In the Court of Appeal of Alberta

Citation: Isbister v Metis Settlements Appeal Tribunal, 2015 ABCA 164

Date: 20150515
Docket: 1403-0103-AC
Registry: Edmonton

2015 ABCA 164 (CanLII)

Between:

Linda Isbister

Appellant

- and -

Metis Settlements Appeal Tribunal, Fishing Lake Metis Settlement, Metis Settlements General Council, Metis Settlements Land Registry

Respondents

- and -

Morris Aulotte

Respondent

Corrected judgment: A corrigendum was issued on May 28, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Russell Brown
The Honourable Madam Justice Joanne Veit

Memorandum of Judgment

Appeal from the Decision by

Metis Settlements Appeal Tribunal Order 254
Dated the 11th day of March, 2014

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Memorandum of Judgment

The Court:

Introduction

[1] The appellant, Linda Isbister, appeals with leave (granted in 2014 ABCA 193) from a decision of the Metis Settlements Appeal Tribunal (the "Tribunal"). The Tribunal had allowed the application of the respondent Morris Aulotte to revoke Isbister's membership in the Fishing Lake Metis Settlement (the "Settlement").

Background

Facts

[2] The Settlement is a corporation established by section 2(1) of the *Metis Settlements Act*, RSA 2000, c M-14.

[3] Aulotte is a member of the Settlement.

[4] Isbister lived on what is now the Settlement for most if not all of the first 22 years of her life – between 1948 and 1970, inclusive. In 1982, at the time of her marriage, she was registered as an Indian under what is now the *Indian Act*, RSC 1985, c I-5. She was then 35 years old. They divorced in 1992.

[5] The record is unclear as to just when Isbister was (and, conversely, was not) living on the Settlement after 1982. It is however clear that, at the time she applied for membership in the Settlement in November 2008, she was living on the Settlement. Indeed, she was serving as the Settlement administrator.

[6] Isbister's application for membership was successful. A membership bylaw was proposed, put to a secret ballot of the Settlement membership (who approved it by a vote of 49 in favour to 25 against), and passed three readings at the Settlement Council. It took effect December 10, 2008 as Fishing Lake Metis Settlement Bylaw 2008-0186 (the "Bylaw").

[7] While, again, the record is not entirely clear as to precise dates, it appears that Isbister left the Settlement at some point after obtaining Settlement membership. After an absence of approximately 2½ years, she then returned to the Settlement by some point in early 2013.

[8] By an appeal form filed at the Tribunal on May 23, 2013, Aulotte purported to appeal the approval by the Settlement of Isbister's membership application. Coming 4½ years after that approval, his appeal was *prima facie* brought out of time, since section 83(2) of the *Act* provides that an approval of an application for membership in a settlement may (subject to permission to

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appeal being granted by the Tribunal under section 83(3)) be appealed in writing to the Tribunal within 45 days of such approval. Aulotte explained that he did not appeal sooner because he had tried to raise this concern with the Settlement Council on other occasions without success, that he was not aware of the statutory appeal period, and that he had assumed Isbister's move from the Settlement effectively resolved the issue and that it was only her return that prompted his appeal.

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The Decision Below

[9] Before the Tribunal, Aulotte argued that, by reason of Isbister having registered as an Indian, section 75 of the *Act* renders Isbister ineligible for membership. Section 75(1) provides that, subject to (*inter alia*) subsection (2), a registered Indian is ineligible to apply for membership or to be recorded as a settlement member. Subsection (2) provides:

> An Indian registered under the *Indian Act* … may be approved as a settlement member if
>
> (a) the person was registered as an Indian … when less than 18 years old,
>
> (b) the person lived a substantial part of his or her childhood in the settlement area,
>
> (c) one or both parents of the person are, or at their death were, members of the settlement, and
>
> (d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.

[10] Aulotte's argument, put briefly, was that Isbister does not satisfy all of section 75(2)'s criteria because she was not less than 18 years old when she was registered as an Indian. It follows, he says, that Isbister was ineligible to apply for membership when she made her application in 2008.

