In the Court of Appeal of Alberta

Citation: Kikino Métis Settlement v Métis Settlements Appeal Tribunal, 2013 ABCA 151

Date: 20130429
Docket: 1103-0259-AC
Registry: Edmonton

Between:

Kikino Métis Settlement

Appellant (Respondent)

- and -

Métis Settlements Appeal Tribunal

Respondent (Administrative Tribunal)

- and -

Métis Settlements General Council and Métis Settlements Land Registry

Not a Party to the Appeal
Affected Party (Other Party)

- and -

Ernest Pruden, Luke Pruden, Terrence Pruden and Barry Pruden

Not a Party to the Appeal
Affected Party (Respondents)

- and -

Sheila Pruden, Rocky Pruden and Loretta Pruden

Not a Party to the Appeal
Affected Party (Appellants)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald

Memorandum of Judgment of the
Honourable Mr. Justice Slatter

Concurred in by The Honourable Mr. Justice Martin

Memorandum of Judgment of
The Honourable Mr. Justice McDonald
Concurring in the Result in Part

Appeal from the Decision by
The Metis Settlements Appeal Tribunal
Dated the 31st day of August, 2011

Memorandum of Judgment of the
Honourable Mr. Justice Slatter

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[1] This appeal raises issues concerning the distribution of estates that include real property on Métis settlements.

Facts

[2] Willie Pruden owned two quarter sections of land on the Kikino Métis Settlement. He died without leaving estate instructions under section 7.6 of the *Métis Settlements General Council Land Policy*, GC-9201. That invokes a sequential analysis to determine the distribution of the estate. The relevant portions of the *Land Policy* are:

> 7.13 Guiding principles
>
> (1) When an application has been made under section 7.12 [for directions on the distribution of an estate], any determination of the question, whether by the settlement council or the Appeal Tribunal, must be guided by the following principles in the stated order of priority:
>
> > (a) as far as possible, and to the extent that they can be clearly determined, the last wishes of the deceased should be met;
> >
> > (b) the interest must be transferred to the deceased's spouse if it can be registered in his or her name, and if there is more land than can be registered in the spouse's name the spouse can specify the order in which the interests should be considered for registration;
> >
> > (c) if there is one or more living adults on the heirs list and they agree on what should be done with the interest, the agreement should be followed;
> >
> > (d) if it is not possible to get an agreement from the persons on the heirs list but, in the opinion of the body making the decision, there is substantial agreement among adult members of the deceased's family as to what should be done with the interest, that agreement should be followed;
> >
> > (e) if there are no adult members of the deceased's family, but the deceased leaves living children, the land interest should be given to the child who, in the opinion of the settlement council, is best able to use it for the purpose intended;

> (f) if it is not possible within a reasonable time to decide who should receive the interest in accordance with the above principles, the land should be sold and the money made part of the deceased's estate.

Since Willie Pruden's wishes were not known, and he did not have a spouse, his estate stood to be distributed in accordance with any agreement of his heirs.

[3] Willie Pruden had seven children who were his potential heirs. Terrence already owned the maximum amount of land that any individual could hold on the Settlement, and made no claim to the lands. Ernest had for years farmed on the Settlement, including on lands adjacent to one of the quarter sections which Willie had farmed. The other quarter section of land was the home quarter, which included the house. The other potential heirs (Loretta, Sheila, Luke, Barry and Rocky) had no land on the Settlement. At the time of the hearing, Sheila and Rocky were living in the house on the home quarter.

[4] The Kikino Settlement Council attempted to arrange a meeting of the potential heirs, or a mediation, in order to ascertain the wishes of the potential heirs, but those efforts were unsuccessful. On March 10, 2011 the Council directed that the farmed quarter section be given to Ernest, and that the home quarter be subdivided. Luke was to receive approximately 120 acres, including the house. The remaining 40 acre parcel was to be divided into four 10 acre lots, one each for Sheila, Loretta, Rocky and Barry. The Council subsequently subdivided the home quarter into a 113.9 acre parcel, and a 43.47 acre parcel.

[5] Loretta, Sheila and Rocky appealed the decision of the Council to the Métis Settlements Appeal Tribunal. When the appeal was heard, Loretta, Rocky, Sheila and Terrence agreed that the farmed section should be split between Luke and Rocky, and that the home section should be split between Loretta and Sheila. Luke and Ernest supported the decision of the Council. Barry did not appear at the meeting, and has not asserted a claim.

[6] The Appeal Tribunal concluded that by the time the dispute reached it, there was a "substantial agreement" among the beneficiaries, which invoked s. 7.13(1)(d) of the *Land Policy*, because 4 out of 6 heirs had now agreed on a solution. While the *Land Policy* then dictates that the estate should be distributed in accordance with the "substantial agreement", the Appeal Tribunal concluded that the proposed distribution was impractical. Firstly, the Appeal Tribunal found that there was no agreement over who would get the house, and secondly the Appeal Tribunal found that it did not have the power to subdivide the land in order to implement the agreement. It was the Council that had the subdivision power.

