

Order No. 160

File No. 03-0009-00

MÉTIS SETTLEMENTS ACT

MÉTIS SETTLEMENTS APPEAL TRIBUNAL

Between:

Hazel Vicklund

Appellant

-and-

Peavine Métis Settlement

Respondent

-and-

Judy Willier

Affected Party

-and-

Minister of Justice and Attorney General of Alberta

Intervener

**Final Decision Regarding an Appeal of the Decision
of the
Peavine Métis Settlement Council
to
Grant Membership to Judy Willier**

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THE HEARING

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

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

In attendance at the hearing:

Hazel Vicklund, Appellant

Judy Willier, Affected Party

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

Minister of Justice and Attorney General of Alberta, Intervener – (referred to as "Alberta")
Represented by: Margaret Unsworth, Barrister & Solicitor

Mr. Cameron Henry, Alberta Aboriginal Affairs and Northern Development - Witness

Various Observers

Place and date of the Hearing:

Room 301, High Prairie Inn
High Prairie, Alberta
March 2, 2004

BACKGROUND

This hearing was held to conclude the February 25, 2003 appeal, which was held in High Prairie, Alberta. Briefly, by way of background, the appeal challenges the Métis Settlement membership bylaw concerning Judy Willier granted by Settlement Council dated September 26, 2000. A Preliminary Decision was issued by the Métis Settlements Appeal Tribunal (MSAT) on May 15, 2003, by which it was decided that section 75(2)(a) of the *Métis Settlements Act* (the "Act") is the sole basis on which Judy Willier might be disqualified from settlement membership as she became registered as an Indian after the age of eighteen.

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") intervened and raised as a preliminary issue, whether MSAT has jurisdiction to determine the constitutional validity of section 75 of the Act. A hearing was held on September 19, 2003 on the jurisdictional issue and by Decision dated November 18, 2003 MSAT decided that it has jurisdiction to consider the constitutional validity of section 75 of the Act. This hearing was convened to consider the constitutional validity of section 75 (2)(a) of the Act and to ultimately decide the question of Ms. Willier's eligibility for settlement membership.

ISSUES

There are three main issues for the Métis Settlements Appeal Tribunal to decide in this appeal.

- I. Does section 75 of the *Métis Settlements Act* and specifically section 75(2)(a) infringe on the equality rights guaranteed by section 15(1) of the *Charter of Rights and Freedoms*?
- II. If so, does such infringement constitute a reasonable limit prescribed by law and is it demonstrably justified in a free and democratic society pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*?
- III. In view of the conclusions reached by MSAT in relation to the first two questions above, what is MSAT's decision on the issue of Ms. Willier's application for settlement membership?

LEGISLATION

Métis Settlements Act

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.

(4) A right to reside on patented land acquired under this or another enactment, a General Council Policy or a bylaw is not affected by a decision to refuse an application for membership when the decision is based on this section.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15. (1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

a) Any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b) Any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlements.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Part II: Rights of the Aboriginal Peoples of Canada

35.

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

52.

(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

SUMMARY OF EVIDENCE AND ARGUMENTS

Only one witness gave evidence at this hearing. Mr. Cameron Henry of Aboriginal Affairs and Northern Development, was called by "Alberta" and his testimony was helpful. Mr. Henry provided historical documentation including excerpts from *The Métis Population Betterment Act* regarding the exclusion of registered Indians from settlement membership.

In the 1930's the Alberta Government recognized the plight of the Métis people. They were aboriginal but had none of the rights that Indians had. They had no land base and no formal structure of government and were clearly a disadvantaged group in our society. The Alberta government took a number of initiatives to remedy the situation in which the Métis found themselves. One of the most important was the *Métis Population Betterment Act* of 1938. This Act was specifically intended for the Métis and excluded Indians who had land and other rights as a result of treaties. This exclusion of Indians has been constant in Alberta legislation dealing with the Métis.

The Métis Settlements Accord signed in 1990 between the Government of Alberta and the Métis people: "sought to achieve the aspirations of the Métis settlers to secure a land base for future generations, to gain local autonomy in their own affairs, and to achieve economic self-sufficiency."

The *Métis Settlements Act* specifically states that only Métis can become members of a Métis Settlement and specifically excludes Indians. The reason for excluding Indians is that they already had a land base through treaties with the Canadian government.

