

Before:

Metis Settlements Appeal Tribunal
Land Access Panel

Between:

Joshua Daniels and Tania Daniels,

Appellants,

-and-

**Fishing Lake Metis Settlement,
Canadian Natural Resources Limited,
Metis Settlements Land Registry
and
Metis Settlements General Council**

Respondents.

Concerning:

Trespass

Decision Date:

August 2, 2017

DECISION

MSAT Panel members:

Don Cunningham, Chairperson
Phyllis Collins, Panel Member
Cody Hodgson, Panel Member

Parties:

Joshua Daniels, Appellant
Tania Daniels, Appellant

Terry Parenteau, FLMS Council, Respondent
Dwayne Laboucane, FLMS Council, Respondent
Arlene Calliou, FLMS Council, Respondent
Garry Parenteau, Director, FLMS Oil and Gas, Respondent
Maureen Delorme-Ouellette, FLMS Council Land and Membership Clerk, Respondent
Michelle Arrigoni, FLMS Oil & Gas, Respondent

Brent Lawrence, CNRL Representative [by phone], Respondent
Lawrence Ference, CNRL Representative [by phone], Respondent

MSAT Staff:

Karen Mustus, Dispute Resolution Officer
Amanda Wyatt, Dispute Resolution Officer
Harold Robinson, Tribunal Secretary

Hearing:

FLMS Communiplex
June 7, 2017

1.0 Context

[1] This matter involves trespass on Fishing Lake Metis Settlement by contractors for Canadian Natural Resources Limited and compensation for that trespass.

1.1 Evidence before the Panel

General

[2] The following evidence is not contested:

[3] Joshua and Tania are members of the Fishing Lake Metis Settlement. They are brother and sister.

[4] Joshua received a five year Provisional Metis Title (PMT) interest in the NW-26-058-02-4, effective/registered April 14, 2011¹. Tania received her five year PMT interest in the SW-26-058-02-4, effective/registered November 16, 2010².

[5] CNRL acquired a new mineral lease near Tania and Joshua's quarters and required access to it. FLMS Administration contacted Tania and received her permission to "walk through" her quarter to scout out a possible access road to CNRL's new lease.

[6] The "walk through" looked promising and a survey crew was brought in, resulting in damage [cut line and other damage] to Tania's land and to Joshua's land.

[7] In recognition that trespass occurred in 2014 resulting in damages, Joshua, Tania, CNRL and FLMS entered negotiations and developed the following framework³:

For Josh

- Trespass Fee, \$500
- Compensation for damages to the land during surveying (\$1330.00/acre x 0.1 acre) = \$1330.00 (sic)
- Remediation in the form of reseeding along the trail

For Tania

- No Trespass Fee

¹ See Metis Settlements Land Registry Land Search Report for the NW-26-058-02-4, Tab 4 of the Hearing Package for June 7, 2017.

² See Metis Settlements Land Registry Land Search Report for the NW-26-058-02-4, Tab 5 of the Hearing Package for June 7, 2017.

³ See Tabs 8 and 9 of the Hearing Package.

- Compensation for damages to the land during surveying (0.35 acre) ($\$1330.00 \times .035$ acre) = \$465.50
- Remediation in the form of:
 - replanting of saplings at entrance of trail and reseeding along the trail
 - bridge removal
 - block access to the trail at two intervals so no ATV or motor vehicle can access it (no further trees will be cut for this purpose)

[8] Joshua and Tania ultimately rejected the offers and filed their appeals with the Metis Settlements Appeal Tribunal on October 7, 2016.

Joshua Daniels and Tania Daniels

[9] Tania took the lead in communicating concerns, including the appellants' belief that the damage covered an area greater than that estimated by FLMS and that she and Joshua each want \$12,000.00 in damages.

[10] Apart from suggesting that the damage covered an area greater than that estimated by FLMS, neither Tania nor Joshua offered any other proof or actual measurements to back their assertion.

