Court of Queen's Bench of Alberta

Citation: Athabasca Chipewyan First Nation v. Alberta (Minister of Energy) , 2009 ABQB 576

Date: 20091019
Docket: 0803 17419
Registry: Edmonton

Between:

Athabasca Chipewyan First Nation

Applicant

- and -

Minister of Energy, Canadian Costal Resources Ltd., Standard Land Company Inc., and Shell Canada Ltd.

Respondents

Reasons for Judgment of the Honourable Mr. Justice D.R.G. Thomas

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I. Introduction

[1] This application arises out of the Originating Notice filed on December 10, 2008 by the Athabasca Chipewyan First Nation ("ACFN"). The ACFN has applied for judicial review, seeking relief related to decisions of the Minister of Energy (the "Minister") granting various oil sands leases in the vicinity of the Poplar Point Reserve. The basis of the claim is that the Minister failed to consult with the ACFN prior to granting the leases.

[2] The Minister and Shell Canada Inc. ("Shell") apply to have the judicial review motion dismissed pursuant to Rule 159(2) on the ground that the ACFN application is brought outside the limitation period applicable to judicial review because it was filed more than six months after the oil sands leases were granted. The ACFN responds that the six month limitation period does not apply to declaratory relief and argues further that the limitation period only begins to run once the Minister gives notice to the ACFN that the leases have been granted. According to the ACFN, the entitlement to notice arises out of the duty to consult, which is argued to apply in the circumstances of this case.

II. Factual Background

[3] In Alberta Crown-owned mineral rights, including oil sands rights, are leased and administered by the Minister of Energy, through a system known as the "tenure system". The tenure system is based on the legislative framework set out in the *Mines and Minerals Act*, R.S.A. 2000, c. M-17, the *Oil Sands Tenure Regulation*, Alta. Reg. 50/2000, and the *Mines and Minerals Administration Regulation*, Alta. Reg. 262/97. The rights conveyed through the tenures (in this case, oil sands leases), include the exclusive right to drill for, win, work, recover and remove subsurface oil sands, usually over a term of 15 years. However, the leases do not include surface access rights or other regulatory and governmental approvals required for the actual extraction of minerals from the land covered by the leases.

[4] As of January 6, 2009, there were 106,214 active mineral leases throughout Alberta, including 4,965 oil sands leases.

[5] The five leases being challenged here are:

(a) Oil Sands Lease 7406110512, issued to Saskatoon Assets Inc. on November 29, 2006. Saskatoon Assets Inc. paid $28,020,331.85 for this lease, which expires on November 30, 2021 (the "November 2006 Lease").

(b) Oil Sands Leases 7407010607 and 7407010608, issued to Canadian Coastal Resources Ltd. on January 11, 2007. Canadian Coastal Resources

Ltd. paid $15,5428,907.88 and $5,183,385.96 respectively for these leases, which expire on January 11, 2022 (the “January 2007 Leases”).

(c) Oils Sands Leases 7407030913 and 7407030914, issued to Standard Land Company Inc. on March 22, 2007. Standard Land Company Inc. paid $1,530,204.52 and $6,311,926.12 respectively for the leases, which expire on March 22, 2022 (the “March 2007 Leases”).

(Collectively referred to as the “Leases”.)

[6] All of these Leases relate to subsurface mineral rights only and were granted pursuant to valid provincial legislation after a competitive public offering process.

[7] On July 16, 2008 Standard Land Company Inc. transferred a 50% interest in Oil Sands Lease 7407030914 to Shell and the other 50% interest to Chevron Canada Limited.

[8] The application for judicial review seeks declarations that the Minister had a duty to consult with the ACFN prior to granting the Leases and that the Minister breached this duty in granting the Leases without conducting prior consultation. The ACFN also seeks a declaration that the Minister is under a continuing duty to consult the ACFN in respect of the Leases and an order quashing the Leases or alternatively, an order suspending or staying the Leases. The relief sought in the Originating Notice is set out in the Appendix to this judgment.

[9] The Minister states that he does not consult with First Nations in respect to mineral dispositions made under the tenure system, because mineral dispositions do not result in the taking up of any land under the terms of Alberta's historical treaties, and because the leasing of Crown mineral rights does not result in any adverse impact on the exercise of First Nations rights and traditional uses. Any actual development of the mineral resources under the terms of the Leases, such as exploration, drilling, mining, etc. are, however, subject to the Government of Alberta's “First Nations Consultation Guidelines on Land Management and Resource Development”.

III. Issues

[10] In order to determine whether the application by the Minister and Shell for summary judgment should be granted, the Court must consider the following issues:

(a) Is the ACFN's application for judicial review subject to the six month limitation period set out in Rule 753.11 in respect to all or part of the relief claimed?

(b) If so, when did the limitation period begin to run?

(c) Did the Minister have an obligation to give written notice of the Leases to the ACFN?

IV. Analysis

A. Test for Summary Judgment

[11] The Minister and Shell apply for summary judgment pursuant to Rule 159(2), which provides that:

> **159(2)** A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to amount and that the deponent knows of no facts that would substantiate the claim or any part of it.
>
> **(3)** On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant.

