February 7, 2011

The world wide web and the honour of the Crown

By Nigel Bankes

Cases Considered:

Athabasca Chipewyan First Nation v Alberta (Minister of Energy), 2011 ABCA 29, and *Lameman v Alberta*, 2011 ABQB 40

The Court of Appeal (Justices Ritter, Bielby and Read) has denied the appeal by the Athabasca Chipewyan First Nation (ACFN) against the judgement at trial (2009 ABQB 576) which I blogged here. In that decision, Justice D.R.G. Thomas held that ACFN had commenced its application more than six months after the relevant decision, and therefore out of time within the meaning of Rule 753.11 of the old *Alberta Rules of Court*, Alta. Reg. 390/1968. In doing so I think that the Court of Appeal has ignored the constitutional foundation of the duty to consult and as a result has failed to interpret the Rules of Court through that lens.

The background

Oil sands developments in Alberta are taking place in the traditional territories of First Nations in areas of the province that are subject to Treaty 8. As with the other numbered treaties, Treaty 8 contains a hunting clause with a "lands taken up" proviso which reads as follows:

> 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.

The Supreme Court examined the implications of this clause for Crown disposition policies in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (*Mikisew Cree*). I commented on that decision in a short note in *Resources*: "*Mikisew Cree* and the Lands Taken Up Clause of the Numbered Treaties" (2006), 92/93 Resources 1 – 8.

Mikisew Cree stands for the proposition that an alienation of land or resources by the province for one of the purposes contemplated by the lands taken up provision may trigger a duty to consult. This is because, as Justice Binnie remarked for the Court:

> In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and

> trap, and placed in the inventory of lands where they did not. (at para 30, emphasis added)
>
> …. the Crown's right to take up lands under the treaty … is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. (at para 56, emphasis added)

Since *Mikisew Cree*, various First Nations in northern Alberta have turned to the courts to question continued Crown resource alienations in their traditional territories. One First Nation, the Beaver Lake Cree Nation, has elected to proceed by way of action (the statement of claim is posted on the website of Woodward and Co, the law firm representing the plaintiff First Nation) and as to which see the very recent judgement by Justice Keith Yamauchi in the *Lameman* case (2011 ABQB 40).

The Athabasca Chipewyan First Nation (ACFN) in the case that is the principal subject of this comment decided to proceed by way of an application for judicial review of Crown decisions to grant resource rights in the form of long term oil sands leases - alleging in support of that application a breach of the Crown's duty to consult.

The Crown, and one of its lessees (Shell), moved to dismiss the application under Rule 159 on the basis that there was no merit to the claim or any genuine issue for trial on the grounds that ACFN had filed its application more than six months after the relevant decision, and therefore was out of time within the meaning of Rule 753.11. Justice Thomas granted that application with respect to all of the elements of the relief sought by ACFN that related to the validity of the leases held by Shell and others. In doing so Justice Thomas applied a line of cases that stand for the proposition that the usual rule - to the effect that limitations do not run with respect to a declaration - does not apply in the case of an application under the Crown Practice Rules for a declaration of invalidity. That, as I said in my blog on the trial judgement, is likely uncontroversial. The real issue is whether that rule should be just as immutable in a constitutional duty to consult case where there is a legitimate question as to whether the ACFN even had notice of the Crown's decision to issue new dispositions i.e. does it admit of a more favourable *interpretation* if we can read into the rule a constitutional frame of reference.

When does time begin to run? Ordinarily, time begins to run in a judicial review application when the decision is made. There is, however, a line of cases that says that where there is a statutory duty to provide notice of a decision, time does not start to run until such notice has been provided. The Crown admitted that it had not provided any such specific written notice in this case. Shell argued that these cases were distinguishable on the grounds that there was no *statutory* duty to provide notice.

At trial, Justice Thomas held that even if time did not begin to run until ACFN obtained notice (which point he declined to decide), ACFN must be taken to have acquired *constructive* notice of the issuance of the leases by virtue of the fact that the Department posts a notice of successful bids on something called the Aboriginal Community Link, which, along with other electronic posting services, would have advised interested parties of lands that are open for bid and the outcomes of those bids; such notice sufficed to start the clock and therefore ACFN was out of time.

In my blog on the trial judgement I argued that there is a serious technical and substantive difficulty with this line of reasoning in the context of an application for summary judgement in a First Nation consultation case. I suggested that the applicant's argument, at least in part, must have been as follows: (1) there is a duty to consult; (2) at a minimum, the duty to consult requires notice of decisions that are to be made that may affect the First Nation (notice is always required: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras 43 – 45), (3) the duty to consult is a common law constitutional duty (*Haida Nation*), (4) the Minister provided neither notice that the lands were open for bidding nor notice that the lands had been acquired, (5) in the absence of notice, time could not begin to run, (in other words, the applicant must be in at least as strong a position under a common law constitutional duty / right as a party that benefits from a statutory right to notice).

