

Order No. 150

File No. 03-0009-00

METIS SETTLEMENTS ACT
METIS SETTLEMENTS APPEAL TRIBUNAL

Between:

Hazel Vicklund

Appellant

-and-

Peavine Metis Settlement

Respondent

Judy Willier

Affected Party

PRELIMINARY DECISION

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The Hearing

Appeal heard by the following members of the Metis Settlements Appeal Tribunal:

Lorne Dustow, Panel Chair
John Brosseau, Panel Member
Ken Allred, Panel Member

Parties to the hearing and present:

Hazel Vicklund, Appellant

Peavine Metis Settlement Council, Respondent

Represented by: Richard B. Hadjuk, Counsel
Iner Gauchier, Chair
Judy Hopkins, Administrator
Don Cunningham, Land and Membership Coordinator

Judy Willier, Affected Party

MSAT staff present:

Sara Daniels, Executive Director/Tribunal Secretary
Terri Quintal, Research and Development Officer (in part)
Carolyn J. Hutniak, MSAT Advisor

Place and date of the Hearing:

Room 302, High Prairie Inn
High Prairie, Alberta
February 25, 2003

Objections to the Panel:

The Panel Chair asked if there were any objections to the composition or jurisdiction of the Panel.

The Appellant questioned the qualifications of the Panel to deal with the issues raised on the Appeal. MSAT outlined the appointment process under s. 180 of the *Metis Settlements Act* and noted that under the *Metis Settlements Act*, appointed members have the authority to deal with certain specific matters including membership appeals (sections 84 and 189 of the *Metis Settlements Act*).

MSAT also heard arguments of bias made against one of the Panel members. The Appellant raised a concern that she had been unfairly stopped from asking questions by one Panel member in a previous hearing and so was now concerned about his fairness in this hearing. However, she did not want the Panel member to be removed or to remove himself.

The personal representative for the Respondent (Iner Gauchier) also made an objection to the same Panel member on the grounds of bias. He asked that the Panel member either excuse himself or be excused on the basis of this bias. The facts on which he asserted bias were that during Iner Gauchier's questioning of a witness in a previous hearing, the Panel member allegedly leaned over to the Chair and made a comment suggesting that Iner Gauchier was asking questions like a lawyer. This comment provoked laughter. Iner Gauchier felt that these comments compromised him in his position as chairman of the Settlement Council and were indicative of a bias on the part of the Panel member. There was a question as to whether the Panel member made the alleged comment or whether the Panel member said that Iner Gauchier's questioning of the witness was bordering on being out of order.

The affected Panel member advised the parties and the Panel that he did not think he was biased or unable to act impartially and so he was choosing not to remove himself from the Panel. However, he said that he would abide by the decision of the Panel. The chair and the remaining Panel member retired to consider the facts relied on by the Respondent and concluded that there was no evidence of actual bias and that the facts relied on were not sufficient to give rise to a reasonable apprehension of bias. The parties were advised of this and of the decision to proceed with the hearing.

The Appellant also complained about the delay in MSAT bringing the matter to hearing. The Panel acknowledges that regrettably, a substantial amount of time has passed since the appeal was filed. However, none of the parties, including the Appellant offered any evidence of prejudice suffered as a result of the delay and the documents submitted to MSAT indicate that Judy Willier has had membership status while the appeal has been pending. The Panel decided to note the objection but to proceed with the hearing.

As a final jurisdictional matter, MSAT wishes to comment on the argument made by the Respondent that the role of MSAT on appeal is restricted to a review of clear demonstrated error on the part of the Settlement Council. MSAT does not agree that its role is that limited on appeal. It is clear from the *Metis Settlements Act*, and especially sections 185, 189 and 190, that the jurisdiction of MSAT on appeal is very broad. Whether and which of its powers are ultimately exercised by MSAT is a matter of discretion based on the circumstances of each appeal.

Background and Summary

The Appeal concerns the Settlement membership of Judy Willier granted by Settlement Council Bylaw dated September 26, 2000 (the "membership bylaw"). Hazel Vicklund appealed the membership bylaw by letter dated October 27, 2000. The grounds for appeal set out in the letter are:

“...I believe she had chosen to be a Treaty Member of the First Nations Band of Sucker Creek through marriage.

I am questioning the bylaw enclosed.”

