

Before:

Metis Settlements Appeal Tribunal
Land Access Panel

Between:

Lawrence Ladouceur,

Appellant

-and-

Buffalo Lake Metis Settlement,
Alberta Energy Company Ltd.,
and
Rocky River Petroleum Ltd.

Respondents

Concerning:

Rate of Compensation, Distribution, & Trespass

Hearing Date & Place:

September 10, 2008, Buffalo Lake, Alberta

Decision Date:

October 24, 2008

MSAT
Decision

Land Access Panel Members

Don Cunningham, Panel Chair
Violet Haggerty, Panel Member
John Brosseau, Panel Member

Parties present at the hearing

Lawrence Ladouceur, Appellant
Glen Auger, Buffalo Lake Metis Settlement (BLMS) Council
Elmer Ghostkeeper, BLMS Council
Bruce Gordon, BLMS Council
Horace Patenaude, BLMS Council
Deana Auger, BLMS Finance
Dennis Reid, BLMS Public Works
Jude Daniels, representative, TCPL Inc.
Gloria Coles, BLMS member
Dean Howse, BLMS member
Russell Gordon, BLMS member
Marcel Shephard, BLMS member

MSAT staff present at hearing

Harold Robinson, Tribunal Secretary
Russell Teed, Dispute Resolution Officer

Place and date of the hearing

Buffalo Lake Metis Settlement, Alberta
September 10, 2008

Issues/relief - what the Appellant is asking for

1. *Review of rate of compensation and distribution of compensation:* The Appellant (Mr. Ladouceur) wants the compensation rates reviewed for Right of Entry Orders (REOs) E124/80 and 0485/87, and any and all money paid by Trans Canada Pipeline (TCPL) for the REOs in question to be paid only to him and not split with the Settlement.
2. *Compensation for trespass:* The Appellant wants additional compensation for alleged trespass concerning test holes he claims were drilled by Access Pipeline without his knowledge or consent on the SE-21-63-16-4.

These issues will be addressed in the order set out above.

1. Review of rate of compensation and distribution of compensation

1.1 Applicable legislation – jurisdiction

Review of rate of compensation

The Metis Settlements Appeal Tribunal's authority to review and set rates of compensation for oil and gas projects is found in Part 4, Division 7, sections 123 to 128, of the Metis Settlements Act [R.S.A., 2004]. The relevant sections read as follows:

Review of rate of compensation

123(1) In this section and sections 124 to 128,

- (d) “rate of compensation” means the annual or periodic compensation payable under a surface lease or compensation order in respect of the matters referred to in section 118.

Notice to review rate of compensation

124(1) An obligated operator must give a notice to the lessor or occupant on or within 30 days of every 4th anniversary of the date the surface lease commenced or the right of entry order was made that

- (a) the obligated operator wishes to have the rate of compensation reviewed, if applicable, and
- (b) the person receiving the notice has a right to have the rate of compensation reviewed or fixed if no compensation has previously been fixed.

Review initiated by lessors or occupants

128 If the obligated operator fails to give a notice required under section 124, the lessor or any of the occupants may, within a reasonable time after the failure, give notice to the obligated operator stating that they wish to have the rate of compensation reviewed or fixed and, in that case,

- (b) the **Land Access Panel**, despite section 126, may make its order about the rate of compensation effective from the same date it would have been effective if the obligated operator had given notice in accordance with section 124 [**emphasis added**].

In the case at hand, it is for the Land Access Panel to determine whether the conditions for reviewing or altering the rate of compensation have been met.

Distribution of compensation

This question is not about the total amount an operator pays, but about each occupant's share of total amount paid. Section 119 of the *Metis Settlements Act* gives the Land Access Panel the authority to determine who the occupants are and to determine each occupant's share of the compensation. In so doing, the Land Access Panel must be mindful of any and all laws—including local bylaws—that speak to the distribution of compensation.

1.2 Evidence before the Panel

The Appellant said he purchased a Provisional Metis Title (PMT) interest in the SE-21-63-16-4 from Valerie LaRocque on April 11, 2003. He gave the Panel a bill of sale for the land. As set out in the Metis Settlements Land Registry report for the SE-21-63-16-4, the recording and expiry dates of the Appellant's PMT interest are October 11, 2005 and October 31, 2009, respectively.

Review of rates of compensation

As set in the hearing package, the next date of notice for review of REO E124/80 is January 23, 2009. As further set out, the next date of notice for review of REO 0485/87 is March 9, 2011. The Appellant did not challenge these dates.

