Fishing Lake Metis Settlement v. Metis Settlements Appeal Tribunal Land Access Panel, 2003 ABCA 143

Date: 20030508
Docket: 9803-0198-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE CONRAD
THE HONOURABLE MR. JUSTICE WITTMANN
THE HONOURABLE MADAM JUSTICE KENNY

IN THE MATTER OF THE *METIS SETTLEMENTS ACT,*
R.S.A. 1980, c. M-14.3 AS AMENDED

AND IN THE MATTER OF AN ORDER OF THE
METIS SETTLEMENTS APPEAL TRIBUNAL LAND ACCESS PANEL
DATED MARCH 25, 1998, IDENTIFIED AS MSAT LAP ORDER NO. 10

BETWEEN:

FISHING LAKE METIS SETTLEMENT

APPELLANT

- and -

METIS SETTLEMENTS APPEAL TRIBUNAL LAND ACCESS
PANEL, METIS SETTLEMENTS GENERAL COUNCIL,
and IMPERIAL OIL RESOURCES LIMITED

RESPONDENTS

APPEAL FROM THE ORDER OF
THE METIS SETTLEMENTS APPEAL TRIBUNAL LAND ACCESS PANEL
DATED MARCH 25, 1998

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE CONRAD
CONCURRED IN BY THE HONOURABLE MR. JUSTICE WITTMANN
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE KENNY

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REASONS FOR JUDGMENT OF THE HONOURABLE
MADAM JUSTICE CONRAD

INTRODUCTION

[1] This appeal relates to the review of compensation rates for right of entry orders under the *Metis Settlements Act,* R.S.A. 1990, c. M-14.3 (*"MSA"*) and the *Surface Rights Act*, R.S.A. 1983, c. S-27.1 ("*SRA*"). It engages questions of retroactive compensation, reasonable time to request a review, and the right to review for terminated right of entry orders ("REOs").

[2] Imperial Oil Resources Limited ("Imperial") held several REOs on the Fishing Lake Metis Settlement ("the Settlement"). It failed to provide notice to the Settlement of the Settlement's right to request a review of compensation rates as it was required to do by statute. Both the *MSA* and the *SRA* allow the Settlement to request a review within a reasonable time of such failure. In many cases, the Settlement did not request a review until several years after Imperial's first failure to provide notice. Many of the REOs had been terminated prior to notice or hearing. Under section 125 of the *MSA*, all reviews are conducted by the Land Access Panel of the Metis Settlements Appeal Tribunal ("the Panel").

[3] The Panel found it was not reasonable to review rates once a 5 year compensation period had passed. Moreover, it concluded that notice 4 years into a 5 year compensation period was not reasonable. Finally, it declined to hold compensation reviews for terminated REOs.

ISSUES

[4] Leave to appeal was granted on the following issues:

1. Did the Panel err by finding the Settlement was not entitled to compensation reviews for past compensation periods?

2. Did the Panel err in determining the length of the compensation periods applicable to each REO?

3. Did the Panel err in determining that the Settlement was not entitled to compensation reviews for terminated REOs?

DISPOSITION

[5] The Panel did not err. It determined, correctly, that the compensation review period under the *MSA* is the same 5 year review period contained in the *SRA*. It also reviewed each of the REOs individually. It was alive to the issue of reasonable notice and did not err in

concluding 4 years was too long. It exercised its discretion properly in determining what was reasonable notice. Finally, the Panel did not err in refusing to consider the terminated REOs.

BACKGROUND

[6] The legislative schemes under both the *SRA* and *MSA* enable operators and sub-surface mineral lease holders to enter property owned or occupied by someone else for the purpose of developing the underlying mineral interests. The holder of an REO must pay compensation to the occupier of the land for the right of access. In most of Alberta, the Surface Rights Board grants REOs, sets appropriate compensation, and periodically reviews the compensation rate according to the terms of the *SRA*. In 1983, the *SRA* was amended to provide a window of opportunity for the periodic review of compensation rates every 5 years.

