In the Court of Appeal of Alberta

Citation: McCargar v Metis Settlements General Council, 2025 ABCA 33

Date: 20250204
Docket: 2403-0060AC
Registry: Edmonton

Between:

Donald Walter McCargar

Applicant

- and -

Metis Settlements General Council, Kikino Metis Settlement, Metis Settlements Appeal Tribunal

Respondents

Metis Settlement Land Registry

Non-party

Reasons for Decision of
The Honourable Justice Jack Watson

Application for Costs

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I. Introduction

[1] The self-represented applicant was unsuccessful in his application for permission to appeal a decision of the Metis Settlements Appeal Tribunal (MSAT) being MSAT Order 475 on substantive grounds: 2024 ABCA 389. When he had launched his motion for permission to appeal that MSAT decision on the substantive grounds, the applicant had also applied for stay pending appeal of the disposition by MSAT as to costs of the proceedings before MSAT which formed part of that MSAT decision.

[2] The topic of whether permission to appeal *the costs disposition itself* made by MSAT in that decision was not directly dealt within oral submissions as to permission to appeal. Nor was it dealt with in writing specifically. Inasmuch as the applicant was not successful on the substantive grounds, the question of permission to appeal on the costs disposition now remains to be dealt with by itself. The parties to the substantive application were invited to provide written submissions on that topic. The applicant and counsel for the Kikino Metis Settlement Council (KMS) responded.

II. Jurisdiction

[3] In requesting input from the parties about permission to appeal the costs disposition, I invited the parties to include comment as to jurisdiction. There is a 45-day time limitation in the *Metis Settlements Act*, RSA 2000, c M-14 *(MSA*) for permission motions to be brought. The parties do not take issue with the applicant as having made a timely application for permission to appeal the costs order. There was no objection by the respondents to dealing with permission in this case.

[4] Sections 191(1) and (2) of the *MSA* provides for costs authority in these terms:

> Costs
>
> 191(1) The costs of and incidental to proceedings before the Appeal Tribunal are in the discretion of the Tribunal.
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> (2) The Appeal Tribunal may order by whom and to whom any costs are to be paid, and by whom they are to be determined and allowed.

[5] The Act does not provide elaborate guidance as to terms or conditions for the exercise of the discretion thus given to the MSAT by the Legislature. It can be said that since the Legislature has granted the power and discretion to award costs, it has not purported to expressly limit the scope of that power and discretion.

[6] The Legislature has worded provisions authorizing costs differently in different enactments: compare s 12 of the *Court of Appeal Act*, RSA 2000, c C-30, which refers to costs that are "appropriate in the circumstances". I cannot believe that the Legislature intended to authorize costs awards by the MSAT that would *not* be "appropriate in the circumstances" so I do not infer a variation in the intended discretion from the variation in wording. Put another way, I am of the view that the MSAT is expected to act judicially when exercising this discretion.

[7] Furthermore, in ***Canada (Canadian Human Rights Commission) v Canada (Attorney General),*** 2011 SCC 53 at paras 24-27, [2011] 3 SCR 471 ("***Mowat***"), the Supreme Court of Canada said that the standard of review of reasonableness applied to the interpretation given by the Commission to the word "compensation", which the Commission was authorized to give to a successful complainant (subject to a statutory maximum figure) pursuant to section 53(2)(c) and (d) of the *Canadian Human Rights Act*, RSC 1985, c H-6.

[8] In this regard, a standard of review which might more precisely be expressed as 'reasonableness within legal constraints' was effectively applied by the Supreme Court of Canada in ***Mowat*** in review of the interpretation of the word "compensation" by the Commission in its empowering enactment. In my view, the approach by the Court in ***Mowat*** foretold the test of a 'reasonableness within legal constraints" review standard that became clearer in the later decisions in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at paras 99-101, [2019] 4 SCR 653 and ***Mason v Canada (Citizenship and Immigration)***, 2023 SCC 21 at paras 10-11, 72, 85, 91, 95, 104, 115-117 and 121, 485 DLR (4th) 583. See also ***Auer v Auer***, 2024 SCC 36, at paras 50-51, 497 DLR (4th) 381, ***Yatar v TD Insurance Meloche Monnex***, 2024 SCC 8 at paras 71-76, 489 DLR (4th) 191, and ***York Region District School Board v Elementary Teachers' Federation of Ontario***, 2024 SCC 22 at paras 4, 40 and 91 in the majority and also at paras 115-118 in concurring reasons, 492 DLR (4th) 613.

