Tribunal Order: 294

Before:

Metis Settlements Appeal Tribunal

Between:

Harry Supernault

Applicant

-and-

East Prairie Metis Settlement

Respondent

-and-

Brendon Desjarlais

Respondent

-and-

Metis Settlements General Council

Respondent

-and-

Metis Settlements Land Registry

Respondent

Concerning:

Membership

Hearing Date:

June 27, 2016

Decision Date:

October 11, 2016

DECISION

The Hearing – parties, place and date

Panel members:
Lorne Dustow, Panel Chair
David Drummond, Panel Member
Don Cunningham, Panel Member

Parties Present at the Hearing:
Harry Supernault, Applicant

Marcel Desjarlais, Representative for Brendon Desjarlais

East Prairie Metis Settlement, Respondent
Councilors: Colette Duh, Wade L'Hirondelle, Peter Patenaude, Jackie Bellerose, Interim Administrator

Observers:
Joan Haggerty, Violet Haggerty, Chad Haggerty, Karen Cunningham, Rose Prinz, Murielle L'Hirondelle, Ronald Bellerose, Lashay Chalifoux

Appeal Tribunal Staff Present at the Hearing:
BJ Simpson, Appeal Tribunal Officer
Harold Robinson, Tribunal Secretary

Place and Date of the Hearing:
East Prairie Metis Settlement Communiplex
June 27, 2016 at 3:45 p.m.

1.0 Context

[1] East Prairie Metis Settlement (EPMS) Council approved Brendon Desjarlais' membership bylaw on September 21, 2015 and Settlement member, Harry Supernault, appealed Council's decision on November 5, 2015. This Panel permitted Harry to make an appeal because he met the basic requirements set out in section 83(2) of the Metis Settlements Act[1] (MSA), including meeting the 45 day appeal deadline and other conditions (i.e. being a settlement member) to file this type of appeal.

[2] This matter was heard at the East Prairie Metis Settlement Communiplex on June 27, 2016.

[3] A number of issues[2] were discussed, including the following:

1) *Should the public meeting/bylaw vote (held on September 2, 2015) that recommended Brendon for membership be set aside if it is proven on the balance of probabilities that terminal errors were made in the way the vote was recorded?*
2) *Did EPMS Council properly execute its statutory duties in reviewing and approving Brendon's membership application? What deference is owed to Council in this regard?*
3) *Harry alleged that a member of this Panel, Don Cunningham, is a registered Indian and that this means that the Panel is bias. Has Harry raised a real or reasonable apprehension of bias?*
4) *Section 75 of the MSA enables a person to apply for membership in a Metis settlement, providing they were registered as an Indian after 1990 and before they turned 18 and that they meet certain other conditions. Is section 75 outside of the power (ultra vires) of the Province of Alberta?*

[4] The Panel carefully considered each issue that falls within its mandate and while certain irregularities are present, we do not think it appropriate to overturn Brendon's membership bylaw.

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[1] *Metis Settlements Act* [RSA 2000, Chapter M-14]

[2] This hearing involved the same appellant and respondent (EPMS Council) and was held on the same day in the same location as two other hearings, including Tristyn Haggerty's matter. Many of the same issues and evidence were raised between Tristyn's matter and this one. While the Panel for this matter carefully considered each issue before us and carefully considered the merits and uniqueness of the evidence and arguments before us, some overlap in wording and reasoning exists between this and Tristyn's decision (Order 293) because it aligns with our views on this matter.

1.1 Evidence before the Panel

Harry Supernault

[5] With respect to the records that were produced concerning the public meeting/bylaw vote on September 2, 2015, Harry said that the "Ballot Account[3]" form at Tab 11 of the Hearing Kit is terminally flawed. Harry pointed out that the number of ballots supplied total 52, the total number of ballots counted only totals 50, leaving 2 ballots unaccounted for. [4] According to Harry, these flaws require that the outcome of Brendon's vote be reviewed and overturned.

[6] Harry said that the Appeal Tribunal's neutrality is also compromised. He claims that Panel member Don Cunningham is a registered Indian and that, if true, this Panel is bias. Apart from claiming bias, though, Harry did not offer any evidence concerning Don's handling of this or other related matters to illustrate his point.

[7] Harry questioned where the Government of Alberta "gets the authority to turn an Indian into a Metis." His argument is that the Supreme Court of Canada (in Cunningham[5]) affirmed Alberta's authority to establish an ameliorative legislative framework for Metis, including defining membership and the right to terminate the membership of those who voluntarily became registered Indians after 1990 (and after they turned 18 years old), but it does not grant Alberta authority over Indians or the ability to "turn an Indian into a Metis;" which is what he says is being done when registered Indians are allowed membership through the section 75 bylaw process.