[7] Given its finding that the "substantial agreement" was impractical, the Appeal Tribunal concluded that the estate should be distributed based on the "principles underlying the agreement". Those principles it found to be that each sibling be treated "equitably/fairly", that cooperation amongst the heirs be promoted, and that the purposes for which Willie Pruden had developed the

land (i.e. farming and ranching) be respected. The panel found that it was "equitable/fair" to give the house to a beneficiary who did not have housing: either Sheila, Loretta or Rocky. Terrence had testified that his father wanted the property to go to Sheila, and while the Appeal Tribunal had found that "Willie Pruden's discussion with Terrence Pruden cannot be taken as conclusive proof of his wishes", it found these wishes to be a "reference point". It therefore directed that both the 113.9 acre parcel and the 43.47 acre parcel of the home quarter be transferred to Sheila. In accordance with the stated principle of cooperation, the Appeal Tribunal anticipated, but did not order, that Sheila would work with her siblings to subdivide the lands to provide each of them with a place to build a house. Ernest was given the farmed quarter, because he was best able to pursue the purposes of farming and ranching.

Issues

[8] Leave to appeal was granted on two issues:

(a) Did the Tribunal reversibly err in law in relation to the level of deference, if any, owed to a Council decision by the Tribunal in addressing an issue of descent of Métis title under the *Land Policy*?

(b) Did the Tribunal reversibly err in law in relation to the interpretation and application of the expression "substantial agreement" as contained in section 7.13(1)(d) of the *Land Policy*?

Before this Court it is agreed that Ernest should be given the farm quarter. The only remaining issue is therefore with respect to the home quarter.

Standard of Review

[9] It is clear that this Court applies a correctness standard of review to the decisions of the Appeal Tribunal over what standard of review it should apply to decisions of the Settlement Council: ***Newton v Criminal Trial Lawyers' Association***, 2010 ABCA 399 at para. 39, 38 Alta LR (5th) 63, 493 AR 89.

[10] The standard of review that this Court applies to the substantive decisions of the Appeal Tribunal is determined under the analysis in ***Dunsmuir v New Brunswick***, 2008 SCC 9, [2008] 1 SCR 190. The standard of review is set by considering four factors: "(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal": ***Dunsmuir*** at para. 64. That standard therefore depends, in part, on the nature of the question. There may be some issues surrounding the interpretation of the statutory regime that would require a correctness standard of review of decisions of the Appeal Tribunal. However, given the expertise and role of the Appeal Tribunal, with respect to the interpretation and application of the *General Council Land Policy* on the distribution of Métis estates, the standard of review is generally reasonableness.

[11] The standard of review that an appellate administrative tribunal (here the Métis Settlements Appeal Tribunal) applies to the decisions of an administrative tribunal of first instance (here the Kikino Settlement Council) is determined by a number of factors set out in ***Newton*** at para. 43:

> (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
> (b) the nature of the question in issue;
> (c) the interpretation of the statute as a whole;
> (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
> (e) the need to limit the number, length and cost of appeals;
> (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
> (g) other factors that are relevant in the particular context.

The mere fact that the appeal is *de novo* does not automatically imply that the standard of review is correctness: ***Newton*** at paras. 44(a), 51.

[12] This ***Newton*** standard of review may well vary depending on the issue at hand. The Appeal Tribunal is charged with preserving and enhancing Métis culture and identity and furthering the attainment of self-governance by Métis settlements under the laws of Alberta: *Métis Settlements Act*, RSA 2000, c. M-14, s. 0.1. It undoubtedly plays other roles, including, for example, promoting consistency in the interpretation and application of the statutory regime throughout Alberta. To the extent that an appeal raises issues of this type, the Appeal Tribunal owes less deference to the settlement council. The settlement council, on the other hand, is charged with the local management of the Métis settlement, and with having regard to local interests and issues. On those issues, as well as on its basic findings of fact, more deference is due.

[13] The issues raised on this appeal, with respect to the distribution of this particular estate, do not appear to raise any issues of systemic importance. The Appeal Tribunal did not attempt to set any generic definition of what constitutes a "substantial agreement", nor did it attempt to set out any general guidelines for how estates should be distributed. There is, however, a large local interest. While the potential heirs are not in agreement, there is no indication that the Council itself was compromised by personal or local friction. These factors suggest the Appeal Tribunal should defer to the Council. However, it is not necessary to finally determine the standard of review in this case. Prior to the issue reaching the Appeal Tribunal, the Settlement Council had experienced a great deal of difficulty in ascertaining the wishes of the potential beneficiaries. The alleged agreement between the beneficiaries was only revealed at the appeal hearing. Thus, the Settlement Council was never called on to decide whether there was a "substantial agreement", and the issue before the Appeal Tribunal was new and different. In those circumstances, the Appeal Tribunal was not "reviewing" a previous decision, and it is artificial to speak of any standard of review. Since the issue was fresh, the Appeal Tribunal was, on this occasion, proceeding *de novo*.

