27] Ms. O'Leary will be issued a MNBC citizenship card. It is requested that you contact the MNBC Central Registry to request completion of your file and issuance of a MNBC citizenship card.