There was an impact on the *Métis Settlements Act* due to the *Indian Act*, as it existed prior to 1985. Any Métis woman who married an Indian man became an Indian and gained all the status rights of an Indian but lost her Métis rights as the *Métis Population Betterment Act* specifically restricted Indians from being members of a Métis Settlement. A further implication is that once a Métis woman gained Indian status there is no way to ever remove it. Under Canadian law she is an Indian for life.

"Alberta" argued that:

- Section 75 of the *Métis Settlements Act* is aimed at a distinct group of people.
- At law adults are assumed to know the law and its consequences.
- Pre-existing legislation would not allow the affected party to be a member.
- To deny Judy Willier's application would not be a violation of human dignity.
- The *Métis Settlements Act* is an ameliorative piece of legislation.
- Under the leading Supreme Court of Canada case of *R. v. Oakes* section 1 of Charter saves section 75 of the *Métis Settlements Act*
- The pressing objective of the legislation is to improve the condition of a certain group of people and as such it is rationally connected to the goal.
- It does however impair the rights of registered Indians.
- there must be proportionality between the effects and the objective as detailed in the *Oakes* case.

"Peavine" argued that:

- Judy Willier's rights to equality under section 15(1) of the Canadian Charter of Rights and Freedoms have been infringed or denied by Section 75(2)(a) of the *Métis Settlements Act*
- While section 90 of the *Métis Settlements Act* deals with voluntary registration as an Indian, section 75(2)(a) is actually "involuntary" registration and hence must be dealt with differently.

The Appellant argued that:

- Judy Willier made a conscious decision to become a registered Indian by marrying a registered Indian. Therefore she made herself ineligible for membership in the settlement.
- If MSAT decides Judy is a member there will be consequences.
- There is no gender distinction in section 75.
- The *Métis Population Betterment Act* was tough on registered Indians as is the *Métis Settlements Act*.

FINDINGS OF FACT

Judy Willier was registered as an Indian after the age of majority (18 years). Peavine Métis Settlement passed a membership bylaw granting Judy Willier membership that contained inaccurate information. At the present time there are no provisions for Judy Willier to have her name removed from the Indian Register.

DECISION

The Métis Settlement Appeal Tribunal hereby declares that Peavine Métis Settlement Membership Bylaw # 54/00 passed pursuant to section 75(2)(d) of the *Métis Settlements Act* is null and void.

The Métis Settlement Appeal Tribunal determines that Section 75(2)(a) of the *Métis Settlements Act* infringes on the equality rights guaranteed by section 15(1) of the *Charter of Rights and Freedoms* and is therefore of no force or effect with regard to the eligibility of Judy Willier to apply for membership in the Peavine Métis Settlement.

REASONS

Bylaw # 54/00

It is clear from the evidence that Bylaw 54/00 of the Peavine Métis Settlement was in error in that it stated that the applicant "was registered as an Indian when less than 18 years old.". The information provided on the application was clear and correct that she "became treaty at the age of 18 years." [Emphasis added]

The Métis Settlement Appeal Tribunal has however decided in our Preliminary Decision (Order # 150) that MSAT in hearing this matter will "make a decision about Judy Willier's settlement membership once we have received submissions from all the parties on the fundamental legal issue." i.e. the application of the *Canadian Charter of Rights and Freedoms*."

Section 75(2)(a)

I. Does Section 75(2)(a) violate section 15 of the Charter?

In addressing this question, we first looked at the entire Act and asked ourselves - Is the *Métis Settlements Act* discriminatory? We concluded that yes, in a general sense the Act clearly

discriminates between Métis and other Canadians and specifically excludes Indians and Inuk and generally excludes other persons who are not Métis. Thus it discriminates on the basis of race, national or ethnic origin. Secondly we asked ourselves - Is the purpose of the *Métis Settlements Act* ameliorative? Yes, again in a general sense, this Act was set up to deal with the plight of an underprivileged sector of Canadian society, which is aboriginal, but with none of the rights allocated to Indians. We then looked at Section 75. Section 75 of the Act sets the ground rules for registered Indians and Inuk who wish to become settlement members. Section 75 (1) states that a person registered as an Indian is not eligible for membership in a settlement. Section 75(1) is therefore boldly discriminatory in that it prohibits Indians registered under the *Indian Act* from obtaining membership in a Métis Settlement. While we do not need to answer this question, section 75(1) is however, in keeping with the ameliorative intention of the *Métis Settlements Act* to provide a land base for Métis people - not Indians.

