

Before:

Metis Settlements Appeal Tribunal
Land Access Panel

Between:

Sherry Greene	Appellant
-and-	
Elizabeth Metis Settlement	Respondent
-and-	
Metis Settlements General Council	Respondent
-and-	
Metis Settlements Land Registry	Respondent
-and-	
Canadian Natural Resources Limited	Respondent
-and-	
Crescent Point Energy Corp.	Respondent

Concerning: Oil and Gas Compensation Dispute

Hearing Date: October 4, 2016

Decision Date: October 28, 2016

DECISION

The Hearing – parties, place and date

MSAT Panel members:

Lorne Dustow, Chairperson
David Drummond, Panel Member
Cody Hodgson, Panel Member

Parties Present at the Hearing:

Sherry Greene, Appellant

Elizabeth Metis Settlement, Respondent
Settlement Council
Irene Zimmer, Chairperson
Kathy Lepine, Councillor
Mavis Desjarlais, Councillor
Joan Wells, Councillor
Loretta Jacknife, Land and Membership

MSAT Staff Present:

Karen Mustus, Dispute Resolution Officer
Harold Robinson, Tribunal Secretary

Place and Date of the Hearing:

Elizabeth Metis Settlement Community Hall
Elizabeth Metis Settlement, Alberta
October 4, 2016

1.0 Context

[1] Sherry Greene (Sherry) holds the Metis Title interest for the NE-21-059-02-4 (the land). Sherry received initial and annual compensation payments for oil and gas activity on the land from 1992 up until this year, 2016, when the payments were stopped by Elizabeth Metis Settlement (EMS) Council. The payments were stopped because Sherry lives in Ontario (returning to EMS for a maximum of three months per year) and because EMS Council had passed a Surface Rights Payment Policy¹ on September 22, 2015 eliminating payments to members of the EMS who reside in other provinces.

[2] In the case at hand, EMS tried to change the rules for distributing compensation using a simple Council resolution/policy. This is not allowed. If EMS Council decides to put rules in place for the distribution of oil and gas compensation, it has to do so through a properly approved settlement bylaw.

1.1 Evidence before the Panel

Sherry Greene

[3] Sherry confirmed that she received compensation payments up until this year, when they stopped. Sherry said that the payments stopped because EMS Council passed a new policy in 2015 stopping payments to members who live outside of Alberta. Sherry said that she did not know about the new policy, nor was she given an opportunity to speak to the matter with Council.

[4] Sherry said that she has a house on EMS, but it is damaged. Sherry said that she is fixing it, and living in a trailer while doing so.

[5] Sherry said that she lived outside of the EMS once before when she went to Lethbridge College in 2006. Sherry said that she has been living in Ontario from 2014 until now because of a custody issue involving her daughter requiring her not to be away (from Ontario) for more than three months out the year. Sherry said that she has not abandoned her place in EMS and that she spends the three months that she can leave Ontario in EMS.

[6] Sherry said she got a leave of absence when she went to school in Lethbridge, but that she does not have a leave of absence to cover her time in Ontario, in part, because she still

¹ Policy Name: Surface Rights Payment Policy, EMS Council Motion Date, September 22, 2015.

considers EMS to be her home and that she intends to return to EMS as soon as circumstances allow.

Elizabeth Metis Settlement

[7] EMS Council said that 10 members are living outside of Alberta. Council members said that they passed the Surface Rights Payment Policy on September 22, 2015, that “Non-residing members who are members of the Elizabeth Metis Settlement who reside in other Provinces shall not be eligible for Surface Rights Payments” because of the concern that these members were not actively contributing to the EMS.

[8] In answer to whether EMS had a bylaw in place to provide for the distribution of compensation received in relation to oil and gas projects, EMS Council members produced a document entitled: “EMS In the Province of Alberta Compensation Payment for Surface Rights Bylaw #2001-03 (Amended) – A Bylaw to authorize Compensation Payment for Surface Rights.” As this document was previously not submitted by EMS prior to the hearing, it was marked as “Exhibit 1” by this Panel and reviewed at the hearing.