[9] This is not a matter of purely academic interest here. First, my reasoning about the whether the test for permission to appeal under section 204(1) of the *MSA* is met should have regard to the standard of review ultimately to be applied by this Court on any appeal of the matter: see *eg* ***Noskey v Metis Settlements Appeal Tribunal***, 2022 ABCA 54 at paras 5 and 14, [2022] AJ No 177 (QL) and ***Paddle Prairie Metis Settlement v Alberta (Metis Settlements Appeal Tribunal)***, 2009 ABCA 178 at paras 14-15, 90 Admin LR (4th) 167. A test of 'reasonableness within legal constraints' would seem to apply to a decision of MSAT as to costs under the enabling legislation.

[10] Second, the Supreme Court of Canada included - as a key form of 'legal constraint' (on the reasonable interpretation of the word 'compensation' in Mowat) - what Parliament would have known about the meaning of a term of art such as 'legal costs'. Legislatures including Parliament enact with knowledge of the larger book of law and tend to carry forward the "cluster of ideas" around any such legal term: ***R v W(DL),*** 2016 SCC 22 at paras 20-21, [2016] 1 SCR 402; ***Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG***, [1975] AC 591 at 649; ***Belhaj & Anor v Director of Public Prosecutions & Anor***, [2018] UKSC 33 at para 19; ***Air***

Wisconsin Airlines Corp v Hoeper, 571 US 237 (USSC 2014); ***Helsinn Healthcare S.A. v Teva Pharmaceuticals USA Inc***, 586 US __ (USSC 2019); ***Mhlongo v S; Nkosi v S***, [2015] ZACC 19 at footnote 47; see also para 198 of my reasons at 2024 ABCA 389. ***Mowat*** concluded that Parliament could not have intended 'costs' to be included within 'compensation'. In explaining this point, the Supreme Court of Canada in ***Mowat*** said:

> **40** Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning": Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.

[11] Later in ***Mowat***, at para 49, the Court noted that an earlier draft of the *Act* not enacted showed "that the word 'costs' was understood to be a legal term of art to be used when the intention was to confer authority to order payment of legal costs." The Court went on, at paras 53-56, to discuss that the Commission's own prior interpretation of 'costs' had been that Parliament had not endowed it with jurisdiction to award costs. In addition, the Court addressed the Commission's interpretation of the limits on its statutory powers in light of comparable statutory regimes elsewhere in Canada.

[12] This context leads me to the conclusion that an implicit legal constraint on the jurisdiction and discretion of MSAT under section 191(1) and 191(2) is that 'costs' should be defined as recognized legal costs and not an arbitrary figure thought to be fair, although fairness in determining the eligibility and proportion of such costs is involved. Accordingly, in deciding permission to appeal, part of my task is to interpret the MSAT's reasoning in this case to see whether it would be arguable -- within the test for grant of permission to have this Court review the matter – that MSAT wrongly interpreted 'costs' as a matter of law.

[13] The applicant also alleges that the process leading to the costs award was procedurally unfair, which is an issue that is a different line of inquiry from review of the decision itself and essentially involves determining whether the process was fair although a question of law is involved: see my earlier reasons at 2024 ABCA 389 at para 17; see also ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817 at paras 23-27; ***Canada (Attorney General) v Mavi***, 2011 SCC 30 at para 42, 332 DLR (4th) 577; ***Law Society of Saskatchewan v Abrametz,*** 2022 SCC 29 at paras 3, 26-30, 38, 59, 126, 470 DLR (4th) 328; ***Sran v University of Saskatchewan Academic Misconduct Appeal Board***, 2024 SKCA 32 at para 57, 29 Admin LR (7th) 179.

[14] Translated to my function, my decision must consider whether the question of procedural fairness has sufficient validity and significance to require determination by a panel of the Court.

