

METIS SETTLEMENTS ACT

Before:

**The LAND ACCESS PANEL of the
METIS SETTLEMENTS APPEAL TRIBUNAL**

Between:

**Gift Lake Metis Settlement, Kenneth Russell Shaw
and
Conrad Patrick Shaw**

Applicants,

- and -

Devon Canada Corporation,

Respondent,

- and -

**Metis Settlements General Council, ATCO Electric Ltd.,
Precambrian Shield Resources Limited,
and
Hillcrest Resources Ltd.,**

Affected Parties / Occupants.

DECISION

COPY

**Claim for Costs
Relating to Hearing Held to Determine the Rate of Compensation**

Background

On May 1, 2003, Gift Lake Metis Settlement (GLMS) wrote to the Metis Settlements Appeal Tribunal (MSAT) to request a hearing to review the rate of compensation received from Devon Canada Corporation (Devon) under surface leases, road use and operation agreements.

A hearing was held in High Prairie, Alberta between November 7 and 10, 2005 to review the rate of compensation pursuant to s.125 of the *Metis Settlements Act (MSA)*. The Land Access Panel (LAP) issued MSAT Order No. 176 dated April 12, 2007.

By letter dated May 22, 2007, Ken Shaw, on behalf of himself and Conrad Shaw, submitted a claim for costs. By letters dated May 23, 2007 and May 30, 2007, Ackroyd LLP submitted a claim for costs on behalf of GLMS. Bennett Jones, Counsel for Devon provided a response submission on June 19, 2007. GLMS filed a rebuttal submission on June 27, 2007.

Jurisdiction

MSAT's authority to award costs is set out in s. 191 of the *Metis Settlements Act (MSA)*, which states:

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

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

Summary of Submissions

Gift Lake Metis Settlement

GLMS submitted that it should receive a costs award in relation to the hearing for legal fees, consultant fees and honoraria and expenses for GLMS Council representatives and members involved in the hearing.

GLMS requested costs for the proceeding as follows:

Professional Fees	\$119,407.43
Applicant Honoraria	\$19,350.00
Disbursement Claimed (Itemized List)	<u>\$ 173,202.35</u>
Total:	<u>\$311,959.78</u>

GLMS responded to Devon's submissions opposing their request for costs. In relation to Devon's submission that EcoPlan International Report (EPI Report) was not accepted by LAP, GLMS submitted Devon misinterpreted the decision and that the Panel had the benefit of a comprehensive report to consider. GLMS also submitted that the EPI Report constitutes an important beginning to the objective analysis required in order to address cultural value issues.

GLMS disagreed with the submission by Devon that the EPI Report had limited reference to Devon's operations in that the EPI Report used a conservative approach for calculating historical impact by identifying specific impacts at 50% of the overall compensable loss in 2004. GLMS submitted Devon was responsible for 75 % of all wells that have gone into production and in 2004 Devon was responsible for 84% of the producing wells on the Settlement.

In support of the claims for honoraria, GLMS submitted that LAP benefited from the evidence presented by the Elders and members of the Settlement.

In response to Devon's reference to MSAT precedents on costs, GLMS submitted the hearing was unprecedented as it explored the meaning of s. 118 of the *MSA* in depth. GLMS submitted the scope and extent to which evidence was prepared and presented was also unprecedented. GLMS submitted it spent a great amount of time and expense in order to present a reasoned and objective approach for LAP's consideration.

Finally, GLMS submitted that placing Gift Lake in a position where they had to assume all of the costs would be simply unfair and would lead GLMS or indeed other Settlements to the conclusion that their costs on statutory review matters cannot be considered.

Ken Shaw

Ken Shaw requested the following costs for the proceeding:

Ken Shaw:	Lost Wages	\$500.00
	Travel Costs / Meals	\$242.40
	Research and Preparation	\$360.00
Conrad Shaw:	Lost Wages	\$750.00
	Travel Costs / Meals	<u>\$1,008.60</u>
Total:		<u>\$2,861.00</u>

Devon Canada Corporation

Devon chose not to seek costs and submitted that all parties should bear their own costs.

Devon submitted the Maynard and Telford Report (M+T Report) was largely, but not entirely accepted and utilized in the assessment of compensation and GLMS's expert report (EPI Report) and testimony by EcoPlan International was not accepted by LAP for reasons identified in the decision:

- Concerns relating to expertise and methodology to translate analysis into concrete monetary figures.
- Calculations based on revenue figures that included more than annual surface rights compensation.
- Limited relevance to the specific operations of Devon.
- Report relied almost entirely upon the perceptions and values of GLMS members.
- Objectivity.

Devon submitted the costs claimed by GLMS were excessive and should be greatly reduced if costs are awarded. Devon submitted that there is no way to determine whether the costs claimed by GLMS are reasonable due to the lack of detail / breakdown relating to the consultation / legal fees and other expenses. In regard to claims for honoraria for the Elders and GLMS Councillors, Devon submitted that any amounts awarded should be limited to necessary costs to attend the hearing. In the case of the Shaws, Devon submitted it would be inappropriate to award costs for lost wages. It is also noted that Conrad Shaw did not attend any of the hearing proceedings.