At the hearing, the Appellant made essentially two arguments as to why the appeal should succeed and the membership bylaw should be set aside, namely that:

Judy Willier voluntarily chose Treaty status when over the age of 18 and she is therefore ineligible for settlement membership by reason of s. 75 of the *Metis Settlement Act*; and

The membership bylaw is invalid because it was:

Granted on the basis of preferential treatment, - that the Settlement Council did not apply section 75 of the *Metis Settlements Act* or applied it inconsistently because Judy is a relative;

Granted on the basis of inaccurate and misleading information in that it stated that Judy acquired Treaty status under age 18.

At the hearing Judy Willier advised MSAT of her desire to argue the constitutionality of section 75 of the *Metis Settlements Act*. The Respondent also made arguments concerning the discriminatory effect of the legislation. Based on the arguments of the parties and its own consideration of the *Metis Settlements Act*, MSAT itself believes that there may be *Charter of Rights and Freedoms* considerations bearing upon the proper interpretation of section 75. As a result, after hearing all of the arguments and evidence of the parties, MSAT advised the parties of its decision that:

1. On a preliminary basis, MSAT is satisfied that section 75(2)(a) is potentially the only ground on which the Appeal might succeed and Judy Willier might be disqualified from settlement membership;
2. The hearing will be adjourned so that the appropriate notice can to be given to the Governments of Alberta and Canada and so that Charter and constitutional arguments can be made by the parties concerning the proper interpretation of section 75(2) of the *Metis Settlements Act*; and;
3. A preliminary decision will be released detailing MSAT’s factual findings on the evidence presented and its decisions on the other issues raised by the appeal.

This is that preliminary decision.

Jurisdiction

The Tribunal has jurisdiction to hear this appeal according to sections 83, 84 and 189 of the *Metis Settlements Act*, which state:

83 (2) If a settlement council approves an application for membership in a settlement, any member of the settlement may appeal in writing to the Appeal Tribunal within 45 days after the application was approved.

(3) No settlement member may make an appeal under subsection (2) without the permission of the Appeal Tribunal.

Appeal Tribunal hearing

84(1) On receipt of an appeal under section 83, the Appeal Tribunal must hold a hearing after giving everyone it considers affected by the appeal reasonable notice of the date, time and place of the hearing.

(2) The Appeal Tribunal must make its decision in accordance with Part 7.

...

189(1) The Appeal Tribunal

(a) must hear appeals and references and perform any function given to it under this Act or any other enactment;

Preliminary and Procedural Issues

At the outset of the hearing a number of preliminary and procedural issues and objections were raised and dealt with by MSAT.

The first was an objection made by the Respondent and by Judy Willier to the presence of Barb and Lawrence Cunningham in the hearing room given that this is a closed hearing. After the Appellant advised that she intended to call both of those people as witnesses, MSAT decided that they could remain as witnesses and that MSAT would determine the relevance of any evidence given, once it was given.

A formal motion was then made by the Respondent to have the hearing recorded. Following its deliberations on the issue, MSAT concluded that a formal recording was not necessary because: there is no statutory obligation to record; the nature of the hearing and the issues raised do not require a formal recording, no evidence was offered supporting any potential prejudice to parties if there was no recording and finally, the Panel was satisfied that there would be a sufficient record of the proceeding even without a formal recording. MSAT is also of the view that in addition to being unnecessary in the circumstances of this appeal, recording the proceedings would introduce an undesirable element of formality into the proceedings and one that some of the participants might find uncomfortable.

The Appellant also raised an objection to Iner Gauchier appearing as personal representative of the Respondent on the grounds of bias, namely his family relationship to the Affected Party. After hearing arguments from both the Appellant and the Respondent, MSAT dismissed this objection. As Iner Gauchier is not a decision maker in this appeal and has no role in the decision making process, MSAT is of the view that there is no basis upon which it could be concluded that Iner

Gauchier's involvement in the hearing, as the personal representative of the Respondent, gives rise to an actual or a reasonable apprehension of bias.

The Panel also dealt with an objection from the Respondent that the Appellant was trying to broaden the scope of her appeal at the hearing. The Respondent argued that the Appellant should be restricted to what it claimed was the only ground of appeal set out in her appeal letter, namely Judy Willier's registration status. Counsel argued that the Appellant should not now be allowed to make any new arguments about the validity of the membership bylaw, as those arguments did not form part of her letter of appeal.