[8] Harry also raised certain challenges for the EPMS community to consider as a whole. He said that parents on the Metis Settlements should stop registering their children as Indians before they turn 18 years old. He said that he asked his own daughter not to register his grandchildren as Indians before they turn 18 and that he believes she has left the choice to them. He said that this decision—whether to become a registered Indian—should be left to each individual to make, voluntarily, after they turn 18 years old. He suggested that this approach would better guarantee that Metis are not displaced from the Settlements by registered Indians in the way that Metis families were displaced from their homelands in the 1800's by white settlers. He said that this

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[3] The Ballot Account form shows how many ballots were supplied, not used, spoiled and shows the ballot count for Brendon.

[4] The Ballot Account for the East Prairie Metis Settlement Business Membership Admission Bylaws form [TAB 11] has both Tristyn Haggerty [EPMA060] and Brendan [EPMA061] on the same form. The numbers add up for Tristyn, but not for Brendon. The form shows the total ballots supplied of 52; number of ballots not used [original number scratched out] 3; spoiled ballots 1; count of ballots in favour of 26 and not in favour at 20 leaving a discrepancy of 2 ballots unaccounted for.

[5] See Cunningham v. Alberta (Aboriginal Affairs and Northern Development), 2009 ABCA 239

problem of displacement does not affect First Nation Reserves because "Reserves have higher fences and stronger padlocks."

EPMS Council

[9] EPMS Council confirmed that they considered and applied the membership criteria set out in the MSA concerning Brendon's membership application, including section 74 through 78 of the MSA.

[10] In particular, EPMS Council was satisfied that Brendon met the admission requirements set out in sections 74 and 75 of the MSA to be considered through the section 75 bylaw process. EPMS confirmed that they were satisfied that Brendon has aboriginal ancestry and that he identifies with Metis history. Finally, EPMS confirmed that Brendon has suitable living accommodation in EPMS and that he is committed to living in the settlement area and preserving a peaceful community.

Brendon Desjarlais

[11] As allowed by the Tribunal's Rules of Procedure and as is common in Metis communities and culture, a family member spoke for Brendon Desjarlais. In this case, it was his uncle, Marcel Desjarlais, who spoke for him.

[12] Marcel said that Brendon met all the membership requirements set out in the MSA. He said that as set out in his membership application[6] Brendon:

- met the requirements in section 74 of the MSA in that he:
  - is a Metis and was at least 18 years old when he applied;
  - has lived in Alberta for 5 years immediately before applying;
- met the requirements set out in section 75 of the MSA in that he:
  - was registered as an Indian before he turned 18 years old;
  - lived a substantial part of his childhood on EPMS;
  - that his mother, Val Desjarlais, is a member of the EPMS;
  - and that he was approved through the bylaw process, including a successful outcome at the public meeting on September 2, 2015 of 26 for v. 20 against;
- met the requirements in section 76 of the MSA for proving Metis identity in that his membership application was accompanied by:
  - a statutory declaration declaring his Canadian aboriginal ancestry and that having been raised in EPMS, he identifies with Metis culture and considers EPMS his home;
  - other evidence that the applicant has aboriginal ancestry including common

[6] See Tab 6, Hearing Kit, Harry Supernault and EPMS/Brendon Desjarlais, June 27, 2016 – Membership application

knowledge of his family tree in EPMS that includes his maternal grandparents who are both members of EPMS;
- met the requirements in section 78 of the MSA in that Brendon:
  - is a person of Canadian aboriginal ancestry who identifies with Metis history and culture;
  - has suitable living accommodations in the settlement area; and
  - is committed to living in the settlement area and preserving a peaceful community.

[13] Marcel responded on Brendon's behalf to Harry's challenge to the community with one of his own. Marcel said that the future of the Metis Settlements lies in inclusion. He said that the look and nature of being Metis is evolving, including seeing Lebanese Metis, African American Metis, Chinese Metis and other mixes that build on the original combination of French, Scottish, and Aboriginal unions and cultures. He said that whatever the mix, "There is no denying we all have the same [Aboriginal] grandmothers" and that it is these family ties and the resulting membership—not legislation or court cases—that make for strong Metis communities.

1.2 Findings of Fact

- On September 23, 1991, Brendon was registered (before he was 18) to the Frog Lake First Nations Band.

- On February 19, 2015, Brendon Desjarlais applied for membership into the East Prairie Metis Settlement.

- On August 17, 2015, EPMS Council approved 1st and 2nd reading of Membership Admission By-law #EPMA061 for Brendon.