Distribution of compensation

Buffalo Lake Metis Settlement Council presented the Panel with Bylaw 001-15, which was passed by Settlement Council on August 11, 2005. The Bylaw sets out the share Buffalo Lake Metis Settlement receives from oil and gas projects, including right of entry and compensation orders, and the share each occupant receives depending on the type of interest in land the individual holds and when they got it. The Appellant did not challenge the validity of the Bylaw, or its application to him.

The representative from TCPL simply confirmed that "Nova Corporation" (which appears on the REOs) is still a registered company under the TCPL banner.

1.3 Findings of Fact

- The Appellant purchased Valerie LaRocque's PMT interest on April 11, 2003.
- The Metis Settlements Land Registry report for the SE-21-63-16-4 shows recording and expiry dates of the Appellant's PMT interest of October 11, 2005 and October 31, 2009, respectively.
- The next date of notice for review of REO E124/80 is January 23, 2009, and the next date of notice for review of REO 0485/87 is March 9, 2011.
- Bylaw 001-15 was passed on August 11, 2005 and it contains a system for distributing oil and gas compensation between the Buffalo Lake Metis Settlement and individual occupants.
- The Appellant did not challenge whether the notice dates for review were correct, nor did he challenge whether Bylaw 001-15 was validly passed.

1.4 Analysis / Reasons

The Appeal Tribunal's job is to take notice of, consider, and apply the laws passed under the *Alberta-Metis Settlements Accord* for self-government to issues in dispute. Whether these laws are passed by Alberta, the Metis Settlements General Council, or Settlement Councils, if the Tribunal does its job in a reasonable and clear manner, all parties to a dispute will better know how the laws passed under the Accord apply to issues in dispute.

Review of rates of compensation

Part 4, Division 7 of the Metis Settlements Act sets out the rules and timing for reviewing rates of compensation. The Land Access Panel must follow these rules.

In the case at hand, it appears that the timing of the notice to review rate of compensation (which can be done every four years as set out in section 124 of the Act) is still some time in the future for both REOs. According to this 4 year cycle, the next dates of notice for review of REO E124/80 and 0485/87 are January 23, 2009 and March 9, 2011, respectively.

Once these dates were brought to light at the hearing, the Appellant agreed that it was premature to call for a review of rates of compensation at the present time.

Distribution of compensation

Bylaw 001-15 sets out a system for the distribution of oil and gas compensation between the Buffalo Lake Metis Settlement and individual occupants. Once the Bylaw was presented, the Appellant abandoned his claim for a greater share of the existing oil and gas proceeds.

Had the Appellant persisted in his claim for a greater share of compensation, he would have had to deal with the Tribunal's presumption that Bylaws, Policies, and provincial acts have all been properly established unless clearly proven otherwise. Meaning, the Appellant would have had to prove on the balance of probabilities that Bylaw 001-15 was not passed in accordance with bylaw-making rules set out in the Metis Settlements Act, or that the Settlement Council lacked the authority to develop and pass Bylaw 001-15.

1.5 Decision

Review of rates of compensation

The notice periods for reviewing rates of compensation must be followed. It is premature to review the rates of compensation at the present time.

Distribution of compensation

The distribution of oil and gas compensation is to follow the rules set out in Bylaw 001-15.

2. Compensation for trespass

2.1 Applicable legislation – jurisdiction

Section 129 applies to the matter at hand. It reads as follows:

Right to damages

129 Notwithstanding anything in the Petty Trespass Act, a person who, under a right of entry order, enters or uses the surface of patented land contrary to this Division

- (a) commits a trespass, and
- (b) is liable in damages or otherwise for the trespass to the occupants, or any of them.

As the expert concerning the workings of this Division, the Land Access Panel is in the best position to adjudicate on this question and, as requested by the Appellant, asserts its authority over this matter.

2.2 Evidence before the Panel

The Appellant said that Access Energy dug one or more test holes on his property (SE-21-63-16-4). However, he was unable to say where they were drilled, or what damages were caused.

The Appellant added that he received a cheque for \$200 in 2008—about two and a half years after he claims the alleged trespass occurred—and did not know at the time why this payment was received. He cashed the cheque.

He further argued that each landholder should be notified when there is any planned use of their land. Otherwise, how are they to know how many holes are dug, and how much damage is done to their property?

Though notified of the proceedings, representatives from Access Energy were not present at the hearing.