[14] It is therefore not necessary, nor is it advisable, to give a final answer to the first question upon which leave was granted.

Distributing the Estate

[15] To summarize the provisions of the *Land Policy*, where the wishes of the deceased cannot be "clearly determined" the *Land Policy* requires both the council and the Appeal Tribunal to respect any agreement, or at least any "substantial agreement" reached by the heirs.

[16] As noted, the standard of review applied by this Court to the interpretation and application of the *Land Policy* by the Appeal Tribunal on the type of issues presented in this appeal is reasonableness. The decision that there was "substantial agreement" here is, however, unreasonable. It is not a result available on the facts and the law.

[17] The interpretation of the *Land Policy* must be based on reading the entire document together. The clauses are to be read sequentially, with each provision only applying if the previous one is inapplicable. Section 7.13(1)(c) recognizes any agreement of the heirs, and by its wording it must mean a "unanimous and complete agreement". If there is not complete agreement, s. 7.13(1)(d) provides next for a "substantial agreement". In context, a substantial agreement must be one that is close to a unanimous agreement.

[18] It was inconsistent to conclude that there was a "substantial agreement", but that the agreement could not be implemented because there was no agreement on a very significant asset: the house. It is unreasonable to interpret this provision such that a bare majority of the heirs can agree to exclude the minority from the entire estate. That is not an "agreement", much less a "substantial agreement". A "majority vote" is not an "agreement".

[19] In order to be a "substantial agreement" there must be an agreement between something approaching all of the beneficiaries, on something approaching all of the issues in the distribution. The clearest example would be where all the beneficiaries agree on the distribution, but there is some disagreement on minor details, or small items in the estate. Since each estate distribution will depend on its own facts, there may be "substantial agreement" where one (or perhaps more than one) of the beneficiaries is not in agreement with the substantial majority on an objectively fair distribution. There may also be a "substantial agreement" where all of the beneficiaries agree in general terms, but there are moderately important issues that remain outstanding. The *Land Policy* provides that whether there is a substantial agreement is "in the opinion of the body making the decision", so that body clearly has a discretion to exercise. That discretion is not, however, unlimited, and it can be reviewed for reasonableness. Where 4 of 6 beneficiaries agree to totally exclude the other 2 from the estate, it is unreasonable to suggest that there is substantial agreement.

[20] The decision of the Appeal Tribunal is clearly unreasonable for another reason. Even if there was a substantial agreement, the Appeal Tribunal failed to implement it. If there was a substantial agreement, that agreement had to be implemented. It was unreasonable for the Appeal Tribunal to

conclude that it had no reliable evidence about the wishes of Willie Pruden, but then to purport to write a will for him based on what it perceived his wishes to be. The Appeal Tribunal has no authority to purport to distribute the estate on the "principles underlying the agreement". It was not open to the Appeal Tribunal to give one quarter section to Ernest, when the premise of the agreement was that he would receive nothing since he already had land. It was not consistent with the agreement to give the home quarter to one beneficiary (Sheila) when the agreement was to divide the land among four landless beneficiaries. In any event, a solution that completely excludes some beneficiaries cannot reasonably be called "equitable/fair", and it is not objectively reasonable. If the agreement was impractical because it required subdivision, and the Appeal Tribunal had no subdivision power, the obvious solution was to send the matter back to the Settlement Council to reconsider the estate distribution now that there was possibly an agreement. Alternatively, if the agreement cannot be implemented, then s. 7.13(1)(f) is invoked, and the land must be sold.

[21] The answer to the second question on which leave was granted is that the Appeal Tribunal erred in its interpretation and application of what constitutes a substantial agreement.

Conclusion

[22] Whatever the standard of review may be, the decision of the Appeal Tribunal must be reversed, and the matter returned for a rehearing.

Appeal heard on November 27, 2012

Memorandum filed at Edmonton, Alberta
this 29th day of April, 2013

Slatter J.A.

I Concur:

Martin J.A.

McDonald J.A. (Concurring in the Result in Part):

Introduction

[23] Leave to appeal was granted to Kikino Métis Settlement to appeal a decision of the Métis Settlements Appeal Tribunal (Tribunal), Order 226, dated August 31, 2011, on the following questions:

(a) Did the Tribunal reversibly err in law in relation to the level of deference, if any, owed to a Council by the Tribunal in addressing an issue of descent of Métis title under the *Métis Settlements General Council Land Policy* (the *Land Policy*);

and

(b) Did the Tribunal reversibly err in law in relation to the interpretation and application of the expression "substantial agreement" as contained in section 7.13(1)(d) of the *Land Policy*?

Background Facts

[24] Willie Pruden died in October 2009 without leaving estate instructions under section 7.6 of the *Land Policy*, which permits an owner of an interest in land to file estate instructions with the Registrar of the Métis Settlements Land Registry. Willie had two quarter sections on the Kikino Métis Settlement. He had five sons and two daughters.

