

Before:

Metis Settlements Appeal Tribunal
Land Access Panel

Between:

Joseph D. Blyan (Land Trustee), Appellant

-and-

Metis Settlements General Council, Buffalo Lake Metis Settlement,
Rocky River Petroleum Ltd., Laverne J. Reid, and Marty E. Howse, Respondents

-and-

Metis Settlements Land Registry, Other Party

Concerning:

Surface Rights Compensation

Hearing Date:

March 13, 2009

Decision Date:

June 3, 2009

D e c i s i o n

Land Access Panel Members

Allan Lamouche, Chair
Dorothy Anderson
John Brosseau

Parties present at the hearing

Joseph D. Blyan (Land Trustee), Appellant
Horace Patenaude, Council Member, Buffalo Lake Metis Settlement
Leona Berard, Council Member, Buffalo Lake Metis Settlement
Elmer Ghostkeeper, Council Member, Buffalo Lake Metis Settlement
Deana Auger, Finance, Buffalo Lake Metis Settlement
John Prevost, Rocky River Petroleum Ltd.
Emile Blyan
Ernest Blyan
Evelyn Willier
Alex J. Blyan
Louise Howse
Floyd Cardinal

MSAT staff present at hearing

Karen Mustus, Oil & Gas Officer

Place and date of the hearing

Buffalo Lake Metis Settlement, Alberta
March 13, 2009

Issue

1. Distribution of Compensation: Land Trustee, Joseph D. Blyan wants any money paid by oil companies to BLMS for access along his late father's land, NE-19-064-17-4, to be paid to his father's estate.

1. Distribution of Compensation

1.1 Applicable legislation – jurisdiction and decision-making criteria

The Land Access Panel's authority to decide this appeal comes from section 189(1)(g) of the *Metis Settlements Act* (the Act), [RSA 2004] and Surface Lease #SL-93-BL-03. The former provides that the Tribunal can decide a matter when all parties agree in writing that it should decide the matter, and the latter provides written consent that if a lessee, General Council, the Settlement and Occupant cannot agree on compensation, the matter will be put to the Appeal Tribunal. Combined with the written appeal from the Land Trustee, this Panel is satisfied it has jurisdiction to decide this compensation dispute.

1.2 Evidence before the Panel

Documentary Evidence

A hearing package was compiled and provided to the parties and made part of the hearing. Materials from the hearing package form part of the evidence, findings of fact, and analysis in this decision.

In this regard, this Panel notes that an allocation interest for the NE-19-064-17-4 was recorded on November 1, 1991 in the name of Louis F. Blyan. On May 31, 1995 he received Metis Title to this same parcel of land, and his allocation was cancelled.

It was further noted that Louis F. Blyan died on July 12, 1996.

On July 11, 1997, the parcel was registered in the name of Joseph D. Blyan as the Land Trustee.

On April 22, 2002, Plan 900324 was registered at the Metis Settlements Land Registry which created two Metis Titles, NE-19-064-17-4 (Remainder) and 900324-00-01 (10 acres).

On September 10, 2002, Buffalo Lake Metis Settlement revoked the authority of Joseph D. Blyan to act as Land Trustee for the Metis Title in the NE-19-064-17-4.

On September 16, 2004, the Metis Title for 900324-00-01 (10 Acres) was registered to Priscilla Howse.

On February 5, 2008, Buffalo Lake Metis Settlement, Land Trustee for the NE-19-064-17-4 transferred the trusteeship to Joseph D. Blyan.

On March 27, 2008 Joseph D. Blyan submitted a written appeal on behalf of the Estate of the Louis F. Blyan for compensation dating back to November 24, 1993. This compensation is being sought because he believed that the access road to the well site was not built on the road allowance, but actually used an existing trail within the north boundary of the land of his late father.

Joseph D. Blyan, (Land Trustee)

Joseph D. Blyan testified that he became aware that the access road to the well site was going through his father's land about two years ago and not on the road allowance which had been commonly believed. He said he found out about this through the Settlement surveyor, Mr. Dean Howse.