[12] Summary judgment may be granted to a defendant under Rule 159 if the court is satisfied that there is no merit to the claim which means that it does not raise a genuine issue for trial and the claim has no reasonable prospect of success: ***Allied Signal Inc. v. Dome Petroleum Ltd.*** (1991), 81 Alta. L.R. (2d) 307 at 319 (Q.B.), rev'd on other grounds (1992), 3 Alta. L.R. (3d) 155 (C.A.). The test sets out a high standard because an applicant must show it is "plain and obvious" or "beyond doubt" that the action will not succeed: ***Southland Transportation Ltd. v. Calgary (City)***, 2008 ABCA 321 at para. 11, 437 A.R. 295.

[13] This approach was affirmed by the Supreme Court of Canada in ***Canada (Attorney General) v. Lameman,*** 2008 SCC 14, [2008] 1 S.C.R. 372 at para. 11:

> For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial"... The defendant must prove this; it cannot rely on mere allegations or the pleadings... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts[.]

[14] Rule 159(2) is applicable to applications for judicial review: ***Becker v. Alberta (Director of Employment Standards)***, 2000 ABCA 329 at para. 31, 277 A.R. 131.

B. Limitation Period Applicable to Judicial Review Motions

[15] The Minister and Shell point out that the ACFN filed and served its Originating Notice more than two years after the November 2006 Lease was granted, nearly 23 months after the January 2007 Leases issued, and more then 20 months after the March 2007 Leases were granted. The Minister argues that the ACFN's application for judicial review is barred because it has been brought outside of the limitation period set out in Rule 753.11:

> **753.11(1)** Where the relief sought is an order to set aside a decision or act, the application for judicial review shall be filed and served within six months after the decision or act to which it relates.
>
> **(2)** Rule 548 does not apply to this Rule.

[16] Rule 548 sets out the court's general power to enlarge or abridge time under the Rules.

[17] Therefore, the Applicants argue that the ACFN's claim for judicial review is barred pursuant to Rule 753.11(1) and (2) because the Originating Notice was filed and served more than six months after the Leases were granted, and should be summarily dismissed pursuant to Rules 159(2) and (3) as it is plain and obvious that the application of the ACFN cannot succeed.

[18] The fact that Rule 753.11 specifically excludes the operation of Rule 548 is a clear signal that the six-month time period is intended to be fixed and cannot be extended: ***Urban Development Institute v. Rocky View (Municipal District No. 44)***, 2002 ABQB 651 at para. 26, 321 A.R. 253 ("***Urban Development Institute***").

[19] There are good policy reasons behind the adoption of limitation periods. They are necessary to bring finality and certainty to events because without them, the conduct of affairs of state and business would be chaotic: ***Babiuk v. Calgary (City)*** (1992), 133 A.R. 21 (Q.B.) ("***Babiuk***"), at para. 25. This rationale was articulated further by Veit J. in ***Johannesson v. Alberta (Workers' Compensation Appeals Commission)*** (1995), 175 A.R. 34 (Q.B.) at para. 34:

> The Rules establish a 6 month limit within which a motion for judicial review must be brought. This limitation reflects a policy decision to the effect that, ordinarily, when a properly constituted tribunal makes a decision, that decision is binding; any challenge to that decision must be made promptly because the rights and responsibilities of many persons may be affected by the decision. All of those people who are directly and indirectly affected by such a decision cannot be left in limbo indefinitely. There must be closure, finality, so that every one can move

> on. It is therefore important to move to set aside or challenge a decision within 6 months of the day when the decision is issued.

[20] However, the Alberta courts have held that Rule 753.11 does not apply in some situations where a party is seeking a declaration or prohibition: ***Dwyer v. College of Physicians & Surgeons of Alberta*** (1989), 98 A.R. 81 (Q.B.), at para. 27. For example, Rule 753.11 does not apply when an applicant seeks a declaration that a municipal bylaw is invalid due to lack of jurisdiction: see ***Urban Development Institute*** at para. 26.

[21] That said, an application for declaratory relief will be subject to Rule 753.11 when the the declaration would have the effect of setting aside an administrative decision: see ***Babiuk*** at para. 24. If the claims for declaratory relief and *certiorari* are identical, the six month limitation applies: ***Boyd v. Alberta***, 2000 ABQB 840 at para. 17, 278 A.R. 341, aff'd 2002 ABCA 34, 299 A.R. 198. As such, Rule 753.11 applies not only to applications for *certiorari* but to any judicial review remedy which may have the effect of quashing a delegate's decision: ***Krawec v. Alberta (Workers' Compensation Board, Appeals Commission)***, 1998 ABQB 886 at para. 43, 15 Admin. L.R. (3d) 98. As noted by the Alberta Court of Appeal in ***Alberta Union of Provincial Employees v. Alberta***, 2001 ABCA 309 at para. 3, 303 A.R. 1:

> Declaratory relief, as we will later note, must be real and not merely advisory. The conclusion reached in *Babiuk v. Calgary (City of)* (1992), 133 A.R. 21 (Q.B.) confirms that declaratory relief, in the nature of certiorari, including a prayer to set aside a regulation, is escorted by a six month limitation period. This is set forth in the Alberta Rules of Court, Rule 753.11 (1)... This Court has previously declined to adopt a liberal approach to time restrictions on applications for prerogative relief, *Simlote v. Alberta*, [1989] A.J. No. 818 (C.A.) (8 September 1989).

[22] In ***Simlote v. Alberta***, (1989), 69 Alta. L.R. (2d) 401 (C.A.), leave to appeal refused [1989] S.C.C.A. No. 407, the Alberta Court of Appeal refused to grant prerogative relief in the guise of a declaration and mandamus which amounted to a *certiorari* application brought outside of the limitation period.

