

Before:

Metis Settlements Appeal Tribunal

Between:

Bruce L. Barry

Applicant,

-and-

**Buffalo Lake Metis Settlement
Metis Settlements General Council, and
Metis Settlements Land Registry**

Respondents.

Concerning:

Decision Regarding Prematurity of Membership Appeal

Hearing Date:

September 7, 2017

Decision Date:

October 3, 2017

DECISION

Panel members:

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

Parties Present at the Hearing:

Bruce L. Barry, Applicant
Accompanied by: Mabel Howse

Buffalo Lake Metis Settlement, Respondent

Represented by: Harold Blyan

Councillors: Horace Patenaude, Lorne Ladouceur, Cyril Jack Boucher, Archie Handel

Observers:

Shelly Durocher
Jenelle Durocher

Fiona N. Vance, Shores Jardine LLP, Legal Counsel for Metis Settlements Appeal Tribunal

Appeal Tribunal Staff Present at the Hearing:

Amanda Wyatt, Dispute Resolution Officer
Harold Robinson, Tribunal Secretary

Place and Date of the Hearing:

Meeting Room, Canalta Hotel,
9905 – 83 Avenue, Lac La Biche, Alberta
September 7, 2017

1.0 Context

[1] On February 13, 2015, Bruce Barry submitted a membership application to Buffalo Lake Metis Settlement.

[2] On August 4, 2015, Settlement Council deferred consideration of Mr. Barry's membership application.

[3] On September 15, 2015, the Chairman of Settlement Council issued an expulsion order against Mr. Barry (the expulsion order was the subject of an appeal in Metis Settlements Appeal Tribunal [MSAT] Order 300).

[4] On September 22, 2015, Settlement Council voted to refuse Mr. Barry's membership application. The minutes from that meeting reads:

MOTION #244/09/15 Harold moves to refuse Bruce Barry's Membership application due to unable to keep a peaceful community, seconded by Archie Handel. 4 in favour, 1 opposed, carried.

[5] On September 28, 2016, MSAT issued Order 301 ("Deferral Appeal"). The subject of that appeal was not the September 22, 2015 decision to refuse membership. Rather, it related to the deferral by Settlement Council on August 4, 2015 to consider Mr. Barry's membership application. In that context, the hearing package for the Deferral Appeal included the minutes from the September 22, 2015 Council meeting.

[6] On January 23, 2017, Mr. Barry filed an appeal with MSAT under section 83 of the *Metis Settlements Act* asking MSAT to direct the Registrar, Metis Settlements Land Registry, to enter him as a full member of Buffalo Lake Metis Settlement. Among his arguments was that the Settlement Council had not provided him with the required statutory notice of their refusal of his membership application, and he had not been advised of well-defined reasons for their decision (referencing section 79).

[7] On August 23, 2017, MSAT staff sent the Hearing Package for this appeal to the parties. In her Report, the Appeal Tribunal Officer identified the following as the first five (of 16) issues:

- a) *Did Buffalo Lake Metis Settlement Council comply with the requirement to give notice and reasons under section 79(2) and (3) of the Metis Settlements Act? Buffalo Lake Metis Settlement Council decided to refuse Bruce L. Barry's membership application, which is reflected in the Council minutes of September 22, 2015 (Tab 4). However, Council did not send out written notice to Bruce L. Barry directly. This is evident from the letter dated January 10, 2017 from the Settlement's Land Membership Clerk/Council Secretary to the Applicant (Tab 20).*
- b) *If the Appeal Tribunal finds that Buffalo Lake Metis Settlement Council did not comply with the requirement to give notice and reasons under section 79(2) and (3) of the Metis Settlements Act, is this appeal premature? Under section 83(1) of the Metis Settlements*

Act, an applicant may appeal to the Appeal Tribunal within 45 days after receiving notice of the refusal of the membership application.