A representative for Buffalo Lake Metis Settlement Council, Mr. Horace Patenaude, said that Access Energy was given authorization by Settlement Council to do soil testing. This testing was to determine whether the soil was suitable for a possible pipeline. This representative also told the Panel that it was not its practice to consult with occupants before authorizing this sort of activity. In keeping with this practice, it did not consult with the Appellant prior to authorizing Access Energy to do soil tests on the SE-21-63-16-4.

It was further confirmed that the work was done in 2005, but that payment was not received from Access Energy until 2007. According to Council, the money received (\$200 per test hole) was forwarded to each occupant.

Another Council member, Mr. Elmer Ghostkeeper, testified that it was Council's practice to give operators authorization to do investigations to determine if conditions were favourable for their

project. It was stated that authority to do so is found in the Metis Settlements General Council Land Policy (*GC-P9201*). According to this Council member, that there was no trespass by Access Energy because Council had authorized it to dig test holes.

He added that 36 inch holes were dug, and he believed one hole was dug per quarter section. In his opinion, if there was any damage to the land, the land holders were compensated for it.

A third Council member, Mr. Bruce Gordon, said that the sites of the drill holes were accessed through an existing pipeline right of way. In his opinion, this means that compensation could and should be limited to the actual damages caused by the drilling [of the holes] and not for accessing the sites, per se.

Finally, the Director of Public Works, Mr. Dennis Reid, testified that it was his understanding that Buffalo Lake Bylaw 001-05, required that any entry onto Settlement lands must involve the land holder. He added that it was generally his practice to notify land holders before undertaking any work on their land.

2.3 Findings of Fact

- Buffalo Lake Metis Settlement Council authorized Access Energy to drill a test hole on the Appellant's land (SE-21-63-16-4).
- The Appellant received \$200 related to the drilling of a test hole on his land and he cashed the cheque.

2.4 Analysis / Reasons

The answer to the question of whether a trespass occurred under section 129 of the Act depends on whether the rules governing access to land were followed.

One of these rules is set out in Buffalo Lake Bylaw 001-05. Section 2(2) of the Bylaw reads as follows:

2(2) When an operator [i.e. Access Energy] wishes to gain access to Settlement land, the Settlement will consult with the affected land holders and occupants [i.e., the Appellant] to obtain the required consents, along with any special terms and conditions relating to the access and to negotiated agreements for compensation

This section—which the Panel takes as good law in the same manner that it accepted Buffalo Lake Metis Settlement's Bylaw on Distribution of Compensation as good law—sets out the clear requirement that occupants be notified and consulted before access is granted to operators.

The Panel also takes note of section 114(2) of the *Metis Settlements Act* [R.S.A., 2004]. It reads,

Entry onto the surface of patented land restricted

114(2) An operator must not enter or use the surface of patented land unless the operator

- (a) has obtained any consent of the General Council and a Settlement Council required under section 7 of the *Metis Settlements Land Protection Act*, and
- (b) has obtained
 - (i) the consent of the occupants of the surface of the parcel or parcels of patented land sought to be entered whether or not the consent has been obtained or is required under clause (a), or
 - (ii) a right of entry order to the parcels under an order of the Land Access Panel.

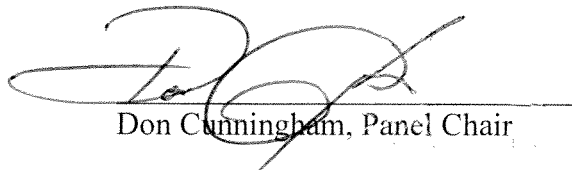
Taken together, it would appear that Council's apparent practice of granting access to operators wishing to do soil testing contravenes its own Bylaw and the Act. It also stands to reason that Access Energy, (although perhaps through no fault of its own given that it relied on Council's authorization), trespassed on the Appellant's land. Specifically, in failing to follow the requirements of Part 4, Division 7, of the Act, Access Energy committed a trespass under section 129 of the Act.

With respect to damages, the Panel is of the opinion that none should be awarded in this particular instance. The breach was inadvertent (Access Energy relied on Council's authorization as being sufficient authority to enter the land), the impact on the land was negligible, and a payment of \$200 was made by Access Energy and accepted by the Appellant to compensate for access and any disturbance to the land.

2.5 Decision

Access Energy trespassed on the Appellant's land. However, no damages are awarded in relation to the trespass.

Dated in the City of Edmonton in the Province
of Alberta on this 24th day of October, 2008.



Don Cunningham, Panel Chair