[23] A declaration that actually challenges the validity of a decision cannot evade the six-month limitation period. Justice Slatter (as he then was) explained this distinction in para. 114 of ***Papachase Indian Band No. 136 v. Canada (Attorney General)***, 2004 ABQB 655, 365 A.R. 1 ("***Papachase***"), rev'd ***Lameman v. Canada (Attorney General)***, 2006 ABCA 392, 66 Alta. L.R. (4th) 243, rev'd 2008 SCC 14, [2008] 1 S.C.R. 372:

> Some case law holds that the six-month limitation period for *certiorari* cannot be evaded by simply asking for a declaration of invalidity instead: *Krawec v. Workers' Compensation Board* (1988), 233 A.R. 110; *Simlote v. The Queen*, [1989] A.J. No. 818, [1989] A.U.D. 673, 69 Alta. L.R. (2d) 401 (C.A.); *Re Babiuk* (1992), 133 A.R. 21, 4 Alta. L.R. (3d) 390; *Boyd v. Alberta* (2000), 278 A.R. 341, aff'd 299 A.R. 198 (C.A.). Other cases suggest that time limitations do not apply

> to decisions that are characterized as "void", or that the time limitation on a motion to quash does not apply to a declaration that the decision is void: see *United Taxi Drivers Fellowship of Southern Alberta v. Calgary (City)* (2002), 3 Alta. L.R. (4th) 211 (C.A.) at para. 162, reversed on other grounds (2004), 236 D.L.R. (4th) 385, 2004 SCC 19. *Alberta Union of Provincial Employees v. Alberta* (2002), 310 A.R. 240 at paras. 39-40; *Urban Development Institute v. Rocky View (M.D. #44)* (2002), 8 Alta. L.R. (4th) 273 at para. 12. In my view the better interpretation is that the limitation period prevents all challenges to the decision, including the ability to challenge the alleged voidness of the decision. In the end, this is largely a matter of statutory interpretation: when the Legislature enacted the limitation period, did it intend to apply it only to errors of law on the face of the record, or also to jurisdictional errors? The purpose of the limitation period is to bring certainty to administrative decisions, and there is no obvious reason why the Legislature would exempt a large body of decisions from the rule. In Alberta the issue is in my view answered by Rule 753.05 which reads:
>
> > **753.05** Subject to Rule 753.11, where the applicant on an application for judicial review is entitled to a declaration that a decision or act is unauthorized or invalid, the court may, instead of making a declaration, set aside the decision or act.
>
> While not expressly addressing the issue, this rule clearly contemplates that no distinction is to be drawn between a motion to quash and a declaration. It specifically states that it is "subject to Rule 753.11" which is the six-month limitation period. I accordingly conclude that seeking a declaration is not an effective strategy to avoid the six-month limitation period for quashing a decision.
> [Emphasis added.]

[24] Based on the law expressed above, one must look to the nature and substance of the relief requested, and not merely to whether the relief is framed in the form of a declaration, in order to determine whether the application for judicial review is subject to the six-month limitation set out in Rule 753.11.

C. Distinguishing Declaratory Relief that Challenges the Validity of a Decision

[25] In order to avoid the six-month limitation period set out in Rule 753.11, the ACFN must either satisfy me that time did not begin to run on the day the decisions to grant the Leases were made, or that the limitation period does not apply because ACFN seeks declaratory relief. I deal with the declaratory relief argument first.

[26] The Minister and Shell argue that the declarations sought by the ACFN are really an attack on the validity of the Leases, and that a party cannot avoid the six-month limitation period by cloaking its relief in the form of declarations.

[27] In response, the ACFN submits that the limitation period in Rule 753.11 has no application to the bulk of the relief sought in its judicial review application, namely the declaratory relief, the stay, and the power to seek directions from the Court. The ACFN argues that the issue on judicial review is not simply whether the Leases were granted unlawfully; instead, it is a dispute over the very purpose and nature of the duty to consult and the proper scope of the Minister's obligations. As such, the declarations claimed in this case serve a purpose quite separate from that served by seeking to quash the Leases. The ACFN further submits that even if this Court does not quash the specific Leases in this case, a declaration that there was a duty to consult in respect of the Leases will allow the parties to use such a declaration as a tool to guide future consultation between the Minister and the ACFN.

[28] The relief available on judicial review in civil matters is set out in Part 56.1 of the Rules of Court:

> **753.04(1)** On an application for judicial review, the court may grant any relief that the applicant would be entitled to in proceedings for any one or more of the following remedies:
>
> (a) an order in the nature of mandamus, prohibition, certiorari, quo warranto or habeas corpus;
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> (b) a declaration or injunction.
>
> (2) In such application a declaration may be made or an injunction granted where the court considers that it is just and convenient to do so having regard to all the circumstances of the case including
>
> (a) the nature of the matters in respect of which relief may be granted by orders in the nature of mandamus, prohibition, certiorari or quo warranto, and
>
> (b) the nature of the persons from whose decisions, acts or omissions relief may be granted by such orders.
>
> (3) Subrule (1) applies whether the remedy under which the applicant would be entitled to the relief is or is not specifically named in an application.
>
> (4) Before the court may grant relief under subrule (1), it must be satisfied that the grounds for the remedy under which the applicant would be entitled to the relief have been established.

> **753.05** Subject to Rule 753.11, where the applicant on an application for judicial review is entitled to a declaration that a decision or act is unauthorized or invalid, the court may, instead of making a declaration, set aside the decision or act.