Looking specifically at Section 75(2), it sets out an exception allowing an Indian registered under the *Indian Act* to become a settlement member as long as the person:

- (a) was registered when under the age of majority,
- (b) lived on the settlement most of their childhood,
- (c) has parents who are members, and
- (d) the membership is endorsed by the governing council and a majority of the settlement members.

It has been determined that Judy Willier meets the conditions of Section 75(2)(b) and (c). The requirement established by subsection 75(2)(d), will ultimately be answered by this decision as MSAT has exercised its jurisdiction to decide the question of Ms. Willier's settlement membership, itself.

Section 75(3) anticipates allowing Indians to become settlement members if they are able to have their names removed from registration under the *Indian Act*. There is presently no provision in legislation that would allow a person to have their name removed from registration as an Indian. Section 75(4) is therefore irrelevant to this decision.

This leaves section 75(2) (a) which is the only basis on which Ms. Willier might be disentitled to settlement membership and which will therefore be the subject of the following discussion.

In *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at ¶84 and elaborated upon at ¶88, the Supreme Court of Canada set out the three central issues that we need to consider in terms of deciding the constitutionality of section 75(2)(a):

- (A) *Whether a law imposes differential treatment between the claimant and others, in purpose or effect;*
- (B) *Whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and*
- (C) *Whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.*

Each of these questions will be addressed in turn.

A. Does section 75(2)(a) impose differential treatment between the claimant and others in purpose or effect?

The language and intent of Section 75(2)(a) is clear - a person who becomes registered as an Indian when less than 18 years old is entitled to be considered for membership provided the other conditions are met. The use of the word 'may' in section 75(2) gives some discretion in approving applications under this section.

Under this section, settlement membership could be granted to a person who becomes registered as an Indian when less than 18 years old in a number of circumstances including:

- a child may be born of an Indian mother who is member of a Métis Settlement.
- an Indian child may be born of a Métis mother outside of marriage.
- an Indian child may be adopted by a member or members of a Métis Settlement.
- a Métis woman may marry an Indian when under the age of 18 years.

Conversely, the language and intent of Section 75(2)(a) is equally clear that a person who becomes a registered Indian when over 18 years of age is ineligible to be considered for membership. Section 75(2)(a) reflects the issues of the age of majority and of informed consent.

It is clear that by its apparent purpose, section 75(2) of the *Métis Settlements Act* imposes differential treatment on Judy Willier as compared to individuals who become registered Indians before age 18 including a Métis woman who is under the age of 18 and chooses to marry an Indian, thus gaining Indian status. A Métis woman in that circumstance is given the privilege of choosing to apply for settlement membership if a number of specific criteria are met.

By its effect, section 75(2) also imposes differential treatment on Judy Willier as compared to a Métis man who marries an Indian woman (whether over the age of 18 or not). In those circumstances, the Métis man would not automatically become registered under the *Indian Act* (given its provisions) and hence he would remain eligible for membership under the *Métis Settlements Act*.

Similarly, the applicant is treated differentially as compared to a Métis woman who married an Indian subsequent to the passage of *Bill C-31*. With the passage of that legislation, Indian status was not automatically conferred on women marrying Indian men. A Métis woman marrying an Indian man after 1985 would not automatically be registered as an Indian as a consequence of marriage and would therefore remain eligible for settlement membership.

Finally, the effect of section 75(2) is to impose differential treatment on Judy Willier as compared to other single individuals. If Ms. Willier had remained single, she would be eligible for membership. She is not currently married but divorced - She is being treated differentially as a result of having once been married to an Indian man by virtue of which her ethnic origin was changed in law. By virtue of the workings of the *Indian Act*, Judy

Willier was and is registered as an Indian. Judy Willier however, is in fact neither an Indian nor married.

We are satisfied that section 75(2) imposes differential treatment between Judy Willier and others in purpose and effect.

B. Are one or more of the enumerated or analogous grounds, the reason or basis for the differential treatment?

Before addressing this specific question, we note that counsel for Peavine and Ms. Willier attempted to compare the situation under section 75(2)(a) with section 90(1)(a) - section 75(2)(a) being "involuntary" registration as opposed to "voluntary" registration under section 90(1)(a).

