

Before:

Metis Settlements Appeal Tribunal
Membership Panel

Between:

Cora Abtosway

Appellant

-and-

Kikino Metis Settlement

-and-

Metis Settlements General Council
Metis Settlements Land Registry

Other Parties

Concerning:

Membership Dispute

Decision Date:

May 18, 2016

DECISION

The Hearing – parties, place and date

MSAT Panel members:

Don Cunningham, Panel Chair
David Drummond, Panel Member
Ross Daniels, Panel Member

Parties present at the hearing:

Cora Abtosway-Appellant
Terrence Pruden-Husband of Appellant
Floyd Thompson-Council for Kikino Metis Settlement
Chad Cardinal-Council for Kikino Metis Settlement
Ben Hardy-Council for Kikino Metis Settlement

MSAT staff present:

Harry Cunningham, Dispute Resolution Officer

Place and date of the Hearing:

Kikino Metis Settlement Community Hall
March 18, 2016

1.1 Context

Cora Abtosway applied for membership in the Kikino Metis Settlement on June 26, 2014. Kikino Settlement Council responded by letter to Cora on September 16, 2014, advising her that her application for membership was refused. Kikino wrote that “No new membership applications are being approved at this time other than those applicants who are born and raised on the settlement until such time as a satisfactory process is agreed to by the Province of Alberta and the Metis Settlements General Council.” Kikino also informed Cora that she could appeal their decision (within 45 days of the decision date (sic) [it should have read that she could appeal their decision within 45 days after receiving notice of Council’s decision]).

Cora wrote to the Metis Settlements Appeal Tribunal (the Tribunal) on October 1, 2014, appealing Kikino’s decision.

Cora’s matter was heard on March 18, 2016 at the Kikino Community Hall.

Having considered the evidence given at the hearing and considered the rules for granting membership, this Panel thinks it appropriate to grant membership to Cora Abtosway in the Kikino Metis Settlement.

1.2 Evidence before the Panel

On June 26, 2014 Cora filed the Application for Membership (Form 1) with Kikino Metis Settlement. Included with her application was her Membership Declaration (Form 2), two Elder’s declarations (Form 3) and her ancestral chart.

On July 7, 2014, Cora completed the form letter supplied by Kikino requesting Indian and Northern Affairs Canada (INAC) to see if she is registered as an Indian under the Indian Act. She received a response from INAC on July 15, 2014 confirming she is not registered as an Indian.

Kikino Metis Settlement Council dealt with Cora’s membership application on August 26, 2014 and refused her application. Kikino did not notify Cora that they were dealing with her membership application on August 26, 2014. However, Kikino notified Cora of its decision in a letter dated September 16, 2014 that her membership application was refused because:

No new membership applications are being approved at this time other than those applicants who are born and raised on the settlement until such time as a satisfactory process is agreed to by the Province of Alberta and the Metis Settlements General Council.

Kikino also advised Cora that:

You are welcome to submit your application again once a decision is made to accept new memberships. You may also appeal the decision of

council by contacting the Metis Settlements Appeal Tribunal within 45 days of council's decision (sic).

Cora appealed Kikino's decision on October 1, 2015.

What we heard at the hearing is that while Kikino was restricting membership to only those who were born and raised in Kikino, Council was satisfied that Cora is Metis. It was also clear that Cora lived in Alberta for five years before applying for membership in Kikino and has been living peacefully with relatives in Kikino for at least 7 years.

This Panel also reviewed all the information provided by Cora concerning her membership application, including all membership criteria listed in Part 3 of the MSA.

1.3 Findings of Fact

- Cora Abtosway applied for membership in Kikino Metis Settlement on June 26, 2014.
- Cora's application included a statutory declaration by her and by an elder speaking to her Metis identity; suitable living accommodations; commitment to living in the settlement area and to preserving a peaceful community.
- Kikino Council met on August 26, 2014 to deal with Cora's membership application. Notice was not provided to Cora about the meeting.

Kikino refused Cora's membership application on the grounds that No new membership applications are being approved at this time other than those applicants who are born and raised on the settlement until such time as a satisfactory process is agreed to by the Province of Alberta and the Metis Settlements General Council.

- Kikino Council sent a letter to Cora dated September 16, 2014 informing her that her membership was refused and of her right to appeal.
- Cora filed an appeal in writing with the Appeal Tribunal on October 1, 2014.