III. Submissions of the Parties

[15] The applicant submits that there are three considerations of importance which he poses as three questions: (a) "Did MSAT apply the following sections of the MSA to the appellant correctly"; (b) "Would the cost order of MSAT cause the appellant financial harm"; and (c) "Can MSAT apply a cost judgment against the appellant from actions and claims retroactively prior to bankruptcy / debt [consolidation] date from the court of December 28, 2022".

[16] The applicant then goes on to make submissions as to the proper meaning of s 191 of the *MSA*, bringing into the analysis the context of s 192 of the MSA which he says requires decisions of MSAT to be "consistent with the Act and any other enactment, general counsel [sic] policies and valid settlement bylaws".

[17] The applicant also argues that the process denied him procedural fairness because "any cost award must consider the economic status of the person and the effects on such person". He underlines the statement in ***Mason*** that where a decision has severe effects on the interests of the individual, the reasoning to the decision "must reflect the stakes".

[18] The applicant also argues that he went through a bankruptcy process starting on August 8, 2022, and that he was "released by the courts" on December 28, 2022. He notes that his appeal to MSAT - which led to MSAT Order 475 - was launched on March 18, 2022. As noted in my earlier reasons on the main motion, the crucial hearing before MSAT took place on October 25, 2023, and MSAT Order 475 was issued on February 8, 2024. It is also noteworthy that the applicant objected and sought disqualification of members of MSAT shortly before December 28, 2022, which led to an interim ruling given by Vice Chair Lakey dated March 2, 2023.

[19] KMS submits that the assessment of whether permission to appeal to this Court on an award of costs should be governed by the same test which applies to costs awards made under Part 10 of the *Alberta Rules of Court*, AR 124/2010 as amended, notably Rule 10.33 setting out factors to consider relating to costs awards. Counsel for KMS cites ***Banovich v Banovic***, 2023 ABCA 54, [2023] AJ No 144 (QL) which addressed Rule 14.5(1)(e) of those *Rules* and specifies a requirement of permission to appeal being given before the Court will hear an appeal of an award of costs by itself.

[20] In the ***Banovich*** decision. Feehan JA explained:

> 10 Costs decisions are highly discretionary and will not be interfered with lightly; they should not be set aside on appeal unless the judge below made an error in principle or the award was plainly wrong. Permission to appeal costs orders

> should be granted sparingly and the party seeking permission must meet a high threshold: *Bun v Seng*, 2015 ABCA 165, paras 4-5.
>
> 11 The test to be employed is set out in *Jackson v Canadian National Railway Company*, 2015 ABCA 89, paras 9-10. The applicant must demonstrate:
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> (i) a good arguable case having sufficient merit to warrant scrutiny of this Court;
> (ii) issues of importance to the parties and in general;
> (iii) that the costs appeal has practical utility; and
> (iv) no delay in proceedings will be caused by the costs appeal.
>
> See also *Brill v Brill*, 2017 ABCA 235, paras 2-3; *Bun*, para 4; *1985 Sawridge Trust v Kennedy*, 2017 ABCA 368, para 3, 61 Alta LR (6th) 21.
>
> 12 Additionally, if there is no rationale for the costs award that reasonably justified the trial judge's exercise of discretion, it will be simply arbitrary and permission to appeal should be granted. And where it is difficult to see a sufficiently cogent rationale to justify the particular award of costs, permission may also be granted*: Scramstad v Stannard*, [1997] A.J. No. 302, para 9 (QB).

[21] These principles are helpful in this context, although, strictly speaking, that framework of analysis is nourished by the *Rules of Court* and by the common law pronounced by Courts consisting of superior court judges appointed pursuant to section 96 of the *Constitution Act, 1867*, and by the *Judicature Act*, RSA 2000, c J-2. By comparison, the costs award in MSAT Order 475 was made under statutory authority and not under the *Rules of Court*. Moreover, members of MSAT are not judges of the superior courts with inherent jurisdiction. Once again, however, noting what the Supreme Court opined in ***Mowat***, the exercise of statutory authority as to legal costs by MSAT would, in my view, be more predictably done if the "cluster of ideas" associated with legal costs in this province were imported into the assessment.