[11] Relying on section 83(2), Isbister argued before the Tribunal that Aulotte's appeal was brought too late.

[12] The Tribunal granted leave to appeal, explaining briefly that it viewed "membership questions to be integral to the functioning of Metis [s]ettlements." It then considered its jurisdiction to hear an appeal from a grant of membership by bylaw, noting that, while section 245 of the *Act* permits an application within 2 months of the coming into force of a settlement bylaw to the Court of Queen's Bench to quash the bylaw for illegality, section 190(1)(i) provides "another concurrent route for settlement members to challenge the legality of a straight-forward membership bylaw and have it quashed or repealed on the basis that it was, and remains, illegal on

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its face ….” (The relevant portion of Section 190(1)(i) provides that the Appeal Tribunal "may, in respect of any matter before it, … amend, make or repeal a settlement bylaw to conform with … this or another enactment ….")

[13] Having concluded that section 190(1)(i) conferred jurisdiction upon it to quash or repeal the Bylaw, the Tribunal then disposed of Isbister's argument about timeliness, giving five reasons for extending time:

1. Isbister clearly did not qualify to submit an application for membership (since she had registered as an Indian after turning 18) and therefore did not qualify for membership under section 75(2);

2. Isbister failed in her duty as an administrator for the Settlement Council by even allowing "this type of application" to go forward;

3. It did not appear that Settlement members were not notified of the right of appeal or of the appeal period;

4. Aulotte was under the impression that Isbister had decided not to live on the Settlement; and

5. "The issue of membership lies at the heart of Metis identity".

[14] In light of those considerations, the Tribunal found that "extraordinary circumstances" existed in this case which supported extending the 45 day appeal period, and it relied upon section 202 of the *Act* to effect that extension. Section 202 states:

> When a matter before the Appeal Tribunal is, by this Act, or any other enactment or by any rule or decision of the Tribunal required to be done within a specified time, and if the circumstances of the case in its opinion so require, the Tribunal may, with or without notice, extend the time so specified or waive the requirement whether or not the time has expired.

[15] Turning to the merits of the appeal itself, the Tribunal concluded that the statutory language of section 75 clearly signifies that Isbister was not entitled to apply for membership in the Settlement because of her Indian status. It found that Isbister did not fall within the exception set out in section 75(2) because she had acquired Indian status through marriage after she reached 18 years of age. As a result, the Tribunal held that Isbister was ineligible to apply for membership back in 2008. She should not, the Tribunal elaborated, "be able to gain and keep membership by an illegal bylaw", elaborating that "erroneous approvals [of membership] cannot legally confer membership where the law prohibits such membership … [n]or can the elapse of time, even 4½ years, confer or perfect membership where the law expressly prohibits it." Given that section 72 deems a bylaw that is inconsistent with the *Act* to be of no effect to the extent of the inconsistency,

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the Tribunal exercised what it understood to be its authority under section 190(1)(i) to repeal the Bylaw, thereby terminating Isbister's membership. It added that there was no reason to remit the matter back to the Settlement for determination, since the statutory language was clear and any membership application filed by Isbister would inevitably lead to the same result as the Tribunal reached.

Grounds of Appeal

[16] Section 204(1) of the *Act* states that an appeal from a decision of the Tribunal on a question of law or a question of jurisdiction lies to the Court of Appeal after permission to appeal has been obtained.

[17] Leave to appeal was granted on the following questions of law or jurisdiction, which we have re-stated somewhat:

1. Did the Tribunal err in granting Aulotte an extension of time to appeal the the Bylaw?

2. Did the Tribunal err in granting what it called the "substance" of Aulotte's appeal by finding that it had jurisdiction under section 190(1) of the *Act* to repeal the Bylaw?

3. Did the Tribunal err in finding the Bylaw to be illegal?

4. Did the Tribunal err in concluding that there was no reason to return the matter to the Settlement for reconsideration?

