

Before:

Metis Settlements Appeal Tribunal

Between:

Mabel Howse

Applicant

-and-

**Buffalo Lake Metis Settlement
Bruce L. Barry
Metis Settlements General Council, and
Metis Settlements Land Registry**

Respondents

Concerning:

Decision Regarding the Standing of Mabel Howse to appeal the expulsion of Bruce L. Barry from the Buffalo Lake Metis Settlement

Hearing Date:

April 21, 2016

Decision Date:

May 9, 2016

DECISION

Panel members:

Phyllis Collins, Panel Chair
David Drummond, Panel Member
Cody Hodgson, Panel Member

Parties Present at the Hearing:

Mabel Howse, Applicant
 Represented by: Lorne Ladouceur
 Nicole Nielson

Buffalo Lake Metis Settlement, Respondent

Councilors: Horace Patenaude, Harold Blyan, Archie Handel, Jack Boucher

Bruce L. Barry, Respondent

Fiona N. Vance, Shores Jardine LLP, Legal Counsel for Metis Settlements Appeal Tribunal

Appeal Tribunal Staff Present at the Hearing:

Karen Mustus, Appeal Tribunal Officer

Place and Date of the Hearing:

Meeting Room, Ramada Lac La Biche
Lac La Biche
April 21, 2016 at 10:00 a.m.

1.0 Context / Finding of Fact

- [1] On August 10, 2015, Buffalo Lake Metis Settlement Council passed a motion (Motion #183/08/15) to request Bruce L. Barry to leave Buffalo Lake Metis Settlement immediately in accordance with section 92 of the *Metis Settlements Act*.
- [2] On September 1, 2015, Buffalo Lake Metis Settlement Council passed a motion (Motion #214/09/15) to make an order to expel Mr. Barry from Buffalo Lake Metis Settlement in accordance with section 93(1.1) of the *Metis Settlements Act*. Ms. Howse is recorded in the minutes as an observer at the September 1 Council meeting.
- [3] On September 15, 2015, the Chairman of Buffalo Lake Metis Settlement entered an order expelling Mr. Barry from the Settlement effective immediately.
- [4] On October 7, 2015, Mr. Barry filed an appeal notice with Metis Settlements Appeal Tribunal of the expulsion order made September 15, 2015, under section 94 of the *Metis Settlements Act*.
- [5] On October 14, 2015, Mabel Howse filed an appeal notice with the Metis Settlements Appeal Tribunal regarding the expulsion order made September 15, 2015. In her Notice of Appeal, Ms. Howse stated that Mr. Barry lives with her. Ms. Howse referenced sections 92, 93 and 94 of the *Metis Settlements Act*, and asked that the Metis Settlements Appeal Tribunal quash the order of Buffalo Lake Metis Settlement Council to banish Mr. Barry from the Settlement.
- [6] On March 8, 2016, the Metis Settlements Appeal Tribunal advised that Ms. Howse's appeal involved a preliminary issue to be determined, namely whether the *Metis Settlements Act* conferred standing to Ms. Howse to appeal the expulsion order against Mr. Barry.
- [7] On April 15, 2016, the Metis Settlements Appeal Tribunal determined that, if they found that Ms. Howse had standing to bring this appeal, her appeal would be heard at the same time as Mr. Barry's appeal.
- [8] The only issue considered at this hearing was the preliminary issue of whether Ms. Howse had standing under section 94 of the *Metis Settlements Act*, or some other section, to appeal the expulsion of Bruce L. Barry from Buffalo Lake Metis Settlement. If the Metis Settlements Appeal Tribunal ("MSAT") found that Ms. Howse had standing to bring the appeal, there were other potential issues in the appeal. However, as the MSAT found Ms. Howse did not have standing to bring the appeal, the MSAT will not consider the other issues.

1.1 Standing

- [9] The Panel understands that the issue of standing, in this context, is whether Ms. Howse may be an appellant in relation to the expulsion order made against Mr. Barry.

[10] Ms. Howse told the Panel that Mr. Barry is living in her house. The Settlement never built the house. It is her land and she decides who lives in her house, unless a court orders it.