[22] It is not necessary for me to reach a conclusion on whether the *Alberta Rules of Court*, the foregoing principles and the guidance in Part 10 of the *Rules* should be applied to all cases under the *MSA* authority. Rather, I note that MSAT has worked to develop its own jurisprudence and has sought to apply that. Here MSAT Order 475 refers to *Houle v Paddle Prairie*, MSAT Order 335 for guidance. In the *Houle* decision, MSAT specified three key considerations: (1) the overriding consideration of s 187.1 of the MSA; (2) the impact of a cost award on access to justice; and (3) the impact of a cost award on efficiency. *Houle* was treated as a precedent as were other MSAT decisions mentioned.

[23] Section 187.1 of the MSA was a policy instruction by the Legislature to MSAT that it "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." This language is imperative: s 28(2)(f) of the *Interpretation Act*, RSA 2000, c I-8. That does not mean it is peremptory -- but it does indicate that the Legislature intended MSAT to comply with it. Interpreting the costs award authority must adhere to statutory construction principles when applying the *MSA*.

[24] While older administrative law cases said that administrative deciders are not obligated to follow their own earlier precedents, I noted in my earlier decision at 2024 ABCA 389 in para 28 that the decision in ***Mason*** includes "the applicable precedents" as part of 'legal constraints'. I also noted, at para 180 of my earlier decision, "Statutory deciders with authority to decide legal questions must be able to give legally *effective* answers. To be legally effective answers, such decisions must be *meaningful* in later proceedings." Those comments were in reference to *res judicata* and collateral attack and whether those concepts were appropriate to decisions of MSAT. In this case, I am referring to something different, namely the doctrine of *stare decisis*, and whether a decision on a point of procedure in one case should also be influential in relation to a decision on a similar point of procedure in a different case.

[25] It strikes me that a consistency in approach to exercise of discretion -- at least analogous to *stare decisis* -- by any decision maker is generally to be approved by the court unless the starting point of precedent is clearly wrong, unprincipled or unfair, or the precedent is adapted to the case at hand in a manner that can be called 'abuse of discretion' as being inconsistent with proper exercises of discretion, as described in ***Canada (Attorney General) v Fontaine***, 2017 SCC 47 at para 36, [2017] 2 SCR 205, in relation to the surveillance of discretion by appellate or reviewing courts:

> As regards the exercise of discretion, "[a]ppellate intervention is warranted only if the judge has clearly misdirected himself or herself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice" (*P. (W.) v. Alberta*, 2014 ABCA 404, 378 D.L.R. (4th) 629, at para. 15; *Balogun v. Pandher*, 2010 ABCA 40, 474 A.R. 258, at para. 7). As this Court has said, where the judge at first instance has given sufficient weight to all relevant considerations and the exercise of discretion is not based on an erroneous principle, appellate reviewers must generally defer (*Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, at para. 95; *Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478, at para. 52).

It goes without saying that another legal constraint applicable to discretion to awards of costs is procedural fairness as noted above.

[26] The administrative law has moved some distance from the suggestion that administrative deciders could make individualized decisions without impediment of prior decisions of the same administrative decider in different cases but on the same point: compare ***Loewen v Manitoba Teacher's Society***, 2015 MBCA 13 at para 80, 380 DLR (4th) 654, which distinguished *stare*

decisis from *res judicata* but said "it may be preferable for purposes of consistency". The rationale for flexibility of determination of cases in part emanated from the role of such bodies as experts in their field and for the need to make prompt situation specific decisions which were usually complicated by various polycentric considerations – as is likely to be the case in relation to interpretation of collective agreements where the language of one clause may be a trade off against language elsewhere, and harmony in overall interpretation is desirable.

[27] Related to the principle underlying *stare decisis*, Justice L'Heureux-Dube explained in ***Domtar Inc v Québec (Commission d'appel en matière de lésions professionnelles)***, [1993] 2 SCR 756, "a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals". But in ***Vavilov***, at para 72, citing ***Domtar***, the Court underlined that decision making based on the identity of the decider is antithetical to the rule of law. The rule of law, it said, can be supported by "internal administrative processes to promote consistency".