- c) *If the Appeal Tribunal finds that the appeal is premature, should the Appeal Tribunal direct the Buffalo Lake Metis Settlement Council to send written notice of its decision, with reasons, to Bruce L. Barry? This direction would be made under sections 187.1 and 190(1)(o) of the Metis Settlements Act.*
- d) *If the Appeal Tribunal finds that Buffalo Lake Metis Settlement Council did comply with the requirement to give notice and reasons under section 79(2) and (3) of the Metis Settlements Act, on what date did they comply?*
- e) *Based on the date of compliance with section 79(2) and (3), did the applicant meet the required timelines to appeal? Section 83(1) of the Metis Settlements Act sets out a timeline to file an appeal within 45 days after receiving notice of the refusal or deferral, or within 45 days from the date the council should have made a decision. Bruce L. Barry filed his appeal on January 23, 2017 (Tab 5).*

[8] The other 11 issues would only come into play if the appeal advanced past the first five issues.

1.1 Preliminary Issue

[9] All five Councillors from the Settlement were present at the hearing. They did not speak with the same point of view. Mr. Blyan objected to two Councillors speaking on behalf of the Settlement as they had submitted statements as part of Mr. Barry's submissions. Mr. Blyan thought that they should be counted as submissions from Mr. Barry, not from the Settlement. Upon a question from one of the Panel members, one of those Councillors stated that he would like to speak on both sides. The other stated he was neutral.

[10] After the Panel broke to consider this issue, the Chair stated that the Panel needed to hear from both sides in order to make a fair and just decision. Everyone would have a chance to speak, but the Panel needed to know who would be the spokesperson for Settlement Council, and who for Mr. Barry. It would be helpful to be able to identify which side a person was speaking for, ensuring each side had fair opportunities to speak. It was determined that Mr. Blyan would speak for Settlement Council and Mr. Barry would speak for himself.

1.2 Evidence before the Panel

[11] Both Mr. Barry and Settlement Council had opportunity to submit documents to the Panel, which were compiled in a bindered Hearing Package.

[12] On December 2, 2016, Mr. Barry wrote to Settlement Council requesting that he be served notice of the decision in Settlement Council Motion #244/09/15, under section 79(2)(e) of the *Metis Settlements Act*, so that he could appeal that decision. He also noted he had "not been informed of any well-defined reasons for your decision," referencing section 79(3).

[13] By letter dated January 10, 2017, the Land Membership Clerk/Council Secretary to the

Settlement replied to Mr. Barry. In this letter, she wrote in part:

In response to your letter dated December 02, 2016, the following letter is to offer an explanation as to why a notice of decision was not sent out when the resolution was passed on September 22, 2015, to refuse your membership application.

During training at Land Registry in Edmonton it was my understanding that all letters would be coming out of the Edmonton office and was later told that it was my responsibility to send out any letters pertaining to membership. At this time, it was around January 2016 and I felt that a notice was not necessary because of the banishment order and that you had already filed a membership appeal with MSAT.

Although a written notice was not sent out to you directly you were made aware of the decision at the very latest on April 18, 2016, by way of a letter from MSAT to all parties regarding procedural direction of your membership appeal and Mabel Howse's appeal of your banishment order. Subsequently, copies of the September 22, 2015 council meeting minutes were included in the hearing package for Mabel Howse's appeal hearing on April 21, 2016 and the hearing package for your membership appeal held on September 28, 2016.

I trust that this letter will answer any questions as to why a notice was not sent out.

[14] On February 6, 2017, Mr. Barry submitted a copy of the January 10, 2017, letter to MSAT staff to be added to his appeal materials. He had written on this letter, "Rec'd Friday Feb/3/2017."

1.3 Findings of Fact

[15] On September 22, 2015, Settlement Council for Buffalo Lake Metis Settlement passed a motion to refuse Mr. Barry's membership application "due to unable to keep a peaceful community."

[16] Mr. Barry learned of this decision to refuse his membership either by word of mouth or through the evidence in the Deferral Appeal that led to Order 301.

[17] By Form 6A and Form 7 dated November 4, 2015, the Settlement submitted membership notice to the Registrar, Metis Settlements Land Registry. Form 7 identifies that Mr. Barry's application for membership was refused for "unable to keep a peaceful community." This appears to relate to section 79(5) of the *Metis Settlements Act*, which requires a settlement council to send a copy of every membership application decision to the Minister.