Standard of Review

[18] The Settlement submits that question 1 raises a question of true jurisdiction, reviewable for correctness. It argues that the Tribunal's decision to extend the time for Aulotte to appeal entailed considering whether section 202 authorizes the Tribunal to do so *as a precondition* to deciding the subject matter of the appeal.

[19] Question 1 implicates the Tribunal's interpretation of its "home statute", which is presumptively reviewed on a reasonableness standard: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 30 and 49, [2011] 3 SCR 654 [*ATA*]; *Paddle Prairie Metis Settlement v Metis Settlements Appeal Tribunal*, 2012 ABCA 220 at para 17, [2012] AJ No 705 (QL). That presumption depends, however, upon the nature of the questions raised: *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at paras 36 and 45, [2015] SCJ No 16 (QL) [*Saguenay*]. Deference is not accorded where the question on appeal raises (*inter alia*) true questions of jurisdiction or *vires*, or a question regarding the jurisdictional lines between two or more competing specialized tribunals: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras 59 and 61, [2008] 1 SCR 190 [*Dunsmuir*].

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[20] While the substance of Isbister's arguments are not entirely clear, she appears to be arguing in places (and the Settlement clearly argues) that the Tribunal, in respect of the first ground of appeal, was required to determine explicitly whether its statutory grant of power gives it the authority to consider extending an appeal period. Neither Isbister nor the Settlement, however, dispute the Tribunal's authority to enter into that inquiry. The question raised is rather whether the Tribunal ought to have applied section 202 as it did to extend the appeal period. While it is true that, if the answer to that question is in the negative, then the Tribunal would have lacked authority to do what it did, it does not follow that the question is truly jurisdictional, since this would in effect turn every question on judicial review or statutory appeal into a jurisdictional question. Such a wide understanding of what is meant by a jurisdictional question was repudiated, at least implicitly, in *Dunsmuir* at para 59; *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*, [1979] 2 SCR 227. Indeed, administrative delegates' decisions regarding whether their home statutes authorize extensions of time in relation to the discharge of their functions have been found *not* to raise truly jurisdictional questions, and have been reviewed for reasonableness: *ATA* at para 33; *MacNeil v British Columbia (Superintendent of Motor Vehicles)*, 2012 BCCA 360 at paras 32-33), 353 DLR (4th) 705; and *Canada Post Corporation v Canadian Union of Postal Workers*, 2011 FCA 24, 330 DLR (4th) 729, leave to appeal refused, [2011] SCCA 127 (QL).

[21] In the result, answering the first question entails a reasonableness review.

[22] Isbister also argues, in relation to the second ground of appeal, that the Tribunal erred in exercising what she appears to concede was concurrent jurisdiction with the Court of Queen's Bench to hear bylaw challenges and declare bylaws illegal. In respect of this question, the appropriate standard of review is correctness: *Dunsmuir* at para 61; *ATA* at para 30.

[23] The parties are not agreed on the appropriate standard of review applicable to the third ground of appeal. Aulotte emphasizes that this is an instance of the Tribunal interpreting and applying its home statute, and urges review for reasonableness. The Settlement, in support of correctness review, points to what it says is the concurrent jurisdiction between the Court of Queen's Bench and the Tribunal to decide applications to quash membership bylaws. The Settlement's argument, put briefly, is that were the Tribunal's decision reviewed for reasonableness, differing standards of review would apply as between the decision of the court (since its decision on a question of law is reviewable for correctness) and of the Tribunal.

[24] As will be seen below from our disposition of the appellant's arguments under this ground, we need not resolve this concern here, as Isbister has not persuaded us that the Tribunal's handling of this question was either incorrect *or* unreasonable.

[25] The Tribunal's decision not to remit the matter back to the Settlement Council, which is impugned in the fourth ground of appeal, is reviewable for reasonableness. Its reasoning need therefore only be transparent and intelligible: *Saguenay* at para 50.