[28] In that passage, ***Vavilov*** was addressing the scope of 'reasonableness' as a test for judicial review and declined to escalate to a correctness level the standard of review for a decider's departure from its precedent. Nonetheless, as in ***Mason***, the legal problem may well demand a single answer. Exercises of discretion as to costs awards are circumstance specific. A reviewable question would arise where there is abuse of discretion as noted above – of which departure from precedent might be an *indicium*.

[29] That said, it seems now apparent that such deciders have themselves embraced the common law tradition of *stare decisis* and not faint-heartedly. For example, there are numerous 'reporter services' on CANLII which are not merely archives, but precedential data banks for the deciders. The Supreme Court of Canada in ***Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd***, 2013 SCC 34 at para 16 (majority) and paras 75-79 (dissent), [2013] 2 SCR 458, also signalled a recognition of the utility (and fairness) of the doctrine of precedent; see also ***Mowat*** at para 53.

[30] ***Vavilov***, at para 22, expressly explained its approach to reasonableness was seeking "to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward." At para 101, the Court identified that one form of unreasonableness is untenable in light of factual and legal constraints which can be identified by reference to prior decisions of the same decider. This was further outlined at paras 111-114 of ***Vavilov***. ***Mason***, and more recently ***Pillar Properties Real Estate Corp v Saskatoon (City),*** 2024 SKCA 75 at paras 17-28, came in the aftermath of ***Vavilov.*** In addition, to the extent that the issue involves the application of principles of statutory construction to an enabling provision, consistency of the exercise of that discretion with the proper construction of the provision is expected: see ***Québec (Commission des droits de la personne et des droits de la jeunesse) v Directrice de la protection de la jeunesse du CISSS A***, 2024 SCC 43 at paras 23-28, 36, 50-51, 71-72, [2024] SCJ No 43 (QL).

[31] In the end, consistent identification of relevant factors to the exercise by MSAT of its authority to make costs awards is more likely to be considered reasonable than unexplained or unique expressions of interpretation and conclusion. I turn now to the reasons given by MSAT with a view to determining whether a reviewable error meeting the test for permission to appeal has occurred.

IV. Reasons of MSAT as to Costs

[32] MSAT Order 475 did not merely make a costs order against the applicant but provided substantial reasons for doing so. In the proceedings before MSAT, KMS told MSAT that it had warned the applicant as long ago as April 12, 2022, about "Kikino's concerns regarding costs continuing to escalate in the case of the above-mentioned abuse of process by Mr. McCargar, Kikino would seek costs as against Mr. McCargar from those dates -- from that date on." [AT 68/22-27]. Counsel for KMSC had advised MSAT by letter dated May 18, 2022, that KMSC reserved its right to seek solicitor and client costs under section 53 of the Rules if required to defend the KMSC decision dated March 8, 2022.

[33] The applicant did not dispute this. He did not respond to the argument about costs at that time before MSAT but returned to his arguments on the merits. The applicant did discuss costs elsewhere in the hearing before MSAT in different contexts. So, plainly, the applicant was not taken by surprise. Moreover, MSAT Order 475 said the applicant was familiar with MSAT and its processes. That is apparent.

[34] MSAT, at para 84-85 of MSAT Order 475, considered an application by KMS to have the applicant declared a vexatious litigant under s 190(o) of the *MSA*. MSAT said it had "serious concerns" about the applicant's conduct but opined that "such a declaration could have significant and serious impacts on individuals who seek to access the services provided by the Tribunal" and that the applicant had not gotten advance warning of a vexatious litigant motion. I mention this although it is not part of the Costs reasons of MSAT as such. That expression of reasoning of MSAT supports an inference that MSAT was not motivated to deploy costs in a disciplinary manner, but in a compensatory manner. Absent a proper basis to question the reasons, MSAT should be taken at their word: compare ***R v O'Brien***, 2011 SCC 29 at para 18, [2011] 2 SCR 485.

[35] As noted in my earlier reasons, MSAT Order 475 explained that the usual practice of MSAT was not to award costs, notably so as not to create a general chilling effect on individuals who seek recourse at MSAT (at paras 89-90). However, in this instance MSAT was satisfied that the applicant's "application to KMS was an abuse of process, and that Mr. McCargar's appeal to this Tribunal perpetuates that abuse" (at para 92). An order for costs may be capable of enforcement by permission of, and subject to terms of, the Court of King's Bench under s 209 of the *MSA*.