[11] Tania and Joshua do not live on the parcels in question, preferring instead to leave the lands in their natural state for hunting, fishing and trapping. Nor have Tania or Joshua made any improvements to the lands in question.⁴

[12] Tania said that a Settlement staff member called her, asking if FLMS could do a "walk through" her land and that no damage would be done. Tania agreed to the walk through providing no damage would be done.

[13] Tania was subsequently stunned to learn from another member that a partial cut-line was cut through her property.

[14] Joshua was not involved in any discussions and did not know anything was happening on Tania's land, and only found out later—when FLMS sent workers out to assess and document the damage—that his land was also impacted by the partial cut line.

[15] Other than saying that they were not consulted, and that their lands should have been left untouched, Tania and Joshua did not provide any evidence of additional damages to their lands;

⁴ Which runs contrary to the purpose of a PMT interest as set out in the MSGC Land Policy, section 2.5, because PMT interests are intended to get members to improve their parcels (by building houses, fences and such) within a five year period, or ten at the most, in order to qualify for a full Metis Title.

nor did they submit any specific policy grounds as to why they should each be paid \$12,000.00 in damages.

FLMS Administration and Council

[16] Oil and Gas Director, Garry Parenteau, said that FLMS' practice concerning oil and gas projects is to contact the occupant and ask for consent to go onto the occupant's land. If the project is a large one, written consent is requested. Garry said that surveys are often done in conjunction with walk through, because a "line of sight" is often needed, which requires cutting down trees.

[17] Garry said that CNRL had acquired a new lease near Tania and Joshua's quarters and needed a way to access it. In keeping with Settlement practice, a staff member called Tania and asked if they could do a "walk through." Garry said that Settlement staff did not call Joshua because the Settlement did not think the new lease could be accessed through Joshua's quarter.

[18] Garry was not on the call to Tania and could not say for sure whether the possibility of sending in a survey/cutting crew was discussed and whether Tania agreed to it. Certainly, there was no written consent from Tania in evidence.

[19] FLMS stopped work on Tania (and Joshua's) quarters when told to stop by Tania. Upon hearing Tania's concerns, contractors were sent out to document the damage. They took pictures and measurements, calculating the damage to Tania's quarter as covering 0.35 of an acre and discovering that the cutting went into Joshua's land as well, covering approximately 0.1 of an acre.

[20] Tania and Joshua were offered \$1330.00 per acre of damage because FLMS and CNRL used FLMS's *Surface Rights Payments Schedule* as a guide to developing the compensation framework. This Schedule was submitted at the hearing (and marked as Exhibit 2) and it reads that:

The following formulas will be utilized to determine the compensation payable for various new takings:

Incidental Takings⁵

Defined as those land uses necessary or incidental to development, drilling, production, transportation, exploration activities... etc

Initial compensation = \$1330.00 per acre

⁵ Though 'trespass' was...

General

Compensation for timber loss is included within the value of interest required. Reasonable timber salvage requirements will be completed. Timber is the property of the Fishing Lake Metis Settlement.

Payment by the Producer to Fishing Lake Metis Settlement for each new surface acquisition will be... Individual Member Signing Fee = \$825.00

[21] A Council member also suggested that *had* Tania and Joshua been given the opportunity to give their consent in writing for the survey work, they would have received the "Individual Member Signing Fee" of \$825.00, and not just the \$500.00 offered to Joshua. (See fee schedule, above).

Canadian Natural Resources Limited

[22] Representatives from CNRL participated in the hearing by telephone. They said that compensation is normally based on a "use-loss" basis and the typical rate for damage to agricultural lands is up to \$450.00, depending on commodity prices.

[23] The representatives said CNRL is not interested in paying anything more than what was previously offered to Tania and Joshua.