MSAT has considered this argument and the letter of appeal and is of the view that the Appellant's arguments about the membership bylaw do not amount to a new ground of appeal. In her letter of appeal the Appellant states that she is challenging the bylaw. This is a general statement. Nevertheless, because of the relatively informal nature of the group involved in this hearing and particularly in light of the fact that the Appellant is not represented by counsel, the Panel is not inclined to take a narrow interpretation of her letter of appeal. It is the Panel's view that the bylaw issues argued by the Appellant are fairly raised by the letter of appeal.

The Respondent and the Affected Party also argued that the Appeal is completely without merit and is brought by the Appellant for purely personal/ ulterior motives- namely to challenge the termination of her brother and sister's (Barb and Lawrence Cunningham's) Settlement membership. MSAT is of the view that the evidence given by Barb and Lawrence Cunningham is of limited relevance given the very different circumstances surrounding their membership status, as will be described below. However, MSAT does not agree that the Appeal is without merit or substance. The Appellant has raised a legitimate issue concerning the interpretation of section 75 of the *Metis Settlements Act* and whether a person is disentitled to settlement membership if they become a registered Indian after age 18. MSAT is also satisfied that the Appellant has raised a real issue concerning the validity of the membership bylaw.

Evidence and Arguments

Appellant's Evidence and Arguments

Turning to the specific grounds of appeal, the Appellant argued that Judy Willier: has Treaty status; voluntarily became Treaty as an adult; and had an option to opt out of registration but did not. She argued that section 75 of the *Metis Settlements Act* is clear and it must be applied strictly. The Appellant also questioned the membership bylaw on the grounds that it was granted on the basis of preferential treatment; - she argued that the Settlement Council did not apply the law because of family relationship. She called her brother and sister (Barb and Lawrence Cunningham) to give evidence that both were born and raised in the Settlement, had parents who are members of the Settlement and yet their membership was terminated by the Settlement Council after they applied for and received Treaty status when over the age of 18. The Appellant argued this as evidence of the inconsistency of the Settlement Council and evidence of bias.

Respondent's Evidence and Arguments

The Respondent argued that the *Metis Settlements Act* should be interpreted to disentitle a person from settlement membership only where there is evidence of voluntary registration. In support of this interpretation, the Respondent relies on section 90 of the *Metis Settlements Act* arguing that because the *Metis Settlements Act* provides for termination of membership where there has been a voluntary registration, this signals a broader intent to distinguish between involuntary and voluntary registrations throughout the *Metis Settlements Act* (s. 90, s. 75(2)). The Respondent also argues that because section 75(2) refers to age 18, which is the age of majority, this is further support for its argument that the Legislature intended to distinguish between involuntary and voluntary registration because actions are deemed to be involuntary under the age of 18. To accept the Appellant's interpretation, the Respondent argues, would be to take a very narrow reading of the section. Instead, consistent with the Interpretation Act, a large and liberal interpretation should be given to the section. Finally, the Respondent argues that to deny a person eligibility for membership solely on the basis of registered status acquired by reason of or as a consequence of marriage would be discriminatory. As well, the Respondent called Dennis Cunningham who gave evidence that women were not eligible for settlement membership prior to 1985. The Respondent argued that there was no opportunity for the Affected Party to become a settlement member before her marriage because of this practice no opportunity for her to become a member after her marriage, if the Appellant's interpretation of section 75 is accepted. That would be discriminatory and unfair. The Respondent asserts that the Affected Party has satisfied all of the other requirements of section 75(2) and is entitled to membership.

On the issues relating to the bylaw, the Respondent argues that there is no evidence to support the argument of preferential treatment aside from the fact that the Chair of the Settlement Council is the Affected Party's brother in law. The Respondent argued that in a small community such as Peavine, most residents are related in some way and so the fact of a family relationship alone is not evidence of bias or preferential treatment. As to the consistency of the Settlement Council in its interpretation and application of the *Metis Settlements Act*, the Respondent argued that the circumstances of Barb and Lawrence Cunningham are very different from those of Judy Willier. The Respondent argued that both Barb and Lawrence Cunningham voluntarily filled out applications with Indian Registry seeking Indian status after age 18 with full knowledge and understanding of what they were doing. In contrast, Judy Willier's Treaty status was the consequence of her marriage to a Treaty Indian and was not voluntarily chosen or applied for. Counsel for the Respondent argued that the errors on the face of the membership bylaw are technical irregularities that can be fixed by MSAT.