Devon referred the Panel to four decisions in which MSAT ordered the parties to bear their own costs.

Devon cited *Anderson v. Gift Lake Metis Settlement Council*, [1994] A.M.S.A.T.D. No. 3 in which MSAT, in ordering the parties to bear their own costs, adopted the reasoning of the Court of Appeal which held:

Given the circumstances of this case, and particularly in light of the fact that this is the first appeal from the Tribunal, the parties will bear their own costs.

Devon submitted that the decision in *Husky Oil Ltd. v. Elizabeth Metis Settlement* [1996] A.M.S.A.T.D. No. 26 supports not awarding costs if the parties acted in good faith and exercised due diligence in attempting to adapt to the new legislative regime.

In *Pruden v. Canadian Natural Resources Ltd.*, [1996] A.M.S.A.T.D. No. 11, MSAT denied Pruden's claim for costs associated with the hearing.

In *Cunningham v. East Prairie Metis Settlement* [1997] A.M.S.A.T.D. No. 2, MSAT dismissed Settlement Council's claim for costs because Settlement Council did not show Cunningham acted in a vexatious or malicious manner in filing the land appeal.

Devon also cites *Freyburg v. Fletcher Challenge Oil and Gas Inc.* [2005] A.J. No. 108 at para. 230:

The purpose of costs generally is to reimburse the successful litigant for a portion of the cost the litigation and, in appropriate special circumstances, to provide complete indemnity for those costs.

In conclusion, Devon stated:

In summary, Devon acted in good faith and exercised due diligence to present evidence to the MSAT LAP which was both objective and compelling. Devon does not question the right of the GLMS to seek a determination of annual compensation in accordance with the MSA, but where Devon's evidence was largely accepted and formed the basis of the decision, and where various concerns were identified with respect to evidence submitted on behalf of GLMS, it is respectfully submitted that it would be unfair to require Devon to pay costs in that regard.

Findings of Fact

The Panel finds that MSAT Order No. 176 resulted in mixed success for the parties. In particular:

- The Panel granted more compensation to the GLMS than Devon suggested but the Panel did not accept GLMS's proposed valuation either.
- The Panel accepted some of Devon's and GLMS's arguments on notice and rejected other arguments.
- The Panel rejected GLMS's requests for compensation for cultural loss in relation to Sandy Bay Road.
- The Panel rejected Devon's approach to initial and annual compensation.
- The Panel did not fully accept Devon's arguments on the review periods that the Panel had jurisdiction to review. However, the Panel also rejected GLMS's arguments that the Panel had jurisdiction to review past review periods going back decades.
- The Panel found GLMS's elder evidence useful and informative. However, it preferred the expert evidence presented by Devon in the M+T Report and gave the EPI Report limited weight.
- The Panel accepted that oil and gas activity had negative impacts on the cultural value of the Sandy Bay area. However, the Panel was not persuaded that GLMS's evidence demonstrated the losses of the magnitude GLMS claimed occurred in review periods the Panel had jurisdiction over or whether Devon was actually the operator responsible for the impacts.
- In the case of Ken Shaw and Conrad Shaw, the Panel found the provisions of Part 4, Division 7 contemplates the individual occupant having a right to individual compensation and compensation should be paid to the occupant directly. However, the Panel found that the right to compensation for impacts on cultural value and cultural environment is a community right and not an individual right and that GLMS was the only occupant entitled to compensation based on the cultural considerations under s.118 of the *MSA*.

Decision

The Gift Lake Metis Settlement claim for costs is disallowed.

The Ken Shaw claim for costs for himself and Conrad Shaw is disallowed.

Reasons

MSAT considers each costs application on its own merits. There is no doubt that the hearing in this matter was a lengthy one that raised complex issues. All parties invested considerable time, money and effort in the proceeding. The two main parties both produced and reviewed a voluminous amount of documentation.

However, a key consideration in deciding whether to award costs is to examine the outcome. The Panel finds that, in this case, there was definitely mixed success. Neither Devon nor GLMS got exactly what they argued for at the hearing. All parties were successful on some points and unsuccessful on others. Examining the result purely from a financial perspective, the Panel's decision on compensation did end up being closer to the figures proposed by Devon than the figures proposed by GLMS. The Shaws received some increase in compensation but were not successful in establishing a right to compensation as a result of one of their main concerns, the scentless chamomile.


The Panel finds that in cases of mixed success, parties should generally bear their own costs.

There has been no suggestion to the Panel that any party behaved improperly or tried to unnecessarily lengthen or complicate the proceeding. The Panel finds there are no unusual or extraordinary circumstances that would make having the parties bear their own costs in a case of mixed success inappropriate or unfair.

Order

LAP orders that all parties are responsible for their own costs in this appeal.

Dated on the 13 day of August, 2007.


Lorne Dustow, Panel Chair