[18] On December 2, 2016, Mr. Barry wrote a letter asking the Settlement to comply with section 79(2) of the *Metis Settlements Act* and send him written notice of the refusal so that he could appeal.

[19] On January 10, 2017, the Settlement wrote to Mr. Barry to explain why he was not sent notice.

1.4 How the law applies to this matter

[20] The first issue was whether Settlement Council sent out notice, with reasons, to Mr. Barry of its decision that his application was refused. Put another way, did Settlement Council comply with sections 79(2) and (3)?

[21] Part 3 of the *Metis Settlements Act* governs membership and membership appeals. Sections 74 through 76 govern the requirements for membership and membership applications. Sections 77 through 79 govern how a settlement council considers and decides on membership applications.

[22] Section 79 provides in part:

79(2) Within 45 days after considering an application, or any longer period agreed to by the applicant and the settlement council, the settlement council must send to the applicant a notice of its decision stating that the application

- (a) is approved,
- (b) is deferred pending further information or compliance with specified conditions,
- (c) is deferred because of a lack of suitable living accommodation,
- (d) is approved for a stated probationary period, which cannot be longer than 2 years, or
- (e) is refused.

(3) When an application is deferred or refused, the notice must give reasons for the decision.

[23] Mr. Barry purported to appeal the refusal of his membership application under section 83 of the *Metis Settlements Act*, which provides in part:

83(1) If a settlement council refuses or defers an application for membership, or an application is not considered or a decision is not made by the settlement council within the required time, the applicant may appeal in writing to the Appeal Tribunal

- (a) within 45 days after receiving notice of the refusal or deferral, or
- (b) within 45 days after the date the council should have made a decision.

[24] The Panel considered arguments from Mr. Barry, Applicant and from Harold Blyan, Councillor and spokesperson for Buffalo Lake Metis Settlement Council at the hearing.

[25] Mr. Barry argued that Settlement Council did not comply with section 79(2) and (3). They only sent him notice after he wrote in December 2016 asking them to comply with the Act. Everyone should be treated the same under the Act.

[26] He said that the letter dated January 10, 2017, from the Settlement's Land Membership Clerk/Council Secretary was notice, and that the reasons appear in the minutes of the September 22, 2015 Council meeting. He said that he had filed his appeal after getting the January 10, 2017 letter, well within time under section 83.

[27] For Settlement Council, Mr. Blyan conceded that the Settlement Council had never sent out written notice under section 79(2).

[28] Mr. Blyan submitted that Mr. Barry did receive constructive notice of the refusal. On April 18, 2016, MSAT sent out a procedural direction regarding the September 2016 hearings (on deferral and expulsion). Those packages included the September 22, 2015, minutes stating what the decision was, and why. There was ample time to address the refusal of the membership application, and another hearing held in the interim. Section 83 says a person may appeal 45 days after receiving notice of the refusal. It does not say that it has to be written notice from the Settlement. The Settlement Council's position is that Mr. Barry received notice and that the matter was well beyond the 45-day period.

[29] In the alternative, if written notice with reasons is required, that has never been done. The January 10, 2017 letter merely explains why no notice was provided. It cannot be taken as the notice itself. Then the argument rests on jurisdiction, namely that the MSAT did not have jurisdiction to hear this appeal under section 83(1) as Mr. Barry's appeal was premature.

[30] When Settlement Council approves a membership application, they send the notice to the Metis Settlements Land Registry, and the Land Registry sends notice out to the member. On November 4, 2015, the Settlement submitted the membership notice electronically to the Land Registry. However, the Land Registry does not send out notices when an application is refused. As explained in the January 10, 2017, letter the Land Membership Clerk/Council Secretary did not realize she had to send out letters. A written decision was never sent to Mr. Barry.

[31] When the Settlement's Land Membership Clerk/Council Secretary found out she was supposed to send a notice, Mr. Barry had already filed an appeal and the purpose of the notice would be redundant.

[32] Mr. Blyan drew the Panel's attention to the handwritten indication that Mr. Barry did not receive the January 10, 2017, letter until February 3, 2017, which was after Mr. Barry filed his appeal (January 23, 2017). Mr. Barry replied, saying that he did not want to wait around, after he had delivered his December 2, 2016, letter to each of the Councillors.