[36] It is appropriate here to quote the key reasoning of MSAT:

[89] Section 187.1 provides that the exercise of the Tribunal's power to award costs must be considered in the context of the Tribunal's duty to preserve and enhance Metis culture and identity, and "furthering the attainment of self-governance by Metis settlements under the laws of Alberta." Therefore, the Tribunal considered what effect the ordering of costs would have on Metis self-governance. In the Tribunal's view, part of self-governance means that Metis settlements should expect to incur some expense as part of the ordinary course of governing. Individuals who are affected by the decisions of settlements have a right to appeal to the Tribunal. Individuals also often have fewer resources compared to a settlement. This is why the Tribunal's general practice is not to award costs:

[A]dministrative tribunals such as the Metis Settlements Appeal Tribunal are intended to be a less formal, less expensive and less intimidating way to resolve disputes than by using a traditional court system. It is important that settlement members have access to justice before us regardless of the success of their appeal. We are reluctant to award costs …to do so would unnecessarily punish the appellant and would be a disincentive to others contemplating appeals generally. Order 349 (*L'Hirondelle v Duh*) at para 20. [Italics in original]

[90] With respect to access to justice, the Tribunal considered what the effect of a cost award would be on access to the Tribunal's services. Mr. McCargar is familiar with the Tribunal and its processes. As he noted during his submissions, this was his third appeal to the Tribunal. This suggests to the Tribunal that Mr. McCargar is aware of the risks of litigation, and familiar with the statutory scheme governing membership and the Tribunal. The facts of this case are also unique, given that the matter has already been up to the Supreme Court of Canada. In light of the unique circumstances of the case, the Tribunal is satisfied that a cost award will not create a general chilling effect on those individuals who seek to use the Tribunal's services. Any award of costs would be based on the unique fact that this matter has been previously decided, and that these proceedings have been determined to be an abuse of process.

[91] Finally, the Tribunal considered the impact of a cost award on efficiency; specifically, whether a cost award would deter unreasonable, vexatious, or otherwise inappropriate conduct. In the Panel's view, Metis settlements should not be expected to bear the full costs of appeals where the appeal is an abuse of process. It is unfair to the settlement and to the membership of the settlement to incur significant legal costs to defend a decision that had already been found to be reasonable, and upheld by the courts. As Justice Devlin noted in *Canadian Natural Resources Limited v Elizabeth Metis Settlement*, 2020 ABQB 210 at para 102, there are unique challenges arising from "operating small-scale self-governing communities" related to the resources necessary to provide services. These

> challenges are made all the more difficult when a settlement must spend significant resources to defend its actions that have already been found to be reasonable. In the Tribunal's view, this matter rises to the level contemplated in Order 300 (*Barry v Buffalo Lake Metis Settlement*):
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> *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.* [Original in italics, bolding emphasis added in original].

[37] MSAT noted that the costs request from KMS was $21,836.24. It said that "legal costs of approximately $20,000 for an application to Settlement council, and the appeal to the Tribunal (including a preliminary Application about bias) are very reasonable and likely [do] not fully take into account the cost to Settlement resources". MSAT considered that award to be "fair in the circumstances".

V. Discussion

[38] In responding to the submissions, I would underscore that MSAT Order 475 noted that Metis settlements such as KMSC are "small-scale self-governing communities", citing ***CNRL v Elizabeth Métis Settlemen***t, 2020 ABQB 210 at para 102, 10 Alta LR (7th) 389. Legal expenses for KMSC are a burden and necessarily compete with other budget needs and priorities.

[39] While there may be a tendency in relation to costs awards to think of government as capable of bearing costs, there is a large difference between the provincial or the federal government on the one hand and a local democratically chosen government of a small community on the other. This is not to suggest that the provincial or the federal government have deep pockets and their concerns about costs are unimportant. After all, those governments share the reality with Metis Settlement Councils that they do not have any pockets of their own to reach into. But in the case of KMS, MSAT was in a position to take judicial notice of the "small scale" nature of the resources of KMS as local government. The applicant did not dispute the ability of MSAT to assess local realities, although he did imply that KMS was not a poor community when arguing that KMS had room for him despite his lack of any specific pre-existing links to KMS.