[25] Pursuant to section 7.9(3) of the *Land Policy*, a Land Trustee Kikino Council (Council) was appointed as land trustee for Willie's interests in the two quarter sections. The Council initially met with Ernest on February 9, 2010 to discuss his father's estate, where it was decided that a meeting should be arranged with all the children. A letter was sent to all the children asking that they meet with the Council but some failed to respond. The Council then asked the Tribunal to attempt a mediation, but it was abandoned for lack of response.

[26] The Council again attempted to arrange a meeting with all the children. On January 25, 2011, the Council met with some but not all of the children. On February 8, 2011, the Council meet with Ernest and Luke. At no point did the Council speak with all the children, and not all together in one room. No agreement was reached between the children regarding their father's estate.

[27] On March 8, 2011, the Council decided that Willie's interest in one quarter section should go to his son Ernest. It also decided that 120 acres of the other quarter section, which included their father's house, should go to Willie's son Luke, and the remaining 40 acres should be available as 10 acre lots upon request of his children, Sheila, Rocky, Loretta and Barry. These were to be

subdivided at their expense.[1] The remaining son of Willie, Terrence, already possessed land on the Kikino Settlement and expressed no desire to have any of his father's land interests. No reasons were issued by the Council to explain the basis for its decision.

[28] At the time of the Council decision, Ernest had land on the Kikino Settlement, Luke lived in a house on the Goodfish Lake reserve, and Sheila had no land interests but was occupying her father's house.

[29] Sheila, Rocky and Loretta appealed the Council decision to the Tribunal pursuant to section 8.1 of the *Land Policy*. At that hearing, Loretta suggested, for the first time, that she and Sheila split one quarter section, while Ernest and Luke split the other. Loretta's proposal had the agreement of Sheila, Rocky, and Terrence representing four of the six children of Willie Pruden who attended at the hearing before the Tribunal. Barry did not attend the appeal and his position, if any, was not known. The Tribunal was told that Barry had sold his interests in land on the Kikino Settlement.

[30] Ernest supported the Council's decision. As a rancher and farmer with lands adjacent to his father's, he considered himself well suited to carry on his father's work and hoped his brothers and sisters would eventually start working together so their family could again become leaders in farming and ranching on the Kikino Métis Settlement.

[31] Luke also supported the Council's decision. He had no interests in land on the Kikino Métis Settlement and did not own the house he lives in on the Goodfish Lake Reserve. He was anxious to move into his father's house as the house he was currently living in was infested with mould which he believed was negatively affecting his children's health. He wanted to continue his father's work as a rancher and farmer, and thought he and Ernest could work together to build up the lands in question.

[32] Terrence told the Tribunal his father had wanted the two quarters to be transferred to Sheila. He supported Loretta's proposal because it would ensure Sheila had a place to live, and the remaining children use or be given interest in land.

Tribunal's Decision

[33] In its decision dated August 31, 2011, Order 226, the Tribunal reaffirmed that one quarter section be transferred to Ernest, and the other should be transferred to Sheila in its entirety. The Tribunal went on to state:

> In particular, it is anticipated, though not ordered, that Sheila will work with her siblings to one day subdivide her interest so that her

[1]The Tribunal decision describes the division of the quarter section as 113.9 acres and 43.47 acres.

> siblings may also build or apply for their own houses on the Kikino Métis Settlement.

[34] The Tribunal did not take Terrence's discussion with his father as conclusive proof of Willie's wishes. With no estate instructions, and no unanimity, the Council was to determine whether there is "substantial agreement" amongst the immediate family. While acknowledging that Loretta's proposal, supported by four out of the six at the hearing, constituted a "substantial agreement" under section 7.13(1)(d) of the *Land Policy*, it found itself unable to implement such a proposal given that the Tribunal, unlike the Council, lacks the authority to subdivide land and it was uncertain who should hold Métis title over the land upon which the house sits.

[35] Although the Tribunal held that the substantial agreement was not practicable to implement, it felt it should still be guided by the principles it claimed were inherent in that agreement. The Tribunal went on to conclude that the children be treated "equitably/fairly" with respect to housing, that cooperation amongst the siblings be promoted, and the purposes for which the land was developed by Willie (farming and ranching) be respected.

[36] With respect to the quarter section that had the house, the Tribunal held it was equitable/fair to give priority to the children who do not have a house to live in or who have not otherwise previously disposed of their interest/house on the Kikino Métis Settlement. That would give priority to Sheila, Loretta and Rocky because Ernest, Terrence and Luke all have houses to live in. At the time of the hearing, Rocky was living in the house but the Tribunal found he was not interested in taking ownership over the homestead quarter. This left either Sheila or Loretta. The Tribunal considered Terrence's testimony that Willie wanted Sheila to receive the homestead quarter, that Sheila had spent upwards of $5000 maintaining the house, and that she was currently living in the house. The Tribunal concluded that all the lands of the homestead quarter be transferred to Sheila. It would ensure Sheila has a house to live in, and accepted the testimony of Sheila, Loretta and Rocky that they will respect the principle of cooperation.