Joseph D. Blyan stated that the leadership of the Settlement should be held responsible for keeping Settlement members informed of developments affecting their interests in land. He also said he believed Council had not acted in the best interests of the Blyan family.

Joseph D. Blyan testified that the "old road" located on a cut line on the land at issue was abandoned a year ago, and there is no dispute about the current location of the road because it is not on any of the Blyan property. He further testified that there were no other improvements on the land at issue.

Mr. Emile Blyan (Affected Party)

Emile Blyan, brother of the Land Trustee, testified that the "old road" was built on the land while his father Louis F. Blyan was still alive.

BLMS Council (Respondent)

BLMS Finance Clerk, Deana Auger, testified that in 1993 the Oil Company [then Renaissance Energy Inc.] began to pay compensation under Surface Lease #SL-93-BL-03 to the Buffalo Lake Metis Settlement. The compensation was paid for usage of what was believed to be access on a road allowance, which had been surveyed by an Alberta Land Surveyor, and attached to the lease (see Plan 5001709).

BLMS Council Member, Horace Patenaude, testified that the Settlement had no capacity in 1993 to do surveys and as a consequence relied on oil companies to do this work. He further stated that the oil company was told to stay on the road allowance and the survey indicated that the oil company did. Council was of the belief that the oil company was using a road allowance as access and this is why no compensation was ever paid to Louis F. Blyan.

Mr. Patenaude testified that two years ago Rocky River Petroleum Ltd. took over the lease and it was resurveyed. The survey discovered that the existing lease was not on a road allowance but on land owned by the Estate of Louis F. Blyan. When this discovery was made Council informed John Prevost of Rocky River Petroleum Ltd. that the access they were using was not theirs to use and that they were trespassing on the Blyan property.

Mr. Patenaude stated that an agreement was signed in 2007 with Rocky River Petroleum Ltd. for the road allowance it was using and the Buffalo Lake Metis Settlement in turn received compensation from Rocky River Petroleum Ltd.

However, a sketch done by the MMM Group, Job No. 2000.07.03 dated June 11, 2007 was reviewed with Council at the hearing, and it shows that the access road was actually within the boundary of the NE-19-064-17-4 and not on the road allowance. As indicated on the sketch, the access road encroaches on Louis F. Blyan's land for approximately 0.85 kms.

Mr. Patenaude testified that Al-Pac built a "new" road on the road allowance in 2008 and this new road is being used by Rocky River Petroleum Ltd.

Mr. Patenaude also testified that as required by Settlement By-Law 004/04/08 (adopted on May 6, 2008) and its predecessor By-Law 001-05, when the Settlement receives compensation for an access road on a member's property the Settlement's revenue sharing formula for compensation was 80% to the owner and 20% to the Settlement. This is consistent with Settlement By-Law 004/04/08 adopted on May 6, 2008 and was consistent with previous By-Law 001-05.

Rocky River Petroleum Ltd. (Respondent)

John Prevost testified that the old road was anything but straight and meandered to the site along the north boundary of the property. It was not a straight line access as set out in Dean Howse's plan.

Surface Lease #SL-93-BL-03 covers the land at issue which is currently held by Rocky River Petroleum Ltd. John Prevost maintains that Rocky River Petroleum Ltd. has followed through on all of its obligations and commitments in the lease.

1.3 Findings of Fact

The Panel finds the following evidence to be true on the balance of probabilities:

- The dispute involves the NE-19-064-17-4, to which Louis F. Blyan was the occupant.
- Metis Settlements General Council, Buffalo Lake Metis Settlement, Laverne Reid, and Marty Howse entered into Surface Lease #SL-93-BL-03 for well site 6-19-64-17-4 and an access road with Renaissance Energy Inc. on November 24, 1993.
- A survey of the area was done by J. Stuart Engineering and Surveying Ltd. documented the access road in the road allowance on Plan 5001709, which is attached to and forms part of Surface Lease #SL-93-BL-03.
- A request to register the surface lease / plan interest was made on October 7, 1994. The interest was registered with the Metis Settlements Land Registry on October 26, 1994.
- Louis F. Blyan died on July 12, 1996.