- On September 2, 2015, the EPMS membership voted on Brendon's membership bylaw. The results were itemized on the "Ballot Account for EPMS Business Membership Admission Bylaws," summarized below:

  - 52 ballots supplied
  - 3 ballots not used, with the initial number being scratched out
  - 1 spoiled ballot
  - 26 in favour
  - 20 against

- On September 21, 2015, EPMS Council approved Brendon's bylaw for 3rd reading and sent him a letter approving his membership into EPMS.
- On October 19, 2015 EPMS adopted its September 21, 2015 minutes approving Brendon's membership. It is not clear if or when these minutes were posted.
- On November 5, 2015, Harry appealed (in writing) EPMS Council's decision to grant Brendon membership.

1.3 How the law applies to this matter

[14] This Panel will analyze the issues, arguments, facts, and law in the order set out above in the section marked "Context."

1) Should the public meeting/bylaw vote (held on September 2, 2015) that recommended Brendon for membership be set aside if it is proven on the balance of probabilities that terminal errors were made in the way the vote was recorded?

[15] The way in which the vote at the September 2, 2015 public meeting was recorded on the "Ballot Account for EPMS Business Membership Admission Bylaws" form was not free from errors. The initial number given for "ballots not used" was scratched out and replaced with the number 3 and the tally of ballots for Brendon fall two ballots short of the total number of ballots distributed (52) at the public meeting.

[16] In our view, these errors are not suggestive of a deliberate attempt to skew the actual vote count, but are simply evidence of some sloppiness in recording the outcomes. Nor can it be said that the mistakes materially affected the outcome or legitimacy of the vote itself. No one contests that Brendon "won" his membership vote 26 to 20 and the addition of two more ballots, even if they are counted against Brendon, would not change the end result. While we would have preferred that the first number beside "ballots not used" have simply had a line drawn through it and been initialed by the official in charge, and that separate[7] Ballot Account forms were used—one for Brendon and one for Tristyn—these mistakes are not sufficiently material to set aside the bylaw vote of September 2, 2015.

[7] See MSAT Order 197, January 21, 2009, in which the Tribunal recommends that separate ballots be used to record the votes for each membership bylaw applicant.

2) *Did EPMS Council properly execute its statutory duties in reviewing and approving Brendon's membership application? What deference is owed to Council in this regard?*

[17] Starting with the second question first, the standard or reasonableness applies to EPMS Council's interpretation of the membership criteria set out in section 74 through 78 of the MSA. What this means is that where it is shown that EPMS Council addressed their minds to the relevant legislation and applied the correct facts to reach their decision, the Tribunal should not replace EPMS Council's decision with its own.

[18] In this regard, the Panel walked through the membership criteria set out in sections 74 through 78 of the MSA with EPMS Council[8] at the hearing with a view to understanding if and how Council addressed the requirements for membership. In our view, EPMS Council addressed its mind to each requirement, including being satisfied that Brendon's application form contained such other evidence under section 76(b)(iii) that the applicant has aboriginal ancestry, and, equally if not more important, that Brendon identifies with Metis history and culture.

[19] Given these facts, this Panel is satisfied that EPMS Council's interpretation of the membership criteria was reasonable and that process followed to implement the criteria met the requirements set out in the MSA.

3) *Harry alleged that a member of this Panel, Don Cunningham, is a registered Indian and that this means that the Panel is bias. Has Harry raised a real or reasonable apprehension of bias?*

[20] If we follow Harry's argument correctly, the alleged presence of a registered Indian on the Appeal Tribunal is enough to render our processes as bias. The suggestion being that a registered Indian—by virtue of his or her status as a registered Indian—would not be able to fairly arbitrate the issues before us, thereby compromising the integrity of our whole process.

[21] While it is tempting to disregard such an allegation because it suggests that neutrality is tied wholly to what someone *is* as opposed to *how* they act, this Panel would miss the opportunity to talk about what bias is and about the tests for bias. It would also miss the opportunity to remind the parties about the appointment criteria for members of the Appeal Tribunal; and, in particular, that nothing in the MSA prohibits the appointment of a registered Indian to the Appeal Tribunal.

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[8] The Panel also heard from all the other parties about the application of the membership criteria.

[22] In general, bias exists when it is clear or reasonably certain that a decision-maker has closed his or her mind to the arguments and evidence before him or her.

[23] When alleging "actual bias," the parties might bring evidence forward that convincingly demonstrates that the decision-maker is framing or deciding the matter on an *irrelevant consideration* or *improper motive*. While Harry is suggesting, albeit obliquely, that if Don is a registered Indian that this alone is enough to find actual bias, we do not agree. In our view, the test for actual bias requires cogent evidence that a panel member is acting on considerations or motives that are irrelevant to the matter at hand, and there is no evidence of any such conduct or propensity before us.