[11] Mr. Ladouceur, on behalf of Ms. Howse, submitted that Ms. Howse has standing to appeal the order issued by Buffalo Lake Metis Settlement to expel Mr. Barry on three bases:

1. by right of statute under section 94 of the Metis Settlements Act;
2. by right at common law; and
3. by right of Metis tradition.

[12] In relation to Ms. Howse's right under statute, Mr. Ladouceur submitted that Ms. Howse had standing under section 94 of the Metis Settlements Act. Section 94 provides:

94 If an order is made under section 93, the person concerned may appeal to the Appeal Tribunal by giving it written notice of appeal within 30 days of receiving the order.

[13] Mr. Ladouceur argued that section 26(3) of the Interpretation Act (Alberta) allows "the person concerned" in section 94 to be plural, to be "the persons concerned." Section 26(3) of the Interpretation Act provides:

26(3) In an enactment, words in the singular include the plural, and words in the plural include the singular.

[14] By using section 26(3) of the Interpretation Act to interpret section 94 of the Metis Settlements Act, there is more than one "person concerned." In the facts of this matter, not only Ms. Howse but also other Metis members are "persons concerned," along with Mr. Barry.

[15] In relation to Ms. Howse's right at common law, Mr. Ladouceur argued that common law is necessary as the Metis Settlements Act does not include a reference to an intervener. Mr. Ladouceur provided the Panel with a summary of, and excerpts from, case law on intervener status through the courts. Under the common law (*Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320; *Ahyasou v Alberta (Minister of Environmental Protection)*, 1998 ABQB 875; *University of Alberta v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 389), there is a two-part test for intervening:

- (1) what is the subject matter of the proceeding?
- (2) what is the proposed intervener's interest in the subject matter?

[16] Mr. Ladouceur also provided the Panel with an excerpt from *Alberta (Minister of Justice) v Metis Settlements Appeal Tribunal*, 2005 ABCA 143, which at para 4 stated that "Intervener status may be granted when the proposed intervener will be specially affected by the decision facing the Court or has some special expertise or insight to bring to bear on the issues facing the Court."

[17] Mr. Ladouceur submitted that the subject matter is the effect of deciding who lives in Ms. Howse's home that she built, owns, maintains and pays taxes on. Ms. Howse clearly has an interest and will be especially affected by the decision. Further, the precedential effect of

granting relief that Buffalo Lake Metis Settlement seeks will have a wide-reaching impact on all Metis.

[18] In relation to Ms. Howse's right of appeal through Metis tradition, Mr. Ladouceur argued that Ms. Howse has a right based on democracy under Metis tradition. Ms. Howse is a Metis member in good standing. She is an elder. She is under much stress that affects not only her but other Metis members. Expulsion is akin to lateral violence towards an elder. Under Metis tradition, elders are protected. Under Metis tradition, when problems arise, elders would try to solve the problem before it grows. That is how the Metis handled things before the Metis Settlements Act came into effect. This could be chaos for a lot of Metis members. If you have a friend who has been convicted for property crime, but did his time and changed his life, if he comes to visit, can he be expelled?

[19] Mr. Blyan responded for the Settlement. Mr. Blyan noted that section 94 says that "the person concerned may appeal to the Appeal Tribunal by giving it written notice of appeal within 30 days of receiving the order." Legislative provisions must be read together and must make grammatical sense. Only the person who is being expelled and receiving notice of the order can appeal. Notice is not provided to everybody. In a plural interpretation of section 94, using the Interpretation Act as a legislative tool, that would be the case if more than one person were being expelled.

[20] The Settlement stated that their dispute was with regard to Mr. Barry, not Mabel Howse. Council made a decision about Mr. Barry; Mr. Barry has the right to appeal, and under section 189(1)(a) of the Metis Settlements Act the MSAT must hear that appeal. There is nowhere under section 189(1) of the Metis Settlements Act that requires or enables MSAT to hear Ms. Howse's matter in the absence of consent from the Settlement.