- The NE-19-064-17-4 was registered in the name of Joseph D. Blyan as the Land Trustee on July 11, 1997.
- On April 22, 2002, Plan 900324 was registered at the Metis Settlements Land Registry, which created two Metis Titles: 900324-00-01 (10 acres) and the NE-19-064-17-4 (Remainder).
- On September 10, 2002, Buffalo Lake Metis Settlement revoked the authority of Joseph D. Blyan to act as Land Trustee for the Metis Title in the NE-19-064-17-4.
- On September 16, 2004, the Metis Title for 900324-00-01 (10 Acres) was registered to Priscilla Howse.
- On February 5, 2008, Buffalo Lake Metis Settlement, Land Trustee for the NE-19-064-17-4 transferred the trusteeship to Joseph D. Blyan.
- On March 27, 2008 Joseph D. Blyan submitted a written appeal on behalf of the Estate of the Louis F. Blyan for compensation dating back to November 24, 1993. This compensation is being sought because he believed that the access road to the well site was not built on the road allowance, but actually used an existing trail within the north boundary of the land of his late father.
- Since 1993, all annual compensation payments under Surface Lease #SL-93-BL-03 for usage of the access road in the road allowance (sic) have been made to and received by Buffalo Lake Metis Settlement. The rate for the access road was \$295.00/km. The rate increased by 10% in 2003.
- The sketch by the MMM Group, Job No. 2000.07.03 dated June 11, 2007 was reviewed with Council at the hearing, and it shows that the access road was actually within the boundary of the NE-19-064-17-4 and not on the road allowance. In this regard, the Panel accepts that part of the road used by Rocky River Petroleum Ltd. to access its well site ran through Louis F. Blyan's property for 0.85 kms.
- In 2008, Al-Pac built a road within the road allowance adjoining the North Boundary of NE-19-064-17-4 and there is no longer any use being made by Rocky River Petroleum Ltd. of the road running through the land in question.

1.4 Analysis/Reasons for Decision

Evidence presented shows that the operator (Rocky River Petroleum Inc.) entered onto the land in question without the consent of the occupant, Louis F. Blyan. This contravenes section 114(2)(b) of the Act, which reads as follows:

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

...

- 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 to the parcels under an order of the Land Access Panel.

This section places an onus on operators to not only seek out the consent of occupants to access lands (or a right of entry order), but makes it their duty to ensure their operations are carried out on lands where such consent, or order, has been granted.

While it is an operator's responsibility to ensure its operations match the area in the lease agreement, it cannot be said that an operator should pay more compensation than it already has. In this case, the compensation paid was based on length of roadway. This length did not change even though there was a deviation in the route.

Put another way, the operator paid for the 0.85 kms of access road, it simply paid it to the wrong person. Should the operator be made to pay twice for its oversight? Under different circumstances, the answer might be yes, but given its reliance on the original survey, the Panel is not inclined to make such a finding in this case.

Since BLMS received the compensation for the 0.85 kms stretch, should it be ordered to pay that money to the Louis F. Blyan estate? On the face of it, the answer seems to be yes, it should pay. Firstly, BLMS received payment for something it had no right to receive payment for (at least no right beyond the 20% it receives under the Compensation Bylaw). In short, it is unfair for one party to benefit at the expense of another, and this Panel has a duty to ensure that its remedies are fair in all circumstances.

Secondly, despite its lack of capacity in 1993 to do survey work, BLMS had and has some responsibility to ensure proper oversight of operations on Settlement lands. This responsibility sharpened when it took over land trusteeship duties for Louis F. Blyan's land. Thus, whether it knew that the operations encroached on the land, BLMS, through Council, had the means and the responsibility to make itself aware of the breach and to then take appropriate action.

