

Order No. 156

File No. 03-0009-00

METIS SETTLEMENTS ACT
METIS SETTLEMENTS APPEAL TRIBUNAL

Between:

Hazel Vicklund

Appellant

-and-

Peavine Metis Settlement

Respondent

-and-

Judy Willier

Affected Party

-and-

Minister of Justice and Attorney General of Alberta

Intervener

Concerning the Granting of Membership to Judy Willier.

**Decision Regarding the Jurisdiction of the Metis Settlements Appeal Tribunal to
Consider the Constitutionality of the Metis Settlements Act**

DECISION

Table of Contents

THE HEARING	3
BACKGROUND	4
JURISDICTION	4
DECISION	6
REASONS	6
ORDER	11

The Hearing

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

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

In attendance at the hearing:

Hazel Vicklund, Appellant

Judy Willier, Affected Party

Peavine Metis Settlement, Respondent
Represented by: Richard Hajduk, Barrister & Solicitor

Minister of Justice and Attorney General of Alberta, Intervener
Represented by: Margaret Unsworth, Barrister & Solicitor

Carolyn Hutniak
Counsel to the Metis Settlements Appeal Tribunal

Various Observers

Place and date of the Hearing:

Metis Settlements Appeal Tribunal Board Room
11th Floor, 10055-106 Street
Edmonton, Alberta
September 19, 2003

Background

This hearing was held as a continuation of the February 25, 2003 appeal, which was held in High Prairie, Alberta. The appeal challenges the Metis Settlement membership bylaw concerning Judy Willier granted by Settlement Council dated September 26, 2000. A Preliminary Decision was issued by this panel on May 15, 2003, by which it was decided that section 75(2)(a) of the *Metis Settlements Act* (the “Act”) is the sole basis on which Judy Willier might be disqualified from settlement membership as she became a registered Indian after age 18. The appeal hearing was adjourned to allow for notice to be given to the Province of Alberta and to the Government of Canada and for argument to then be made on the constitutional validity of section 75 of the Act. By letter dated July 14, 2003, Justice Canada advised that it would not intervene in the appeal. The Minister of Justice and Attorney General for Alberta (“Alberta”) has intervened and has raised as a preliminary issue, whether the Metis Settlements Appeal Tribunal (“MSAT”) has jurisdiction to determine the constitutional validity of section 75 of the Act. The hearing on September 19, 2003 and this Decision deals only with that issue.

Jurisdiction

The Appellant, Ms. Vicklund, challenged the authority and qualifications of the panel to decide the limits of its own jurisdiction as well as its authority to hear the Charter issues. On that first point, Counsel for the Respondent and for Alberta took the position that MSAT does have the authority to decide the question of its own jurisdiction. We agree.

Section 180 of the Act deals with appointments to MSAT by the General Council and the Minister. Once appointed, the members of MSAT have jurisdiction to hear matters in accordance with the Act. MSAT’s specific jurisdiction to hear this appeal is found in sections 83(2) and (3), 84(1) and 189 of the Act:

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.

84(1) After 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;

Counsel for Alberta provided this Tribunal with decisions from the Supreme Court of Canada, which confirm that once a matter is before it, a tribunal such as this has the authority to decide whether it has jurisdiction to consider constitutional questions bearing upon the issues raised. (*Cuddy Chicks Ltd. v. Ontario* [1991] 2 SCR 5 at paragraph 21).

As to the broader issue of jurisdiction, Counsel for Peavine Metis Settlement and for Alberta provided written submissions to MSAT in advance of the hearing. Ms. Hazel Vicklund provided a short written statement as well as verbal arguments at the hearing. Ms. Judy Willier, the Affected Party did not make submission, written or verbal.

Essentially, the Appellant argued that MSAT lacked the necessary qualifications to consider constitutional issues and in order to ensure fairness, it is necessary to have these sorts of issues resolved by the Courts. Counsel for Peavine Metis Settlement and Alberta also made verbal submissions to supplement their previously submitted written materials.

In short, Counsel for Alberta argued that MSAT does not have jurisdiction to subject the Act to Charter scrutiny. She referred the panel to a number of cases (*Cuddy Chicks Ltd. v. Ontario* [1991] 2 S.C.R. 5, *Douglas/Kwantlen Faculty Assn. v. Douglas College* [1990] 3 S.C.R. 570, *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 S.C.R. 22, *Cooper v. Canada* [1996] 3 S.C.R. 854 and *Richard Kappo, Councillor of Sturgeon Lake Cree Nation v. Subdivision and Development Appeal Board*, 2003 ABCA 146). Counsel argues that these cases establish that in order to have the power to determine constitutionality, a tribunal must be given the power to determine questions of law and nowhere in the Act is MSAT given the power to decide questions of law.