90(1) A settlement member terminates membership in a settlement if
*(a) the person **voluntarily** becomes registered as an Indian under the Indian Act (Canada), or*
(b) the person becomes registered as an Inuk for the purpose of a land claims agreement.
(2) On receipt from the settlement council of notice of a termination of membership under subsection (1), and after any verification of the facts that is considered necessary, the Minister must remove the name of the person concerned from the Settlement Members List.
(Emphasis added)

Section 90 deals with "voluntary registration" under the *Indian Act*. The consequence of voluntary registration is automatic termination of membership and removal from the Métis Settlement membership list. It falls within the intent of the Métis Settlements legislation for a member who voluntarily becomes registered under the *Indian Act* to have his or her membership in a Métis Settlement terminated. The person has chosen to become an Indian and in doing so has chosen not to be associated with the Métis community. The principle is - if you choose to be an Indian you can't be a member of a Métis Settlement - one or the other but not both.

Counsel for Peavine referred to the situation in the case of Judy Willier as "involuntary" registration, and attempted to build a case on "voluntary" registration as opposed to "involuntary" registration. As section 75(2)(a) applies to the situation at issue, the reference is to a person who becomes registered under the *Indian Act* as a consequence of marriage. This is not an involuntary act but rather a legal decision made by a person, who enters into a legal contract of marriage and must be prepared to accept the consequences of that contract. In this case one of the legal consequences of marriage is automatic registration under the *Indian Act*. Thus we must distinguish between the concept of voluntary registration under section 90 and what we have termed "consequential" registration under section 75(2)(a). Section 75(2)(a) applies specifically to a person who becomes registered as an Indian when under the age of majority. This would include a person who became registered as an Indian by virtue of marriage. Ms. Willier was clearly of the age of majority and thus fully responsible for the legal consequences of her decisions. We therefore do not accept the analogy of involuntary registration as an appropriate descriptor of the process referenced by section 75(2)(a). That is not however, determinative of

the issue before us. What is at issue is whether section 75(2)(a) violates the equality guarantees under the Charter.

As noted above, section 75(2)(a) allows a person who became registered as an Indian under the Indian Act to become a settlement member if they became registered before they reached the age of 18. We have identified that the purpose or effect of this section is to treat Ms. Willier differently than:

- Individuals who become registered Indians under age 18;
- Métis women who marry Indian men but under age 18;
- Métis women who marry Indian men after 1985;
- Métis men who marry Indian women (irrespective of age at the time of marriage); and
- Single individuals (whether Métis or not).

Section 15 (1) of the *Canadian Charter of Rights and Freedoms* states:

15. (1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

In addition to the above, in *Miron v. Trudel* [1995] 2 S.C.R. 418 at ¶160 the Supreme Court of Canada wrote:

I conclude that marital status may serve as an analogous ground of discrimination under s. 15(1) of the charter.

We are satisfied that one or more of the enumerated or analogous grounds under the Charter, are the reason or basis for the differential treatment of Judy Willier. Specifically, we identify: age, ethnicity, sex and marital status.

Under section 75(2)(a), age is the benchmark for the determination of when a person became registered as an Indian and therefore their eligibility for settlement membership. This is straightforward and requires no further discussion. For the reasons illustrated above, we are also of the view that ethnicity, sex and marital status are also determinative factors in the effect of section 75(2)(a) as it governs eligibility for settlement membership.

In terms of ethnic origin, counsel for "Alberta" argued that it is registration that is the determining factor as opposed to race or ethnicity - It is true that section 75 speaks about "An Indian registered under the *Indian Act*" and that Judy Willier is not an Indian - she is a Métis. We can also accept that "registration under the Indian Act" is not about ethnicity; it is about the bureaucratic process of registration. However, that does not alter the fact that Ms. Willier is ineligible for settlement membership by reason of her registered Indian status. To say that she is not treated differently in this respect because of a registration process as opposed to a 'deemed

ethnicity' is somewhat artificial and in any event, is not consistent, in our view, with the generous interpretation, which is to be generally afforded human rights legislation. However, it is not strictly necessary for us to determine this as we find that Ms. Willier is treated differently not only as a result of age and ethnicity but also on the basis of sex and marital status.

She is treated differently on the basis of sex – By operation of the *Indian Act* she was registered as an Indian under the *Indian Act* as a consequence of her marriage to an Indian and as a result of the provisions of section 75(1) and (2) of the *Métis Settlements Act* she loses her rights to become a member of the Métis Settlement. In similar circumstances a Métis man who marries an Indian woman would not be disentitled to settlement membership.