Ultimately, appropriate action was taken in 2008 when access to the well site was corrected to fall into the confines of the proper road allowance. However, this action only addresses the access issue, and not the compensation issue. BLMS still received 15 years worth of payments to which it was not fully entitled.

Before ordering that payment be made, though, this Panel must also consider the role and duties of Joseph D. Blyan as Land Trustee. In this regard, Joseph D. Blyan was first named as the Land Trustee on August 6, 1997. If it holds true that BLMS has an overarching duty to ensure that oil and gas work is being conducted in a manner consistent with lease agreements and entry orders, and this duty sharpened when it took over as Land Trustee for Louis F. Blyan's estate, it must also hold true that Joseph D. Blyan had certain responsibilities to learn what activity was taking place on his later father's land, and to address that activity.

It is a Land Trustee's duty to make themselves aware of circumstances affecting the estate and the proper administration of that estate.

Could Joseph D. Blyan have made himself aware of the encroachment onto his father's land in 1997? He might have done so by simply touring the land and taking note of where the access road lay. This exercise—touring the land and taking note of activity in or around the land—should be standard practice for all land trustees. It should also be standard practice for all land trustees to meet with Settlement Council, or Settlement Land Clerks, to discuss what activity is taking place in or around the land.

However, it is not obvious that touring the land or talking the matter over with Settlement Council or staff would have shed light on the encroachment. This is so because it does not seem that this particular encroachment was plainly visible to those without survey skills. Nor was it known for certain until such time as the "sketch" was completed in June 11, 2007 by the MMM Group showing that the access road actually ran for 0.85 kms within the boundary of the NE-19-064-17-4 and not on the road allowance.

Of course, another consideration is that BLMS Council revoked Joseph D. Blyan's trusteeship in September 2002. When trusteeship was transferred back to Joseph D. Blyan in February 2008, he acted on the "new" information and filed an appeal with MSAT in a timely manner.

Given the overall circumstances at hand, it would be unfair to transfer the burden of ensuring the project was taking place within the scope of the lease agreement to the original Land Trustee, Joseph D. Blyan.

Finally, this Panel has not been made aware of any statutory limitation for its ability to redirect compensation payments.

This Panel is therefore of the opinion that BLMS should transfer \$3,129.00 to the Louis F. Blyan Estate. This amount represents the money that would have been paid to Louis F. Blyan, or his estate, had proper oversight taken place and the encroachment been immediately identified:

Year	Amount ¹	\$ to Blyan @ 80%	\$ to BLMS @ 20%
1994	250.75	\$200.60	50.15
1995	250.75	\$200.60	50.15
1996	250.75	\$200.60	50.15
1997	250.75	\$200.60	50.15
1998	250.75	\$200.60	50.15
1999	250.75	\$200.60	50.15
2000	250.75	\$200.60	50.15
2001	250.75	\$200.60	50.15
2002	250.75	\$200.60	50.15
2003	275.75	\$220.60	55.15
2004	275.75	\$220.60	55.15
2005	275.75	\$220.60	55.15
2006	275.75	\$220.60	55.15
2007	275.75	\$220.60	55.15
2008	275.75	\$220.60	55.15
Total		\$3,129.00	\$782.25

Given the general lack of capacity, and the honest nature of this mistake, the Panel does not think interest should be paid on the \$3,129.00 payable to Louis F. Blyan's estate.

1.5 Decision

BLMS is ordered to transfer \$3,129.00 to the Louis F. Blyan Estate by no later than 60 days of the issuance of this Order.

Dated in the City of Edmonton in the Province of Alberta on the 3rd day of June 2009



Allan Lamouche,
Panel Chair

¹ Rate of Compensation: \$295.00/km x 0.85 km. Increase of 10% in 2003.