[21] The Settlement also submitted that there would be no utility in having two appeals on the same subject matter. Mr. Barry has already started an appeal of the expulsion order involving the same parties. One option is for Ms. Howse to be an intervener or witness in support of Mr. Barry in his appeal.

[22] The Settlement stated that, if there were concerns with the legislation itself, then the political process should be engaged to change the legislation. That is outside the jurisdiction of the MSAT.

[23] Mr. Barry then spoke in support of Ms. Howse's standing. He submitted that a right is something that no one can take away from you. The appeal mechanism to MSAT is a right to sober second thought. Mr. Barry agreed with Mr. Ladouceur's analysis of standing under the statute using the Interpretation Act. Mr. Barry also submitted that there is nothing in the legislation stating who may appeal.

[24] Mr. Barry submitted that, while the intention of the Legislature may be to give MSAT power, section 187.1 states that the power must be used in accordance with the goals and Metis culture. Section 187.1 of the Metis Settlements Act provides:

187.1 The Appeal Tribunal shall exercise its powers and carry out its duties with a view to preserving and enhancing Metis culture and identity and furthering the attainment of self-governance by Metis settlements under the laws of Alberta.

[25] If Ms. Howse is denied the right to appeal something that affects her so dramatically, that would not be in accordance with section 187.1 of the Metis Settlements Act, or with Metis culture. Ms. Howse was one of the original settlers. It is against the core of Metis culture, which is respect for the hunt, for each other and for community.

[26] Mr. Barry also supported Mr. Ladouceur's argument about intervening. While there is a difference between standing as an appellant and intervening, the test for intervention is helpful. Intervening cases are analogous because the key is whether you are affected. The subject matter of this hearing is who gets to live in Mabel's home? Who does she have a right to have a relationship with? Ms. Howse is also specially affected. She is living with him, and they are intertwined economically. The hammer of administrative law power ought to be dealt with carefully. We struggle with the Metis Settlements Act, until a person does not like a decision of MSAT, then they can go to the Court of Appeal with its \$600 filing fee.

[27] Mr. Barry submitted that the utility argument raised by the Settlement should fail because, if Ms. Howse were to have standing, Mr. Barry's and Ms. Howse's appeals would be heard together.

[28] In commenting on Mr. Barry's presentation, Mr. Blyan for the Settlement agreed that the Panel must look at section 187.1, but that section 187.1 is not a means for MSAT to expand its jurisdiction. The Panel looks at section 187.1 only in the course of making decisions within the jurisdiction the MSAT does have.

[29] The Settlement also argued that intervener case law is not relevant in this case. Interveners are different and they want to bring something to a case that might not otherwise get heard. If Ms. Howse wants to be an intervener in Mr. Barry's appeal, that is one matter. Starting a separate appeal is a different matter.

1.2 Decision

[30] The Panel considered arguments from Mr. Ladouceur on behalf of Ms. Howse, from Mr. Barry in support of Ms. Howse, and from Mr. Blyan on behalf of Buffalo Lake Metis Settlement. The Panel determined that Ms. Howse does not have standing to appeal the expulsion order made by Buffalo Lake Metis Settlement against Mr. Barry on September 15, 2015.

1.3 Analysis / Reasons

[31] The Panel listened carefully to the submissions made in support of Ms. Howse's claim to standing as an appellant in an appeal of the expulsion order made against Mr. Barry. The Panel also listened carefully to Mr. Blyan's arguments for the Settlement.

[32] No person has an appeal before the MSAT only by reason of feeling aggrieved. Regardless of sympathetic facts, there is no inherent jurisdiction of the MSAT to hear appeals from anyone, or on any issue, that are not provided for in the Metis Settlements Act, its regulations or other instruments made under authority of the Act.

[33] That said, the Panel considered whether Ms. Howse had standing under all three branches of argument made by Mr. Ladouceur and elaborated on by Mr. Barry, in support of Ms. Howse's standing as an appellant: (1) Metis tradition, (2) analogy to intervener status through common law, and (3) section 94 of the Metis Settlements Act.