Evidence and Argument of the Affected Party

The Affected Party gave evidence and argued that she has lived the whole of her childhood in the Settlement and that her parents are members of the Settlement. She married the father of her child in 1981 at age 19 as a result of pressure from her mother to do so. She gave evidence that she did not appreciate at the time of her marriage that the father was a Treaty Indian and was not aware of the consequences of the marriage in terms of her membership rights. She did not choose to become a Treaty Indian nor did she marry to acquire that status. She asserted, and her mother gave evidence confirming, that she married only as a result of the pressure she received from her

mother because of the birth of her daughter. She gave evidence that if she had known that she would lose membership eligibility as a result of marriage, she never would have married. She gave evidence that she separated and was divorced in the early 1990's and but for her 9 years of marriage and one year living in High Prairie following the breakdown of the marriage, she has lived her entire life in the Settlement. She gave evidence that she made inquiries of the membership clerk in Sucker Creek and determined that there was no way that she could give up her Treaty status - that she will be Treaty until she dies. She has always identified with the Settlement community and she gave evidence of her participation in it and that of her children.

The *Metis Settlements Act*, Findings of Fact and Decision

Section 75 of the *Metis Settlements Act* states,

75(1) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement is not eligible to apply for membership or to be recorded as a settlement member unless subsection (2) applies.

(2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if

- (a) the person was registered as an Indian or an Inuk when less than 18 years old,
- (b) the person lived a substantial part of his or her childhood in the settlement area,
- (c) one or both parents of the person are, or at their death were, members of the settlement, and
- (d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.

(3) If a person who is registered as an Indian under the *Indian Act* (Canada) is able to apply to have his or her name removed from registration, subsection (2) ceases to be available as a way to apply for or to become a settlement member.

The Appellant conceded that Judy Willier lived a substantial part of her childhood in the Settlement and that her parents were and are members of the Settlement. MSAT also received evidence from Judy Willier and from her parents, which makes it clear that she fully and unquestionably satisfies the requirements of sections 75(2)(b) and (c). Judy Willier also gave uncontradicted evidence that she made inquiries of and was advised that there was no way for her to remove herself from the Indian register. MSAT is satisfied that subsection 75(3) does not apply so as to disentitle Judy Willier from membership approval.

That leaves the requirements of subsection 75(2)(a) and 75(2)(d).

Section 75(2)(a)

As to the proper interpretation of section 75(2)(a), MSAT cannot accept the Respondent's argument that we should imply a distinction between voluntary and involuntary registration. It is too great a stretch to do so, in MSAT's opinion. First of all, the language of section 75(2)(a) is clear - it specifically disentitles a person registered when over the age of 18. However, even if there is some uncertainty, it is our view that if the Legislature intended to make a distinction between voluntary and involuntary registration for the purposes of section 75, they likely would

have used those terms expressly just as they did in section 90. The fact that section 90 draws a distinction between voluntary and involuntary registration in the context of a completely different issue (terminating memberships) and in a part of the *Metis Settlements Act* physically distant from section 75 does not support the Respondent's interpretation of section 75, in MSAT's view. Looking at the *Metis Settlements Act* as a whole, we cannot accept the Respondent's argument that a distinction between voluntary and involuntary registration should be implied into section 75(2) of the *Metis Settlements Act*.

Section 75(2)(d)

As to section 75(2)(d), MSAT has been provided with a copy of Bylaw # 54/00. This bylaw reads,

*“Peavine Metis Settlement
Membership Bylaw #54/2000
A bylaw to approve the membership of Judy Willier
Whereas section 75(2) of the Metis Settlement Act provides for the approval of a
membership by a By Law for a person who is registered under the Indian Act
(Canada) and who is unable to apply to have his name removed from registration*

*And whereas Judy Willier was registered as an Indian when less than 18 years
old, lived a substantial part of his childhood in the Settlement area and one or
both of his parents are, or at their death were members of the settlement:*

*Now therefore the council and members of the Peavine Metis Settlement enacts
follows:*

*1. the admission of Judy Willier as a member of the Peavine Metis Settlement is
authorized.....”*

MSAT is not satisfied that there is any evidence to support the Appellant's argument that the membership bylaw was granted on the basis of preferential treatment or as a result of an inconsistent interpretation or application of the *Metis Settlements Act*. In a small community such as Peavine there is bound to be family involvement in decision-making. The Panel received evidence that Judy Willier's brother in law read and moved to give third and final reading to the membership bylaw. However, the fact of such involvement alone, is not, in MSAT's view, evidence that the Settlement Council acted on the basis of inappropriate considerations. As well, MSAT is of the view that the circumstances of Barb and Lawrence Cunningham are very different from those of Judy Willier. In the first place, both were members of the Settlement whereas Judy was not. Secondly, both voluntarily applied for and were given Treaty Indian status whereas Judy Willier acquired Treaty status as a consequence of her marriage and her evidence was that she was not aware of and did not understand the consequences of the marriage regarding membership at the time she married.