[33] Mr. Barry also replied that Acts have to make sense and they are remedial (referring to a discussion on statutory interpretation in *Vicklund v Peavine Metis Settlement*, 2014 ABQB 397 at para 36). The Settlement cannot block him from having a right to appeal by just not telling him. Their rationale is that they can say nothing for two years, and then he cannot appeal.

1.5 Decision

[34] After some deliberation, the Panel found that Settlement Council did not comply with sections 79(2) or (3). Settlement Council did not send Mr. Barry a written notice of its decision on September 22, 2015, to refuse his membership application, as the *Metis Settlements Act* requires.

[35] Accordingly, Mr. Barry's appeal is premature. The trigger for an appeal under section 83(1) is receiving the notice from Settlement Council. If the applicant (Mr. Barry) has not yet received that notice, then the right to appeal under section 83 has not crystallized, and the 45-day limitation has not yet begun.

[36] The letter of January 10, 2017, did not constitute notice as contemplated in section 79(2). Nor did it constitute reasons for the decision to refuse the membership application as contemplated in section 79(3). The letter did not explain why Settlement Council had refused his membership application. The letter instead explained why Settlement Council had not sent such a notice.

[37] When interpreting what "notice" means under section 79(2) and (3), the Panel found it necessary to consider the broader scheme of membership applications and appeals under the *Metis Settlements Act*. In particular, the wording of section 83(1)(a) was informative.

[38] On a plain reading of section 83(1)(a), the act that triggers the appeal period of 45 days is the receipt of the "notice of the refusal." It is not the sending of the notice, and it is not happenstance word of mouth that may or may not reach the membership applicant's ears. It seems clear that the "notice" in section 83(1)(a) refers to the "notice" in section 79(2) and (3).

[39] From the perspective of certainty, to read section 79(2) as including constructive notice does not assist settlements or membership applicants in understanding both membership decisions and appeal periods. If constructive notice could mean rumour, word of mouth, an MSAT hearing package for an appeal that may or may happen, or anything other than clear written notice, then the date for the 45-day limitation to be triggered under section 83(1) will be nearly impossible for anyone – council or applicant – to ascertain.

[40] It is not, however, desirable to allow Settlement Council to comply with section 79(2) and (3) whenever they find it convenient. Settlement Council may have decided Mr. Barry's membership application in a timely matter, but they did not inform him of the result in a timely manner. Two years later, they still have not done so. In *Isbister v Metis Settlements Appeal Tribunal*, 2015 ABCA 164, the Court of Appeal wrote at para 42:

There are, moreover, compelling reasons for the Legislature to preclude indeterminacy in cases of Metis settlement membership. Just as membership questions are (as the Tribunal observed) integral to the proper functioning of a Metis settlement, so is membership itself integral to both the private and public life of the person who holds it. It is associated with statutory rights in land (and therefore homes) and with the right to vote and to hold office in the governance structure of what are typically small communities where decisions of local government carry more direct significance than they typically do in larger

communities. For settled expectations of this sort to be upset 4½ years later undermines the Legislature's objective of securing certainty and finality in these important matters, and defies good sense.

[41] It is significant that section 83(1) not only contains an appeal limitation, but also contains the right to appeal. As the right to appeal under section 83(1) is tied directly to the notice in section 79(2), it would thwart the purpose and objects of the *Metis Settlements Act* to leave the timing of notice under section 79(2) to the convenience of the council in question. A council could theoretically bar an applicant from appealing under section 83(1) simply by neglecting to send written notice. If that were possible, the objects of certainty, rule of law and self-governance that live in the *Metis Settlements Act* would be defeated.

1.6 Remedy

[42] The Panel sends the matter back to Settlement Council so that Settlement Council can provide written notice and reasons for their refusal of Mr. Barry's membership application.

[43] To be clear, this order does not make any finding about whether Settlement Council's decision to refuse Mr. Barry's membership application was reasonable. Settlement Council made its decision regarding Mr. Barry's membership application. That is water under the bridge.