[9] As set out in the “Whereas” section of Exhibit 1, EMS recognizes that a bylaw is required for the distribution of compensation in relation to oil and gas projects.² It also sets out a payment framework for oil and gas activity to members who hold recognized interests in land, but there is nothing in the framework excluding payments for those who hold a recognized interest, but are living outside of Alberta. Finally, it was discovered during the review of the document that 28 members were present on April 22, 2002 when the bylaw was presented at the public meeting that is necessary for passing bylaws and of those **28 members, 13 voted in favour** of the bylaw. The ledger goes on to read that 0 were against the bylaw, and there is no recording concerning how many abstained from voting.

[10] Council members expressed some concern about being asked by this Panel about the various pieces of legislation that may apply to this matter. They felt that it was unfair to be quizzed about the law when it is the Appeal Tribunal’s job to say what the law is and how to apply it.

1.2 Findings of Fact

[11] Sherry holds the Metis Title interest in the land.

² The Alberta Gazette, Part 1, May 15, 1997, *Metis Settlements General Council Mineral Projects Policy* [GC-9603], section 3.7((2)).

[12] Sherry has been receiving annual payments for oil and gas activity on the land from 1992 up to and including the end of 2015 when payments stopped. Sherry was paid as follows:

- Surface Lease Agreement between Crescent Point and EMS, signed by Sherry in which she received 80% of the annual compensation amounting to \$1,848.00 (wellsite), plus \$5.44 (access road);
- Surface Lease Agreement between AltaGas and EMS, signed by Sherry in which she received 80% of the annual compensation amounting to \$400.00 (valve site), minus an additional 10% for monies owed to the Settlement; and
- Surface Lease Agreement between CNRL and EMS, in which Sherry receives annual compensation of \$1,760.00 (wellsite) plus \$47.74 (access road), amounting to 80/20 split but for which no such provision can be found in the Agreement.

[13] Sherry has been living in Ontario since 2014 and returns to EMS for three months a year.

[14] Of the 28 members present at the April 22, 2002 public meeting for the proposed Surface Rights Bylaw #2001-03, only 13 voted in favour of it. Nevertheless, the Council of the day approved Bylaw #2001-03 on third reading on May 13, 2002.

[15] The *Surface Rights Payment Policy* dated September 22, 2015 was passed by a single Council resolution. It is not a bylaw.

1.3 How the law applies to this matter

[16] The Appeal Tribunal has assumed jurisdiction over this matter under section 119 of the Metis Settlements Act³ (MSA). Section 119 provides that the Appeal Tribunal can amend a compensation order when it is satisfied that there has been a change of occupant and that compensation should properly be paid to a new occupant. There is no appeal deadline in section 119.

[17] Applied to the case at hand, EMS is arguing that it is the “new occupant” because its *Surface Rights Policy* dated September 22, 2015 prohibits payments to members who reside in other provinces; which happens to be the case for Sherry.

³ See Metis Settlements Act [RSA 2000, Chapter M-14].

[18] That EMS can make rules for the distribution of compensation received for oil and gas payments is correct. However, any such rule *must be in the form of bylaw*. See section 3.7 of the Mineral Projects Policy, below:

3.7 Compensation

(2) A Settlement may, *by bylaw*, provide for the distribution of compensation received in relation to a project [emphasis added].

[19] Furthermore, if a bylaw is required to do a thing, a settlement council cannot pass a resolution in place of a bylaw. See section 43(4) of the MSA, below:

Kinds of decision

43(4) A settlement council cannot pass a resolution on a matter when a bylaw is required.

[20] So, is the EMS *Surface Rights Policy* dated September 22, 2015 (and which prohibits payments to members residing outside of Alberta) a bylaw? No, it is not.

[21] The process for making bylaws on the Metis Settlements is set out in Part 2, Division 4, section 50 – 64 of the MSA. The relevant sections read as follows:

Bylaw authority

51 A settlement council may make bylaws respecting

- b. the matters described or referred to elsewhere in this Act and in other enactments [i.e. the Mineral Projects Policy].

Enactment of bylaws

52(1) No bylaw has any effect unless it is given 3 distinct and separate readings at a meeting of a settlement council, and no more than 2 readings may be given at the same meeting.

Public notice of bylaws

54(1) Every proposed bylaw must be presented at a public meeting in the settlement area after second reading but before third reading.