(1) Metis Tradition

[34] On behalf of Ms. Howse, Mr. Ladouceur spoke with some frustration that Metis tradition is not appropriately reflected in the Metis Settlements Act, and specifically in relation to problem-solving with elders. Mr. Barry also submitted that Metis culture, along with section 187.1 of the Metis Settlements Act, requires that Ms. Howse has the right to appeal an issue that affects her dramatically.

[35] The MSAT respects the Metis tradition and always strives to exercise its responsibilities under the Metis Settlements Act in alignment with Metis tradition, culture and identity. The MSAT does not, however, derive its authority from Metis tradition itself. The MSAT has powers to facilitate mediation under the Act, but this proceeding was not brought as a mediation. It was brought as an appeal under the statute. The Notice of Appeal refers to sections 92, 93 and 94 of the Act.

[36] The issue of appellant standing before the Panel in this hearing was a very narrow question and inescapably had to be resolved through statute.

[37] In determining this matter, the Panel was also mindful of section 187.1 of the Metis Settlements Act, set out above. The Panel takes the mandatory direction from the Legislature in section 187.1 seriously. Section 187.1 directs the MSAT to "exercise its powers and carry out its duties with a view to preserving and enhancing Metis culture and identity and furthering the attainment of self-governance by Metis settlements." MSAT's powers and duties derive from the Metis Settlements Act and from regulations, bylaws and policies made under authority of that Act. Section 187.1 also directs the MSAT to operate "under the laws of Alberta." Mr. Barry argued that section 187.1 was a basis for Ms. Howse's standing as an appellant. For the Settlement, Mr. Blyan argued that section 187.1 is not a means for MSAT to expand its jurisdiction.

[38] In the Panel's view, section 187.1 informs how the MSAT does what it does. Once a matter is properly before the MSAT, MSAT applies section 187.1. Section 187.1 is not a vehicle for putting a matter before the MSAT. Section 187.1 does not tell MSAT what it can do – including who can be an appellant before it. That must be found elsewhere in the legislation.

(2) Intervener analogy

[39] Mr. Ladouceur and Mr. Barry submitted the Panel should find standing for Ms. Howse in a body of common law relating to intervener status in courts. Mr. Barry argued that case law on interveners was an appropriate analogy that the Panel could apply in determining standing in Ms. Howse's case.

[40] On the other hand, the Settlement argued that intervener case law is not relevant in this case.

[41] The Panel reviewed the excerpts from case law provided by Mr. Ladouceur and found them very helpful in determining what the courts have set out as the common-law test for interveners.

[42] The Panel is grateful for the arguments made before it on whether intervention law should be a basis for standing in this matter. From the authorities provided by Mr. Ladouceur, on behalf of Ms. Howse, the Panel understands that intervention is generally decided on a case-by-case basis by applying the two-part test. The Settlement did not disagree that this is the test for interveners. Rather, the Settlement disagreed that the intervener test was applicable to deciding appellant standing.

[43] The Panel has little doubt that Ms. Howse is affected by the expulsion order issued against Mr. Barry. It is possible – though the Panel is not deciding this – that Ms. Howse could appear in Mr. Barry's appeal in some capacity and add perspective to that appeal. However, being an appellant is an entirely different thing from being an intervener, and the Panel is not being asked to admit Ms. Howse into the process as an intervener, but as an originating, stand-alone appellant.

(3) Section 94 interpretation

[44] Section 94 was presented by both Mr. Ladouceur and Mr. Barry as the toe-hold of Ms. Howse's appellant standing. Section 94 is an appeal function given to the MSAT under the *Metis Settlements Act*.

94 If an order is made under section 93, the person concerned may appeal to the Appeal Tribunal by giving it written notice of appeal within 30 days of receiving the order.

[45] Mr. Ladouceur, for Ms. Howse, submitted that the Panel should use section 26(3) of the Interpretation Act to interpret section 94. In that way, the plural will allow Ms. Howse to appeal as one of "the persons concerned" as well as Mr. Barry. Mr. Barry also submitted that the Panel should use intervener case law to interpret section 94 and in deciding who is "concerned."

