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The role of a limitations defence in a judicial review application involving the Crown's duty to consult

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Cases Considered:

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

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 resorted 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).

The Athabasca Chipewyan First Nation (ACFN) in the case that is the 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 and without consultation.

The Crown, and one of its lessees (Shell), moved to dismiss the application under Rule 159 of the *Alberta Rules of Court*, Alta. Reg. 390/1968, 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 out of time within the meaning of Rule 753.11. Mr. Justice D.R.G. Thomas has, in large part, granted that application, and in particular has granted that application with respect to all of the elements of the relief sought by ACFN that relate to the validity of the leases held by Shell and others. Hence the only element of the application that is still alive (pending a possible appeal) is that part of the application in which ACFN seeks a declaration as to the Minister's continuing duty to consult with respect to on-going decision-making by the Minister in relation to the oil sands leases.

In so holding, 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 for invalidity. That much is likely uncontroversial. Were the law otherwise it would be a straightforward matter for any application for judicial review to seek declaratory relief rather than relief in the nature of certiorari and thereby completely undermine and circumvent Rule 753.11.

But that still leaves open the question of when time began to run and whether it was possible to make a decision on that question on a motion for summary judgement.

When does time begin to run? Ordinarily time beings 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 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.

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 obtained 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.

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. The applicant's argument, at least in part, must be 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).

By deciding that constructive notice suffices (because the Crown did not provide actual notice), Justice Thomas has effectively decided that a common law constitutional duty grounded in the honour of the Crown is of less significance than an express statutory right to notice. But, more specifically, the Court has also made a crucial ruling on the merits of the applicant's argument with respect to the *content* of the duty to consult (i.e. that constructive notice suffices). That was not something that Justice Thomas was entitled to do on a motion under 159(2) precisely because it must be at least arguable that the Crown cannot take the benefit of a limitations defence unless it has provided *actual* notice of conduct that it contemplates that might adversely affect the applicant's rights. The relevant conduct in this case was that of the Crown in commencing a process that might shift lands from Category A (hunting allowed) to Category B (hunting not allowed). For the Court in *Haida Nation* (at para. 35) it was the Crown that must be taken to have constructive notice of the interests of First Nations (a reasonable proposition since it is the Crown that takes the benefit of the assertion of sovereignty); there is no suggestion in *Haida Nation* that the First Nation should be taken to have constructive notice of proposed Crown conduct.