[29] There is a distinction between the traditional prerogative remedies and private law declarations. The Originating Notice here appears to seek three of the prerogative remedies described by David Phillip Jones and Anne S. de Villars in Principles of Administrative Law, 5th ed. (Toronto, Ont.: Thomson Reuters Canada Limited, 2009) ("Jones & de Villars") at 634, 638:

> (a) *Certiorari*: permits the court to review the legality of the decision of a delegate and to quash it if defective.
>
> (b) Prohibition: used anticipatorily to prevent a delegate from committing certain kinds of errors. Prohibition is forward-looking, designed to prevent something from being done and is, therefore, invoked earlier in the proceedings than certiorari, which only comes into play once an erroneous decision has been made.
>
> (c) Mandamus: compels a delegate to perform statutory duties imposed on it. In this case, the ACFN argues that the Minister is under a duty to consult but does not suggest that the duty arises out of statute.

[30] All three of the prerogative remedies described above are discretionary and may be refused by the Court even though the applicant has otherwise made out its case: Jones & de Villars at 643.

[31] In 1987, the Government of Alberta implemented a significant procedural reform to create a uniform procedure for obtaining the traditional prerogative remedies as well as the two private law remedies of injunctions and declarations:

> The purpose for creating the new procedure for obtaining judicial review was two-fold. First, different rules governed the availability of different remedies, resulting in differences with respect to standing to commence proceedings, the time within which different remedies had to be sought and the grounds which had to be proved in order to obtain the different remedies. Although more than one remedy may have been available in certain circumstances, the remedies were not completely fungible and care had to be taken to choose the correct one. Secondly, an application for one or more prerogative remedies could not be joined with an action at private law. Notwithstanding the implementation of this significant procedural change, the substantive law relating to the remedies has generally not changed. Therefore, it is still important to understand the scope, advantages and limitations of different prerogative remedies.
> Jones & de Villars at 635-6; see also 660-3 [emphasis added].

[32] In contrast, a declaration is traditionally a private law remedy. At 755, Jones & de Villars explain that:

> A declaration, or declaratory judgment, is a judgment of a court of law which determines the legal position of the parties or the law applicable to them. It is an unusual remedy in that it is not coercive in nature as no consequential relief is granted. As a result, there is no penalty or sanction to be imposed on a defendant for failing to act on the declaration. It can be contrasted with an executory judgment of a court, one in which "the court declares the respective rights of parties and then proceeds to order the defendant to act in a certain way, for example to pay damages or to refrain from interfering with the plaintiff's rights." Non-compliance with such a judgment can lead to enforcement proceedings. [Emphasis added.]

[33] Declarations have become a popular remedy in public law due to their flexible nature and the absence of restrictive technical requirements: Jones & de Villars at 756. The absence of coercive affect has not been seen as a problem in that it is expected that government and other public authorities will respect declaratory judgments of the courts: *ibid.*

[34] The use of declarations in the public law context has both advantages and disadvantages:

> Declarations are chiefly used as a supervisory remedy in administrative law to challenge the legality of legislative or administrative action. Indeed, a declaration may be the chief form of remedy when the constitutionality or legality of primary or subordinate legislation is at issue. As an alternative form of proceeding to an application for *certiorari* or prohibition, declarations also have commonly been used to challenge the legality of administrative action. Declaratory relief rather than the prerogative order of *certiorari* has been pursued for a number of reasons, including: the absence of a statutory limitation provision in the case of declarations... If the applicant wishes to quash a decision of a tribunal or if he or she wishes to stop a tribunal from proceeding, a declaration will not help them. An order in the nature of *certiorari* may have to be sought instead. However, a declaration has the procedural advantage that there is no time limitation within which the action must be brought, unlike *certiorari* and prohibition.
> Jones & de Villars at 757 [emphasis added.]

[35] With these contextual comments in mind, I now turn to consider the relief requested in the Originating Notice for judicial review, which is reproduced in the Appendix to this decision. That relief can be characterized as follows:

> (a) a declaration that the Minister was under a duty to consult the ACFN prior to granting the Leases and that by failing to do so, the Minister breached the duty to consult;

(b) a declaration that the Minister is under a continuing duty to consult the ACFN regarding the Leases;

(c) an order in the nature of *certiorari* to quash the Leases;

(d) an order in the nature of an injunction suspending or staying the Leases; and

(e) an order in the nature of prohibition forbidding further steps from being taken with respect to or in reliance of the Leases until adequate consultation has occurred and has been confirmed by further court order.

[36] Based on these characterizations, I conclude that ACFN's request to quash the Leases falls within the relief contemplated by Rule 753.11 and is therefore subject to the six-month limitation period.

[37] In terms of the other relief requested in the ACFN's Originating Notice, I note that Rule 753.11 refers to "an order to set aside a decision or act". This indicates that the six-month limitation period is intended to encompass a broader range of relief than a pure quashing application for *certiorari.* In order to determine whether the relief requested is captured by the phrase "an order to set aside a decision or act", a court should consider whether the relief sought, if granted, would have the effect of challenging the validity of an administrative decision or the authority under which the decision is made.

[38] This is consistent with the case law discussed above which stands for the principle that a party cannot avoid the six-month limitation period in Rule 753.11 by dressing up what is essentially a request to have a decision or act set aside as a declaration that challenges the validity of an administrative decision.