1.2 Findings of Fact

[24] This Panel is of the view that the following evidence is relevant and more likely than not to be true:

- a. The MSLR Land Search Report for the NW-26-058-02-4 shows that Joshua Daniels holds a registered [five year] PMT interest in the land, recorded April 14, 2011;
- b. The MSLR Land Search Report for the SW-26-058-02-4 shows that Tania Daniels holds a registered [five year] PMT interest in the land, recorded November 16, 2010;
- c. Neither Joshua nor Tania live on their respective parcel. To date, neither has made improvements to their land;
- d. CNRL is an oil and gas operator and has a lease/REO near Tania and Joshua's parcels.
- e. As stated by Garry Parenteau, FLMS undertook the walk through and subsequent cutting/slashing activities on Tania and Joshua's parcels to determine if CNRL's nearby lease could be accessed through Tania's parcel;
- f. A FLMS staff member called Tania in the summer of 2014 and asked her if FLMS

could do a “walk through.” Tania gave verbal permission for the walk though, but permission was not given to do any slashing or cutting of trees or to disturb the land in any other way;

- g. No one contacted Joshua to get his consent because FLMS Administration did not think Joshua’s land would be disturbed;
- h. FLMS sent personnel out to Joshua and Tania’s parcels with a view to assessing the type and scope of damage. As shown by the pictures at Tab 7 of the hearing kit, and from the testimony given by the parties, the contractors cut down some trees in order to establish a “clear line of sight.” The contractors pushed some of the trees into piles, or otherwise left them where they fell. They also trampled down natural grassland areas, built a wooden bridge by laying 12 logs across a small depression and also created a short dirt path between the trees;
- i. According to the measurements taken by FLMS personnel, the scope of damage covered 0.35 of an acre on Tania’s parcel and 0.1 of an acre on Joshua’s parcel;
- j. Neither Tania nor Joshua took any actual measurements of the damaged area; and
- k. FLMS and CNRL used the *Surface Rights Payments Schedule* to develop the compensation framework, in which Tania was offered \$465.00 and Joshua offered \$633.00.

1.3 How the law applies to this matter

[25] Joshua and Tania filed their appeal under section 129 of the *MSA*, which reads:

Right to damages

129 Notwithstanding the *Petty Trespass Act*, a person who, under a right of entry order, enters or uses the surface of land contrary to this Division [Division 7 – Access to Patented Land]

(a) commits a trespass, and

(b) is liable in damages or otherwise for the trespass to the occupants, or any of them.

[26] Reading section 129 in its entire context, and interpreting the words in their grammatical and ordinary sense within the scheme of the *Act*, we know immediately from reading the sections surrounding section 129 that this section is meant to apply to oil and gas operations. Specifically,

we know that the sections within Division 7 apply to working or developing minerals under the Co-Management Agreement and to which “right of entry” orders apply.

[27] In this regard, we know from the testimony that the cutting/slashing in question was done on behalf of operator CNRL in relation to a lease/REO near Joshua and Tania’s land. We also know from reading section 129 that there is no appeal deadline.

[28] Taken together, this means that the conditions for triggering an appeal under section 129 of the *MSA* have been met and the Appeal Tribunal has jurisdiction over this matter.

[29] In terms of assessing damages, this Panel believes that while trespass may sometimes be utilized to punish those who wantonly infringe the exclusive use and enjoyment of land interests held by settlement members, the primary purpose of section 129 is to reconcile the fact that trespass and damages have occurred with a member’s continued use and enjoyment of the interest in question. In this vein of reconciliation, consideration may be given to the steps and compensation that would have been undertaken had the consent of the interest holder been properly secured in the first place.

[30] In the case at hand, this Panel does not think the trespass was wonton; it was accidental. Steps were taken by FLMS to secure at least Tania’s consent, albeit falling short of securing consent to do any cutting or slashing to other survey work. Joshua was not involved because FLMS did not think his parcel would be affected and it seemed to be a surprise to everyone that the cutting and slashing work bled over to Joshua’s parcel. At any rate, this Panel sees no reason to award punitive damages in this case. Instead, our focus will be on reconciling the damages done with future use and enjoyment and on the compensation that Tania and Joshua would have received had their consent been properly secured.

