

Before:

**Metis Settlements Appeal Tribunal
Membership Panel**

Between:

Erin Henderson and Evan (Ross) Henderson

Applicants

-and-

**Paddle Prairie Metis Settlement
Minister of Alberta Indigenous Relations, Metis Settlements General Council, and
Metis Settlements Land Registry**

Respondents

Concerning:

Membership

Decision Date:

September 19, 2017

DECISION

The Hearing – parties, place and date

APPEAL TRIBUNAL Panel members:

Phyllis Collins, Chair
David Drummond
Don Cunningham

Parties Participating at the Hearing:

Erin Henderson, Appellant
Evan (Ross) Henderson, Appellant
Georgina Henderson, Appellants' mother and representative
Ross Henderson, Appellants' father and representative

Paddle Prairie Metis Settlement, Respondent
Harvey Christian, Council member¹

Minister of Alberta Indigenous Relations – Written Submissions

APPEAL TRIBUNAL Staff:

Harold Robinson, Tribunal Secretary
Amanda Wyatt, Dispute Resolution Officer

Hearing Date, Time and Venue:

Thursday, August 24, 2017, at 9:00 AM
Metis Settlements Appeal Tribunal Boardroom, Edmonton, Alberta

¹ The Henderson hearing was scheduled to start at 9 AM on August 24, 2017 and all the parties received notices of the date, place and time of the hearing. Harvey Christian attended for Paddle Prairie Metis Settlement. Paddle Prairie Council Chairman Greg Calliou arrived unannounced and late at 9:40 AM, and the hearing was being adjourned by the Panel Chair as he entered the room. The recording equipment was turned off upon the Panel Chair's announcement that the hearing had been adjourned and whatever Mr. Calliou said after arriving is not part of the record.

1.1 Context

[1] Erin and Evan Henderson are brother and sister. They applied for membership in the Paddle Prairie Metis Settlement (PPMS) on January 15, 2016. PPMS Council refused their membership applications on April 11, 2016. No reasons for the refusal are given in Council's minutes or in the Settlement's notice to the Metis Settlements Registrar, or in the subsequent letter to the applicants, dated April 13, 2016.

[2] Erin and Evan Henderson appealed PPMS Council's decision to the Appeal Tribunal on June 14, 2016.

1.2 Evidence before the Panel and *Findings of Fact*

[3] The following evidence is taken from the first hearing kit² provided for this matter and is *relevant and true*:

- i. *Erin Henderson and Evan Henderson are brother and sister and they each applied for membership in Paddle Prairie Metis Settlement on January 15, 2016 (Tab 6, hearing kit);*
- ii. *According to the Council minutes dated April 11, 2016, Council voted 4 – 0 to refuse Erin and Evan's membership applications. No context or reasons were given by Council for refusing the applications (Tab 8, hearing kit);*
- iii. *Nor are reasons given in the notice to the Metis Settlements Land Registry even though the form clearly requires reasons to be given (Tab 9 of the hearing kit);*
- iv. *Finally, Paddle Prairie's letters to Erin and Evan dated April 13, 2016 do not contain any reasons. The letters just say that the applications for membership were not approved.*

[4] The Minister of Alberta Indigenous Relations provided written submissions concerning the receipt of notice of PPMS Council's refusal and the Minister's role in relation to membership generally. The Minister named the Metis Settlements Land Registry as the entity that receives membership notices and reflected on the Minister's obligation to ensure that the Members List is up to date (as determined by the Alberta Court of Appeal in *Gauchier v Alberta (Metis Settlements Land Registry)* 2014 ABCA 356.)

[5] In response to this Panel's suggestion that PPMS Council be given the opportunity to once again review Erin and Evan's membership applications—with instructions from the Appeal Tribunal to review and meet all legislated procedural requirements, including inviting Erin and

² The one with 15 tabs, which was delivered to the parties on January 30, 2017.

Evan to meet with Council for its deliberations and to provide intelligible³ reasons should their membership applications once again be refused—Georgina Henderson expressed concerns that Erin and Evan might not be given a fair hearing by PPMS Council. However, PPMS Council member, Harvey Christian, indicated that Council would abide by the legislated process if given another opportunity to review and report on Erin and Evan’s membership applications.

1.3 How the law applies to this matter

[6] When a settlement council makes a decision on membership, section 83 of the *Metis Settlements Act* confers a right of appeal to the Appeal Tribunal. This appeal is in the nature of *an appeal on the record*, in which the Appeal Tribunal will inquire into the procedure and record of decision of the settlement council in question. Here, the PPMS Council is the initial decision-maker under the governing legislative provisions, and the Appeal Tribunal sits in appeal from PPMS Council’s initial decision.

[7] The *Metis Settlements Act* has both procedural and substantive provisions regarding membership applications. This Decision turns on a *mandatory procedural* point, and therefore the Appeal Tribunal makes no findings regarding the substantive provisions. For the reasons that follow, this is a matter which is best remitted to Paddle Prairie Metis Settlement due to breach of a mandatory procedural obligation.

[8] The mandatory procedural point that was breached is at section 79(3) of the *Metis Settlements Act*. PPMS failed to give reasons at any juncture—in its minutes, in its notice to the Minister and in its letter to Erin and Evan—for its decision to refuse Erin and Evan’s membership applications.

Decisions on applications

79 (3) When an application is deferred or refused, *the notice must give reasons for the decision. [emphasis added]*.

...

79 (5) A settlement council must send a copy of every membership application decision to the Minister unless the Minister directs otherwise.