[7] Prior to November 1, 1990, the Metis Settlement Land was governed by the *Metis Betterment Act*, R.S.A. 1970, c. 233 (The "*MBA*"). Pursuant to that Act, various Crown Ministers were responsible for the administration of the Settlements. On November 1, 1990, jurisdiction over Metis Settlement lands was transferred to the Metis Settlements Appeal Tribunal as part of the Alberta Government's plan to grant a measure of self-determination to Alberta's Metis. On that date, the Panel became responsible for issuing new REOs, on Metis Settlement lands, and for conducting compensation reviews on REOs previously granted by the Surface Rights Board.

[8] Both the *SRA* and the *MSA* provide for notice to an occupant and owner of its right to apply for a review of compensation. Both also provide that, where an operator fails to provide notice, the occupant or owner has a right to apply for a review within a reasonable time of such failure.

[9] Imperial held a number of REOs relating to Settlement land. Since November 1, 1990, Imperial had, with respect to many of the REOs, provided notice to various persons, including the Minister responsible for the Settlement under the *MBA*, the actual occupants of the land, and persons entitled to receive the compensation (including the Metis Betterment Trust Fund). However, Imperial failed to give the proper notice to the Settlement for 17 of the 20 REOs involved here.

[10] Both parties argued that confusion arose from the transfer of jurisdiction. The Panel concluded that Imperial's failure to give notice was not deliberate. Imperial was apparently confused about who required notice under the new legislation. The Settlement argued that lack of administrative staff and skills during the first few years of self-government contributed to its failure to request a review on a more timely basis. The handling of the claims by the Minister responsible for the Settlement under the *MBA* is not in issue here.

[11] There were more than 100 REOs on Settlement lands held by a variety of operators. Between 1992 and 1994, the Settlement not only notified, but resolved, its position with other operators. Yet, it was not until 1995 that the Settlement sent a letter to Imperial, attempting to initiate the review process, relying on section 128 of the *MSA* which allows a lessor or occupant to begin the process where an obligated operator, like Imperial, has failed to give proper notice. The ensuing negotiations failed, however, and on October 23, 1996, the Settlement applied to the Panel to fix the rate of compensation on the REOs. Significantly, by the time of this application, 11 of the REOs had been terminated.

[12] The Panel issued a decision on March 25, 1998. Section 204(1) of the *MSA* allows an aggrieved party to apply for leave to appeal a decision of the Panel. The section reads:

> An appeal from a decision of the Appeal Tribunal on a question of law or a question of jurisdiction lies to the Court of Appeal after leave to appeal has been obtained.

[13] Leave to appeal was granted by this court on December 16, 1998.

RELEVANT FACTS

[14] The parties take no issue with the Panel's findings of fact. It is common ground that Imperial's REOs were granted between 1966 and 1989. The chart below sets out the details of the subject REOs, including the date they were originally granted and their "status". Briefly stated, there were 3 types of REOs involved: terminated, reclaimed and ongoing. At the time of the Panel hearing, termination orders had been issued for 11 of the 20 REOs. Imperial had completed its operations, completed reclamation and terminated the REOs with the Settlement's consent. Reclamation certificates had been issued for 2 of the REOs. On these REOs, Imperial had completed operations and reclamation, but the Settlement had not consented to termination. Seven of the REOs were ongoing and continued to be used by Imperial.

REO	Date Granted	Status
1910/66	November 30, 1966	ongoing
E848/79	July 25, 1981	ongoing
E2824/84	October 5, 1984	reclamation certificate issued
E2826/84	October 5, 1984	termination order - Jan. 12, 1994
E2828/84	October 5, 1984	termination order - Jan. 12, 1996
E2829/84	October 5, 1984	termination order - Jan. 12, 1994
E2830/84	October 5, 1984	reclamation certificate issued
E2831/84	October 5, 1984	termination order - Jan. 12, 1996

E2978/84	October 19, 1984	ongoing
E413/85	February 25, 1985	termination order - Jan. 12, 1994
E415/85	February 25, 1985	termination order - Jan. 12, 1994
E2640/85	November 14, 1985	termination order - Jan. 12, 1994
E2642/85	November 14, 1985	ongoing
E2643/85	November 14, 1985	termination order - Jan. 12, 1996
E2645/85	November 14, 1985	termination order - Jan. 12, 1994
0059/86	January 13, 1986	ongoing
2015/86	October 20, 1986	ongoing
0268/88	February 4, 1988	termination order - Jan. 12, 1996
0269/88	February 4, 1988	termination order - Jan. 12, 1996
2086/89	August 11, 1989	ongoing (not appealed)