I further suggested that by deciding that *constructive* notice suffices (because the Crown did not provide *actual* notice), Justice Thomas effectively decided that a common law constitutional duty grounded in the honour of the Crown was of less significance than an express statutory right to notice.

The Court of Appeal's decision

The applicants maintained three grounds of appeal:

> a. that the case management judge erred by treating the declaratory and other relief sought by ACFN as indistinguishable from quashing, contrary to consistent judicial recognition of a distinct purpose and role of declaratory relief, especially in the context of Crown consultation with First Nations;
>
> b. that the case management judge erred by holding that constructive notice triggered the start of the limitations period, as this holding (a) improperly decides important questions of constitutional law in a summary proceeding, and (b) arbitrarily affords less protection to constitutional notice rights than the law recognizes for statutory rights; and
>
> c. in the alternative, even if constructive notice is enough to trigger the limitations period, the case management judge erred in holding that constructive notice was effected by general postings to electronic services that were never presented to ACFN as a means of notice, could not realistically be monitored by ACFN and, to the Minister's knowledge, were not utilized by ACFN at the material times.

This comment focuses on grounds (b) and (c), which the Court deals with together under the omnibus heading of "constructive notice". Under this heading the Court made two main points.

The first was that limitations rules apply to "Aboriginal constitutional claims" in much the same way as they apply to other claims (at paras. 26 and 32). In doing so the Court cited two cases, *Lameman v Canada (Attorney General)* [2008] 1 SCR 372 and *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245 – and read in the word "constitutional". Neither case is on point. Neither case is a judicial review case; both cases involve what is effectively a private cause of action in the form of a breach of fiduciary duty with much longer limitations periods; both cases involved fact patterns that reached back decades if not a century. Neither case engages the common law duty to consult which rests on the constitutional foundation of the honour of the Crown and is not the basis for a private cause of action.

The second point the Court makes is that Rule 753.11 has been strictly construed in Alberta (at para. 27) and that "the Legislature (*sic*) intended the limitation to operate without regard to the potential applicant's knowledge" and therefore "that there was no need … to consider the constructive notice as notice was not required [by the Rules of Court]" (at para. 28). That is all very well in an ordinary case. But the Court completely fails to confront the fact that the Rules of Court are not part of the Constitution but, on the contrary, must be read in the context of and subject to the common law duty to consult founded on the constitutional principle of the honour of the Crown. Neither the provincial legislature nor the Rules Committee of the Court can control the question of whether constructive or actual notice serves to trigger the running of a Crown proceedings limitations period (described by the Court as a "generous" six month window – in what context, the history of colonization?) which applies to a decision which potentially engages the duty to consult. Just as statutes must be interpreted in light of the Constitution (surely uncontroversial but passing here without mention, see *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53 at paras. 47 and 57 (and my blog on that decision) and *Minister of Fisheries and Oceans* v. *Nunavut Tunngavik* (1998), 162 DLR (4th) 625 at paras 13 - 16), so too must the Rules of Court. This is at least an arguable case which is all that the applicant need show in response to a motion to dismiss.

The title of this post refers to the honour of the Crown. The Supreme Court of Canada has stated in a series of judgements that the duty to consult derives from the general constitutional concept of the "honour of the Crown" - for the most recent example see *Beckman*, *supra* at para 42. Yet in this case the Court of Appeal of Alberta manages to affirm a motion for summary dismissal in a case dealing with the Crown's duty to consult without mentioning the concept. So yes, First Nations may sue the Crown in Her Majesty's Courts but only in strict accordance with Her Majesty's Rules (fixed by the legislature or the Rules Committee of the Court) which the Court interprets here without taking into account the constitutional dimensions of the applicant's case. Thus, according to this Court, the Crown may unilaterally decide that it will provide notice via the WWW that it is just about to shift lands (*Mikisew Cree*, above) from Category A (hunting allowed) to Category B (hunting not allowed). Indeed, once the Crown has posted to the web it appears that the onus is now on the First Nation to show that it did not receive actual notice (at paras. 26 – 33). Is this really consistent with the honour of the Crown? Is it too much to require that the Crown provide actual notice of such dispositions, failing which the running of the six month limitations period under the Crown practice rules will simply be postponed?