[40] There is also no error in MSAT relying on the submissions of counsel for KMS as to the calculation of the amount of costs at $21,836.24: compare ***Borgel v Paintearth (County No 18) Subdivision and Development Appeal Board,*** 2020 ABCA 321 at para 30, 13 Alta LR (7^{th}) 85; ***Canadian Broadcasting Corp v New Brunswick (Attorney General)***, [1996] 3 SCR 480 at para 72; ***R v Peets***, 2024 ABCA 48 at paras 153-154, 437 CCC (3d) 415.

[41] Returning to the applicant's submissions, I first note that he asserts that he was not 'allowed' to speak to the matter of a cost award during or after the hearing. I am not persuaded that there was any substantial wrong done to the applicant on this. Counsel for KMS put its assertions on the record, and the applicant did not respond to it. Counsel for KMS underlined his

argument before MSAT by saying that the applicant met the text for vexatiousness, and his conduct wasted resources, which was inconsistent with access to justice for *bona fide* litigants with meritorious and justiciable points, citing ***British Columbia (Attorney General) v Council of Canadians with Disabilities***, 2022 SCC 27 at para 1, 470 DLR (4th) 289.

[42] The applicant did not plead bankruptcy as an exemption to costs when addressing MSAT, although he did talk about the effects on him of delay, stress and expense as part of his argument on the merits. The applicant must have been aware of the implications of costs having heard the blunt submissions for KMS. He had not inconsiderable prior experience in proceedings before MSAT. Moreover, he has placed before me what he would have said to MSAT on that subject. Accordingly, his points can be weighed considering the reasoning and the governing principles applied by MSAT.

[43] The applicant argues that MSAT had jurisdiction to "waive or reduce a fee" under s 191 of the *MSA*. That was not a mandate on MSAT. Although the applicant mentions these sources of law, he does not show how the decision on costs violated the *MSA*, general council policies and valid settlement bylaws.

[44] Reiterating his point about not being heard on costs, the applicant argues that neither MSAT nor the Minister gave "any consideration or allow the appellant to speak to his economic situation and the harm it would do to the appellant". As noted above, he cites from ***Mason*** about the importance of the impact of a decision. I am not persuaded that the costs award was unavailable because of the personal circumstances of the applicant. This was repeated litigation, and it does not appear that prior lack of success resulted in him being unable to continue to press forward again.

[45] There is something of a paradox in the applicant's submissions. He suggests that the costs award could "not be obtained against the appellant" due to his bankruptcy. If he were correct in that, which he is not, there would be no 'harm' to speak of for the applicant. In any event, while some of the costs of the proceedings, arguably, may have occurred before he launched and finalized his bankruptcy proceedings, most of it was pursued by him after the bankruptcy proceedings. The most expensive elements would have been on the appeal to MSAT and the prior application to disqualify members of MSAT. There is no evidence that the applicant raised legal costs of these proceedings in the bankruptcy proceedings. I am not persuaded that the existence of a bankruptcy process operates to rebut the costs award.

[46] The applicant also suggests that his application for permission to appeal on the merits covered by my earlier decision was based on "MSAT egregious procedural error". In effect, he seems to be saying that he had an arguable case before KMS and MSAT and therefore that costs were not appropriate. That sort of argument might have some weight in 'test cases' of Constitutional dimensions where society at large was served by a party seeking resolution of legal questions with no personal benefit in mind and at their own expense. But this was not such a case. This was a case where the applicant insisted that he was entitled to membership in KMS, full stop.

It was personal litigation seeking a benefit for himself, even if he ventured what he suggested to be applicable principles of foundational and international law: ***A(S) v Metro Vancouver Housing Corp***, 2019 SCC 4 at paras 68-70, [2019] 1 SCR 99.

[47] As for the applicant's financial circumstances, his potential inability to pay costs is not sufficient to prevent the costs award from having effect. As pointed out by the Australia High Court in ***Northern Territory v Sangare***, [2019] HCA 25 at para 24, the power to award costs "is a discretionary power, but that it is a power that must be exercised judicially, by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation", citing, *inter alia*, ***Donald Campbell & Co v Pollak*** [1927] AC 732 at 811-812 (UKHL).