In our view, marital status is also a reason or basis for the differential treatment of Judy Willier. Again, Judy Willier is a person of Métis national origin who is registered under the *Indian Act* because of her former marriage to an Indian man.

Registration in this case was the direct result of a marriage of a Métis woman to an Indian man. Registration as an Indian would not have taken effect if the marriage had been between a Métis man and an Indian woman or if the marriage had occurred after 1985. Although the marriage has ended, Ms. Willier is not able to remove herself from the register. We view this as differential treatment on the basis of either an enumerated ground or an analogous ground. Even, if not properly considered differential treatment on the basis of marital status alone, we view it as differential treatment on an analogous ground in that registration under the *Indian Act* was a consequence of marriage prior to *Bill C-31* and registration only applied to a non-Indian woman who married an Indian man. It did not apply to a non-Indian man who married an Indian woman. It only applied up until 1985 when *Bill C-31* was passed.

C. Is this discrimination under Section 15(1) of the *Canadian Charter of Rights and Freedoms*?

We are satisfied that the differential treatment of Ms. Willier amounts to discrimination within the meaning of section 15 of the Charter. To highlight the discrimination we cite the following hypothetical situations:

- If Ms. Willier had married an Indian before she was 18 she would be eligible for membership.
- If Ms. Willier had married a non-Indian she would have been eligible.
- If a Métis man married an Indian woman he would be eligible.
- If Ms. Willier's Indian status could be canceled she would be eligible.
- If *Bill C-31* had restored her status as a non-Indian she would be eligible.
- If Ms. Willier had married an Indian after 1985 she would be eligible.

Judy Willier is in fact a Métis; however in law she is an Indian. She does not have the same rights as other Métis persons and does not enjoy equal benefit of the law without

discrimination based on her acquired status as an Indian, which resulted from her marriage. She is discriminated against based on her legally imposed ethnicity. The enumerated ground of sex and the analogous ground of marital status as well as what we have previously described as the analogous ground of the combined effect of her marriage and the consequence it had in determining her legal status as an Indian are among the reasons for her differential treatment. This combined analogous ground is amplified by the fact that she is now divorced and cannot have her registration as an Indian under the *Indian Act* annulled. In our view, this differential treatment is discrimination within the sense intended by the Charter.

Having found that Section 75 discriminates between the applicant and other persons based on age, sex, and marital status as well as ethnicity (as determined by registration under the *Indian Act*), the provisions of section 15(2) must be considered:

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

While section 75 and the overall intent of the Métis Settlement Act may be largely ameliorative in intent, section 75(2)(a) – has the opposite effect by perpetuating the disadvantages of a particular group, namely female Métis who marry Indian men after age 18 and before 1985.

II. Is the Discriminatory Effect of Section 75(2)(a) a Reasonable Limit Pursuant to Section 1 of the Charter?

Having found that section 75(2)(a) is discriminatory, we must go on to consider whether the discriminatory effect constitutes a reasonable limit prescribed by law and is demonstrably justified pursuant to section 1 of the Charter.

Section 1 of the *Canadian Charter of Rights and Freedoms* states:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

According to *R. v. Oakes [1986] 1 S.C.R. 103*, the first question to be answered is whether the objective of the legislation is pressing and substantial. We accept that the provisions of the Métis Settlement Act and section 75 in particular, are intended, among other things, to preserve a land base for the Métis people and that this is a pressing and substantial objective.

The second question for our consideration is whether the means chosen to achieve the objective are reasonable and demonstrably justifiable. To answer this question, according to the Supreme

Court of Canada, we must consider three further questions, each of which will be addressed in turn.

1. Is the violation of equality rights resulting from the application of section 75(2)(a) rationally connected to the aim of the legislation?

The rights violation is connected to the legislation in that section 75(1) bars registered Indians from becoming members of Métis settlements. It goes about this prohibition by using the phrase "An Indian registered under the *Indian Act*". However, we are not satisfied that the violation of Ms. Willier's rights in this particular case is rationally connected to the aim of the legislation. While the aim of the legislation is clear in providing a land base for Métis people as opposed to non-Métis people, the application of section 75 in the circumstances of the applicant (one who acquires registered Indian status by reason of marriage after age 18), has the effect of denying settlement membership and its benefits to one of the very people that the Métis Settlements legislation was designed to protect.