STATUTORY PROVISIONS

[15] The scheme for compensation review under the *MSA* is contained in sections 124-28: These sections read:

> 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.
>
> (2) If either party indicates that they wish to have the rate of compensation reviewed or fixed, the parties must enter into negotiations in good faith for that purpose.
>
> 125 If within 12 months of the date of a notice given under section 124 the parties have not agreed on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may apply to the Land Access Panel for a hearing to determine the rate of compensation.
>
> 126 The Land Access Panel must hear the application and must make an order fixing, confirming or varying the rate of compensation payable

> commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under section 124.
>
> 127 When the Land Access Panel makes an order varying or fixing the rate of compensation for a surface lease, the order operates to amend the surface lease in respect of the rate of compensation under it, despite anything contained in the surface lease.
>
> 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,
>
> (a) sections 124(2) to 127 apply,
>
> (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, and
>
> (c) the Panel may make any order regarding the payment of interest that it considers appropriate.

THE PANEL'S DECISION

Effect of Termination Orders

[16] The Panel first considered the 11 REOs terminated prior to October 13, 1996. The Panel held that it did not have jurisdiction to order compensation for terminated orders. It stated [A.B. 268]:

> Once an operator's legal interest in the lands is terminated, the Land Access Panel no longer has any jurisdiction over the former right of entry order, and an occupant is no longer eligible to apply to the Panel for past compensation reviews.

Even if it had jurisdiction, the Panel concluded that the Settlement was barred from claiming compensation where it had signed consent forms providing it would not make further claims for compensation. The Panel stated:

> The Panel decides that the Settlement Council cannot make a claim for compensation when they have consented to a termination order on the specific terms that they would make no further claim to compensation.

Reasonable time

[17] The Panel concluded the *MSA* established a framework for reviewing compensation every 5 years, with the new rate commencing at the beginning of the next compensation period. It noted that the process of notice set out under the *MSA* was "essentially the same" as the process set out by the *SRA*. The Panel then considered the issue of a "reasonable time" for providing notice, given Imperial's failure to provide notice of the Settlement's right to seek a variation of compensation. The Panel concluded that sections 124 to 128 of the *MSA* should be interpreted, at a minimum, to suggest that 1 year is a "reasonable time" for the Settlement to provide notice after the operator fails to provide notice. Noting the confused state of affairs following the transfer of jurisdiction under the *MSA*, the Panel concluded that a "reasonable grace period" of more than 1 year was warranted. It specifically noted that the time line suggested by the *MSA* should be flexible to account for circumstances where both parties were learning to work with the *MSA*.

[18] The Panel went on to examine the specific circumstances relating to each REO. For 3 of the ongoing REOs, 1910/66, E848/79, E2978/84, the Settlement was seeking a review of compensation rates for past compensation periods. The Panel found that reviews were appropriate where the Settlement's notice fell 1 or 2 years into the next compensation period. It decided, however, that it would not review the rates for compensation periods that had already expired by the time the Settlement gave notice to Imperial. In each of these cases, the Panel stated that "[t]he panel does not find it reasonable to review rates once a 5 year compensation period has passed." [A.B. 270]

[19] The Panel also refused to review 3 compensation orders where the Settlement's notice was not given until about 4 years into the new 5 year compensation period, finding that "it would be unfair to conduct a review of rates 4 years into the 5 year compensation agreement... ." It noted that to allow a review back that far would "defeat the purpose of certainty in the 5 year compensation rate contract... ." [A.B. 271]

[20] The Panel found further that the Settlement was entitled to a compensation review for REO 2086/89. This finding was not appealed.

STANDARD OF REVIEW

[21] There are 3 standards for judicial review of administrative decisions: correctness, reasonableness *simpliciter* and patent unreasonableness: ***The Law Society of New Brunswick v.***

Michael A. A. Ryan, 2003 SCC 20. File No: 28639. The appropriate standard of review to be applied to the decision of an administrative tribunal must be determined by applying the "pragmatic and functional approach" as set out by the Supreme Court of Canada in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46. Four factors must be weighed against each other: (a) the presence or absence of a privative clause; (b) the expertise of the tribunal; (c) the purpose of the statute and the provision in particular; and (d) the nature of the problem.