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Analysis

Preliminary Matter – the Settlement's Factum

[26] On April 10, 2015, Aulotte applied before Bielby JA, sitting as a single judge of this Court, for an order striking the Settlement's factum. In reasons dismissing the application (reported at 2015 ABCA 130), Bielby JA referred the matter to this panel for determination. Before us, however, Aulotte did not advance his application.

First Ground

[27] This ground relates to the Tribunal's decision to extend the time for Aulotte to appeal. None of Isbister's arguments directly concern that extension. Instead, she raises various arguments about procedural fairness. Aulotte objects that procedural fairness constitutes a new issue on appeal for which leave was not given. Whether this is so, however – that is, whether her submissions go to the ground upon which leave to appeal to this Court was given – depends *not* (as Aulotte appears to assume) upon the fact that Isbister raises procedural fairness arguments, but rather upon whether those arguments relate to a ground upon which leave to appeal was granted. We note that, for the purpose of statutory appeals, an allegation that an administrative tribunal breached its duty of procedural fairness *is* an allegation of error in law: *JH Drilling Inc v Alberta (Natural Resources Conservation Board)*, 2014 ABCA 378 at para 15, [2014] AJ No 1261 (QL) (single judge) [*JH Drilling*].

[28] Isbister's first argument is that the Tribunal did not tell her, but should have told her, of a preliminary issue to be decided, being whether the Tribunal should grant Aulotte leave to appeal from the Settlement's decision. While it appears from Aulotte's factum that he understands Isbister to be arguing that the Tribunal acted unfairly by not saying they were deciding merits as well as leave, we read her factum as arguing the reverse: she was prepared to discuss the merits, but was caught by surprise on the leave question. This is, at least, the best that we can make of her submissions, taken together, that "the Tribunal made a jurisdictional error in granting [Aulotte] leave to appeal [the Bylaw]", and that "[Isbister] would reasonably have been mistaken in believing that [Aulotte's] dilatoriness in bringing his appeal was, for [the Tribunal], the pivotal threshold issue in deciding whether to proceed with a hearing on the appeal."

[29] While the Tribunal's explanation for granting leave is brief ("membership questions [are] integral"), and while the Tribunal took no submissions before deciding to grant leave, the insurmountable obstacle for Isbister is that this was not a question upon which leave to appeal to this Court was granted.

[30] Isbister also argues under this ground that, for the Tribunal to have had jurisdiction to hear Aulotte's appeal, it must have either assumed what she alternately calls the "jurisdictional fact" and "the apparent jurisdictional fact" that the council had approved her membership, or somehow corralled her into admitting that the council had done so, despite her membership (she says) not

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having been passed by a council resolution. She reasons that, since an appeal under section 83(2) of the *Act* is taken from a settlement's approval of an application for membership, it raises a question of whether her membership had in fact been approved, which question the Tribunal should have raised and upon which it should have requested submissions.

[31] While we do not agree with Isbister's characterization of this question as jurisdictional (see *JH Drilling* at paras 13-15), in any event we see no error in the Tribunal failing to raise it with the parties, since the answer is obvious: the Settlement *did* approve Isbister's membership, by giving third reading to the Bylaw enacting it.

[32] Isbister's third argument under this ground of appeal is that the Tribunal's reasons for giving Aulotte leave to appeal (again, that "membership questions [are] integral") is not a valid reason for doing so. Just what she is arguing here is unclear, but as we can best understand it, she says that the Tribunal failed to account for section 187.1 of the *Act*, which requires the Tribunal to exercise its powers and carry out its duties "with a view to preserving and enhancing Metis culture and identity and furthering the attainment of self-governance by Metis settlements under the laws of Alberta." Whether, however, the Tribunal ought to have concluded that the circumstances of Aulotte's application for leave failed to meet the requirements of section 187.1 is not a question of law or jurisdiction. As such, Isbister has not properly put it before us.

[33] Isbister's final argument under this ground urges us to find reasonably apprehended bias in the Tribunal's decision. Her reasoning here appears to be that, in view of the Tribunal's reasons for granting Aulotte leave, the negative potential impact on Metis culture and identity, and what Isbister sees as the Tribunal's unnecessary remark about her job responsibilities as the Settlement administrator, a reasonable apprehension of bias is made out.