Approval of bylaws

55(1) A quorum for public meetings called to vote on settlement bylaws is 15 settlement members who are eligible to vote on the bylaw, or any other number specified by settlement bylaw.

(4) A bylaw voted on at a public meeting is approved if *a majority of the settlement members who are eligible to vote* and who vote at the meeting vote in favour of the bylaw.

(5) If the vote at the public meeting is not in favour of the proposed bylaw, the bylaw is defeated, and all previous readings are cancelled.

[22] With respect to the *Surface Rights Policy* dated September 22, 2015, it was not subjected to three distinct readings and a public meeting. It was created through a simple Council resolution and cannot be considered a bylaw. As such, it cannot be used to divert compensation from Sherry to EMS.

[23] EMS should also be made aware that *Surface Rights Bylaw #2001-03* (sic) is not a bylaw either.

[24] The reason that *#2001-03* is not a bylaw is because it was approved by the then EMS Council even though it failed to secure the support of *a majority* of the Settlement members at the public meeting on April 22, 2002. As required by section 55(4) of the MSA, if **28** members were present at the public meeting when the vote was taken (as appears to be the case from the tally included on page two of *#2001-03*), then at least **15** members needed to vote in favour of it. In the case at hand, only **13** members voted in favour of the bylaw; which is **2 votes short** of the required majority! This fact triggers the statutory directive in section 55(5) of the MSA defeating the bylaw and cancelling all previous readings.

[25] Put another way, EMS should not have approved Bylaw *#2001-03* on third reading because it was defeated at the public meeting and all previous readings should have been treated by application of the MSA as being automatically cancelled.

[26] Unless there is some other validly enacted bylaw that was not presented to the Appeal Tribunal, it appears that EMS has yet to put a valid bylaw in place for the distribution of monies received for oil and gas projects on EMS. Furthermore, in the absence of a properly passed bylaw concerning the distribution of oil and gas monies, any such payments must comply with existing surface lease agreements, road agreements, or other valid instruments put in place between an oil and gas company and the occupants.

[27] Insofar as Sherry's residency is concerned, section 234 of the MSA sets out certain rules about residence:

Rules about residence

234(1) The place of residence of a person under this Act is governed by the following rules:

- a. If a settlement member is on an authorized leave of absence described in section 85, the member is a resident of the settlement area for all purposes, except as otherwise provided by bylaw;
- b. If clause (a) does not apply, residence is decided by applying whichever of the following rules is applicable, unless the matter is governed under a settlement bylaw:
 - i. the residence of a person is the true, fixed permanent home or lodging place to which, when the person is absent, he or she has the intention of returning;
 - ii. a person does not lose residence by leaving home for a temporary purpose;
 - iii. if a person leaves the settlement with the intention of making a permanent residence elsewhere, that person loses residence in the settlement area;
 - iv. the place where a person's immediate family resides is to be considered that person's residence unless the person's home is somewhere else and that person intends to remain in that other place;
 - v. the residence of a single person is the place where he or she occupies a room as a regular lodger, or to which he or she habitually returns not having any other permanent lodging place.

(2) Unless a settlement bylaw otherwise provides, if a settlement member has a residence in both a settlement area and outside the settlement area, he or she must decide on one residence for the purpose of this Act.

[28] Sherry's circumstances may require a judgment call as to her residency; but this is not a call that needs to be made now because there does not appear to be a valid residency bylaw or oil and gas compensation distribution bylaw in place in which to apply the answer. Absent any such bylaws, it may be open to EMS to use section 87 of the MSA to terminate Sherry's membership, but again, this can only be done through the bylaw making process, in accordance with strict notification requirements of section 87⁴. The consequence of failing to maintain a residence under section 87 seems to be the loss of membership (providing, of course, that a bylaw is passed terminating membership), not the curtailing of oil and gas compensation payments.

⁴ See section 87 of the MSA.

[29] That noted, we do not discount the possibility of curtailing oil and gas payments to members based on residency requirements providing those requirements are clearly spelled out in a bylaw that is properly made and that is consistent with provincial laws and MSGC Policies.

1.4 Order

[30] EMS is ordered to pay Sherry the annual oil and gas compensation for 2016.

Dated in the City of Edmonton, in the Province
of Alberta on this 28th day of October 2016.



for Lorne Dustow
Panel Chair