[22] In the present case, the statute contains both a right of appeal to this court on matters of law and jurisdiction (with the power to "confirm, vary or reverse" a decision of the Panel and to draw the requisite inferences), and a full privative clause that insulates any remaining issues from review. The Supreme Court, in ***Pushpanathan***, *supra*, described such provisions as the opposite ends of the spectrum of curial deference. Bastarache J. stated, at para. 30:

> [T]he presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question. ... At the other end of the spectrum is a clause in an Act permitting appeals, which is a factor suggesting a more searching standard of review.

[23] In light of these provisions, the Panel's expertise, and the nature of the specific issues before it, I am satisfied that determining the length of the compensation review period, and whether the terminated REOs could be reviewed, are matters of law and/or jurisdiction and the Panel is not entitled to deference. On the other hand, determining a reasonable period under section 128 of the *MSA* is a matter of delegated discretion and the Panel's decision can only be upset if it was patently reasonable.

ANALYSIS

Issues Relating to the Non-terminated REOs

[24] The Settlement raises two arguments with respect to the non-terminated REOs. First, it argues the Panel applied a blanket rule that it would not review past compensation periods. Second, the Settlement says the Panel erred in finding that the length of the compensation periods under the *MSA* were the same as those under the *SRA*. As the Panel concluded that the *MSA* and the *SRA* were essentially the same, and as the length of the compensation periods may have affected its decision on reasonableness, I will address the latter argument first.

(a) Length of each new compensation term

[25] The relevant section of the *MSA* provides:

> 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 ...

[26] The Panel determined that the compensation review scheme under the *MSA* was essentially the same as that found in the *SRA*. Thus, it held [A.B. 269]:

> The *Act* sets out a framework for conducting compensation reviews with time periods of 5 years and 12 months. Compensation is reviewable every 5 years.

[27] The Settlement argues, however, that the scheme contained in the *MSA* is different from the one found in the *SRA*. According to the Settlement, the *SRA* creates a 5 year term throughout, whereas, the *MSA* creates an initial review period of 5 years followed by 4 year review periods. The Settlement submits that the words are clear and unambiguous and that "every 4th anniversary date" can have but one meaning - every 4 years from the date the REO was made.

[28] I accept as a fundamental principle of statutory interpretation that words are to be read in their entire context, and in their grammatical and ordinary sense – harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: ***Bell Express Vu Limited Partnership v. Rex***, [2002] S.C.J. No. 43 at para. 26., 2002 SCC 42. But I do not accept that the application of that principle points clearly to the Settlement's conclusion.

[29] Imperial's REOs were granted under the *SRA*. The sections of that Act that deal with compensation review read:

> 27(4) An operator shall give a notice to the lessor or respondent, as the case may be,
>
> > (a) on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or the right of entry order was made, as the case may be, where the term of the surface lease commenced or the right of entry order was made on or after July 1, 1983, or ...
>
> (5) A notice under subsection (4) shall state

> (a) that the operator wishes to have the rate of compensation reviewed,
>
> (b) that the lessor or respondent, as the case may be, has a right to have the rate of compensation reviewed, or
>
> (c) ...
>
> in respect of the compensation years of the term subsequent to the year in which notice is given.
>
> ...
>
> (14) The operator shall give a notice that complies with subsection (5) to the other party on or within 30 days **after every 5th anniversary date after the date notice should have been given** under subsection (4) for as long as the surface lease or right of entry order, as the case may be, is in effect and subsections (6) to (13) apply to such a notice. [emphasis added]

[30] Thus, initially an obligated operator must give notice for compensation review within 30 days of the 4th anniversary from the date the REO was made. Any new compensation order begins at the end of year 5. After that, the obligated operator must continue to give notice every 5th anniversary from the date notice should have been given under subsection 4. The result is a continuous process of compensation review occurring every 5 years.

