

Before:

Metis Settlements Appeal Tribunal
Land Panel

Between:

Ben Howse, Appellant

-and-

Kikino Metis Settlement Council & Alvin Howse, Respondents

Concerning:

Infringement on the SE-35-63-15-4

Hearing Date:

May 8, 2008

Decision Date:

July 3, 2008

D e c i s i o n

Land Panel Members

Don Cunningham, Panel Chair
Dorothy Anderson, Panel Member
John Brosseau, Panel Member

Parties present at the hearing

Ben Howse, Appellant
Floyd Thompson, Chairman, Kikino Metis Settlement Council
Allyson Jeffs, Counsel for Kikino Metis Settlement Council
Alvin Howse, Respondent

MSAT staff present at hearing

Russell Teed, Dispute Resolution Officer
Harold Robinson, Tribunal Secretary

Place and date of the hearing

MSAT Offices, Edmonton, Alberta
May 8, 2008

Issue/relief - what the parties want

1. *Infringement of use and occupancy of land*: The Appellant, Ben Howse, wants the Tribunal to find that Kikino Metis Settlement Council infringed on his rights of exclusive use and occupancy to SE-35-63-15-4.

1. Infringement of exclusive use and occupancy on SE-35-63-15-4

1.1 Applicable legislation – jurisdiction and decision-making criteria

Two issues were raised in this appeal. The first involves the question of responsibility for conducting surveys on Settlement lands. The second concerns the question of potential infringement on land interests.

Both matters involve the extent of an interest (and responsibilities) in land in a Settlement area. Section 8.2 of the Metis Settlements General Council Land Policy (the Land Policy) (GC-P9403) provides this Panel with the authority and duty to address such questions. It reads as follows:

8.2 References

Any question or dispute as to the ownership or extent of an interest in land in a Settlement area may be referred to the Appeal Tribunal for an advance ruling or for a decision. [A footnote to section 8.2 reads that section 189 of the Act sets out the conditions under which a dispute or reference can be made to the Appeal Tribunal].

The relevant part of section 189(1) of the *Metis Settlements Act* (the Act) [R.S.A. 2004] is set out below:

Responsibilities

189(1) The Appeal Tribunal

- (b) must hear appeals and references and perform any other function given to it or required to be performed by it under the regulations, bylaws or General Council Policies.

To be sure, this Panel is satisfied that these sections vest us with the authority and duty to resolve land disputes by determining the extent of interest and responsibilities in land in a Settlement area and any potential infringements on that interest.

1.2 Evidence before the Panel

The Appellant said that Kikino Metis Settlement Council wrongly built an access road and part of his brother's house on the SE-35-63-15-4, which belongs to the Appellant in Metis Title. The Appellant said that he does not think his brother, Alvin Howse, is responsible for the alleged infringement on his property because, in his opinion, it was the Settlement's responsibility to do a survey before building his brother's access road and house.

The Appellant said that the access road to his brother's house was built on an old oil and gas access road on his property and for which he received compensation. The Appellant also told the Panel about old survey mounds that he believes clearly show that the access road and part of his brother's house are situated on his property. No documentation was provided to corroborate these statements.

The Respondent Kikino Metis Settlement Council reminded the Panel that it is the Appellant to prove his case (on the balance of probabilities). The Respondent added that it was not aware of any Policy or by-law, or other legislative instrument, requiring Settlement Council to do a survey and cover all survey costs before building an access road or residence.

The Respondent concluded by telling the Panel that while it takes no responsibility for doing surveys on lands held by Settlement members, it has a 50/50 program through which members can apply to have the Settlement cover half of the costs of a survey. It said that this program would be open to the Appellant if he chose to access it.

1.3 Findings of Fact

- The Metis Settlements Land Registry (MSLR) Land Search Report—which was contained in the hearing package—shows that the Appellant holds Metis Title for the SE-35-63-15-4.

1.4 Analysis / Reasons

The *Alberta-Metis Settlements Accord* of 1989 vested the Metis Settlements of Alberta with self-governance authority. A key aspect of this authority is the passage of laws by the Metis Settlements General Council and local Settlement Councils concerning interests in Settlements lands. To this end, the Metis Settlements General Council passed the Land Policy, which sets out different types of land interests, accompanying rights, and rules for granting interests in land.

As set out in the Land Policy, holders of Metis Title enjoy the exclusive right to use and occupy the land. Note, though, this right is subject to natural rights of light, air, water and support, as well as traditional community pathways and uses. Accordingly, the Appellant, who is the holder of Metis Title in the SE-35-63-15-4, has the right not to have his use and occupancy in the SE-35-63-15-4 diminished by others (unless such diminishment is tied to the natural rights or traditional uses set out above).

Having accepted that holders of Metis Title enjoy exclusive rights of use and occupancy, the initial question, as framed by the Appellant, is whether Settlement Council has the responsibility to do a survey—which is more accurately called a “plan of survey” under the Metis Settlements Land Registry Regulations—before building access roads or houses in the Settlement area?

Though the Appellant raised the question, he did not answer it to our satisfaction. To do so, the Appellant should have shown us where in the Accord legislation (i.e. within the Act, Land Registry Regulations, Policy, or by-laws), or other law, that Settlement Council is responsible for creating a plan of survey. Given that it is for the Appellant to prove such assertions on the balance of probabilities, he leaves this Panel with no option but to stop our review on this first question of responsibility for plans of survey.

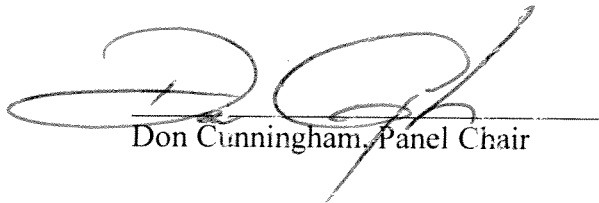
For clarity, though, our finding is that the Appellant has not demonstrated that it is Settlement Council's responsibility to do a plan of survey before building access roads or houses in the Settlement area. Nothing in this finding takes away the Registrar's authority within Division 6 of the Metis Settlements Land Registry Regulations to cause a plan of survey or descriptive plan to be prepared by the owner of a registered interest. Nor should our finding limit the Appellant from applying to Kikino Metis Settlement to access its 50/50 program for the creation of a proper plan of survey, which the Respondent Settlement Council said would be open to the Appellant, should he apply for it.

Finally, should the Appellant have a plan of survey done that meets the Registrar's requirements for such plans within six months from our today's decision date, the Appellant may apply in writing to the Tribunal to deal with the question of infringement on his Metis Title interest, which is still an open question.

1.5 Decision

The Appellant has not demonstrated to this Panel's satisfaction that it is Settlement Council's responsibility to do a plan of survey before building access roads or houses in the Settlement area. However, should the Appellant access the 50/50 survey program offered by Kikino Settlement Council, or undertake the costs of doing a plan of survey on his own within six months from today's decision date, the Appellant may bring the question of potential infringement and remedy back to the Appeal Tribunal for a decision.

Dated in the City of Edmonton in the Province
of Alberta on the 3rd day of July 2008.



Don Cunningham, Panel Chair