[37] For the other quarter, the Tribunal held the purposes for which the land was developed by Willie should be given priority. In the Tribunal's view, Ernest, who was actively farming and who provided hay for his father's horses, was best able to use the quarter for the purposes of farming and ranching as intended by Willie.

Issues on Appeal

[38] Did the Tribunal reversibly err in law in relation to the level of deference, if any, owed to a Council decision by the Tribunal in addressing an issue of descent of Métis title under the *Land Policy*?

[39] Did the Tribunal reversibly err in law in relation to the interpretation and application of the expression "substantial agreement" as contained in section 7.13(1)(d) of the *Land Policy*?

Relevant Legislation

[40] The relevant sections of the *Act* and the *Land Policy* are appended to the end of this judgment.

Analysis

Did the Tribunal reversibly err in law in relation to the level of deference, if any, owed to a Council decision by the Tribunal in addressing an issue of descent of Métis title under the Land Policy?

[41] Some further background information is in order.

[42] The Kikino Métis Settlement is one of eight Métis Settlements established pursuant to the provisions of the *Act*. Each Métis Settlement has a settlement council (Council) composed of five councillors, section 8(1). Each Council may carry out certain activities as specified in section 3(2) of the *Act*.

[43] The *Act* provides for the establishment of a Métis Settlement General Council (General Council). The General Council "consists of the councillors of all the settlement councils and the officers of the General Council" (section 214). The General Council can enact general council policies provided there is a special resolution, meaning a resolution approved by at least six settlement councils (section 219). The *Land Policy* is such a policy.

[44] Section 7.13(1) of the *Land Policy* mandates a hierarchy of results in the event there is an application made to Council for direction in a situation, inter alia, where there were no estate instructions. The provisions of section 7.13 are to be found appended at the end of this judgment.

[45] The *Act* also provides for the establishment of the Tribunal which is to consist of not fewer than seven persons,(section 180). The Tribunal is to consist of one person appointed by the Minister from a list of nominees provided by the General Council and that person is to serve as Chair. Three further members are to be appointed by a Resolution of the General Council and three additional members appointed by the Minister of whom at least two are not to be settlement members.

[46] Additionally, the Tribunal is tasked by virtue of section 187.1 of the *Act* as follows:

> The Appeal Tribunal shall exercise its powers and carry out its duties with a view to preserving and enhancing Métis culture and identity and furthering the attainment of self-governance by Métis Settlements under the laws of Alberta.

[47] At the hearing before the Tribunal, no question was raised as to the level of deference, if any, owed by the Tribunal to the decision of Council. This court has not yet had the occasion to determine what is the proper standard of review to be employed by the Tribunal when hearing an appeal from a Council decision dealing with an issue of descent of Métis title under the *Land Policy*.

In my view, little deference is owed by the Tribunal when dealing with this issue, thereby suggesting a standard of correctness. I say that for the following reasons.

[48] In *Newton v Criminal Trial Lawyers Association*, this court identified factors that should generally be examined in determining the proper standard of review to be applied by an appellate administrative tribunal (in this case the Tribunal) to the decision of the administrative tribunal of first instance (in this case the Council). These factors are:

(a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
(b) the nature of the question in issue;
(c) the interpretation of the statute as a whole;
(d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
(e) the need to limit the number, length and cost of appeals;
(f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
(g) other factors that are relevant in the particular context.

I will address this aspect of the appeal a little later on.

[49] However, in this case there is a further factor present; namely, that the Council issued no reasons for its decision. Therefore this is not a situation where a tribunal has given sketchy reasons; rather there is a complete paucity of any reasoning. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, the court at para 52 made the following comment in the context of judicial review:

> Obviously, where the tribunal's decision is implicit, the reviewing court cannot refer to the tribunal's process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal's decision-making process. The reviewing court cannot give respectful attention to the reasons offered because there are no reasons.

Similarly, as this court asked in *Spinks v Alberta (Law Enforcement Review Board)*, 2011 ABCA 162, 505 AR 260 at para 17:

> As a matter of basic principles, a deferential standard of review by the Court of Appeal would make little sense, especially when the impugned reasons do not say why they omit a topic. If the reasons in question omit entirely a vital topic or a necessary step, or do not even mention an important flaw in the conclusion which they reach, what is there to defer to?

In my view, the complete absence of reasons in this case in itself would be sufficient to impose the standard of correctness.

[50] The fact that a representative of Council appeared at the hearing before the Tribunal and gave reasons for the Council decision is simply too late in the process and not sufficiently reliable. As the Supreme Court of Canada made clear in *R v Teskey*, 2007 SCC 25, [2007] 2 SCR 267, (albeit in the context of criminal proceedings) any new reasons offered by a decision maker after a challenge to a decision has been launched must be viewed with deep suspicion. This principle has been followed in the administrative law context in at least two decisions: *Stemijon Investments Ltd. v Canada* (Attorney *General)*, 2011] FCA 299, 425 NR 341 at para 41, and *Jacobs Catalytic Ltd. v International Brotherhood of Electrical Workers, Local 353*, 2009 ONCA 749, 255 OAC 201 at paras 52 and 77.

