

Before:

Metis Settlements Appeal Tribunal

Between:

Bruce L. Barry

Appellant

-and-

Buffalo Lake Metis Settlement

Respondent

-and-

Metis Settlements General Council

Respondent

-and-

Metis Settlements Land Registry

Respondent

Concerning:

Expulsion

Hearing Date:

September 28, 2016

Decision Date:

November 8, 2016

DECISION

The Hearing – parties, place and date

MSAT Panel members:

Phyllis Collins, Panel Chair
David Drummond, Panel Member
Cody Hodgson, Panel Member

Parties Present at the Hearing:

Bruce L. Barry, Appellant
Represented by: Brian Vail, Q.C., Field Law,
Legal Counsel for Bruce L. Barry

Buffalo Lake Metis Settlement, Respondent

Settlement Council:

Horace Patenaude, Chair
Harold Blyan, Councillor
Archie Handel, Councillor
Cyril Boucher, Councillor
Lorne Ladouceur, Councillor

Metis Settlements Land Registry, Respondent

Ashley Bodnar, Registrar
Lori Gabara, Land Examiner

MSAT Staff Present:

Karen Mustus, Appeal Tribunal Officer
Harold Robinson, Tribunal Secretary
Fiona Vance, Legal Counsel for the Metis Settlements Appeal Tribunal

Place and Date of the Hearing:

Ramada Inn, Lac La Biche, Alberta
September 28, 2016

1.1 Context

[1] There was a phone call between Bruce Barry and staff for the Buffalo Lake Metis Settlement on August 4, 2015. The Settlement alleges that Mr. Barry made some threats during that phone call, and the RCMP were involved. Starting August 7, 2015, Buffalo Lake Metis Settlement Council began moving to expel Bruce Barry from the Settlement area. Mr. Barry was not a member of the Buffalo Lake Metis Settlement. Council did this by instructing their lawyer to write a letter to Mr. Barry asking him to leave; then by making a motion in Council to expel Mr. Barry; then on September 15, 2015 the Chairman issued an Expulsion Order (under section 93 of the Metis Settlements Act) to Mr. Barry to leave the area immediately.

[2] Mr. Barry appealed the Expulsion Order by filing a Notice of Appeal with the MSAT on October 7, 2015. The MSAT determined Mr. Barry filed his appeal within 30 days of receiving the Expulsion Order, so the MSAT had authority to hear the appeal under section 94 of the Metis Settlements Act.

[3] Mr. Barry's grounds of appeal listed in his Notice of Appeal were numerous, but boiled down to these:

- 1) That Council did not follow sections 92, 93 and 94 of the MSA.
- 2) That Council did not have "just cause" to expel him.
- 3) That Council did not act in accordance with Metis spiritual, justice and cultural principles relating to ethics, moralities and fundamental beliefs.
- 4) That Council breached his section 2(b), 2(d), 7 and 11(d) Charter rights.¹

[4] The Panel reviewed the procedure in expelling a person from a settlement area, as set out with specifics in the *Metis Settlements Act*. One of the requirements is under section 93(2):

93(2) No order can be made under subsection (1) or (1.1) unless the person concerned has been given an opportunity to tell the settlement council why he or she should be able to remain in the settlement area.

[5] In this case, after hearing the evidence, it became clear that Mr. Barry was not given this opportunity properly. Because of that, the Expulsion Order was not properly issued. The Panel quashed the Expulsion Order against Mr. Barry.

¹ The Notice of Appeal also contained a ground of appeal that the MSA is *ultra vires* the Province of Alberta. Mr. Barry abandoned this ground of appeal before the appeal.

[6] Whether the Expulsion Order was justified or not was not an issue before the Panel, and the Panel made no findings as to the merits of the expulsion.

1.2 Evidence before the Panel

[7] The participating parties at the appeal – Mr. Barry and Buffalo Lake Metis Settlement – evidently wanted to get into some detail over what may have happened during the August 4, 2015 phone call. Both sides attempted to give some evidence over what happened.

[8] However, because the first issue was whether the Settlement complied with section 93(2) of the *Metis Settlements Act*, the Panel determined to put the August 4 issue on hold.