[31] In my view, the Legislature was attempting to incorporate the practice described in sections 27(4) and (14) of the *SRA* into one section (section 124 of the *MSA*), by setting up 5 year terms and requiring notice every 4th anniversary from the beginning of such term. Unfortunately, in its effort to simplify, the Legislature failed to provide the trigger event for the 4 year countdown. The Panel's conclusion, however, that section 124 creates an initial 5 year term, and future 4th anniversaries to be counted from the beginning of the new 5 year term, is logical nonetheless.

[32] There are a number of reasons for this. First, it does not make interpretive sense to distinguish between the compensation review schemes set out in the *MSA* and the *SRA*. The *SRA* was the governing statute at the time the REOs were granted. The purpose of the *MSA* was to grant a degree of self-governance to the Settlements. A reading of the relevant terms of the 2 statutes, which in most respects are identical, indicates that the Legislature intended to simply transfer jurisdiction for dealing with the granting and review of REOs to the Panel. There is nothing to suggest that it intended to change the way in which compensation reviews are done.

[33] Second, an ongoing 5 year compensation review period can be implied from the language of the statute. The *MSA* provides that the first notice take place 4 years into the REO (the first 4th anniversary). Where there is a hearing, section 126 requires that the Panel make "an order fixing, confirming, or varying the rate of compensation payable commencing on the **anniversary date ... next** following the date notice was given under section 124." [emphasis added] That results in the first new compensation rate commencing at the end of the 5th year (or beginning of the 6th year). In my view, the logical intent of "every 4th anniversary" was to continue the countdown commenced under the *SRA* as at the beginning of every new 5 year term.

[34] In short, a notice is due within 30 days of every 4th anniversary from the beginning of every 5 year term. Notices would be due on the 4th, 9th, 14th, with start dates on the 5th, 10th, 15th, etc., from the beginning of the REO. This interpretation provides internal consistency, resulting in all new terms being 5 years, as opposed to one 5 year term and 4 year terms thereafter. Most importantly, it is consistent with the scheme under the *SRA*. From a practical point of view, it is the only approach which makes sense considering that at the transition date some of the REOs would have been in their 2nd or 3rd year. The Settlement's interpretation would have the court re-calculate when notice should have been given in the past. The consistent interpretation simply continues the REOs with reviews every 5 years.

[35] Third, previous decisions of the Panel have also held that "[t]he rental review scheme set out in ... sections 124 through 128 of the *MSA*, is for a five-year review by the Land Access Panel.": ***Husky Oil Ltd. v. Elizabeth Metis Settlement,*** [1996] A.M.S.T.A.D. No. 26 (LAP Order No. 1) at para. 50. While decisions of the Panel are not binding on this court, they are helpful and informative as to the industry practice. Its view of the statutory regime under the *MSA* is entirely consistent with the wording and intent of the Act.

[36] Finally, a search for legislative intent should consider consistency between various statutes relating to similar subject matter. Here, both the *SRA* and the *MSA* deal with regulatory schemes relating to the review of compensation rates for REOs in the resource industry. No policy reasons are offered for different treatment. The provisions of the *MSA* should be interpreted in a broad and purposive manner in relation to the treatment of REOs within the industry, including their treatment under the *SRA* and in relation to the rest of the scheme created under Division 7 of the *MSA*. In ***Giant Grosmont Petroleums Ltd.* v. *Gulf Canada Resources Ltd.***, [2001] A.B.C.A. 174 (C.A.) at para. 21, this court considered an assertion made by Sullivan, R. in *Driedger On The Construction of Statutes*, 3d ed. (Vancouver: Butterworths, 1994) at 285:

> Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a

> coherent and consistent treatment of the subject. The governing principle was stated by Lord Mansfield in *R. v. Loxdale*:
>
> > Where there are different statutes in *pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.
>
> In effect, the several statutes are construed together as if they constituted a single Act and the presumptions of coherence and consistent expression apply to these statutes as if they were part of a single Act.
>
> ***Acts constitute a single scheme***. Where two or more statutes are enacted by a legislature on the same subject, they are presumed to operate together to create a single regulatory regime. In such cases, the provisions of each statute must be read in the context of the others and consideration must be given to their role in the overall scheme. ...