[44] This remedy requires Settlement Council to step back into the process as required under the *Metis Settlements Act* at the point in the legislation of sending out notice of its decision to refuse membership, as required under section 79(2).

[45] In his Appeal Form, Mr. Barry argued that the membership decision ought not to be returned to Settlement Council, as lateral violence would make returning the matter to Settlement Council unjust and a breach of the principles in the *Metis Settlements Act*.

[46] Though the question of Mr. Barry's membership application is aging quickly and has now been through two appeals, MSAT is willing to give Settlement Council the opportunity to correct its procedural error. The rationale of this willingness is fairness to all participants in this appeal:

- a. To benefit Mr. Barry, in allowing him to understand why Settlement Council refused his membership application; and enabling him to identify a clear trigger point for any subsequent appeal under section 83(1).
- b. To benefit Settlement Council, in permitting them to become compliant with the legislation, and in providing them with an opportunity to set out cogent reasons for why they decided to refuse Mr. Barry's membership application on September 22, 2015. This order may have an added benefit to the Settlement of encouraging systemic procedures for compliance with the legislation.
- c. To benefit MSAT, so that if the matter of Mr. Barry's membership application returns to this forum, a panel will be able to truly review the reasons for Settlement Council refusing Mr. Barry's membership application on September 22, 2015.

[47] The Panel makes this order under authority of section 190(1)(o) of the *Metis Settlements Act*, which allows the Appeal Tribunal to “provide any remedy that, in all the circumstances, fairness requires.”

[48] In doing so, the Panel is driven in large part by the Legislature’s directive in section 187.1 to consider as overriding, “the attainment of self-governance by Metis settlements under the laws of Alberta.” Membership is at the core of Metis settlements. Under the *Metis Settlements Act*, membership leads to such entitlements as land interests, descent of property, compensation, and voting rights.

[49] The Panel accordingly orders that:

- a. Settlement Council must send written notice to Mr. Barry that they refused his membership application on September 22, 2015. The written notice must state that this is notice under section 79(2) of the *Metis Settlements Act*. It must also refer to the motion number where Settlement Council refused the membership application, and enclose a copy of the minutes from September 22, 2015. It must also state that this is notice as ordered by MSAT.
- b. The written notice must include reasons, and must state that the reasons are given under section 79(3) of the *Metis Settlements Act*.
- c. The reasons must include particulars of what evidence, documents or testimony were before Settlement Council when it decided to refuse the membership application on September 22, 2015. If there was background or context that is relevant or material to Settlement Council’s decision, the reasons must set that out. If there were incidents or events underlying Council’s decision, the reasons must include names, dates, times, places and other details that will enable Mr. Barry to understand what incident or event Settlement Council is referring to.

In sum, the reasons must be sufficient to enable a reviewing body – whether that be MSAT or a court – to understand on what basis Settlement Council made its decision to refuse the membership application on September 22, 2015.

- d. Settlement Council must send the written notice to Mr. Barry by registered mail to the most recent address that the Settlement has for Mr. Barry.
- e. Settlement Council must put the written notice in registered mail no later than 30 days after the effective date of this order.

[50] The essence of this order is found in both the timeliness of the remedy and the sufficiency of it. Without both these aspects, the order is next to meaningless and nearly unenforceable.

[51] The Panel recognizes that compliance with these orders may cause some administrative burden to the Settlement in terms of accessing records from more than two years ago. Had Settlement Council complied with its obligations under the *Metis Settlements Act* in a prompt fashion, this administrative burden would likely have been considerably less.

1.7 Temporary Stay of Remedy

[52] At the end of the hearing, Mr. Barry advised the Panel that he wished the Panel to stay its decision pending the appeal period. Settlement Council had no objection to a stay. Under section 204(2) of the *Metis Settlements Act*, application for permission to appeal to the Court of Appeal must be made within 45 days after the issue of the decision sought to be appealed.

[53] Accordingly, the orders made in paragraph [50] do not come into effect until 45 days after the date immediately below.

Dated in the City of Edmonton in the Province
of Alberta on this 4th day of October 2017.



