

Before:

Metis Settlements Appeal Tribunal

Between:

Eli Cunningham, Appellant

-and-

Gift Lake Metis Settlement, Respondent

Concerning:

Application for Membership

Hearing Date:

January 21, 2009

Decision Date:

January 30, 2009

D e c i s i o n

Land Access Panel Members

Stan Delorme, Chair

Thelma Chalifoux, Panel Member

John Brosseau, Panel Member

Parties present at the hearing

Vern Cunningham, Appellant's father

Hector Lamouche, Settlement Council Chair

Inier Cardinal, Council Member

Sherry Anderson, Council Member

Kelly Cunningham, Council Member

Ronnie Anderson, Council Member

Pauline Anderson, Settlement Member

Dave Lamouche, Settlement Member

Keltie Lambert, MSGC Legal Counsel

MSAT staff present at hearing

Harold Robinson

Harry Cunningham

Place and date of the hearing

High Prairie, Alberta

January 21, 2009

Issue: (what the appellant wants)

1. *Review of membership application process*: The Appellant, Eli Cunningham, wants the Tribunal to review the membership application process to ensure it is consistent with the Act. He is asking for another opportunity to make his case for membership through the bylaw process.

1. Review of membership application process

1.1 Jurisdiction – the Panel’s authority to decide this appeal

The Panel’s authority to decide this appeal comes from section 83 of the *Metis Settlements Act* (the Act), [RSA 2004]. Section 83 reads as follows:

83(1) If a Settlement Council refuses or defers an application for membership, or an application is not considered, or a decision is not made by the Settlement Council within the required time, the applicant may appeal in writing to the Appeal Tribunal

- (a) within 45 days after receiving notice of the refusal or deferral, or
- (b) within 45 days after the date the council should have made the decision.

Gift Lake Settlement Council wrote to Eli Cunningham on June 17, 2008 advising him that his application for another membership bylaw was turned down by Council. Reasons were set out in the letter for the refusal. These reasons will be discussed later in this decision. Eli Cunningham wrote to the Appeal Tribunal on July 20, 2008 to appeal Council’s decision not to advance his application for membership. His appeal was received by the Tribunal within 45 days of Council’s decision. This meets the requirements set out in section 83 of the Act. Accordingly, this Panel is vested with the authority and responsibility to determine this matter.

1.2 Evidence before the Panel

Eli Cunningham was not present at the hearing and was represented by his father, Vern Cunningham. His father presented a note from Eli Cunningham authorizing him to act as his representative. Council stated that they had no objection to Eli being represented by his father. The Panel agreed to this arrangement as well. It did so because no objections were raised, but also because this sort of representation (by parents or grandparents) is common in Metis communities. However, the Panel stressed that appellants should normally be present at a hearing because the Tribunal makes decisions that could have lasting impacts on their future.

Vern Cunningham said Eli went to the [July 10, 2007] bylaw meeting, but left before the voting began. He said Eli did not speak at the meeting. It was also confirmed that neither one of the postings for May 2 or July 10 included any reference to the right of effected parties to speak at the bylaw meeting.

Vern Cunningham acknowledged that Eli was registered as an Indian before he turned 18. He also added that his son grew up in Gift Lake, played competitive hockey, and has always been proud to tell others that he was from the Gift Lake Metis Settlement.

Settlement member, Dave Lamouche, spoke at the hearing. He said he was the Settlement Administrator at the time this membership process took place. He told the Panel that the first bylaw vote on May 2, 2007, was deemed to be flawed by the Settlement Council because all the applicants were lumped together under one bylaw. He added that the Settlement Council received legal advice that each membership bylaw should be voted on separately and not together; which they did on July 10, 2007.

Mr. Lamouche also suggested that the Act allows applicants to apply more than once for membership.

The Chair of the Gift Lake Settlement Council, Hector Lamouche, said Council was working to improve the public meeting part of the bylaw making process. In particular, he said that the voting process was rough on everybody at the public meeting.

He added that Settlement Council sometimes bring the same bylaw back to the public for approval if it fails the first or second time. This is especially so in the case of budget bylaws, which are essential to Settlement operations and governance and which must be approved at a public meeting.

Another Council member, Inier Cardinal, indicated that the leaders of the Settlement are bound by the rules set out in the Act, and must respect the outcomes of votes at public meetings. He suggested that when budget bylaws are voted down at a public meeting, changes are made to the budget before it is brought back to the public. In the case of membership applications, however, it is not clear what changes might be made to make the substance different than it was the first time it was voted down by the public.