[46] For the Settlement, Mr. Blyan referred to the rule of the purposive approach to statutory interpretation. Materials provided by Mr. Ladouceur stated that words of a statute are to be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Lenz v Sculptoreanu*, 2016 ABCA 111, quoting from *Re Rizzo & Rizzon Shoes Ltd.*, [1998] 1 SCR 27). Using this approach, Mr. Blyan argued, only the person who is being expelled and receiving notice of the order under section 93 is “the person concerned” and can appeal under section 94. Notice is not provided to everybody.

[47] Section 94 ties the deadline to appeal to the MSAT to receipt of the notice of the expulsion order. There is no evidence that Ms. Howse received notice of the expulsion order.

[48] The Panel also looked at the immediate context of section 94. Section 94 refers to an order made under section 93. What is an order made under section 93? It is an order for a non-member resident person to be expelled from the settlement. Section 93 provides:

93(1) A person who is permitted to reside in a settlement area under section 92 is entitled to continue to reside in the area unless the settlement council, for just cause, orders the person expelled from the settlement area.

(1.1) A settlement council may order a person who is not permitted to reside in the settlement area expelled from the settlement area if the person refuses to leave the settlement area on the request of the settlement council.

(2) No order can be made under subsection (1) or (1.1) unless the person concerned has been given an opportunity to tell the settlement council why he or she should be able to remain in the settlement area.

[49] Section 93(1.1) deals with a “person who is not permitted to reside in the settlement area” and authority for a settlement to order that person “expelled” if “the person” refuses to leave. Subsection (2) says “the person concerned” should have an opportunity to state why he or she should be able to remain in the settlement area.

[50] The Legislature used the same wording in section 94 – “the person concerned” – as in section 93(2). It is clear in section 93 that “the person concerned” is the “person who is not permitted to remain in the settlement area.” It makes sense that the person in section 94 is the same person in section 93, and that the appeal right belongs to the person against whom the expulsion order was made. Section 26(3) of the Interpretation Act would operate in the event that there is more than one person not permitted to remain in the settlement area and subject of an expulsion order, and in that case section 94 would be interpreted as “the persons concerned.”

[51] A close grammatical reading supports this interpretation. Section 94 uses the phrase “the person concerned.” It is not “a person concerned.” The word “the” is referential, to the person in section 93. This is different from the meaning had the Legislature used “a,” which could suggest the person in section 94 could be someone other than the person in section 93.

[52] Mr. Barry was ordered expelled by the Settlement on September 15, 2015, under section 93(1.1). Ms. Howse was not. Ms. Howse is not, accordingly, “the person concerned” as section 94 uses that phrase.

[53] The Panel could not identify any other way Ms. Howse could be an appellant of the expulsion order made against Mr. Barry. Outside of the appeal right under section 94, only section 189(1)(f) could apply to give Ms. Howse standing, where the MSAT

189(1)(f) may decide differences or disputes between a settlement and one or more settlement members or persons who are not members if all the parties involved in the difference or dispute agree in writing that the Tribunal should decide the matter;

[54] At the hearing, the Buffalo Lake Metis Settlement stated it did not consent to the MSAT hearing the appeal under the Metis Settlements Act. Accordingly Ms. Howse was not an appellant under section 189(1)(f).

[55] If there are features in the Metis Settlements Act that the parties find unsatisfactory, the course of action does not lie in the MSAT. The MSAT can only act under what the legislation says; the MSAT cannot amend the legislation.

[56] Under the Metis Settlements Act, there is no provision that contemplates someone in Ms. Howse’s situation being an appellant in these circumstances. Regardless of how interested Ms. Howse may be in the expulsion order made against Mr. Barry – who lives with her – Ms. Howse cannot be an appellant before the MSAT in relation to that expulsion order. That is up to Mr. Barry. Indeed, Mr. Barry has appealed the expulsion order against himself, and his appeal will be heard by the MSAT in due course. It is not disputed that Mr. Barry is “the person concerned,” but in the Panel’s view, Ms. Howse is not.

[57] The MSAT cannot hear an appeal that an appellant has no right to bring. Accordingly, the appeal will not be heard.

Dated in the City of Edmonton, in the Province
of Alberta on this 9th day of May 2016.


Phyllis Collins
Panel Chair