Counsel for the Peavine Metis Settlement argues that MSAT has jurisdiction. He agrees that MSAT's jurisdiction to decide questions of law must be found in the Act but notes that according to the Supreme Court of Canada cases cited, that power can be either express or implied. He argues that the Act impliedly gives MSAT the power to decide questions of law and therefore the jurisdiction to consider the constitutionality of section 75. He relies on the purpose of the Act—namely to facilitate a measure of self-determination for Metis people; section 190(1)(o) which gives MSAT broad remedial powers; numerous examples of cases where MSAT has been called on to determine questions of law; and, section 188 of the Act which allows MSAT to act as or appoint an arbitrator. The powers of an arbitrator, he argues, have been considered by the Supreme Court of Canada and include the power to determine questions of law.

Following the hearing, two decisions were released by the Supreme Court of Canada on October 3, 2003 that bear on the issue before us (*Paul v. British Columbia (Forest Appeals Commission)*, 2003 S.C.C. 5 (“*Paul*”) and *Nova Scotia (Workers Compensation Board) v. Martin*, 2003 S.C.C. 54 (“*Martin*”). The panel received written submissions from Counsel for Alberta as well as from Counsel for the Settlement regarding the impact of those decisions on the issue of MSAT's jurisdiction to consider the constitutionality of section 75 of the Act. Although the panel invited submissions from the Appellant as well as from the Affected Party, none were received. In short, Alberta argues that these recent Supreme Court of Canada decisions do not change its position that MSAT lacks jurisdiction to consider the constitutionality of section 75 of the Act. Counsel for the Settlement argues that these decisions lend further support to its argument that

MSAT does have such jurisdiction. He cites extracts from those cases where the Supreme Court emphasized the suitability of administrative tribunals to decide Charter or constitutional issues, including those involving aboriginal issues, and held that a statutory right of appeal on questions of law (as is provided for in the Act) imply that the tribunal has the jurisdiction to decide such issues initially. Counsel also notes that while the test remains whether the tribunal has been given express or implied authority to decide questions of law, these recent cases from the Supreme Court indicate that the remedial powers of the tribunal under the statute are not determinative and should not be the focus of the inquiry. Counsel for Peavine Metis Settlement also points out the Supreme Court of Canada in *Paul* (at paragraph 3) has set aside the decision in *Copper v. Canada* and restated the rules concerning jurisdiction of administrative tribunals to apply the charter established by the trilogy of cases relied upon by Alberta.

Decision

After reviewing all of the written submissions from the parties and considering the verbal arguments made, the panel concludes that it has jurisdiction to consider the constitutionality of section 75 of the Act.

Reasons

In coming to this conclusion we are guided by the principles identified by the Supreme Court of Canada in the cases cited to us. The test to be applied when considering whether a tribunal has jurisdiction to determine constitutional issues, is stated in the *Paul* and *Martin* cases as follows:

1. The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising under the challenged provision.
 - (a) Explicit jurisdiction must be found in the terms of the statutory grant of authority.
 - (b) Implied jurisdiction must be discerned by looking at the statute as a whole. Relevant factors will include the statutory mandate of the tribunal in issue and whether deciding questions of law is necessary to fulfilling this mandate effectively; the interaction of the tribunal in question with other elements of the administrative system; whether the tribunal is adjudicative in nature; and practical considerations, including the tribunal's capacity to consider questions of law. Practical considerations, however, cannot override a clear implication from the statute itself.
2. If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include jurisdiction to determine the constitutional validity of that provision under the *Charter*.

3. The party alleging that the tribunal lacks jurisdiction to apply the *Charter* may rebut the presumption by
 - (a) pointing to an explicit withdrawal of authority to consider the *Charter*; or
 - (b) convincing the court that an examination of the statutory scheme clearly leads to the conclusion that the legislature intended to exclude the *Charter* (or a category of questions that would include the *Charter*, such as constitutional questions generally) from the scope of the questions of law to be addressed by the tribunal. Such an implication should generally arise from the statute itself, rather than from external considerations. (see: *Martin* at paragraph 48; *Paul* at paragraph 39]

In this case, there is no apparent explicit grant of authority to decide questions of law. Accordingly, we have considered whether an implied grant can be found in the language of the Act.

1. The Scheme of the Act and the Mandate of MSAT

The Metis have a unique custom and tradition and distinct culture in western Canada, which has evolved over the past several centuries. After a lengthy period of governmental subjugation and paternalism, the government of Alberta responded to many of the aspirations of the Metis of Alberta by establishing the Act. The Act is a unique form of legislation; part of a trilogy of statutes that together empower the Metis people living on eight settlements of land within the Province of Alberta. Specifically, the Act provides the Metis with a land base, their own style of self-government, complete with a form of local government on the respective settlements, an overall legislative body - the General Council, and an adjudicative body - MSAT. Pursuant to the legislation, the Metis even have their own form of land tenure expressing their cultural belief that they must live with the land as opposed to living off the land.