[34] Isbister was not granted leave to appeal to this Court on this issue. Her argument on this point is therefore improper. All this is quite apart from its frailty (since the Tribunal's remark about Isbister's administrative role was far from gratuitous, being salient to the circumstances in which her membership was granted).

[35] The Settlement raises its own argument on this ground, which is that the Tribunal did not have the power under section 202 to extend the 45 day appeal period contained in section 83(2) of the *Act*. This is a question of interpretation, reviewable for reasonableness – that is, for whether the Tribunal's interpretation of section 202 fell outside the range of defensible interpretations. Normally this entails consideration of the intelligibility and soundness of the Tribunal's reasons, but in this case the Tribunal gave no reasons for its interpretation of section 202, nor did it receive submissions on this point. The Supreme Court has said that, where an administrative tribunal's interpretation of a statute is subject to reasonableness review, but where the tribunal has given no reasons for its interpretation, the reviewing court must "give respectful attention to the reasons which could have been offered in support of a decision: *ATA* at para 53. In other words, if the tribunal could reasonably have decided as it did, this Court may not interfere.

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[36] It is worth reproducing again the relevant sections of the *Act*:

> 83(2) If a settlement council approves an application for membership in a settlement, any member of the settlement may appeal in writing to the Appeal Tribunal within 45 days after the application was approved.
>
> …
>
> 202 When a matter before the Appeal Tribunal is, by this Act or any other enactment or by any rule or decision of the Tribunal, required to be done within a specified time and if the circumstances of the case in its opinion so require, the Tribunal may, with or without notice, extend the time so specified or waive the requirement whether or not the time has expired.

The Settlement argues that section 202 does not give the power to extend the 45 day appeal period imposed by section 83(2), because section 202's operation is preconditioned upon "a matter [being] before [the Tribunal]". The Settlement says that the Tribunal's power thereunder is confined to extending or waiving deadlines that arise after an appeal is validly before the Tribunal. That, in turn (the argument goes), requires that the appeal be filed within the applicable limitation period.

[37] The Settlement offers two other arguments. First, it is undisputed among the participants that membership decisions approved by bylaw can be challenged either before the Court of Queen's Bench (under section 245 of the *Act*) or before the Tribunal (under section 83). Section 245 provides that a member may apply to the Court of Queen's Bench to quash a settlement bylaw or resolution for illegality within two months of the bylaw or resolution coming into effect. There is no provision for the Court of Queen's Bench to extend this time. The Settlement therefore argues that it is unlikely that the Legislature would have intended that the deadline for review by the Tribunal be flexible, while the deadline for review by the Court of Queen's Bench be strict.

[38] Second, the scheme of the *Act* contemplates that, when a membership approval is "final" and the applicant starts living in the settlement, the settlement council must provide certain information to the Minister: section 81 of the *Act*. Section 80(0.1) defines three ways in which a membership approval becomes final:

> (a) the application was approved by the settlement council and the approval was not appealed,
>
> (b) the application was approved by the settlement council and, on appeal, the Appeal Tribunal confirmed the approval, or
>
> (c) the application was refused or deferred by the settlement council and, on appeal, the Appeal Tribunal approved the application.

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The Settlement's argument is that, if section 202 were to permit an extension of the appeal period in respect of a membership approval under section 83, there would be no way of knowing that "the approval was not appealed". In contrast, were the appeal period restricted to 45 days from the date after which the application was approved, the settlement council can know, after that period has passed, whether the approval was appealed.

[39] All this, says the Settlement, demonstrates the Legislature's intent that bylaw challenges be made in a timely manner to allow for finality.

[40] Aulotte counters that section 202 of the *Act* gives the Tribunal broad discretion to extend all time limits under the *Act*, and that the Tribunal's interpretation of it as authorizing extension of the appeal period was therefore a reasonable one. The "matter before [the Tribunal]", he says, was his appeal and, while section 83(2) imposes a 45 day appeal period, the time for bringing that appeal (being a "matter before [the Tribunal]") could be extended by the Tribunal under section 202.