1.4 How the law applies to this matter

The Metis Settlements Appeal Tribunal (MSAT) can decide matters when the subject matter falls within the scope of work that the Tribunal does and when the person who wants the Tribunal to do something, files his or her appeal on time.

In this case, MSAT must hear membership appeals under section 83 (1) of the MSA when the appellant files an appeal within 45 days after receiving notice of the refusal. Council notified Cora of its decision by letter dated September 16, 2014, which she received shortly thereafter. Cora filed her appeal on October 1, 2014, or within the 45 day deadline.

Given that this matter is properly before MSAT, this Panel can make any decision that the settlement council could have made (see section 190(1)(j) of the MSA). This Panel can also confirm or reverse the settlement council's decision (see sections 190(1)(k) and (j).) refer the matter back to settlement council (section 190(1)(m) or provide any remedy that, in all circumstances, fairness requires (section 190(1)(o).)

In applying its powers and duties over this matter, this Panel is also mindful of its statutory mandate as set out in section 187.1 of the MSA. It reads that:

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 the Metis Settlements under the laws of Alberta.

What this means is that our work must protect Metis culture and identity while strengthening self-governance systems established through the *Alberta-Metis Settlements Self-Governance Accord* of 1989.

Dealing with the second part first—*strengthening self-governance under the laws of Alberta*—this Panel is mindful that deference is owed to local decision makers when the local decision makers have executed their duties in a reasonable manner. This means that so long as Kikino settlement council addressed the appropriate criteria for determining membership and made a decision that is reasonable in the circumstances, this Panel should defer to that decision.

So, did Kikino Settlement Council address its mind to the MSA when it refused Cora's membership application? The answer is no.

Rather than determining whether Cora is a person of Canadian aboriginal ancestry who identifies with Metis culture, or determining whether Cora meets the other mandatory criteria set out in section 78 and other relevant sections of the MSA, Kikino Settlement Council refused her membership solely on the grounds that Cora was not born and raised in the Kikino Metis Settlement. While considerations of an applicant's parentage may be used under section 74 (2) of the MSA to waive the 5 year residency requirement, using the question of parentage to refuse membership is improper. Given this faulty approach, Kikino is not owed deference for its decision.

The choice for this Panel is whether to refer this membership application back to Kikino Council with suggestions as per section 190(1)(m) of the MSA, or to make the membership decision ourselves as per section 190(j) of the MSA.

Given the amount of time that has gone by since Cora filed her application for membership and given that all the information necessary to make a decision is at hand, we elect to make the membership decision now. Part of the urgency of making a decision now is that the MSA calls on councils to exercise this duty in a timely manner. As set out in section 77 of the MSA, "a settlement council must consider every application for membership made to it within 90 days of the application being received at the settlement office." Adding to the time it has taken to decide

Cora's membership by referring the matter back to Kikino Council is not in keeping with the intent of the MSA.

In deciding Cora's membership, the panel will do so with a view to *preserving and enhancing Metis culture* as required by the first part of our statutory mandate. To do this, we will carefully examine each requirement for membership as set out in section 78 and related sections of the MSA. To start, section 78 of the MSA is set out below for ease of reference:

Membership decisions

78(1) An application for membership in a settlement can be approved only if the settlement council is satisfied that the applicant

- (a) is a person of Canadian aboriginal ancestry who identifies with Metis history and culture;
- (b) has or will have suitable living accommodation in the settlement area; and
- (c) is committed to living in the settlement area and preserving a peaceful community.

Determining whether a person is of Canadian aboriginal ancestry who identifies with Metis history and culture under section 78(1)(a), requires the decision maker to consider other sections in the MSA, including sections 74 and 76.

Section 74 sets out the basic requirement that applicants for membership are Metis, at least 18 years old and have either previously been a member of a Metis settlement or have lived in Alberta for the 5 years immediately preceding their membership application. In this regard, the evidence is clear and uncontested that Cora was over 18 years old when she applied for membership and that she lived in Alberta for at least 5 years before applying.

With respect to whether Cora is Metis, consideration is given to section 76 of the MSA (Proving Metis identity). For ease of reference, section 76 is set out below:

Proving Metis identity

76 Every application for membership in a settlement must be sent to the settlement office and must be accompanied by

- (a) a statutory declaration that
 - (i) the applicant has Canadian aboriginal ancestry, describing the facts on which the declaration is based, and
 - (ii) the applicant identifies with Metis history and culture;
- (b) one or more of the following:
 - (i) genealogical records as evidence that the applicant has aboriginal ancestry;
 - (ii) a statutory declaration of at least 2 Metis who are recognized as Metis elders that the applicant has Aboriginal ancestry, describing the facts on which the declaration is made;
 - (iii) such other evidence satisfactory to the settlement council that the applicant has aboriginal ancestry;
- (c) an address to which notices and decision can be sent to the applicant.