According to the Supreme Court of Canada, in considering this legislative scheme, the fundamental question is whether the statutory mandate given to MSAT by the Act requires it to determine questions of law.

Part 7 of the Act sets out the establishment, jurisdiction and procedures for appeals to MSAT. Of particular significance are sections 188-192. In short, MSAT is empowered to interpret the legislation and to resolve disputes amongst settlement members, the governing councils, and others such as resource companies operating on the settlements. The disputes falling under MSAT's jurisdiction expressly include appeals concerning settlement membership decisions. [sections 80(3), 83 and 84]. Under the Act, appeals from settlement membership decisions may be made by the applicant or by a settlement member. On receipt of an appeal under section 83, MSAT must hold a hearing and the powers of MSAT on appeal are set out in section 190(1).

- 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;
 - (g) rehear a matter before making a decision about it;
 - ...
 - (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;
 - (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.
 - ...

By section 192, “Decisions of the Appeal Tribunal must be consistent with this Act and any other enactment, ...”

The provision regarding rights of appeal set out in section 204(1) is also significant,

204(1) An appeal from a decision of the Appeal Tribunal on a question of law or a question of jurisdiction lies to the Court of Appeal after leave to appeal has been obtained. (emphasis added)

Finally, the Act expressly states that MSAT’s decisions are final and conclusive subject only to specifically defined rights of appeal to the Court of Appeal and to judicial review. No other body, aside from the courts, can decide matters within the jurisdiction of MSAT.

208 Except as otherwise provided,
 (a) every decision of the Appeal Tribunal is final, and
 (b) no decision of the Appeal Tribunal may be questioned, reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceedings in a court. (emphasis added)

Having regard to these provisions and the overall objective of the Act, there can be no doubt that the power to decide questions of law arising under the Act is necessary in order for MSAT to effectively fulfill its mandate and that the Legislature intended it to have such power. Any conclusion to the contrary would:

1. be inconsistent with the express language of section 204 of the Act. The Supreme Court in both the *Paul* and the *Martin* cases has stated that this type of provision is indicative of an intention that the tribunal may deal initially with questions of law. (see *Paul* at paragraphs 140-141 and *Martin* at paragraphs 4, 49-61);
2. be inconsistent with the language of section 192 which necessarily requires MSAT to interpret not only the Act but also other enactments, as well; and

3. contradict the Legislature's clear intent to create a comprehensive scheme for resolving disputes between settlement members including those concerning settlement membership.

2. Is MSAT's Process an Adjudicative One?

The Supreme Court of Canada has said that the presence of an adjudicative process is an important factor in finding an implied power to decide questions of law. (see: *Martin* at paragraphs 53-54). We are of the view that MSAT's process under the Act is an adjudicative one. In addition to its powers on an appeal under section 190 quoted above, MSAT has the power to award costs (section 191(2)), may make rules of procedure (section 195), is not bound by the rules of evidence and may accept any oral, written or other evidence that it considers proper, whether admissible in a court of law or not. (section 196). Under section 202 of the Act, it has the power to extend and to waive time limits. In the *Martin* case at paragraph 53, the Supreme Court of Canada found that similar provisions indicated an adjudicative body fully capable of deciding *Charter* issues.

From the foregoing it is clear that unlike the tribunal considered in the *Cooper* case, the powers and duties of the MSAT are mostly adjudicative in nature (not administrative). The fact that MSAT is regularly involved in exercising those adjudicative powers is also evident from the decisions cited by Counsel for the Respondent:

Paddle Prairie Metis Settlement v. Metis Settlements Appeal Tribunal ([1998] A.J. No. 863, 1998 ABCA 252); *Fishing Lake Metis Settlement v. Metis Settlements Appeal Tribunal Land Access Panel* ([2003] A.J. No. 563, 2003 ABCA 143) *Paramount Resources Ltd. v. Metis Settlements Appeal Tribunal Existing Leases Land Access Panel*

3. Practical Considerations

According to the Supreme Court of Canada, practical considerations are also appropriately considered in trying to determine the intent of the Legislature. In our view, those considerations identified as relevant by the Supreme Court further support our conclusion that the Legislature intended MSAT to have the power to decide questions of law, including *Charter* issues.