[41] Section 202's phrasing is certainly no model of precision, operating "when *a matter* before the Appeal Tribunal is … required to *be done* within a specified time …." While, however, reasonable minds might differ about what is a "matter" that is to be "done", there is also the requirement that the matter, whatever it is, be "before [the Tribunal]." Just what that reasonably means is informed by the Settlement's submissions about an approval becoming "final" and about the non-extendability of the period for bringing an application to the Court of Queen's Bench to quash a bylaw or resolution. We also note section 84 of the *Act*, which provides that, in matters of membership, the Tribunal's responsibility to hold a hearing arises "on receipt of an appeal *under section 83*". This tends to affirm that an appeal is not properly *before the Tribunal* unless brought in accordance with the terms of section 83 – that is, within the 45 day appeal period. That, coupled with the absence of a specific power in the *Act* to extend the appeal period compels the conclusion that it was unreasonable for the Tribunal to conclude that it had the power under section 202 to extend the appeal period contained in section 83(2) for bringing an appeal.

[42] In short, we agree with the Settlement that the *Act* demonstrates the Legislature's intent that a challenge of the sort advanced by Aulotte should be made within the 45 day appeal period stated in section 83(2). There are, moreover, compelling reasons for the Legislature to preclude indeterminacy in cases of Metis settlement membership. Just as membership questions are (as the Tribunal observed) integral to the proper functioning of a Metis settlement, so is membership itself integral to both the private and public life of the person who holds it. It is associated with statutory rights in land (and therefore homes) and with the right to vote and to hold office in the governance structure of what are typically small communities where decisions of local government carry more direct significance than they typically do in larger communities. For settled expectations of this sort to be upset 4½ years later undermines the Legislature's objective of securing certainty and finality in these important matters, and defies good sense.

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[43] While it follows that the appeal must be allowed, we will also address the remaining grounds of appeal.

Second Ground

[44] This ground impugns the Tribunal's decision to repeal the Bylaw under section 190(1)(i) of the *Act* which, it will be recalled, provides that the Tribunal "may, in respect of any matter before it, … amend, make or repeal a settlement bylaw to conform with … this or another enactment …." The concern underlying this ground was the Tribunal's authority as to remedy. More particularly, Isbister was given leave by this ground of appeal to argue that the Tribunal did not have authority in the circumstances of this case to quash the bylaw which, the appellant argued in seeking leave, was a remedy reserved to the Court of Queen's Bench: 2014 ABCA 193 at para 6.

[45] The argument that Isbister advances before us is, however, quite different. Its essence is that the Tribunal should have declined to hear Aulotte's appeal altogether, since doing so effectively deprived her of the opportunity to seek a declaration from the Court of Queen's Bench that her exclusion from membership in the Settlement by reason of her registration as an Indian infringed section 15 of the *Charter of Rights and Freedoms*. Most of her remaining submissions on this point speak to that supposed breach, and to the Tribunal having invoked the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 [*APJA*] in declining to decide whether it had jurisdiction to hear Isbister on this point.

[46] Aulotte disputes this, saying that by the time he brought his application, the Court of Queen's Bench no longer had jurisdiction to hear a challenge to the Bylaw (presumably because he was out of time), and that the Tribunal, being the only available forum to him, was also the correct one. He cites no authority for that proposition, the correctness of which we doubt: see *Chad Investments Ltd v Longson, Tammets &Denton Real Estate Ltd*, [1971] 5 WWR 89 at 93 (Alta SCAD), 20 DLR (3d) 627.

[47] In any event, we need not decide here whether Isbister is correct to say that the Tribunal erred in declining to consider her arguments on this point, or on whether she is precluded as she says she is from seeking declaratory relief from the Court of Queen's Bench in respect of her section 15 *Charter* argument. It suffices here to observe that she was not granted leave to advance this argument before this Court.