[51] In *Jacobs Catalytic Ltd v International Brotherhood of Electrical Workers, Local, 353*, the majority of the Ontario Court of Appeal panel considered the *Teskey* principle in an administrative law context when they stated at para 52 as follows:

> While *Teskey* is a criminal case, the rationale applies here. When an adjudicator purports to issue the final reasons for a decision and later issues supplementary reasons, without explaining why the supplementary reasons did not form part of the initial reasons, a reasonable person may apprehend that the adjudicator engaged in results-based reasoning in order to shore up the decision. If the adjudicator had relied on the content of the supplementary reasons in arriving at the decision, those reasons should have formed part of the first set of reasons.

These comments are all the more apropos in a situation where there were **no** reasons issued by the Council in the initial instance.

[52] Quite apart from the lack of reasons in this case, there are several other factors that tend to support the view that correctness is the appropriate standard of review to have been employed by the Tribunal. Firstly, unlike the situation regarding the Tribunal itself, there is no privative clause in the *Act* according any deference to a decision of Council. Secondly, while a right of appeal to the Tribunal is not a decisive factor, it does support the position that less, rather than greater, deference ought to be accorded to the decision of a Council.

[53] Furthermore, the appeal from a Council decision to the Tribunal is really in the nature of a hearing *de novo*. Unlike the situation in *Newton*, there is basically no restriction on the evidence that can be called before the Tribunal. Specifically, section 190(1) of the *Act* provides in part as follows:

> The Appeal Tribunal may, in respect of any matter before it...
>
> (c) look at anything necessary in order to make a decision;

> ...
> (g) rehear a matter before making a decision about it;
> ...
> (j) make any decisions that the settlement council could have made;
> ...
> (l) reverse the settlement council's decision

Significantly in this case, of course, was the fact that the Tribunal was presented with a new development altogether (namely the agreement amongst four of the seven Pruden children) that had simply not existed at the time of the Council decision.

[54] The Tribunal has representatives from other Métis Settlements and that fact combined with its statutory mandate indicates that less, as opposed to more, deference is due to the decision of a Council at least as regards an issue involving desent of Metis Title under under the *Land Policy*. As argued by counsel for the Tribunal before this court, the role of the Tribunal includes bringing a more objective perspective to bear on matters that sometimes get clouded by local personalities and issues. Also, the Tribunal is tasked by virtue of section 187.1 of the *Act* to "exercise its powers and carry out its duties with a view to preserving and enhancing Métis culture and identity and furthering the attainment of self-governance by Métis Settlements under the laws of Alberta".

[55] In the result, I would hold that the Tribunal did not err in law when it, in effect, accorded no deference to the decision of Council on the issue of descent of Métis title under the *Land Policy*.

Did the Tribunal reversibly err in law in relation to the interpretation and application of the expression "substantial agreement" as contained in section 7.13(1)(d) of the Land Policy?

[56] On appeal to this Court, it was agreed that Ernest should be given the quarter that he was actively farming. The only remaining issue therefore was with respect to the homestead quarter.

[57] This court has previously decided in *Paddle Prairie Métis Settlement v Alberta (Métis Settlement Appeal Tribunal)*, 2012 ABCA 220 (available online) at para 17, that reasonableness is the standard to be applied by this court to the Tribunal's interpretation of the *Land Policy*.

[58] As the Supreme Court of Canada explained in *Dunsmuir* at para 47:

> A court conducting a review for reasonableness inquires into the qualities that makes a decision reasonable, referring both to the process by articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision

> falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[59] In the case at bar, the Tribunal found that the agreement between four of the six participating children of Willie Pruden constituted a substantial agreement within the meaning of section 7.13(1)(d) of the *Land Policy*. The seventh child elected not to become involved in this matter.

[60] In its written decision, the Tribunal stated in part:

> In this regard, the Panel [the Tribunal] acknowledges that the Land Trustee Kikino Council made many attempts to solicit feedback from the Prudens, but that these attempts did not yield a solid or cohesive response from the Prudens. Rather the solid or cohesive response did not come until the day of [this] hearing itself, when six out of seven adult Pruden children attended and 4 out of 6 present proposed a different split than what was approved by the Land Trustee Kikino Council on March 8, 2011.

It was reasonable for the Tribunal to find that this did comprise a substantial agreement within the meaning of section 7.1(3)(i)(d).

[61] However, having found that there was a substantial agreement, the Tribunal then proceeded to rule that it was impractical that the substantial agreement be implemented. The hierarchy of results mandated by section 7.13(1) clearly contemplates that if there is a "substantial agreement" that the agreement "should be followed" (section 7.13(1)(d)).