As discussed above, the provisions of the Act indicate very clearly that the Legislature established MSAT as the final adjudicator on certain matters including settlement membership (subject only to defined rights of appeal and review on questions of law and jurisdiction). It is equally clear the Constitution must be respected, not only by MSAT, but also by those appearing before it. It follows that the parties appearing before MSAT should be entitled to assert and have their constitutional rights considered by MSAT in the disposition of their appeals.

Also as previously mentioned, the Act is a unique piece of legislation creating unique rights for Metis people as identified above. The Act makes it clear that the Legislature of Alberta intended for MSAT to use a broad selection of dispute resolution mechanisms to settle disputes and determine questions of law consistent with the Act's objective of establishing a new form of

Metis self government. Based on the broader Metis Settlements Accord and the scheme of the package of legislation, MSAT must regularly consider practical as well as policy concerns and objectives, including the broad cultural and familial traditions of the Metis peoples when deciding the disputes coming before it on appeal. This specialized expertise and experience of MSAT better equips it to identify and address overarching and sometimes competing, policy issues as well as to compile a relevant factual record. As noted by the cases cited by Counsel, constitutional issues cannot be considered in a contextual vacuum.

Also among the practical advantages favoring our interpretation of the Act, is that proceedings before MSAT are relatively speedy, inexpensive, and accessible.

Finally, Alberta has indicated an intention to participate in the proceedings before MSAT should we find that we have jurisdiction to consider the constitutional issues raised. The Supreme Court of Canada in the *Martin* case notes at paragraph 55 that, “Such interventions diminish the relative disadvantage of administrative tribunals as compared to courts by relieving private parties or administrative agencies from the burden of defending the validity of legislation”.

In our view, all of this taken together with the overall scheme and object of the Act, very strongly indicates an intention to give MSAT broad responsibilities to decide questions of law in relation to the matters coming before it, subject only to review by the Courts. Nothing has been suggested to us and we see no provision in the Act that would serve to rebut the presumption that MSAT’s implicit power to decide questions of law, includes the power to decide Charter issues.

Jurisdiction Over the Parties, the Subject Matter and the Remedy

As a final note, it appears from our reading of the *Paul* and *Martin* cases, that a consideration of the tribunal’s jurisdiction over the parties, subject matter and remedy is no longer the appropriate approach to a determination of its jurisdiction to consider constitutional issues. However, and in any event, even following that analysis, we are satisfied that MSAT has jurisdiction to consider the constitutional validity of the Act.

Section 83 (2) of the Act reads,

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.

Section 84 of the Act states,

84(1) After 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.

Sections 83, 84 and 190 (quoted previously) clearly afford MSAT jurisdiction over the parties, the subject matter (disputes concerning settlement membership) and over the remedy (confirm, reverse or make any decision the settlement council could have made). To the extent that this appeal broadens the subject matter to include whether section 75 of the Act is inconsistent with the Charter and the remedy to potentially require us to disregard section 75(2) when determining Judy Willier's membership eligibility, we are satisfied that sections 190(1)(c) and 190(1)(o) and 192 of the Act give MSAT jurisdiction over those matters, as well.

Section 190 (1) (o) of the *Metis Settlements Act* is particularly instructive. It clearly gives MSAT very broad powers when it states:

- 190 (1) The Appeal Tribunal may, in respect of any matter before it,
 (c) look at **anything** necessary in order to make a decision;
 ...
 (o) provide **any remedy** that, in all the circumstances, **fairness requires**. (Emphasis added)

In our view, the language of these sections is sufficiently broad to give MSAT jurisdiction to consider whether section 75 of the Act is inconsistent with the Charter and if so, to enable us to disregard section 75(2) when determining Judy Willier's membership eligibility.

Also noteworthy is section 192, which reads,

- 192 Decisions of the Appeal Tribunal must be consistent with this Act and any other enactment, General Council Policies and valid settlement bylaws.

If MSAT not only has power to but is obliged to ensure that its decisions are consistent with other enactments it follows that the Legislature must have intended it to have power to determine questions of law including the constitutional validity of specific provisions of the Act. The *Constitution Act*, being an enactment and the supreme law of Canada, it must certainly be considered when deciding questions arising out of the *Metis Settlements Act*.

For all of the reasons set out above, and whether considered on the basis of the tests described in case law before the *Paul* and *Martin* cases, or on the basis of the test as newly restated in those two cases, we are satisfied that the Act gives MSAT an implicit mandate to decide questions of law and therefore Charter issues when deciding matters arising out of appeals brought under the Act.

Order

MSAT hereby dismisses the objection to jurisdiction filed by Alberta and orders that a further hearing be held to hear the arguments of the parties regarding the constitutionality of Section 75 of the Act and to conclude the appeal by Ms. Vicklund.

Dated in the City of Edmonton in the
 Province of Alberta on the 18th day of
 November, 2003.

Lorne Dustow, Panel Chair