[39] It must be noted that in this case, the declarations sought by the ACFN are all tied to specific administrative decisions made by the Minister, namely the granting of the Leases. This is not a situation where a party seeks a declaration that a bylaw or regulation is invalid due to a lack of jurisdiction or based on constitutional grounds. The ACFN is not questioning the validity of the legislation nor of the regulatory regime itself. The declarations sought by the ACFN, that the Minister is under a duty to consult and that the duty to consult was breached in this case, are not merely advisory; the effect of such declarations, if granted, is to directly challenge the validity of the specific Leases. From a judicial perspective, there would be no point in declaring that the Minister breached the duty to consult in granting the Leases without taking the extra step of setting the Leases aside. Rule 753.05 contemplates this result and Slatter J. noted that this Rule "clearly contemplates that no distinction is to be drawn between a motion to quash and a declaration": ***Papachase*** at para. 114.

[40] In this case, the declarations sought are inextricably bound up with the request for *certiorari*, i.e. a quashing and as such, I find that the request for declarations that the Minister

was under a duty to consult in respect to the Leases and that that duty to consult was breached fall within the relief contemplated by Rule 753.11.

[41] I also find that the request for an order staying or suspending the Leases and prohibiting any further steps being taken with respect to or in reliance of the Leases is also subject to Rule 753.11 because it relates to the specific administrative decision to grant the Leases.

[42] In terms of the second category of declaratory relief sought here, namely that the Minister is under a continuing duty to consult the ACFN regarding the Leases, I am satisfied that this type of claim for relief is not captured by Rule 753.11 because the declaration sought does not challenge the validity of the Leases. However, I do raise the question of whether the request for this sort of relief, in the circumstances of this case, is justiciable. As explained in Jones & de Villars at 759-60:

> A court will not grant a declaration in a matter which is not justiciable. The question of justiciability involves a determination as to whether the dispute is suitable for resolution in the courts. Generally speaking, the courts will be opposed to claims based on moral and political grounds which are beyond the capacity of the court to assess.
>
> See also ***Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)***, [1989] 2 S.C.R. 49 (S.C.C.), at 90-91; ***Brown v. Alberta***, 1999 ABCA 256 at para. 7, 244 A.R. 86.

[43] The Courts will not grant a declaration where it would be a futile remedy or where it will serve no useful purpose: see ***Heller v. Vancouver (Greater)*** (1992), 94 D.L.R. (4th) 718 (B.C.C.A.), leave to appeal refused [1993] 2 S.C.R. viii (S.C.C.).

[44] There is a distinction between declarations that concern future rights and those that are purely hypothetical or speculative: see ***Canada v. Solosky,*** [1980] 1 S.C.R. 821 (S.C.C.) at 832; ***Operation Dismantle Inc. v. Canada,*** [1985] 1 S.C.R. 441 at 457.

[45] I raise this issue because based on my understanding of the tenure system, the Minister's direct involvement in mineral exploration appears to be limited once he has granted the subsurface leases. In order to explore and exploit minerals, a lessee is required to submit to a regulatory process that includes other independent regulatory agencies, such as the Alberta Energy Resources Conservation Board, and other government departments, such as Alberta Environment and Alberta Sustainable Resource Development. Given the involvement of other regulatory agencies and ministries, I am unsure whether a declaration that this Minister has a continuing duty to consult with respect to the Leases serves any useful purpose. I will not rule on this point now but do raise the issue for the parties to consider.

[46] In summary, other than the request for a declaration that the Minister is under a continuing duty to consult, I find that all of the other relief requested is the type of relief contemplated by Rule 753.11 and is subject to the six-month limitation period.

D. Triggering of the Limitation Period

[47] I turn now to the question of when the six-month limitation period begins to run. Rule 753.11 states that "the application for judicial review shall be filed and served within six months after the decision or act to which it relates." The parties propose different interpretations of this Rule, leading to four possible limitation trigger points:

(a) from the date that the Leases were granted;

(b) from the date that information on the Leases was posted on the Alberta Energy website or the Aboriginal Community Link;

(c) from the date that the ACFN first had actual knowledge that the Leases were granted; or

(d) the limitation period has not yet started because Alberta did not give proper notice to the ACFN of the decision to grant the Leases.

[48] The Minister argues that this is not a case where there is a statutory duty to provide notice of a decision and as such, the proper interpretation of Rule 753.11 is that time begins to run from the date of the decision or alternatively, from the date the decision is made public. The Minister submits that discoverability principles do not apply to extend the time to seek judicial review; alternatively, if discoverability does apply, that the ACFN has not provided the necessary evidence to establish that it did not know about the Leases until after the six-month limitation expired or that it has been reasonably diligent. The Minister also suggests that this Court draw an adverse inference against the ACFN regarding the decision not to sign up for Aboriginal Community Link.

[49] Shell seeks to distinguish the cases from this jurisdiction which suggest that the limitation period begins to run from notification of a potentially affected party, as opposed to issuance of the decision itself, because in those cases there was a statutory requirement for the decision-making body to give notice to the party in question. Shell is correct that many of those reported decisions involve municipal planning disputes where the provincial legislation requires that formal notice of decisions be given. Shell argues further that since the application for judicial review was brought outside the mandatory six-month limitation period, the ACFN's claim has no reasonable prospect of success and should be dismissed pursuant to Rule 159(2) because there is no genuine issue for trial.