2. Does Section 75(2)(a) minimally impair the equality rights guaranteed by the Charter?

Section 75(2)(a) attempts to create an exception to the general rule of section 75(1). However, its effect is to significantly impair the right to equality on the basis of sex, ethnicity and marital status for persons in the position of Ms. Willier. The personal circumstances of Judy Willier are clearly one of the "*almost infinite number of factual situations [that] may arise*" referred to by Justice Dickson at ¶71 of *Oakes*.

3. Is there proportionality between section 75(2)(a) and its goal?

This test has three parts:

a) Are the measures carefully designed to achieve the objective?

To a point. This question has already been answered in that the legislation attempted to generally exclude persons of Indian blood yet allow Indians who identified with Métis culture to be excepted from the general prohibition subject to the criteria set out in section 75(2). However, the exclusion is so broad or the exceptions so narrow, that the legislative measure is not proportionate to the objective.

b) Does the provision minimally impair the Charter guarantee?

No. The restriction imposed upon the applicant significantly impairs the equality guarantees under the Charter.

c) Is there proportionality between the effects and the objective?

No. The provisions of the legislation are intended to preserve a land base for the Métis people and prevent persons who are registered and obtaining benefits under the *Indian Act* from becoming members of a Métis Settlement and thus obtaining benefits under that Act as well. However, here we have a woman who has lived on the Peavine Métis Settlement for most of her life. She has a family of two adult daughters and a son who is nearing adulthood. Her parents and other family members also live on the settlement. Peavine Métis Settlement is her home. She identifies with Métis culture. She is Métis tried and true. To deny Judy Willier the right to apply for membership in the Peavine Métis Settlement is to deny her housing, the right to vote, the right to programs and services, and in essence makes her a second-class citizen in her home community. These are the rights that the Métis Settlement Act and the *Canadian Charter of Rights and Freedoms* are intended to protect. There is no proportionality between the objectives of section 75(2)(a) and the ultimate denial of the rights of the applicant.

Summary

In the context of the present case we are satisfied that the discriminatory effect of section 75(2)(a) is not reasonable or demonstrably justifiable in a free and democratic society pursuant to section 1 of the Charter. The effect of the section, while connected to the objective of preserving a land base for Métis, goes too far in our view and serves to exclude a group of Métis people who lose their status as Métis by operation of law. The effect is to significantly impair the right to equality on the basis of one or more of the following grounds: age, sex, ethnicity and marital status. We are therefore not satisfied that there is proportionality between the effect of section 75(2)(a) and its goal. Indeed, in this case, its effect would be to prohibit Ms. Willier, a Métis by birth, from obtaining membership in the Métis settlement where she grew up and has spent all but ten years of her life. Her family (parents, children and siblings) live on the settlement; she is in fact a member of the Métis community. She does not identify herself as an Indian, she does not live with Indians. Nevertheless, by section 75(2)(a), she would be excluded from settlement membership solely by virtue of her registered Indian status acquired because of her marriage to an Indian, whom she has been divorced from for over ten years.

III. What is MSAT's decision on the issue of Ms. Willier's application for settlement membership?

In view of the circumstances of this case and the complex statutory rules governing membership we have concluded that the prohibitions contained in the *Métis Settlements Act* RSA 2000 c. M-14, as it reads on September 30, 2004, are in violation of the equality guarantees under the Charter and are therefore of no force and effect as they work to deny the application of Judy Willier. Ms. Willier is entitled to apply for membership in the Peavine Métis Settlement.

ORDER

Judy Willier is hereby confirmed as a member of the Peavine Métis Settlement.

COMMENTS

MSAT wishes to comment on the fact that this appeal has been outstanding for a considerable amount of time. While the Panel cannot speak to the period before the initial hearing was held, we feel a duty to address the reasons for delay. The need for the rules of natural justice to be followed regarding notice of proceedings, the scheduling of hearings so that interested and affected parties could be in attendance, the need for written submissions to be prepared, and for the written submissions and case law to be studied by the Panel have all contributed to the lengthy decision making process. The complexity of the issues, including the question of jurisdiction and the Supreme Court tests to be applied have all been mitigating factors, as well as the panel's careful consideration of all these issues. This decision has not been made lightly.

Dated in the City of Edmonton in the
Province of Alberta on the 3rd day of
October, 2004.

Lorne Dustow, Panel Chair

John Brosseau, Panel Member

Ken Allred, Panel Member