January 16, 2013

The right to trap in traditional territory: a case of competing normative orders?

Written by: Nigel Bankes

Decision commented on:

Cooper and Boucher v Ganter and HMQA, 2012 ABQB 695

I don't actually know if this is a case of competing normative orders but it sure looks like it. More formally and abstractly this decision confirms that a claimant cannot avoid the six month limitation rule for judicial review proceedings by commencing an action by way of a statement of claim.

The facts

Boucher held a licence for a Registered Fur Management Area (RFMA) under the *Wildlife Act*, RSA 2000, c W-10 and the *Wildlife Regulation*, Alta Reg. 143\1997 for a block of lands on the east side of the Athabasca River between the properties of Shell's Albian project and Suncor project (at para 3). Boucher relinquished the RFMA to his sister Bertha Ganter (BG) in 2006. Boucher said that he did this since he couldn't read or write and (I infer) that it was preferable to have Bertha conduct negotiations with the oil companies in relation to the RFMA. Boucher further stated that it was understood between him and his sister that if anything happened to her he would receive the RFMA (at para 13). Boucher attested to the existence of documentation to this effect but was unable to produce that documentation (*id*.)

Bertha died in 2004. She did not transfer the RFMA to Boucher through her estate. The Department of Sustainable Development took the view that the RFMA was vacant and could be re-distributed. The Chief of the Fort Mackay First Nation recommended that the RFMA be issued to Boucher, but in the end (and using an objective scoring system, the details of which are not discussed in the judgement) the Department decided to issue the licence to Stephen Ganter, the brother of Brenda Ganter.

The claim

Boucher (and junior partner Cooper) brought an action against Stephen Ganter and the Crown alleging that Stephen Ganter failed to recognize the trust conditions on which Boucher transferred the licence to BG. HMQA was named in the suit on the basis of the Crown's responsibility for the management of fish and wildlife in Alberta. The Crown applied for summary judgement.

The decision

The Crown was entitled to summary judgement. Insofar as relief was requested against the Crown the action was in substance an application for judicial review and setting aside (at para 35) of the Crown decision to grant the licence to Stephen Ganter. That decision was made in April 2005 and in October 2005 Boucher and Cooper learned that they were not successful. The statement of claim was filed in March 2007. Rule 3.15 requires that an originating application be made within six months after the relevant decision was made. Thus, whether the six months runs from the date of discoverability or the date of decision the application was out of time (at para 34).

So, what of the competing normative orders point? The question here is simply who *should* be making the decision about the allocation of an RFMA with the traditional territory of a First Nation and as between members (apparently) of that First Nation and on the basis of what norms? Is this a decision that should be made by a Departmental official on the basis of some "objective" test, or is it a decision that should be made by or on the recommendation of the First Nation in accordance with its own norms? The decision does not discuss this issue other than to the point to the fact that the Crown did not act upon the recommendation of the First Nation (at para 10) – but there is no deeper explanation of the status of that recommendation or indeed of the legal basis of the Department's scoring system (other than a reference (*id*) to the fact that Cooper was ineligible, despite getting the highest score, because of previous convictions under the *Wildlife Act*). There is a little more information in the Regulations (see ss 33 – 38) but not much more and Justice Park does not refer to the Regulations in his judgement.