[50] In response, the ACFN argues that the duty to consult arose in the context of the granting of the Leases and that the Crown's failure to give notice means that the Rule. 753.11 limitation period has not yet commenced running. The ACFN submits that the limitation question is intricately intertwined with the question of whether the Minister was required to give notice of

the decision to grant the Leases and if so, whether notice was properly given. According to the ACFN, the obligation to give notice in this case arises not out of statute but out of a common law duty to consult and the Minister did not give notice of the decision to grant the Leases to the ACFN.

[51] Where there is a statutory duty to notify the parties of an administrative decision, the limitation period in Rule 753.11 begins to run as of the date that the decision is provided to the party entitled to receive it: see ***Becker v. Alberta (Director of Employment Standards)***, 2000 ABCA 329 at paras. 12-13, 277 A.R. 131; ***Edmonton (City) v. L.A. Ventures Inc.***, 1999 ABQB 649 at paras. 6-7; 313 A.R. 161.

[52] In this case, the parties agree that there is no explicit statutory duty imposed on the Minister in any of the applicable legislation to provide notice to the ACFN of its decisions to grant the Leases. Instead, the ACFN argues that the Minister's obligation to give notice in this case arises not out of statute, but out of a common law duty to consult. More specifically, the ACFN submits that the Minister has a duty to consult the ACFN with respect to the granting of the Leases and as such, the six-month limitation period only begins to run once the Minister provides the ACFN with notice that the Leases were granted.

[53] The parties referred to Rule 56.06 of the Nova Scotia *Civil Procedural Rules,* which uses similar wording to Alberta Rule 753.11:

> **56.06.** An originating notice for an order in the nature of certiorari shall be filed and served within six (6) months after the judgment, order, warrant or inquiry to which it relates, and rule 3.03 [which allows the court to extend or abridge time] does not apply hereto.
> [Emphasis added.]

[54] This provision was considered by the Nova Scotia Court of Appeal in ***Central Halifax Community Asson. v. Halifax (Regional Municipality)***, 2007 NSCA 39, 253 N.S.R. (2d) 203 ("***Central Halifax***"), leave for appeal dismissed with costs [2007] S.C.C.A. No. 279. One of the issues in ***Central Halifax*** was whether the six-month limitation period begins to run on the date that the decision is made or alternatively, on the date that the decision is communicated to the applicant. The Nova Scotia Court of Appeal held that based on the clear and unequivocal language of the Rule, there was no basis to "read-in" a condition that would have the clock start when notice of the decision is actually received: ***Central Halifax*** at para. 23. Other factors in support of interpreting the limitation period as beginning on the date that the decision issued included the extraordinary nature of the *certiorari* remedy and the corresponding need for finality in the public decision-making process, the generous six-month window to apply for judicial review, and the Court's inherent jurisdiction to address extraordinary abuse if necessary.

[55] In taking this approach, the Nova Scotia Court of Appeal expressly rejected the reasoning of the Newfoundland Court of Appeal in ***Newman v. Newfoundland (Workers' Compensation Review Division),*** 2001 NFCA 67, 208 Nfld. & P.E.I.R. 25 ("***Newman***"), which held at paras. 9-11 that the six-month limitation period set out in an identically worded provision in the

Newfoundland Rules of Court only began running once the applicant received notice of the decision:

> The Court concludes that Rule 54.06 contains no explicit direction as to when the six month period, within which the application may be sought, begins. In the case of specified time periods within which further proceedings, consequent upon a judgment or order of a court may be taken, the time is almost invariably counted from the time of filing of the order in the registry of the court. Although counsel or parties are usually specifically notified of the filing of such a judgment or order, the filing operates effectively as constructive notice of the making of the judgment or order and time limits almost invariably run from the time of filing. Such a judgment or order is considered to have been issued or made public upon being so filed.
>
> In the case of decisions of the [Workers' Compensation Review Division] there is no such registry to which interested parties can resort to seek information as to whether or not a decision has been rendered. There is no issuance or making public of the fact or content of the decision. As a result, there is no basis to support a conclusion that there was constructive notice of the making of the decision. Theoretically, if, due to inadvertence or for any other reason, actual notice of the decision was not given, the full six month period could expire without the interested party even being aware of the decision being made.
>
> In circumstances where the rule is not explicit as to the point in time when the limiting period begins then, in the absence of a filing registry or some other issuing process from which constructive notice can be inferred, it is reasonable to calculate the commencement point of the limiting period from the date on which the decision is actually received, or by which it would have been received, by the party concerned. That is the earliest definitive point at which the decision can be said to have been issued.
> [Emphasis added.]

[56] The decision in ***Central Halifax*** has not been considered by the Alberta courts, nor in any other jurisdiction outside of Nova Scotia. While the reasoning of the Nova Scotia Court of Appeal may be persuasive, it is not binding upon me.

[57] Shell argues that ***Newman*** is distinguishable because in the present case, there was a means by which the affected party or other members of the public could receive constructive notice of the decision to grant the Leases by virtue of publication through the Alberta Energy website.

[58] Alberta Energy notifies the public two years in advance of the date of public offerings by posting a calendar or schedule of public offerings sales dates on its website. Since January 1, 2006, notice of public offerings of petroleum and natural gas and oil sands mineral rights have been published and made available to the public on the Alberta Energy website eight weeks in

advance of the sale date. After the sale, Alberta Energy notifies the public and successful bidders by publishing the names of the successful bidders and the amount paid for each parcel on the Alberta Energy website in the afternoon of the day of each public offering. Alberta Energy also offers an electronic mailing subscription service and interested individuals or groups can subscribe to the service free of charge to receive direct e-mail notification of all public offerings, notices and sales.