[31] In assessing damages, we think it best to work with the objective data on hand; namely, the measurements and pictures provided by FLMS. That Tania and Joshua think the affected area is bigger than 0.35 acre on Tania’s parcel and 0.1 acre on Joshua’s parcel is fine, but they did not provide any alternative measurements for our consideration.

[32] Accordingly, this Panel is of the view that the damage is confined to an area of 0.35 acre in Tania’s case and 0.1 of an acre in Joshua’s case. We are also satisfied that the following remediation efforts will rectify the damage caused to their parcels:

For Joshua:

- reseeding along the trail

For Tania

- replanting of saplings at entrance of trail and reseeding along the trail;
- “bridge” removal
- block access to the trail at two intervals so no ATV or motor vehicle can access it (no further trees will be cut for this purpose)

[33] This Panel is also mindful that neither Tania nor Joshua have invested much or any time or resources to improve their respective parcels. Put another way, the cutting and slashing did not undo or wreck any improvements made by Tania or Joshua because there was nothing to wreck. By extension, this Panel reminds Tania and Joshua that the purpose of a PMT interest is to afford members the opportunity to build fences, houses, and other infrastructure that becomes the basis for upgrading the PMT interest to a full Metis Title interest. Apart from limiting compensation for trespass, without proof of improvements, Tania and Joshua *may* not qualify for Metis Title without proof of improvements.

[34] In terms of monetary compensation, this Panel thinks it was reasonable for FLMS and CNRL to use the *Surface Rights Payments Schedule* as a guide. We think this because although the Schedule provides higher levels of compensation than the “use-loss” benchmarks used off Settlement, it does provide a consistent basis for compensation and one that is endorsed by the community.

[35] Accordingly, we think it appropriate to compensate damages at \$1330.00 per acre; resulting in a payout to Tania of \$465.50 and \$133.00 to Joshua for the damages to their lands.

[36] In addition, we think it reasonable to correct/reconcile the administrative oversight and put Tania and Joshua in the position they would have been had their written consent been properly secured. Namely, we think it fair that both Tania and Joshua should also each receive the “Individual Member Signing Fee” of \$825.00.

1.4 Order

[37] As set out in section 190(1)(f) of the MSA, in any matter before it, the Appeal Tribunal may make a decision granting whole or part of the application or grant any further or other relief in addition to or in substitution for it that seems appropriate to the Tribunal. The Appeal Tribunal can also provide any remedy that, in all the circumstances, fairness requires⁶.

⁶ See section 190(1)(o) of the MSA.

[38] In the case before us, the Tribunal orders that on or before September 29, 2017:

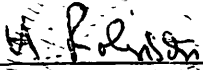
For Tania

- that CNRL pay her \$465.50 ($\1330.00×0.35 acre) as compensation for damages;
- that CNRL pay her an additional \$825.00 for the Individual Members Signing Fee;
- that CNRL work with FLMS and with Tania, to remediate the following:
 - replanting of saplings at entrance of trail and reseeding along the trail;
 - “bridge” removal; and to
 - block access to the trail at two intervals so no ATV or motor vehicle can access it. Furthermore, unless directed otherwise in writing by Tania, no further trees will be cut from Tania’s parcel for this purpose.

For Joshua

- that CNRL pay him \$133.00 ($\1330.00×0.1 acre) as compensation for damages;
- that CNRL pay him an additional \$825.00 for the Individual Members Signing Fee;
- that CNRL work with FLMS and with Joshua, to remediate the following:
 - replanting of saplings at entrance of trail and reseeding along the trail.

Dated in the City of Edmonton, in the Province
of Alberta on this 2nd day of August 2017.



Don Cunningham
Panel Chair

A circular dotted-line stamp is partially visible behind the signature and name.