[48] In the circumstances, we also decline to take up the Settlement's invitation to clarify whether the Tribunal has a general jurisdiction to hear settlement bylaw challenges.

Third Ground

[49] Isbister argues under this ground that the Tribunal erred in finding the Bylaw to be illegal, since section 75(1) of the *Act* makes ineligible for membership in a settlement only those persons who *voluntarily* registered under the *Indian Act* at age 18 or older. Apart from the evidence of her

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having married at the age of 35, she says there was no evidence before the Tribunal of her having *voluntarily* registered under the *Indian Act*. She therefore argues that the Tribunal could not have reasonably determined that she was ineligible for membership. She points to section 75(3) (which precludes a person's reliance upon section 75(2) as a way to qualify for settlement membership notwithstanding Indian status where that person is able to apply to have his or her name removed from registration as an Indian) as proving that eligibility under section 75(1) is tethered to the voluntariness of her registration. In other words, the meaning of section 75(1)'s ineligibility provision ought to be informed by section 75(3), inasmuch as someone who voluntarily remained a registered Indian cannot avail himself or herself of the exception to ineligibility set out in section 75(2).

[50] While Isbister's argument actually relates to the ground upon which leave was granted, it takes her nowhere. First, Isbister does not say that her *Indian Act* registration was *in*voluntary, but rather that the Tribunal did not ask enough questions or gather enough evidence to decide whether it was voluntary or not voluntary. By this argument, she merely spins what is in substance a complaint about fact-finding into an argument about procedural fairness or an error of law. So made, this argument is improper.

[51] Another argument Isbister raises which pertains to the third ground (but which she raises in addressing the fourth ground) goes to the interpretation of the conditions set out in section 75(2), which we have listed above, for membership of a status Indian in a settlement. Invoking the doctrine of *expressio unius est exclusio alterius* (which has no obvious relevance to the argument), her argument appears to be that the conditions in section 75(2) ought to be read disjunctively and not conjunctively, such that if Isbister satisfies *any one* of the conditions listed thereunder (presumably, either that she lived a substantial part of her childhood in the Settlement area, or that her application was approved by passage of a bylaw), she would qualify for settlement membership. This would, she explains, conform to the "purposeful and remedial approach [to statutory interpretation] supported by the [*Interpretation Act*], RSA 2000, c I-8, s 10."

[52] This argument has no merit. Section 75(2)'s inclusion of the conjunctive term "and" (as opposed to the disjunctive term "or") is dispositive. In order for an applicant for settlement membership to qualify notwithstanding his or her having registered as an Indian, he or she must meet *all* the conditions listed in section 75(2). It follows that Isbister shows no error under this ground, since the Tribunal's conclusion that she did not meet all those conditions is both reasonable and correct.

Fourth Ground

[53] Isbister's argument on the fourth ground is nonsensical. On one hand, this ground alleges error in the Tribunal's decision not to remit the matter of her membership back to the Settlement council. On the other hand, Isbister appears to say that submitting the matter back to the council would be unworkable and unfair, since the council would very likely be bound to conclude that her

registration as an Indian after turning 18 would preclude membership. We cannot reconcile these positions, nor can we understand her submissions as reconciling them.

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Conclusion

[54] The appeal is allowed, and the Tribunal's order 254 is vacated. The Settlement administrator shall restore Isbister's name to the settlement membership list.

Costs

[55] Although Isbister is successful in the result, we decline to award her costs, for two reasons: (1) none of her submissions were accepted, and she prevailed only because of an argument raised by the Settlement; and (2) the arguments she did advance were either opaque or beyond the permitted grounds of appeal.

[56] In the result, each party shall bear its own costs.

Appeal heard on May 1, 2015

Memorandum filed at Edmonton, Alberta
this 15th day of May, 2015

Côté J.A.

Brown J.A.

Veit J.