Cora's membership application included a statutory declaration. In that statutory declaration, Cora swears that she has aboriginal ancestry because her father is Metis from Saskatchewan and her mother is a member of the Whitefish River Band. Cora also provided a long form birth certificate (genealogical record) confirming who her parents are and where they are from.

As further set out in her statutory declaration, Cora identifies with Metis history and culture through her father's side of the family and she also provided a family tree (genealogical record) in her declaration showing that her grandfather, Harry Abtosway, was Metis. In addition, Cora secured a declaration from Metis elder, Juliette Bellerose, that Cora has aboriginal ancestry.

Cora also requested that a search be done of the Indian Registry System to determine whether she is listed in the Indian Registry or Band lists. There is no evidence that her names appears on any such lists.

As noted during the hearing, Kikino Council was satisfied that Cora is Metis and that she meets the other criteria for membership. So too is this Panel. Cora is a person of Canadian aboriginal ancestry who identifies with Metis history and culture.

With respect to the additional considerations under sections 78(1)(b) and (c), this Panel is satisfied on the balance of probabilities that Cora already has suitable living accommodations in Kikino and is committed to living in the settlement area and preserving a peaceful community.

As set out in Cora's membership application, and as examined during the hearing, she has lived in Alberta for at least 5 years prior to submitting her application for membership. Cora is not a member of another settlement. Cora is not in debt to Kikino and is committed to living in Kikino. Cora confirmed during the hearing, that she has been living with a Settlement member since 2008 and, as set out in her application and that she is committed to preserving a peaceful community and to complying with Settlement laws. Furthermore, no evidence was presented at the hearing that Cora was in any way a trouble-maker or nuisance to others in Kikino.

Lastly, Kikino's assertion that Cora's membership application cannot be dealt with *until such time as a satisfactory process is agreed to by the Province of Alberta and the Metis Settlements General Council* is simply unacceptable. The message from Kikino does not say what General Council process Kikino is referring to, when the so-called *process* might be concluded, or where Kikino's statutory authority comes from to refuse membership on such a vague ground.

To the extent that some clarity was offered at the hearing about the General Council process in question, it appears Kikino had the following General Council motion in mind when it decided to freeze all membership applications from those not born and raised in Kikino:

General Council Motion 09.07.23.01 [July 23, 2009]
Elizabeth / East Prairie
Resolved that the MSGC direct the MSGC Executive to send a
letter to the Minister to pass a regulation to temporarily extend

*the time lines in the application process for membership to
allow us [General Council] to explore options
7 in favour
1 against / Gift Lake*

Motion Carried

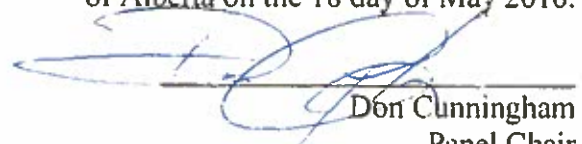
No evidence was given at the hearing that the Minister passed a regulation to extend membership application timelines. Nor was any evidence given to show that some other regulation, statutory amendment or that some new General Council Policy was made that altered the statutory requirements set out in Part 3 of the MSA. Given that the motion that Kikino referred to was not accepted by the Minister, and given the fact that the request was for a temporary extension, and that the request was made in 2009, it is puzzling at best that Kikino continues to refer to the General Council motion at all. There is simply no basis—either in the existing statutory framework or in the political matrix—to justify any delay or denial of membership applications just because they come from Metis who were not born and raised on Kikino Metis Settlement.

What this Panel can say with confidence is that on the balance of probabilities, Cora meets the statutory requirements for membership set out in the MSA. It is therefore appropriate to grant her that membership now.

1.5 Order

The Metis Settlements Land Registry is directed to enter Cora Beulah Abtosway as a member on the Kikino Metis Settlement members list, effective as of the date of this Order.

Dated in the City of Edmonton in the Province
of Alberta on the 18 day of May 2016.


Don Cunningham
Panel Chair