[9] The Panel asked the Settlement whether they gave Mr. Barry an opportunity to tell Council why he should be allowed to remain in the Buffalo Lake Metis Settlement area.

[10] The Settlement pointed to a letter dated August 10, 2015, which asked Mr. Barry to leave because:

- He was not a member of Buffalo Lake Metis Settlement
- He was not permitted to reside in the Settlement per section 92
- His threats to a staff member and subsequent criminal charges constituted “just cause” for expulsion.

[11] The letter went on:

You are being requested to leave Buffalo Lake Metis Settlement immediately, upon receipt of this letter. Any reasons or reply to this letter will be accepted in writing only to our lawyers. They can be reached by fax at [number] or [email address].

[12] Mr. Barry agreed he received the August 10 letter. On the Monday following the August 4 phone call, he attended at the RCMP with a supplementary statement and the sheriff gave him the August 10 letter.

[13] For the Settlement, Mr. Blyan stated there was also an e-mail that went on August 12, 2015 from the Settlement’s lawyers to Mr. Barry. This e-mail went to the e-mail address, bruce@brucebarry.ca. This e-mail was not part of the Hearing Package. Mr. Barry did not object

to the August 12 e-mail being an exhibit, except to say the letter may have been sent, but it was not received. The e-mail and letter were marked as Exhibit 1.

[14] The August 12 e-mail from Ackroyd LLP (Buffalo Lake Metis Settlement's lawyer) to Mr. Barry attached a letter. In part, the letter said:

We understand that despite having been requested to leave you are still residing on the Settlement. Accordingly, this is your notice that Council will be making an order for your expulsion.

You have **one week** from the date of this letter to provide reasons as to why you should be able to remain on the Settlement.

...

If no reasons are provided within **one week**, or if Council deems the reasons insufficient to allow you remain, an order will be made confirming your expulsion from the Settlement.

[15] Mr. Barry said he did not receive the August 12 e-mail. He noted that the e-mail address, bruce@brucebarry.ca, was extant at the time. He said that address is activated through a company in the States. He uses that e-mail when he has an art show coming up. When he does not have a show coming up, he deactivates the e-mail address so he does not have to pay for it. After Mr. Barry consulted his laptop, he said the e-mail address was deactivated on July 15, 2015, and not reactivated until November 12, 2015 at 9:12 a.m.

[16] Mr. Blyan explained that the August 12 e-mail was because special procedures were necessary due to conditions of Mr. Barry's release and custody, not to come to the administration office at the Settlement. The Settlement administrator had contacted the lawyer at Ackroyd LLP, who confirmed that she got the e-mail address from a website, and that the August 12 e-mail did not come back as undeliverable.

[17] The Panel noted and communicated to the parties that the e-mail address on Mr. Barry's Notice of Appeal filed with the MSAT for this appeal had a different e-mail address.

[18] By agreement of the parties, MSAT staff provided the Panel with a document from a different appeal (that was heard earlier in the day on September 28, 2016 with the same parties), which was Mr. Barry's application for membership with the Settlement dated February 13, 2015. The Panel Chair confirmed that the e-mail address on that application was bruce@brucebarry.ca.

[19] When asked why he did not give the Settlement an alternate e-mail address, Mr. Barry said he has never gotten anything from the Settlement by e-mail. He was served with the August 10, 2015 letter by police. He was not expecting to get anything by e-mail from them.

1.3 Findings of Fact

- In the morning of August 4, 2015, Council moved to defer Mr. Barry’s membership application pending a status check. That afternoon, Mr. Barry phoned the Settlement office. Allegations arose from that phone call.
- On August 7, 2015, Council moved to send a letter to Mr. Barry to leave the Settlement. Council also moved to request Mr. Barry to leave in accordance with section 92 of the MSA, and to request the RCMP to deliver the letter to Mr. Barry.
- On August 10, 2015, Mr. Barry received the letter when the RCMP handed it to him.
- On August 12, 2015, Ackroyd sent an e-mail to bruce@brucebarry.ca. Attached to the e-mail was a letter addressed to Mr. Barry. Mr. Barry did not read the e-mail and the letter.
- On September 1, 2015, Council moved to order to expel Mr. Barry from the Settlement “in accordance with Section 93 1.1 of the Metis Settlements Act.”
- On September 15, 2015, the Chairman of the Settlement signed and entered an order expelling Mr. Barry from the Settlement “effective immediately.”