Appearances:

P.L. Taylor
for the Appellant

K.N. Lambrecht, Q.C. (watching brief)
for the Respondent Metis Settlements Appeal Tribunal

J.A. Agrios, Q.C.
for the Respondent Fishing Lake Metis Settlement

Not Represented Respondent Metis Settlements General Council

J.R. Speer (watching brief)
for the Respondent Metis Settlements Land Registry

T.R. Owen and T.M. Rout
for the Respondent Morris Aulotte

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Appendix

1 In this Act,

(h) "General Council Policy" means a policy or an amendment or repeal of a policy made by the General Council, and includes a regulation made under section 229 ....

75(1) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement is not eligible to apply for membership or to be recorded as a settlement member unless subsection (2) or (3.1) applies.

(2) An Indian registered under the *Indian Act* (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if

(a) the person was registered as an Indian or an Inuk when less than 18 years old,

(b) the person lived a substantial part of his or her childhood in the settlement area,

(c) one or both parents of the person are, or at their death were, members of the settlement, and

(d) the person has been approved for membership by a settlement bylaw specifically authorizing the admission of that individual as a member of the settlement.

(3) If a person who is registered as an Indian under the Indian Act (Canada) is able to apply to have his or her name removed from registration, subsection (2) ceases to be available as a way to apply for or to become a settlement member.

(3.1) In addition to the circumstances under subsection (2), an Indian registered under the Indian Act (Canada) or a person who is registered as an Inuk for the purposes of a land claims settlement may be approved as a settlement member if he or she meets the conditions for membership set out in a General Council Policy.

80(0.1) In this section, "becomes final" in respect of the approval of an application for membership in a settlement means that

(a) the application was approved by the settlement council and the approval was not appealed,

(b) the application was approved by the settlement council and, on appeal, the Appeal Tribunal confirmed the approval, or

(c) the application was refused or deferred by the settlement council and, on appeal, the Appeal Tribunal approved the application.

(1) When an approval of an application for membership in a settlement becomes final and the applicant starts to live in the settlement area, the settlement council must

(a) notify the Minister that the application is approved, and

(b) provide the necessary information to the Minister for a record to be made on the Settlement Members List.

(2) An applicant for membership in a settlement becomes a settlement member when

(a) the approval of the application for membership becomes final,

(b) the applicant starts to live in the settlement area, and

(c) the applicant is recorded on the Settlement Members List as a settlement member.

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 a decision.

(2) If a settlement council approves an application for membership in a settlement, any member of the settlement may appeal in writing to the Appeal Tribunal within 45 days after the application was approved.

(3) No settlement member may make an appeal under subsection (2) without the permission of the Appeal Tribunal.

84(1) On receipt of an appeal under section 83, the Appeal Tribunal must hold a hearing after giving everyone it considers affected by the appeal reasonable notice of the date, time and place of the hearing.

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190(1) The Appeal Tribunal may, in respect of any matter before it,

(i) amend, make or repeal a settlement bylaw to conform with General Council Policy or this or another enactment, or to remove an inconsistency or conflict with General Council Policy ....

202 When a matter before the Appeal Tribunal is, by this Act or any other enactment or by any rule or decision of the Tribunal, required to be done within a specified time and if the circumstances of the case in its opinion so require, the Tribunal may, with or without notice, extend the time so specified or waive the requirement whether or not the time has expired.

204(1) 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 permission to appeal has been obtained.

(2) Application for permission to appeal to the Court of Appeal must be made to a judge of the Court of Appeal within 45 days after the issue of the decision sought to be appealed or within any further time that the judge, in special circumstances, permits.

245(1) The Minister, the General Council or a settlement member may apply to the Court of Queen's Bench to quash a settlement bylaw or resolution in whole or in part for illegality.

(2) The application must be made within 2 months of the coming into force of the bylaw or resolution.

(3) The Court may make whatever order it considers appropriate in the circumstances.

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Corrigendum of the Memorandum of Judgment

In paragraph 14, the first sentence now reads "... the Tribunal found ...". As well, in paragraph 31, the third line of the paragraph now reads, "the Settlement did approve ...".