[9] This is a fundamental breach in that it negates the purpose of the notice provisions; which is to help its recipients firstly understand that settlement council followed the procedures for making its decision and, secondly, to know whether and how settlement council applied the legislation tied to proving Metis identity. The lack of any reasons—at any stage of the process—not only negates the purpose of section 79(3), it effectively nullifies the notice itself⁴ and, in effect, renders the entire review as *premature*. Meaning, there can be no review by this Appeal Tribunal until reasons are provided. The exception to this would be if a settlement council simply refuses to discharge its legislative obligations to provide reasons, necessitating that the Appeal Tribunal then take on the initial review for Metis identity. However, this Panel does not think we are at that point, just yet, with PPMS Council.

³ i.e. reasons that are comprehensive, clear and capable of being understood.

⁴ And any appeal deadlines that might have otherwise applied.

[10] Tempering our power to make any decisions that PPMS Council could have made (as per section 190(1)(j) of the *Metis Settlements Act*), is the Appeal Tribunal's overriding consideration under section 187.1 of the *Metis Settlements Act* to further the attainment of self-governance by Metis Settlements under the laws of Alberta. In other words, PPMS Council ought to be given another opportunity to show that it can properly apply the procedural and substantive rules in reviewing Erin and Evan's membership applications.

[11] In remitting this matter back to PPMS Council, this Panel expects that PPMS Council will carefully enumerate and apply all mandatory procedures for processing Erin and Evan's membership applications and that Council will also carefully and fairly consider all substantive provisions for proving Metis identity.

[12] The Minister also has an important role in the membership process and it is further expected that the Metis Settlements Land Registry—which is the Minister's designate for the receipt of Settlement Council decisions to the Minister under section 79(5) of the *Metis Settlements Act*—will continue to take care to ensure that all parts of the notice form it receives pursuant to section 79(5) are fully and properly completed, including and especially the section of the form calling on a Settlement Council to give reasons for any refusals or deferrals. This latter duty is important because it fulfills the Minister's obligation to provide checks and balances against errors of omission or commission concerning the fair and democratic processing of membership applications, contemplated by the Government of Alberta in 1985 through the unanimous passage of Resolution 18:

Resolution 18 reads, in part:

BE IT RESOLVED THAT, THE LEGISLATIVE ASSEMBLY:

1. Endorse the commitment of the Government of Alberta to grant existing Metis Settlement lands... to the Metis Settlement Associations, or to such appropriate Metis corporate entities that may be determined, to be held on behalf of the Metis People of Alberta;
2. ...
3. Recognize the principle that, as a first step toward the grant of existing Metis Settlement lands, it is the responsibility of the Metis to define and propose:
 - a. Fair and democratic criteria for membership in settlement associations and for settlement lands allocation to individual members of settlement associations; and
 - b. The composition of democratic governing bodies for the management and governance of Metis Settlements.

[13] No other Parliament or Legislature has enacted comparable legislation to the suite of legislation for the Metis Settlements of Alberta. This includes the unique features of the *Metis Settlements Act* is evident in the Recital in s. 0.1 of the *Metis Settlements Act*, which cites the *Constitution of Alberta Amendment Act 1990*, the *Metis Settlements Land Protection Act*, the *Settlements Accord* of July 1, 1989, the *Metis Settlements Accord Implementation Act*, and Resolution 18. In its implementation, self-governance of Metis Settlements under the laws of Alberta are best

served if the procedural aspects of the membership application process, and the process of appeal are given timely attention by all parties having regard to the issues raised in any given appeal.

[14] In this regard, PPMS Council is obligated by section 79 of the *Metis Settlements Act* to provide Erin and Evan with a reasonable opportunity of providing evidence to the PPMS Council in support of their membership applications. It is further obligated to give Erin and Evan a hearing with PPMS Council if the applicants requests it and, finally, if their applications are refused or deferred to provide intelligible reasons for the refusal or deferral.

1.4 Decision

[15] The Appeal Tribunal has certain powers under section 190 of the *Metis Settlements Act*, including:

Decisions

190(1) The Appeal Tribunal may, in respect of any matter before it,

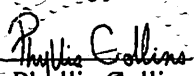
- (c) look at anything necessary in order to make a decision;
 - (e) issue a decision in the form of an order, direction, award or other suitable manner;
 - (f) make a decision granting the whole or part of the application, reference, matter or appeal before it or grant any further or other relief in addition to or in substitution for it that seems appropriate to the Tribunal;
 - (j) make any decisions that the settlement council could have made;
 - (m) **refer a matter back to the settlement council, with or without suggestions or recommendations;**
 - (o) provide any remedy that, in all the circumstances, fairness requires.
- (4) The Appeal Tribunal must send copies of all its decisions to
- (a) the Minister unless the Minister directs otherwise, and
 - (b) all persons that the Tribunal considers affected by the decision.

[16] As permitted under section 190(1)(m) of the *Metis Settlements Act*, Erin and Evan's membership applications are hereby referred back to PPMS Council, on the understanding that PPMS will take care to abide by all mandatory procedural requirements set out in the *Metis Settlements Act* and that PPMS Council will show how it applied the substantive provisions for proving Metis identity to Erin and Evan's membership applications through the reasons for its decision.

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[17] Finally, though this Decision directs that Erin and Evan’s original membership applications be remitted back to PPMS Council, Erin and Evan may consider another option. Namely, they may wish to withdraw their current membership applications and submit new membership applications. If they decide to exercise this option, they should carefully review the membership criteria set out in Part 3 of the Metis Settlement Act (sections 74 and 76, in particular, for proving Metis identity, and any other criteria that has been validly enacted), and ensure their applications address each aspect of the application criteria. In our view, exercising this option will not prejudice the appellants, and may even lend a fresh perspective to any subsequent review by settlement council.

Dated in the City of Edmonton, in the Province
of Alberta on this 19th day of September 2017.



Phyllis Collins
Phyllis Collins
Panel Chair