[48] The Australian High Court indicated that, in point of principle, it is basic justice that a successful party should be compensated for expenses it has incurred because it has been obliged to litigate by the unsuccessful party. That consideration of basic justice does not lose its compelling force simply because the successful party happens to be wealthy: the successful party, whether rich or poor, did not ask to be subjected to the expense of unmeritorious litigation. The Court in ***Sangare*** added that alleged inability to pay costs is not relevant to whether the successful party is entitled to them. It is not a situation where equity generally would not act in vain, a point made three centuries ago: ***Benson v Benson*** [1710] EngR 1, (1710) 1 P Wms 130 at 131. MSAT was not acting in vain to make a costs award here. KMS was entitled to ask for a costs award order even if it might have difficulty collecting on it.

[49] Various Canadian cases seem to accord with the view that, in principle, a party entitled to costs should not be denied those costs because comparatively speaking the successful party can afford it: see ***Griffith v Martin*** (1984), 58 BCLR 228 at para 26, [1984] BCJ No 2024 (QL), which "question[ed] the propriety of imposing costs on a party simply because that party can afford to pay them". In ***H(DJ) v P(L)*** (1987), 81 AR 276 at para 4, this Court said the fact that the successful parties had "a greater ability to pay" was not relevant. The same point was made in ***Arcand v Arcand*** (1990), 100 AR 185 at para 14 ("the fact that a party had some basis for their trial position on one issue in an action is not a reason for denying to the party opposite the costs result envisaged by the Rules") and in ***Cranwill v James*** (1995), 173 AR 376 at para 12 (where the Court did not accede to the idea that a successful party can be refused costs 'because it was more financially capable of the litigation than the unsuccessful party"): see ***also Plumb v Cowichan School District***, [1992] BCJ No 2318 at paras 4-8 (that the mere existence of insurance cover for the successful party did not disentitle that party from a costs award) and paras 12-15 (relative financial strength does not justify denying the winner of costs); ***Castillo v Go***, 2000 ABQB 612 at para 3, 269 AR 361; and ***Fullowka v Witte,*** 2000 NWTCA 1 at para 2, 185 DLR (4th) 485 ("While the particular statutory provision that we had to interpret is unique, the outcome of the appeal was not totally unpredictable")

[50] A costs award may be reviewed if the legal criteria for its exercise are not applied or are misapplied on a matter of principle: see *eg* ***British Columbia (Minister of Forests) v Okanagan***

Indian Band, 2003 SCC 71 at para 43, [2003] 3 SCR 371. But I discern no breach of appropriate legal criteria. As noted above, MSAT instructed itself on existing decisional law on this point, notably *Houle*, and MSAT had regard to s 187.1 of the *MSA*. As I read MSAT's reasoning, it concluded that the effectiveness of MSAT as a tribunal for resolution of the issues given to it under the *MSA* must have regard to the impact of costs awards on access. That is a consideration that works both ways and, it would appear, operates to *discourage* the making of costs awards in most cases. Where MSAT found that the applicant's actions here were abusive, then those actions also conflicted with the functioning of MSAT which similarly works against access for others.

[51] More directly, having found the applicant's proceedings were barred as well as abusive, there is not such an arguable point of principle involved that a panel of this Court is likely to interfere with the decision to award costs as calculated in the circumstances of this case.

VI. Conclusion

[52] The applicant's application for permission to appeal on the issue of costs is dismissed.

Written submissions filed on December 20, 2024
and December 23, 2024

Reasons filed at Edmonton, Alberta
this 4th day of February, 2025

Watson J.A.

Appearances:

Applicant, D. McCargar

W.L. McElhanney
A.W. Yiu
for the Respondent Kikino Metis Settlement

K.L. Lambert (no written submissions made)
for the Metis Settlements General Council

M.J. Redman (no written submissions made)
for the Respondent Metis Settlements Appeal Tribunal

R. Martin - Counsel for the Alberta Justice on behalf of the Metis Settlement Land Registry appeared for the Registry but by agreement of all parties, the Registry was removed from the list of respondents per s 205 MSA.