As to the argument based on the membership bylaw's contents, the Appellant notes that the preamble to the bylaw states “AND WHEREAS Judy Willier was registered as an Indian when less than 18 years old....” This is clearly in error as all parties agree that Judy Willier was

registered after age 18 when she married a Treaty Indian (and as is also indicated on Judy Willier's application for membership) We also note that the preamble contains other errors to the extent that it makes reference to "his childhood" and "his parents". Some argument was made as to the significance of the error in the bylaw's preamble. The Appellant seemed to argue that the bylaw was invalid, whereas the Respondent argued that it was a technical irregularity that can be cured by MSAT.

In the end result, while we acknowledge the error in the preamble, we consider it unnecessary to decide the legal consequence of this error in the circumstances of this case. This is because the appeal is fundamentally made on the basis that the statute does not permit settlement membership to be granted to someone in Judy Willier's circumstances (i.e. a person registered as an Indian after age 18) and so the Settlement Council made an error of law in granting that application. As such, even if we were to grant the appeal on the basis that the bylaw is invalid, or remit the issue to the Settlement Council to be decided on the basis of accurate information,

- The fundamental legal issue remains outstanding;
- Any new decision of the Settlement Council would likely be appealed to us for a decision on that legal issue, in any event; and
- Unnecessary delay and cost would be suffered by all parties.

Under section 190(1)(c) MSAT "may look at anything necessary in order to make a decision" By subsection 190(1)(g) MSAT is expressly empowered to "rehear a matter before making a decision about it". Subsection 190(1) enables MSAT to:

- (j) make any decisions that the settlement council could have made;
- (k) confirm the settlement council's decision with or without changes
- (l) reverse the settlement council's decision.

Under subsection 196(b) the MSAT "may accept any oral, written or other evidence that it considers proper.

We have decided that in the circumstances of this case, the objectives of the Metis Settlements Act are best met by us "rehearing" and making a decision about Judy Willier's settlement membership once we have received submissions from all of the parties on the fundamental legal issue. Again, we believe this to be an appropriate exercise of our discretion in these circumstances because what is really at issue here is a pure legal question - namely the membership eligibility of someone who acquires registered status over age 18 by act of marriage; there are no facts in dispute; the Settlement Council is no better equipped to address the legal issue than is MSAT; and, unnecessary delay and cost will be suffered by all participants if appeal is granted on the basis of non compliance with section 75(2)(d) or is remitted to the Settlement Council to be decided on the basis of accurate information.

Section 75 is discriminatory

This leaves, only the argument of the Respondent and of the Affected Party, that if s. 75 cannot be read as applying only where there is evidence of a voluntary registration, then the operation of the *Metis Settlements Act* (in conjunction with the *Indian Act*) is discriminatory on grounds of race,

sex , family status or one or more of those grounds and that the constitutionality of the section needs to be argued.

The MSAT accepts that there is an argument to be made on that basis and independently sees that this is an issue that may bear upon the interpretation of section 75 of the *Metis Settlements Act*. If MSAT ultimately determines that the operation of section 75 of the Act is discriminatory and contrary to the Charter, it has the authority to read the provisions of the *Metis Settlements Act* in such a way as to avoid a discriminatory effect. However, these are issues that can be determined only after the appropriate notices have been issued to the Province and to the Government of Canada and all submissions have been made to MSAT on that issue. Accordingly, as the parties were advised at the hearing, it is the decision of MSAT to adjourn its hearing, the determination of the proper interpretation of section 75 and the issue of Judy Willier's settlement membership until after the appropriate notices have been given and MSAT has received submissions on those issues.

Order

For those reasons set out above, the Panel therefore orders that the hearing to determine the proper interpretation of section 75 and the issue of Judy Willier's settlement membership be adjourned to a future date to be set by the Panel pending:

- the issuance of Notices to the Government of Alberta and the Government of Canada that the constitutionality of section 75 of the *Metis Settlements Act* will be considered by the Panel;
- and MSAT's receipt of submissions on those issues.

Dated in the City of Edmonton in the
Province of Alberta on the 15th day of
May, 2003.

Lorne Dustow, Panel Chair