[37] In summary, the Panel correctly determined that the schemes under the *SRA* and the *MSA* are "essentially the same". The statute creates equal 5 year terms for the purpose of compensation review.

(b) Did the Panel err by finding the Settlement was not entitled to compensation reviews for past compensation periods?

[38] To satisfy the requirements of section 124 of the *MSA*, Imperial was obliged to give notice to the Settlement of the right to seek compensation review of the existing REOs. It failed to do this. In some cases, its defalcation extended well into the next compensation period. It did not give notice on the 4th year, nor the 9th year of the REO. When the Settlement decided to exercise its right (section 128) to give notice to Imperial, it asked that the compensation review include consideration of these past compensation periods.

[39] The Panel was required, therefore, to interpret section 128 of the *MSA* which gives a remedy to an occupant when an obligated operator, like Imperial, fails to give notice. It provides:

> 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,

(a) sections 124(2) to 127 apply,

(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, and

(c) the Panel may make any order regarding the payment of interest that it considers appropriate.

[40] Thus, the question for the Panel was whether the Settlement exercised its right within a reasonable time. It concluded that under normal circumstances the statute gives an occupant a 1 year grace period - from the time an operator should have given notice under section 124 to the end of the compensation period. It held, however, that the facts and circumstances here justified an extension of that time because of the confusion created by the transfer of responsibility in 1990. It did not, however, find it reasonable to consider these applications where compensation was sought beyond the 5 year compensation period. In addition, the Panel decided that it was not reasonable to go back 4 years because this "would defeat the purpose of certainty in the 5 year compensation rate contract between the operator and occupant."[A.B. 271]

[41] The Settlement submits that by refusing to consider compensation review for past compensation periods the Panel erred by not considering what was "reasonable" in each case. Instead, it imposed a blanket rule and, by doing so, declined jurisdiction or fettered its discretion. I disagree. A careful review of the Panel's reasons demonstrates that it was alive to the issue of reasonable time. It considered each REO separately and made its decision as to reasonableness based on the circumstances of the case. Reasonable time is a question of fact, depending on all the circumstances, including the scheme set out in the statute. The question is an exercise of statutory discretion and falls squarely within the Panel's jurisdiction. The Panel can decide what is reasonable, and the mere fact it considers reasonable time in general terms does not amount to declining jurisdiction.

[42] Moreover, the reasons put forward by both parties as an excuse for the failure or delay in giving notice were essentially the same for all cases, namely, the difficulties arising as a result of the transfer of jurisdiction under the *MSA*. It makes sense, therefore, that the Panel would deal in general terms and come to a similar decision with respect to each of the affected REOs.

[43] Furthermore, this is forward looking legislation. The purpose of an REO is to permit the development of resources. Certainty and transferability are key requirements of that

industry. The Panel is responsible for balancing an assortment of interests including, but not limited to, a need for commercial certainty, and a need for consistency in its decisions.

[44] Finally, while it is argued that operators should not be rewarded for their failure to give notice, I note that the statute contemplates this failure and provides a remedy. Occupants and lessors must be taken to know their rights and must not simply sit on them. They must act within a reasonable time.

[45] I note that even where the notice is timely, the *MSA* makes it clear that where the occupant or owner (as opposed to the situation with the operator) applies for the variation, retroactivity of the new rate is also discretionary under section 128. Section 128 specifically excludes the application of section 126, which provides that a new rate **shall** commence as at the year following the notice where notice is provided by the owner under section 124. When the notice is provided by the occupant under section 128, the right to order retroactively is permissive only (**may**). No doubt the difference arises because of the short time frame (30 days 1 year before expiry of the current term) as opposed to the discretionary time limit afforded the occupant. It is a further indication that, in general, the legislation aims for timeliness and certainty.

[46] For all of these reasons, the Panel's decision was not patently unreasonable and hence is insulated from review.

[47] Although the Panel referred to a minimum 1 year grace period for notice, the reference to the 12 month period comes from section 125 which provides "[i]f within 12 months of the date a notice given under section 124 the parties have not agreed on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may apply to the Land Access Panel for a hearing... ." Section 125 does not deal with the timing of an occupant's notice. Rather, it suggests that notice and negotiation should take place within the 1 year from the date notice should have been provided. If not, the matter would be referred to the Panel. The real question, therefore, is whether the notice was brought within a reasonable time of the default. It may be that sometimes a reasonable time will be less than 1 year. In any event, reasonableness is a question for the Panel. Here the Panel exercised its discretion to allow a period longer than a year so it is unnecessary to decide this issue in this case.

