

Before:

Metis Settlements Appeal Tribunal

Between:

Donald McCargar,

Appellant,

-and-

Kikino Metis Settlement

Respondent.

Concerning:

Application for Costs

Decision Date:

September 5, 2017

DECISION

MSAT Panel members:

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

MSAT Staff:

Amanda Wyatt, Dispute Resolution Officer
Harold Robinson, Tribunal Secretary

Participants:

Donald McCargar, Appellant
Darlene St. Jean, LLB
Floyd Thompson, Chair, Kikino Metis Settlement Council, Respondent
Alex Yiu, LLB

Hearing:

MSAT Boardroom, Edmonton AB
August 22, 2017

1.0 Context

[1] Mr. Donald McCargar wants Kikino Metis Settlement to pay for his personal costs and his legal costs on a solicitor-client basis (i.e. full costs), relating to Appeal Tribunal Order 307.

[2] Kikino Metis Settlement submitted its own claim for costs, but clarified at the costs hearing on August 22, 2017 that it prefers that each side simply carry its own costs.

1.1 Issue

[3] Should costs be awarded?

1.2 Submissions

The following is a summary of the written and oral submissions received from the parties.

Donald McCargar

[4] Mr. McCargar submitted that his legal costs are \$19,908.63,¹ plus personal costs of \$7,696.50 (sic).²

Legal Costs:

Fees (31.2 hours x \$600/hour)	\$18,720.00
Disbursements	\$240.60
GST	\$948.03
Total	\$19,908.63

Personal Costs:

Filling out appeal form and discussion with MSAT (4.5 hours x \$300/hour)	\$1,350.00
Emails to MSAT (5.5 hours - 22 emails x 15 min per email)	\$1,650.00
Phone calls (to whom?) (1.75 hours – 7 calls x 15 min per call)	\$525.00
Attend hearing on Jan 11 (9 hours + 4 hours travel ³)	\$3,900.00
Photocopying expense (220 pages x .25/page)	\$55.00
GST	\$374.00
Total	\$7,854.00

[5] Mr. McCargar, through his lawyer, Ms. Darlene St. Jean, argues that full costs ought to be

¹ See updated roll-up of legal fees and disbursements, dated August 23, 2017. Ms. St. Jean's fees are \$18,720.00 (31.2 hours x \$600/hour), plus disbursements of \$240.00, plus GST of \$948.03.

² Using Mr. McCargar's time estimates and hourly rate, we calculate his total request for personal costs, including expenses and GST to be \$7,854.00, not \$7,696.50.

³ In response to the Panel's request for a roll-up of costs, Mr. McCargar submitted an affidavit dated August 23, 2017. In his affidavit, Mr. McCargar seems to reduce his estimate of time spent at the hearing and travelling to the hearing from a total of 13 hours to 12.7 hours, but does not show how this amended time log affects his original claim in the May 2, 2017 application for costs.

awarded against Kikino Metis Settlement (KMS) primarily because KMS' handling of his membership application was egregious and deserving of negative sanction. To support their claim that KMS acted in bad faith, McCargar/St. Jean argue that:

- KMS failed to process Mr. McCargar's membership application within the time limits imposed by the *Metis Settlements Act* (the Act);
- KMS failed to provide Mr. McCargar with a reasonable opportunity as required by the Act to meet with and give evidence to the KMS Council in support of his application—which is one of the main reasons why his matter was remitted back to the KMS Council as per Appeal Tribunal Order 307;
- KMS did not maintain the integrity of the record in that KMS appears to have relied on extraneous criteria (Bylaw 057) and documents (long-form birth certificate) when it refused Mr. McCargar's membership application;
- KMS delayed the Appeal Tribunal's hearing into the matter by several months; and because
- KMS hired legal counsel to appear at the Appeal Tribunal hearing, compelling Mr. McCargar to do the same.

[6] Regardless of whether or not KMS' conduct is found to be egregious and deserving of negative sanction, McCargar/St. Jean also argued that since the Appeal Tribunal Order 307 was silent as to costs, the Alberta Rules of Court (Rule 10.29) applies. Rule 10.29 provides that costs between parties to legal proceedings will always flow—to the successful party—unless there is an order that there be no costs [*Peavine Metis Settlement v. Whitehead*, 2015 ABCA 366].

Kikino Metis Settlement

[7] Legal Counsel for KMS clarified at the costs hearing on August 22, 2017 that KMS is no longer seeking costs. It is of the view that each party should carry their own costs.⁴

[8] KMS argued that there is no language in Appeal Tribunal Order 307 suggesting that KMS' conduct was egregious, or that KMS acted in bad faith deserving negative sanction. Rather, the Appeal Tribunal Order clarifies procedural requirements that were missed and which are to be applied on the go-forward; and to which KMS will apply itself. Appeals and checks and balances are essential elements of all self-governance processes and the presence of corrective directions should not be interpreted to mean bad faith is in evidence.