[62] If that is not possible, and the next alternative contained in section 7.13(1)(e) does not apply, then by the terms of section 7.13(1)(f) of the *Land Policy*, the following result is mandated:

> (f) If it is not possible within a reasonable time to decide who should receive the interest in accordance with the above principles, the lands should be sold and the money made part of the deceased's estate.

[63] It is clear that the Tribunal's decision does not meet the standard of reasonableness as enunciated in *Dunsmuir*. In other words, while the Tribunal's finding that the agreement proffered to it on the day of the hearing was indeed a "substantial agreement" within the meaning of section 7.13(1)(d) of the *Land Policy*, its decision that it could not be implemented and that another result altogether be implemented is flatly contradictory and blatantly fails to implement the "substantial agreement" as found by it.

[64] Accordingly, in my view the Tribunal reversibly erred in law in relation to the interpretation and application of the expression "substantial agreement" as contained in section 7.13(1)(d) of the *Land Policy.*

Appeal heard on November 27, 2012
Memorandum filed at Edmonton, Alberta
this 29th day of April, 2013

McDonald J.A.

Appearances:

M.M. Conroy and E.L. Jackson
for the Appellant

J.L. Hutchison
for the Respondent

Appendix - Relevant Legislation

Métis Settlement Act, RSA 2000, c M-14

Recital

0.1 This Act is enacted

(a) recognizing the desire expressed in the *Constitution of Alberta Amendment Act, 1990* that the Metis should continue to have a land base to provide for the preservation and enhancement of Metis culture and identity and to enable the Metis to attain self-governance under the laws of Alberta,

(b) realizing that the Crown in right of Alberta granted land to the Metis Settlements General Council by letters patent and that the patented land is protected by an amendment to the *Constitution of Alberta* and by the *Metis Settlements Land Protection Act*,

(c) in recognition that this Act, the *Constitution of Alberta Amendment Act, 1990*, the *Metis Settlements Land Protection Act* and the *Metis Settlements Accord Implementation Act* were enacted in fulfilment of Resolution 18 of 1985 passed unanimously by the Legislative Assembly of Alberta, and

(d) acknowledging that the Government of Alberta and the Alberta Federation of Metis Settlement Associations made The Alberta-Metis Settlements Accord on July 1, 1989.
. . .

Composition

180(1) The Metis Settlements Appeal Tribunal is established.

(2) The Appeal Tribunal consists of not less than 7 persons, of whom

(a) one must be appointed by the Minister from a list of nominees provided by the General Council, who is the Tribunal chair,

(b) 3 must be appointed by resolution of the General Council, one of whom must be designated as a Tribunal vice-chair by the General Council, and

(c) 3 must be appointed by the Minister, of whom

(i) at least 2 must be persons who are not settlement members, and

(ii) one must be designated as a Tribunal vice-chair.

(3) The other persons are appointed to the Appeal Tribunal by agreement between the Minister and the General Council.

(4) The Appeal Tribunal chair may designate any of the persons appointed to the Appeal Tribunal under subsection (3) as a Tribunal vice-chair.
. . .

Panels of the Tribunal

184(3) When the Appeal Tribunal is required to make a decision on a matter in which the primary issue is the allocation of land, the majority of a panel designated to hear the matter must be composed of persons appointed to the Tribunal by the General Council.
. . .

Overriding considerations

187.1 The Appeal Tribunal shall 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.
. . .

Responsibilities

189(1) The Appeal Tribunal

(a) must hear appeals and references and perform any function given to it under this Act or any other enactment;

(b) must hear appeals and references and perform any other function given to it or required to be performed by it under the regulations, bylaws or General Council Policies;

(c) may perform other functions given to it;

(d) may decide differences or disputes between 2 or more settlement members or between settlement members and persons who are not members if

(i) all the parties involved in the difference or dispute agree in writing that the Tribunal should decide the matter, and

(ii) the settlement council of the settlement area in which the difference or dispute arises agrees in writing that the Tribunal should decide the matter;

(e) may decide differences or disputes between 2 or more settlements if the settlements agree in writing that the Tribunal should decide the matter;

(f) may decide differences or disputes between a settlement and one or more settlement members or persons who are not members if all the parties involved in the difference or dispute agree in writing that the Tribunal should decide the matter;

(g) may decide differences or disputes between the General Council and any one or more settlements or other persons if all the parties involved in the difference or dispute agree in writing that the Tribunal should decide the matter;

(g.1) must review a General Council Policy pursuant to a request in accordance with a General Council Policy under section 222(1)(jj);

(h) may make an advance ruling on a matter referred to it by 2 or more persons, whether or not a difference or dispute has arisen over the matter.

(2) With respect to a matter referred to it under subsection (1)(c) to (h), the Appeal Tribunal may

(a) take no action on the matter and notify the parties accordingly;

(b) appoint a person to inquire into the matter and make a report, or endeavour to effect an agreement or resolution of the matter;

(c) hold a hearing or decide the matter on the basis of written submissions if the parties agree.