[48] In summary, I find that the Panel considered the particular requests made with reference to the factual matrix presented, within the context and purpose of the Act. Having found considerable confusion following passage of the *MSA*, the Panel generously allowed reasonable notice up to 2 or 3 years after the Settlement was first entitled to give notice. In coming to its decision, it balanced the unique situation of the Settlement against other relevant factors, such as the desirability of commercial certainty. It did not err in principle and its decision is not patently unreasonable.

(c) The Terminated REOs

[49] The Panel held it did not have jurisdiction to review compensation for REOs terminated prior to October 23, 1996 – the date of the Settlement's application to the Panel for review. It held, as well, that even if it had jurisdiction the Settlement had abandoned any potential claims for compensation by signing a formal consent to termination of the REOs. The Settlement submits this was an error because (a) jurisdiction to review a compensation order only required that the Settlement provide notice to Imperial within a reasonable time; and (b) there was no legal force to the written consents.

[50] The Panel's jurisdiction to review compensation orders is set out in section 125 of the *MSA*, which applies in the present case due to the incorporating provisions of section 128. This section reads:

> 125 If within 12 months of the date of a notice given under section 124 the parties have not agreed on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may apply to the Land Access Panel for a hearing to determine the rate of compensation.

[51] This section contemplates that at the time application is made to the Panel there must be "parties" who have not yet agreed on a rate of compensation. "Parties" is defined in section 123(1)(c)(ii) as:

> with respect to the review or fixing of a rate of compensation under a compensation order, the obligated operator and the occupant;

[52] "Obligated operator" and "occupant" are also defined in the Act. "Obligated operator" is defined in section 123(1)(b). It reads:

> "obligated operator" means an existing mineral lease holder or an operator who is obligated to pay compensation under a surface lease, or who is obligated to pay compensation to an occupant under a compensation order,

[53] "Occupant" is defined in section 111(h). The section reads:

> "occupant" means
>
> (i) a settlement council,

> (ii) the person in actual possession of a parcel of patented land, and
>
> (iii) a person having a right or interest in patented land that is recorded in the Metis Settlements Land Registry;

[54] It is uncontested that the 11 REOs in dispute were all terminated prior to the date the Settlement applied to the Panel for compensation review. It follows that all of the related compensation orders had expired because, according to the wording of those orders, each was to last only as long as the related REO remained in effect. For example, Compensation order E3276/84 provides in Paragraph 2 that the operator shall pay ".....on or before the 5th day of October in each year thereafter for so long as the said order No.E2830/84 is in effect." Number E2830/84 is the right of entry order number.

[55] These facts, in the context of the provisions set out above, indicate that at the time the Settlement applied to the Panel to review compensation, Imperial was no longer an "obligated operator". It was no longer bound to pay compensation under a compensation order because the REO had been terminated. As a consequence, it was no longer a "party" under section 125 when the application for review was made on October 23, 1996. That interpretation is consistent with this being forward looking legislation.

[56] The Panel found, in the alternative, that even if it had jurisdiction to hear the application for compensation review of the terminated REOs, the Settlement was also bound by its signed consent to the termination of the various REOs. While these consents were not contractually binding, they indicate the Settlement has the opportunity to consider the effect the termination of the REOs might have, on any future application to the Panel for compensation review, before the REOs were actually terminated. This was something the Panel could have considered in exercising its discretion to grant compensation review in the event it had jurisdiction.

[57] I conclude, therefore, that the Panel did not err in finding it could not consider the Settlement's application to review compensation for the terminated REOs.

CONCLUSION

[58] For the various reasons set out above, the appeal is dismissed.

APPEAL HEARD on APRIL 12, 2002

REASONS FILED at EDMONTON, Alberta,
this 8th day of May, 2003

CONRAD J. A.

I concur:

WITTMANN J. A.

I concur:

KENNY J.