[24] That the Appeal Tribunal also has safeguards in place to limit the potential of actual bias is worth noting. One such safeguard is to have each prospective panel member consider whether he or she has any immediate family ties, financial or other interests, or views that could inhibit their ability to impartially adjudicate the matter. If the prospective panel member feels he or she is clear of any such entanglements, they then sign a "Declaration of Impartiality" before being appointed to a panel. While it is true that simply signing a Declaration of Impartiality does not guarantee impartiality or neutrality, it does show that the Appeal Tribunal takes the matter seriously and that we would require proof of bias before upsetting a panel appointment.

[25] Insofar as the composition of the Appeal Tribunal writ large is concerned, the only statutory restriction concerning appointment to the Appeal Tribunal is that of the three appointments made by the Minister,[9] "at least 2 must be persons who are <u>not</u> settlement members." [Emphasis added.] The Act does not preclude the Minister from appointing a registered Indian, a white person, a Metis, or really any ethnic or cultural mix to the Appeal Tribunal providing that the individual shares the values of mutual respect, integrity, and common sense called on of all Tribunal members.

[26] With respect to the composition of this particular Panel, it was done in compliance with section 184(2) of the MSA, which requires that membership panels include a person appointed by the General Council [Lorne Dustow] and that a majority of the panel be composed of persons appointed to the Appeal Tribunal by the Minister [David Drummond and Don Cunningham]. In this regard, then, there is no reason to suggest that this Panel is not properly constituted.

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[9] Not including the Tribunal Chair, who is appointed by the Minister from a list of nominees submitted by the Metis Settlements General Council (see section 180(2)(a) of the MSA).

[27] Moving on, the test for reasonable apprehension of bias is whether an informed person, viewing the matter through to its conclusion, would perceive the decision maker to be biased. In this regard, neutrality is not dependent on one's alleged status, but on one's actions, and there is no evidence before this Panel to show that we, or any of our members, have closed our minds to the matters before us.

4) *Section 75 of the MSA enables a person to apply for membership in a Metis settlement, providing they were registered as an Indian after 1990 and before they turned 18 and that they meet certain other conditions. Is section 75 outside of the power (ultra vires) of the Province of Alberta?*

[28] When the Appeal Tribunal was established in 1990 it could and did deal with Constitutional and Charter challenges. That power was lost with the passage of the *Administrative Procedures and Jurisdiction Act* in 2005 and *Designation of Constitutional Decision Makers Regulation* in 2006, which limited questions of constitutional law only to tribunals listed in the regulation (which does not include the Appeal Tribunal). Whether Alberta was correct to make that change to the Metis Settlements negotiated self-governance framework is a matter of debate, but the fact remains that this Tribunal is not empowered to deal with the question of whether section 75 is ultra-vires to Alberta.

[29] That noted, what follows is commentary.

[30] In hearing the submissions by the parties, we were struck by the competing versions of community presented by Harry and Marcel. Despite their diametrically opposed views about how to build vibrant Metis communities, each spoke with the force and eloquence of one who is convinced that they stand in the light.

[31] As a Tribunal, our mandate[10] is to preserve and enhance Metis culture and identity and to further the attainment of self-governance under the laws of Alberta, so we will simply point the parties and others engaged in this critical discussion to consider the following:

- Resolution 18 of the Alberta Legislature in 1985 made the upcoming negotiations of a Metis self-governance framework conditional on the establishment of "*fair and democratic criteria for membership* in settlement associations;"[11] and that

[10] See s. 187.1 of the MSA: **Overriding considerations**: "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."

[11] See *A Resolution Concerning an Amendment to the Alberta Act*, The Honourable Peter Lougheed Premier, June 3, 1985

- It is the principles of diversity, mutual respect, and partnership that underpin most local, provincial and national plans for social and economic prosperity.

[32] If we may be so bold in the execution of our mandate, we also invite the parties to consider how much light can shine on a community whose goal is to "build higher fences" and to talk about what partnerships can possibly prosper when the goal is to put "stronger padlocks" on their gates.

[33] Finally, if there is a middle ground in all this, it likely came in Harry's pragmatic admonishment to not register one's child as a registered Indian before they turn 18. As a matter of respect, let that critical decision rest with your adult son or daughter. They will make a decision that is best for them, and, ultimately, best for the community they voluntarily join.

1.4 Decision

[34] Harry's appeal of Brendon's membership bylaw under section 83(2) of the MSA is dismissed.

Dated in the City of Edmonton, in the Province of Alberta on this 11th day of October 2016.

Lorne Dustow
Panel Chair