1.4 How the law applies to this matter

[20] The Panel identified a preliminary issue about the fourth ground, which was whether the MSAT had jurisdiction to hear the Charter arguments. Under the *Administrative Procedures and Jurisdiction Act*, the MSAT is not a “designated constitutional decision-maker” and lacks jurisdiction to determine “questions of constitutional law.” Mr. Vail advised that Mr. Barry was not asking for a Charter remedy, and was content if the Panel did not make a decision whether certain Charter rights were breached.

[21] As for the merits of the appeal, there are two branches for expulsion from a settlement area under section 93, depending on whether the person is permitted to reside in the settlement area or not. The appeal hearing did not proceed far enough to establish which branch Mr. Barry fell under.

[22] The reason for this is that, regardless of whether Mr. Barry was permitted to reside in Buffalo Lake Metis Settlement or not, the due process requirement under section 93(2) applies. Mr. Barry had to have an opportunity to make his case to Council.

[23] Brian Vail, legal counsel for Mr. Barry, said their position was that Mr. Barry was not given an opportunity to tell Council why he should be able to remain. Mr. Vail argued that e-mail is not service unless the party agrees to e-mail service. The onus was on the Settlement or its lawyers to ensure Mr. Barry got that August 12 letter.

[24] Mr. Blyan for the Settlement said Mr. Barry was given the opportunity anyway. The lawyers told Council not to meet with Mr. Barry. The August 10, 2015 letter said that “Any reasons or reply to this letter” could be given to the Settlement’s lawyers. Any reasons Mr. Barry would have for the Settlement not to expel him could be communicated through the lawyer. That was the intent of both the August 10 and August 12 letters. They left the August 12 communication for the lawyer to take care of. How she chose to do it was out of the Settlement’s hands.

[25] After hearing the evidence, the Panel determined that Mr. Barry did not read the August 12 correspondence in fact. The Panel also determined that delivery by e-mail was not sufficient, if there was no confirmation it had been received. The letter was a document to fulfill a procedural requirement under the MSA, and it had potentially very significant impacts on Mr. Barry. Mr. Barry told the Panel he had never communicated with the Settlement by e-mail before, and that the previous letter (August 10) had been served on him personally by a sheriff. In these circumstances, the August 12 e-mail was not good service.

[26] Without the August 12 e-mail, the question for the Panel, then, was whether the August 10, 2015 letter to Mr. Barry, alone, was sufficient to establish that he was given an opportunity to tell the Settlement why he should be allowed to remain on the Settlement. In the Panel’s view, it was not sufficient. “Any reasons or reply” was not specific enough to alert Mr. Barry that this was his opportunity under section 93(2) to tell Council why he should be allowed to remain on Settlement.

[27] Compliance with section 93(2) of the MSA was a threshold issue, and a matter of procedural fairness.

[28] We therefore find the September 15, 2015 expulsion order invalid. It was unnecessary to consider the merits of the expulsion order. The appeal went no further.

1.5 Order

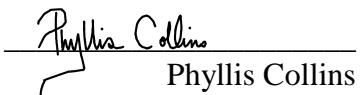
[29] The MSAT grants the appeal on a procedural ground, and quashes the Expulsion Order made September 15, 2015.

[30] Mr. Barry asked for costs against the Settlement.

[31] Mr. Blyan for the Settlement argued that costs were not merited against the Settlement. Each party should cover their own costs.

[32] It is not the usual practice of the MSAT to award costs. It is possible, in a case of obvious malice or bad faith, or where there is an abuse of the MSAT process, that a panel might award costs. This is not such a case. The Settlement did not comply with section 93(2) of the MSA, and did not meet its duty of procedural fairness towards Mr. Barry. However, the Settlement relied on its lawyer to send that second letter of August 12, and believed that they had accordingly complied with section 93(2). There was no bad faith here. While the result of the Settlement's actions was a failure to comply with section 93(2), the Settlement did attempt to comply, and failed only to follow up. This is not an appropriate case for a costs award.

Dated in the City of Edmonton, in the Province
of Alberta on the 8th day of November 2016.


Phyllis Collins
Panel Chair