He also suggested that every member, and would-be member, is responsible for learning about the Act and the rules for applying and speaking to membership.

1.3 Findings of Fact

The following findings of fact are drawn from the testimony of the parties, and from the hearing package, which was made available to the parties before and during the hearing:

- Eli Cunningham was registered as an Indian when he was less than 18 years old. His application for membership was processed under section 75 of the Act. Providing other criteria are met, this section requires that registered Indians must go through the bylaw process.
- Gift Lake Settlement Council set aside the results from the May 2, 2007 membership vote upon receipt of legal advice that its voting process was flawed. Specifically, it was wrong to vote for all thirteen membership candidates under one bylaw. Rather, each candidate is to be given a separate bylaw number and voted on separately.
- A letter was sent to Eli Cunningham on June 27, 2007, indicating that a second membership vote (public meeting) was scheduled for July 10, 2007. This letter did not indicate that Eli

Cunningham had a right to participate in the discussion at the public meeting concerning his application for membership.

- The public posting for the July 10, 2007 public meeting to consider Eli Cunningham's membership application did not indicate that persons affected by the issue under discussion have the right to participate at the public meeting in the discussion of the issue. (The public posting for the May 2, 2007 public meeting did not contain any reference to this right either).
- Eli Cunningham was not informed of his right to participate in the discussion while at the public meeting of July 10, 2007. Nor was he invited to speak at this meeting.
- The membership vote at the public meeting on July 10, 2007 for Eli Cunningham's bylaw (# 2007-013) was 68 for granting membership, 98 against, and two abstentions. Eli Cunningham's membership bylaw #2007-013 was therefore defeated.
- Eli Cunningham wrote to the Gift Lake Metis Settlement Council on April 3, 2008 informing them that he wished to apply for membership "thru the 'bylaw' process as per section 75 of the Metis Settlements Act."
- Gift Lake Settlement Council sent a letter to Eli Cunningham dated June 17, 2008. It reads that "[his] request has been denied." It also reads that "The request was denied citing the results of the Membership Bylaw Vote held on May 2, 2007 [sic] and July 10, 2007, respectively."
- Gift Lake Settlement Council's letter of June 17, 2008 does not provide any information about how Eli Cunningham might appeal Council's decision.
- Eli Cunningham wrote to the Tribunal to appeal Gift Lake's decision with respect to his membership application.

1.4 Analysis / Reasons

All the parties involved in this matter want to ensure the membership process is fair. To ensure fairness, we look to the rules set out in the Act and other associated legislation under the *Alberta-Metis Settlements Accord*, such as General Council Policies, Ministerial Regulations and Settlement bylaws. The Tribunal is also mandated to consider Metis culture and identity when making decisions.

As one who was registered as an Indian before he turned 18, Eli Cunningham rightly indicated that section 75 of the Act be applied to process his application for membership. This means that he can only be approved if all the conditions set out in section 75 are met,¹ including that he be approved through a Settlement bylaw.

¹ Note, this Panel was not asked to determine whether the conditions for membership set out in section 75 of the Act were met. Rather, this review focuses on whether the membership process applied to Eli Cunningham was fair/consistent with the Act.

Two issues emerged during the hearing with respect to the application of the bylaw process. The first was whether the public meetings/membership votes were conducted fairly? It was suggested that if the process for the public meetings/membership votes was seriously flawed, then the results should be set aside. If set aside, Council would not have the grounds—or at least not the same grounds as those cited in its letter of June 27, 2008—to deny Eli Cunningham’s application for another public meeting/membership vote.

Gift Lake Settlement Council conceded that the public meeting/membership vote of May 2, 2007 was flawed. It further conceded that the flaws (in particular, voting on all 13 membership applicants under one bylaw) were serious enough to set aside the results from that day and have another public meeting/membership vote on July 10, 2007.

Having set aside the outcomes from the May 2, 2007 public meeting/membership vote, it is an error to rely on the outcomes from that day, or to cite them, as reasons for denying Eli Cunningham’s subsequent application for membership. Thus, to the extent that Gift Lake’s letter of June 27, 2008 to Eli Cunningham cites the May 2, 2007 vote as a reason for not advancing his application for a membership bylaw, it stands in error.

Having identified the obvious error above, the question now at hand is whether the process leading up to and at the July 10, 2007 public meeting/public meeting was fair? In this regard, Gift Lake adjusted its voting procedure to allow participants to vote on each membership application separately. This means they addressed a critical flaw from the May 2, 2007 public meeting/membership vote. It also demonstrates that Gift Lake Settlement Council is committed to improving the procedures related to these important meetings/votes.