Decisions

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

(a) require, conduct or supervise votes by secret ballot or at a public meeting and make rules for the conduct of the meeting and the vote;

(b) require a transcript of proceedings to be made;

(c) look at anything necessary in order to make a decision;

(d) confirm a mediated or other agreement reached between 2 or more persons in dispute in the form of a decision of the Tribunal;

(e) issue a decision in the form of an order, direction, award or other suitable manner;

(f) make a decision granting the whole or part of the application, reference, matter or appeal before it or grant any further or other relief in addition to or in substitution for it that seems appropriate to the Tribunal;

(g) rehear a matter before making a decision about it;

(h) on receipt of further relevant evidence, and after notice to the persons affected, review, rescind, amend or replace a decision made by it;

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

(j) make any decisions that the settlement council could have made;

(k) confirm the settlement council's decision, with or without changes;

(l) reverse the settlement council's decision;

(m) refer a matter back to the settlement council, with or without suggestions or recommendations;

(m.1) with respect to a matter referred to in section 189(1)(g.1), confirm, reverse or vary the General Council Policy or refer the matter back to the General Council, with or without suggestions or recommendations;

(n) direct the Registrar of the Metis Settlements Land Registry to correct errors, omissions and discrepancies in the Registry;

(o) provide any remedy that, in all the circumstances, fairness requires.

(2) If the Appeal Tribunal refers a matter back to a settlement council, the subsequent decision of the council may be appealed to the Tribunal by the applicant.

(3) The Appeal Tribunal may, if special circumstances so require, make an interim ex parte decision authorizing, requiring or prohibiting anything that the Tribunal would be empowered on application, notice or hearing to authorize, require or prohibit, but the decision must not be made for any longer time than the Tribunal considers necessary to enable the matter to be heard and determined.

(4) The Appeal Tribunal must send copies of all its decisions to

(a) the Minister unless the Minister directs otherwise, and

(b) all persons that the Tribunal considers affected by the decision.

. . .

Appeals to the Court of Appeal

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 leave to appeal has been obtained.

(2) Application for leave 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.

(3) Notice of the application for leave to appeal must be given to the Appeal Tribunal and to any other person the judge directs.

. . .

Finality of Appeal Tribunal decisions

208 Except as otherwise provided,

(a) every decision of the Appeal Tribunal is final, and

(b) no decision of the Appeal Tribunal may be questioned, reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in a court.

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Part 7 - Descent of Property

7.12 Referral to council

(1) The land trustee must apply to the settlement council for direction

(a) if there are no estate instructions;

(b) if for any reason the estate instructions are uncertain or impossible to carry out; or

(c) if the interest held by the trustee has not been transferred to a person on the heirs list by the 21st anniversary of the deceased's death.

(2) On receiving an application for direction the settlement council can either decide who should receive the deceased's interest or refer the matter to the Appeal Tribunal.

7.13 Guiding principles

(1) When an application has been made under section 7.12, any determination of the question, whether by the settlement council or the Appeal Tribunal, must be guided by the following principles in the stated order of priority:

(a) as far as possible, and to the extent that they can be clearly determined, the last wishes of the deceased should be met;[35]

(b) the interest must be transferred to the deceased's spouse if it can be registered in his or her name, and if there is more land than can be registered in the spouse's name the spouse can specify the order in which the interests should be considered for registration;[36]

(c) if there is one or more living adults on the heirs list and they agree on what should be done with the interest, the agreement should be followed;

(d) if it is not possible to get an agreement from the persons on the heirs list but, in the opinion of the body making the decision, there is substantial agreement among adult members of the deceased's family as to what should be done with the interest, that agreement should be followed;

(e) if there are no adult members of the deceased's family, but the deceased leaves living children, the land interest should be given to the child who, in the opinion of the settlement council, is best able to use if for the purpose intended;

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[35]As indicated in the opening words of this section, each subsection only comes into play if the matter is not resolved by the subsections ahead of it. So, for example, if it is clear that the deceased wanted the land to go to a particular underage child, the body making the decision would have to try to make arrangements so that could happen. The next subsection would not come into play if the deceased's wishes are clear.

[36]As indicated in the opening words of this section, each subsection is subject to the subsections ahead of it. So, for example, in this subsection the spouse must be guided by the last wishes of the deceased if those wishes can be clearly determined. Similarly, in the next subsection, if the deceased left clear written instructions that the eldest son was to get the interest, but died before the son was an adult, the family would have to respect those wishes when agreeing on what should be done with the land.

(f) if it is not possible within a reasonable time to decide who should receive the interest in accordance with the above principles, the land should be sold and the money made part of the deceased's estate.

(2) In this section "deceased's family " means the adult members of the deceased's immediate family, if there are any, and otherwise, the adult members of the deceased's extended family.

Part 8 - Appeals and References

8.1 Right to appeal

(1) Wherever this Policy requires the General Council or a settlement council to make a decision related to the granting, transfer, or termination of interests in land in the settlement area, any person affected by the decision, or lack of a decision, can appeal in writing to the Appeal Tribunal.