[9] KMS also argued that it is incorrect to interpret *Peavine Metis Settlement v. Whitehead*, 2015 ABCA 366 as standing for the proposition that the Alberta Rules of Court are to be automatically applied in the event that an Appeal Tribunal is silent on the matter of costs. *Peavine* deals with the question of standing before the Alberta Court of Appeal, which is not a matter for the Appeal Tribunal to decide; unlike costs applications which falls under the Appeal Tribunal's authority under section 191 of the *Metis Settlements Act*. As a matter that falls within the Appeal Tribunal's exclusive domain, it is not for parties to apply rules not otherwise adopted by the Appeal Tribunal, or to otherwise import directions through other processes.

⁴ Had KMS sought to cover its legal costs, and costs to Council, it estimated its legal costs to be \$11,610.00, plus disbursements of \$823.00 with additional costs for KMS Council estimated at \$1,752.75, plus GST.

[10] KMS added that even if the Alberta Rules of Court were to be adopted by the Appeal Tribunal Order 307 is not a “win” for Mr. McCargar. Mr. McCargar’s appeal was allowed, but the end result was that it was remitted back to KMS for review. A “win” would have been the granting of membership as has been the case in other matters before the Appeal Tribunal (for example, see *Abtosway* case, Order 282).

1.3 Analysis/Reasons

[11] Section 191(1) of the *Metis Settlements Act* clearly sets out that costs are at the discretion of the Appeal Tribunal. Section 191(2) affords the Appeal Tribunal control over the procedure used to identify and award costs.

Costs

191(1) The costs of and incidental to proceedings before the Appeal Tribunal are in the discretion of the Tribunal.

(2) The Appeal Tribunal may order by whom and to whom any costs are to be paid, and by whom they are to be determined and allowed.

[12] In the case at hand, the Panel that made Order 307 requested written submissions from the parties, followed by an in-person hearing on August 22, 2017. Of particular interest to the Panel were certain principles that come into play for costs application within the Metis Settlements’ self-governance context.

[13] These principles include the Appeal Tribunal’s overriding mandate to exercise its discretion to award costs “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.” The principles also include considerations of impacts on access to justice, and impacts on efficiency, including potential indemnification of successful parties.

[14] In applying the first principle, this Panel thinks that Metis culture and identity, coupled with the positive implementation of good governance practices, calls on parties to see value in each other, to be respectful of each other’s time and efforts, and to work within the rules for determining membership applications. This is not a call, however, for perfection. Mistakes will sometimes be made and rules—such as the rule to invite membership applicants to meet with Council—will sometimes be mishandled.

[15] In the matter at hand, had this Panel been of the view that KMS Council showed bad faith in the way it handled Mr. McCargar’s membership application, the Panel would have said so in Order 307. Moreover, had this Panel made findings of bad faith or egregious conduct in Order 307, the matter would not have been remitted back to KMS Council for further review. Mr. McCargar’s membership application was mishandled to be sure, but under the Appeal Tribunal’s mandate to strengthen self-governance, the way to correct the mistakes that were made, and to ensure the same mistakes aren’t made again, is/was to remit the matter back to KMS, with instruction.

[16] Put another way, costs may sometimes be used to bring home a general or specific lesson in respect and governance, but the Panel does not feel it necessary or productive to award costs to either party at this stage in the proceedings.

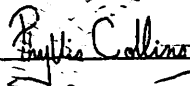
[17] In considering the other two principles concerning access to justice and impacts on efficiency, this Panel is of the further view that awarding costs based on the “success” of one party over another is generally not a desired outcome within the Metis settlements self-governance context. For every appellant that “wins” against Council, one or more loses. Placing the emphasis on winning would likely cast a chill over appeals.

[18] Finally, even if this Panel was to adopt the criteria set out in Rule 10.29 of the Alberta Rules of Court, we cannot conclude that Mr. McCargar “won.” His victory is a shared victory in that the KMS now has the opportunity to more carefully apply the rules for processing his membership application and to determine if Mr. McCargar meets the other membership requirements in the *Metis Settlements Act* and related policies or bylaws that are valid.

1.4 Decision

[19] Each party will bear their own costs.

Dated in the City of Edmonton, in the Province
of Alberta on this 5th day of September, 2017.



Phyllis Collins
Panel Chair