[59] Since 2006, Alberta Energy has also provided an additional source of information to aboriginal communities by way of an interactive mapping website called "Aboriginal Community Link". This resource includes information on tenure sales, including notice of public offerings and the names of successful bidders, and is available at no cost to aboriginal communities.

[60] The Minister observes that the ACFN did not sign up for the electronic subscription service, even though an internet connection was available in Fort Chipewyan and Fort McMurray and certain members of the ACFN's staff had access to email. The Minister also offered the ACFN access to Aboriginal Community Link in June 2006, but the ACFN did not subscribe to the services until November 12, 2008. The ACFN has not put forward evidence to explain why it chose not to subscribe to the Aboriginal Community Link until November, 2008.

[61] The ACFN argues that the Aboriginal Community Link had been established not as a general public registry designed to be part of a project related decision making, but as part of general consultation between the Government of Alberta and First Nations communities who choose to participate and is not tied to any specific project or mineral lease. In approaching First Nations communities to join the Aboriginal Community Link, the Government did not suggest that this was a means of giving notice of pending decisions that may affect a First Nation or that joining was mandatory. The ACFN argues that if the Minister wishes to rely upon a strict interpretation of the limitation period set out in Rule 753.11, he must show that he in fact gave notice in writing of the decision having been made to the party against whom Rule 753.11 is to be engaged. The Minister admitted he had not done so in this case.

[62] If, for the purposes of this summary judgment application only, I assume that a duty to consult exists and that it required the Minister to provide notice to the ACFN of its decision to grant the Leases before the six-month limitation period could begin to run, then the question turns to whether based on the above facts, the notice requirement was met. This determination will depend on the scope of the duty to consult and the form of notice implied by such a duty.

E. The Duty to Consult

[63] The parties presented lengthy argument regarding the Crown’s duty to consult First Nations groups before embarking on government action that could adversely effect aboriginal rights. I do not intend to repeat their extensive arguments here, as the question of whether a duty to consult exists in a case such as this involving the subsurface rights of surrendered lands is an

issue better suited to a full hearing of the judicial review application rather than on a motion for summary judgment grounded in a limitations defence. As such, my comments below should not be construed as being determinative of the duty to consult issue in the broader context of the judicial review application. My remarks are to simply provide some historical background of the relationship between the Crown and First Nations that gives rise to a general duty to consult, and to recognize that the scope of the duty to consult varies depending on the circumstances.

[64] The ACFN is the successor to an Aboriginal group that signed Treaty No. 8 (the "Treaty") in 1899. The ACFN holds the rights to hunt, trap and fish throughout lands that include their traditional territory, pursuant to the Treaty as modified by the *Natural Resources Transfer Agreement, 1930* (enacted by the *Constitution Act, 1930* (U.K.) 20-21 George V, c. 26) (the "Treaty Rights"). The ACFN submits that its ability to maintain its traditional way of life and its identity as a distinctive Aboriginal people depends on its continued ability to meaningfully exercise the Treaty Rights in its traditional territory, in accordance with its customs and traditions. The lands covered by the Leases in question fall within the ACFN's traditional territory and are situated in close proximity to the Poplar Point Reserve.

[65] The ACFN argues that the question of whether the Leases should be quashed is not suitable for summary dismissal as the issues raised by the Minister's motion for judgment are intimately bound up with determining whether the duty to consult arose, a fundamentally constitutional question intertwined with the section 35 rights held by First Nations people, and therefore should be decided in the context of the judicial review.

[66] The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it: ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 S.C.R. 511 ("***Haida***") at para. 35.The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown, which gives rise to different duties in different circumstances: ***Haida*** at paras. 16, 18. At paras. 43-45 of ***Haida***, the Court sets out a spectrum of the nature and scope of the duty to consult:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions

> for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.
> [Emphasis added.]

[67] In ***Haida***, the Supreme Court of Canada held that the Crown had a duty to consult the Haida Nation about a tree farming license on an island that was subject to an unresolved land title claim.

[68] In this case, the ancestors of the ACFN were signatories to Treaty 8, which resulted in the surrender of 840,000 square kilometres to the Crown in exchange for reserves and other benefits, as noted by the Supreme Court of Canada in ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69, [2005] 3 S.C.R. 388 ("***Mikisew***") at para. 2:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
> [Emphasis in original.]

[69] In ***Mikisew***, the federal government approved a winter road that ran through the Mikisew First Nation Reserve without first consulting directly with the Mikisew. After the Mikisew objected, the winter road alignment was changed to track the boundary of the Reserve instead of running through it, again without consultation. However, the modified road alignment traversed Mikisew traplines and hunting grounds. The Supreme Court of Canada held that the government had a duty to consult the Mikisew before interfering with existing treaty rights and that the duty to consult had been breached.

[70] Binnie J., writing on behalf of the Court, noted that where the aboriginal rights have been surrendered and extinguished, the Treaty 8 rights are expressly limited to lands "not required or taken up from time to time for settlement, mining, lumbering, trading or other purposes": ***Mikisew*** at para. 31. In cases involving treaties, the question is to determine the degree to which conduct contemplated by the Crown would adversely affect the treaty rights so as to trigger the duty to consult: ***Mikisew*** at para. 34. The Court held that the proposed road would adversely affect the existing Mikisew hunting and trapping rights, which triggered the duty to consult identified in ***Haida***: ***Mikisew***, at para. 44. In that case, the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question: ***Mikisew*** at para. 55. Based on the circumstances, the Crown's duty to consult was on the lower end of the ***Haida*** spectrum, and required that the Crown provide notice to the Mikisew and to engage directly with them: ***Mikisew*** at para. 64.