Having corrected one critical defect, Gift Lake is encouraged to now correct a second critical defect. Namely, it is encouraged to make reference in its postings, letters to applicants, and at the public meetings to section 55(3) of the Act. This section reads as follows:

55(3) Persons affected by an issue under discussion at a public meeting have the right to participate in the discussion of the issue but may not vote on it unless they are Settlement members and eligible to vote on it.

While Gift Lake Council need not quote the section word-for-word, it should make every reasonable effort to make those affected by issues under discussion at a public meeting aware of their **right** to speak. Given that it is a right, this should be done at a minimum through their notices—both public and in their letters to applicants—and stated publically at the public hearing for those who may have difficulty reading or seeing the postings.

Though Gift Lake Council has a special fiduciary (public trust) duty to let participants know about the rules for public meetings, applicants and others also share some responsibility. Namely, if the Gift Lake Council corrects this oversight, it cannot be held in error if an applicant or others affected by an issue refuse or fail to speak at a public hearing.

However, given that these steps were not taken in the lead-up or at the July 10, 2007 public meeting or vote on bylaw #2007-013, the process did not meet the standards set out in the Act and was not fair. Accordingly, the results from the July 10, 2007 meeting/vote concerning bylaw

2007-013 should be set aside, just as the May 2, 2007, results were set aside once Gift Lake was made aware of the failings in its process.

The second issue that was raised was whether it was appropriate for a membership applicant to re-apply after being rejected at a bylaw meeting. To this, the Panel looks to section 75 of the Act. Without quoting it here, there does not appear to be any restrictions on the number of times an applicant can apply for membership. However, unless a bylaw is brought through the petition process (which is not an available option for non-members), Settlement Council enjoys some discretion under section 51 as to which bylaws it brings forward. Section 51 reads as follows:

- 51 A Settlement Council **may** make bylaws respecting
- (a) the matters set out in schedule 1²;
 - (b) the matters described or referred to elsewhere in this Act and in other enactments.

Although it is arguable that this discretion is limited to setting up rules for managing membership applications [which would actually be quite helpful], what discretion Settlement Council enjoys is limited by its duty to provide reasons under section 79(3) of the Act when deferring or refusing applications for membership. Indeed, this discretion is further limited in that decisions, and non-decisions, on membership may be appealed to the Tribunal.³

On the whole, while it appears that there is no direct limit on the number of times one can apply for membership, this cannot be permitted to allow those membership votes that are fairly executed to be tested or undone the following week, or month, by simply re-submitting another application form. As eloquently stated by a member of Gift Lake Council, these votes must be respected. However, the legislation—which permits applicants to apply more than once—must also be respected.

In this regard, the Panel takes notice of section 60(4) of the Act, which speaks to the frequency that bylaws based on a petition can be brought back after they have been voted down at a public meeting. It provides that if defeated at a public meeting, the Settlement Council may refuse to receive a petition of a similar nature made within one year of the date of the public meeting. While this Panel recognizes that this section is intended to be applied to the petition process, it seems reasonable to use it as a general guide in managing the frequency of applications for membership by the same person. This is so, because it signals that a fair vote on membership is to be respected, while allowing an applicant time to develop a better case for membership, and to otherwise work on improving his or her prospects for success at the next public meeting.

1.5 Decision

Fairness requires that Gift Lake Settlement Council inform membership applicants and others affected by the issue of their right to speak at a public meeting where membership bylaws are being considered. Accordingly, Gift Lake Settlement Council cannot rely on the May 2, or July

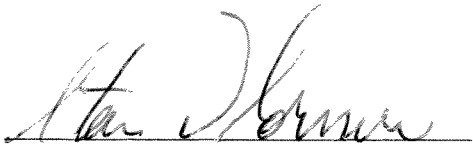
² Schedule 1 says that Settlement Council may make bylaws for the internal management of the Settlement, including applications for membership in a Settlement.

³ Gift Lake's failure to notify Eli Cunningham of his right of appeal is another serious oversight. However, it is not one that affects the integrity or outcome of the public meeting/membership vote process.

10, 2007 membership vote on bylaw #2007-013 as reasons for rejecting Eli Cunningham's application to be considered for membership through the bylaw process.

In addition, given that more than a year has passed since the membership votes were conducted in 2007, Eli Cunningham is free to once again apply for membership through the section 75 process (and related sections of the Act).

Dated in the City of Edmonton in the Province
of Alberta on the 30th day of January, 2009.

A handwritten signature in cursive script, appearing to read "Stan Delorme", is written over a horizontal line.

Stan Delorme, Panel Chair