[71] In this case, the parties were unable to point me to any case law that is determinative of the issue of whether a duty to consult arises in the context of subsurface leases relating to mineral rights, particularly where the First Nation in question has surrendered lands subject to a treaty. Indeed, that question is at the heart of the ACFN's judicial review application. The question of whether a duty to consult ought to be extended in this case to include leases granting subsurface rights is one of mixed fact and law and requires an evidentiary background that is more appropriate to the hearing of the full judicial review application as opposed to a summary judgment motion.

[72] In addition, although the case law indicates that the duty to consult includes, at a minimum, the requirement to give a First Nation notice, it is unclear as to how such notice should be communicated so that the Crown may meet the obligation. Even if the Minister was under a duty to consult the ACFN before granting the Leases and further assuming that the Minister who responds here equates to the Crown in this situation, it is not evident to me that such a duty would necessarily translate into an obligation to give the ACFN specific written notice of the Minister's decision to grant the Leases.

[73] In this case, the Minister set up three mechanisms, namely the Alberta Energy website, the electronic subscription service, and the Aboriginal Community Link, to advise interested parties of public offerings and lease agreements granting subsurface mineral rights. The ACFN does not suggest that the Minister failed to use these mechanisms with respect to the Leases in question. The ACFN has not tendered any evidence to indicate when it first had knowledge that the Leases were granted or to explain why it did not subscribe to either the electronic service or to the Aboriginal Community Link until November, 2008, despite the availability of internet services. The ACFN has failed to show that it had exercised due diligence in becoming aware of the existence of the Leases.

[74] In the context of the duty to consult and absent a statutory obligation to give notice, the provision of information through these electronic mechanisms is akin to constructive notice. Based on the evidence, I find that the latest point in time which would trigger the six-month limitation period is the date that notice of the granting of the Leases was posted on the

Aboriginal Community Link. As the names of the successful bidders are available on the Aboriginal Community Link the day after each public offering, the limitation period began to run the day after the Leases were granted.

[75] In summary, if there is no duty to consult with respect to the Leases, the six-month limitation period would begin to run on the day the Leases were granted. On the assumption there is a duty to consult I find the limitation period would begin to run the day after the Leases were granted, a difference of only one day. Either way, the ACFN is out of time to bring most of its judicial review application.

V. Relief Granted

[76] Shell and the Minister have succeeded on most aspects of their summary judgment motion and paras. 1, 2, 4 and 5 of the Originating Notice are struck.

[77] The parties may speak to costs within 60 days of the date of this decision.

Heard on the 1st, 2nd and 3rd days of September, 2009.
Dated at the City of Edmonton, Alberta this 19th day of October, 2009.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Mr. Robert J.K. Janes,
Ms. Karey Brooks, and
Ms. Jenny Biem
(Janes, Freedman, Kyle Law Corporation)
for the Applicant/Respondent
Athabasca Chipewyan First Nation

Mr. Thomas G. Rothwell and
Ms. Stephanie Latimer
(Alberta Justice-Aboriginal Law)
for the Respondent/Applicant - Minister of Energy

Mr. Bruce E. Mellett
(Bennett Jones LLP)
for the Respondent/Applicant Shell Canada

APPENDIX

ORIGINATING NOTICE

TAKE NOTICE that an application will be made on behalf of the Athabasca Chipewyan First Nation ("ACFN"), the Applicant before the presiding Judge in Chambers, at the Court House, in the City of Edmonton, Alberta, on Tuesday, January 19, 2009 at 10 o'clock in the forenoon or so soon thereafter as counsel may be heard for the following Orders:

1. A declaration that the Minister had a duty to consult and, if indicated, accommodate the ACFN prior to granting the Challenged Tenures (as defined below);

2. A declaration that the Minister breached the duty to consult the ACFN by failing to consult the ACFN, adequately or at all, prior to granting the Challenged Tenures;

3. A declaration that the Minister is under a continuing duty to consult the ACFN in respect of the Challenged Tenures, including a duty to consult in respect of the following matters:

    a. The scope and extent of the ACFN's Treaty Rights and other Aboriginal interests and concerns;

    b. The potential adverse impacts and effects, including the cumulative impacts and effects, of the development of the lands subject to the Challenged Tenures on the Treaty Rights and other Aboriginal interests and concerns of the ACFN;

c. The appropriate management of these adverse impacts and effects, in the context of other existing and reasonably contemplated development that is affecting, or will effect, the Traditional Territory;

d. Terms and conditions that should be attached to the Challenged Tenures to ensure that the Treaty Rights and Aboriginal interests and concerns of the ACFN are reasonably accommodated; and

e. The manner in which ACFN will be meaningfully integrated into the continuing approval process or into other processes providing for the management of the Traditional Territory.

4. An order quashing the Challenged Tenures;

5. In the alternative, an order suspending or staying the Challenged Tenures and prohibiting further steps being taken in respect of or in reliance on the Challenged Tenures until adequate consultation has occurred and an order of this Court to this effect has been made;

6. An order that any Party may apply to this Court for further directions, advice or orders in respect of the conduct of consultation in respect of the Challenged Tenures;

7. Its costs of this application; and

8. Such further and other relief as this Honourable Court may deem just.