In the Court of Appeal of Alberta

Citation: Athabasca Chipewyan First Nation v. Alberta (Minister of Energy), 2011 ABCA 29

Date: 20110128
Docket: 0903-0320-AC
Registry: Edmonton

Between:

Athabasca Chipewyan First Nation

Appellant
(Applicant)

- and -

Minister of Energy and Shell Canada Ltd.

Respondents
(Respondents)

- and -

Canadian Coastal Resources Ltd. and
Standard Land Company Inc.

Not Parties to the Appeal
(Respondents)

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Donna Read

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 19th day of October, 2009
Filed on the 17th day of November, 2009
(2009 ABQB 576, Docket: 0803-17419)

Memorandum of Judgment

The Court:

[1] The Athabasca Chipewyan First Nation ("ACFN") sought judicial review of five oil and gas leases granted to the respondent Shell Canada Ltd. by the Minister of Energy (the "Minister"). ACFN alleges that the Minister's decisions were invalid or unauthorized because the Minister did not consult with ACFN prior to granting the leases. ACFN does not challenge the constitutionality of Rule 753.11 of the Alberta Rules of Court or any legislation, and did not serve notice under the ***Judicature Act***, R.S.A. 2000, c. J-2.

[2] The leases at issue were granted on November 29, 2006, January 10, 2007 and March 21, 2007. ACFN filed its Originating Notice on December 10, 2008. The respondents then sought summary dismissal from the appointed case management judge of most of the Originating Notice on the basis that it was filed out of time. Rule 753.11 requires aggrieved parties to file and serve applications for judicial review within six months after the decision or act to which the judicial review relates. The case management judge granted summary dismissal of all of the Originating Notice except for ACFN's request for a declaration that the Minister is under a continuing duty to consult with ACFN.

Summary Dismissal Decision

[3] In granting summary dismissal, the case management judge noted that Rule 753.11(2) excludes the courts' ability to enlarge or abridge times. He held that was a clear signal that the six month time limit is fixed and cannot be extended. He observed that some requests for declaratory relief may be made outside the six month time limit, but if the declaratory relief sought has the effect of setting aside an administrative decision, it is subject to the six month limit in rule 753.11. In reaching this conclusion he relied on this court's decisions in ***Alberta Union of Provincial Employees v. Alberta***, 2001 ABCA 309, 303 A.R. 1, ***Simlote v. Alberta***, [1989] A.J. No. 818 (C.A.), and ***Lameman v. Canada (Attorney General)***, 2006 ABCA 392, 66 Alta. L.R. (4th) 243 [***Lameman* (ABCA)**], rev'd 2008 SCC 14, [2008] 1 S.C.R. 372 [***Lameman* (SCC)**].

[4] The case management judge held that the declarations that the Minister breached the duty to consult with respect to the leases at issue are tied to the administrative decision to grant the leases and would be an attack on those decisions. He stated that the declarations sought regarding the duty to consult on the leases were inextricably bound up with the request for *certiorari*.

[5] The case management judge then considered what was required to trigger the running of the limitation period. He noted that the parties proposed four possible limitation trigger points:

(a) the date that the Leases were granted;

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

(c) the date that 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 ACFN of the decision to grant the leases.

[6] Rather than settling on any of the four possible triggering points, the case management judge assumed that the duty to consult existed in this case and that it required the Minister to notify ACFN of the decision to grant the leases before the limitation period began to run. He held that this determination depended on the scope of the duty to consult and the form of the notice implied by such a duty.

[7] The case management judge then reviewed the substantive obligations that comprise the duty to consult as set out by the Supreme Court in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 S.C.R. 511 and ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69, [2005] 3 S.C.R. 388 and held that they did not require the Minister to give ACFN specific written notice of its decision to grant the leases. He concluded that the three mechanisms set up by the Minister to give public notice of postings of "land sales" and the award of leases resulting from those "sales" met the notice requirement under the duty to consult. In particular, he noted that the Minister had established the Aboriginal Community Link to advise Aboriginal communities of public offerings and lease agreements granting subsurface mineral rights. He observed that ACFN did not tender evidence as to when it first became aware of the leases or explain why it did not use the Aboriginal Community Link, despite the availability of internet services in its offices. He concluded that if there was no duty to consult, the limitation began to run from the date when the leases were granted. If there was a duty to consult, the limitation period would begin to run the day the leases were posted on the Aboriginal Community Link. Since they were posted a day after granting, the limitation was operative, as in either event notice was provided more than six months before ACFN filed its Originating Notice, thereby defeating any possible remedy. He therefore granted summary dismissal.

The Leases

[8] In order to give context to the issues in this appeal it is useful to describe, in general, the system in place with respect to the sale of oil and gas leases on Crown lands in Alberta. We will also describe how that system worked in this case, including how notice is provided of lands up for bid and of lands for which leases are granted.

[9] The leases at issue are oil sands leases. They are all located near a satellite reserve belonging to ACFN. This reserve is largely used for hunting and fishing purposes. For the purposes of the summary dismissal application the Minister conceded that ACFN is an adherent to Treaty No. 8 and its members possess a treaty right to hunt, fish and trap for food. Arguably that right extends to the leased lands.

[10] At the time of the summary dismissal application, there were 106,214 active mineral leases throughout Alberta that the Minister had granted to various corporations and individuals. Included in these are 4,965 oil sands leases. The system by which lands are leased involves energy producers requesting the posting of lands and a bid system by which interested participants bid on lands. Successful bidders do not acquire title to the land, but are granted a lease for a specified term. The leases are for specified mineral interests only. No specific surface rights are acquired in relation to the leased lands and, before any leases proceed to development, the leaseholders must take other steps. These involve various approvals and sometimes include hearings with respect to conservation and environmental issues. It is at the approval stage that the Minister engages in consultation with potentially affected First Nations.

[11] Not all leases lead to development. In fact, only a small percentage of the oil sands leases issued in Alberta are under development. Numerous factors are at play with respect to the development of oil sands leases. It is evident that many participants acquire leases in case there is substantial improvement in market conditions some time during the term of the lease. At the end of their term many leases revert back to the province without any development. It is for this reason that the Minister only engages in consultation with potentially affected First Nations when lease holders signal that development will proceed. The Minister is of the view that consultation regarding leases that are on paper only serves no purpose. On the other hand, ACFN is of the view that orderly planning of oil sands development requires more broad planning and consultation that should be undertaken well before any development.

[12] The general process described above was followed with respect to the leases at issue in this appeal. Initially, Shell requested that they be posted for sale. The leases were then posted on Alberta Energy's website two years in advance of the date of public offerings. Details of the parcels that were being offered were posted on the website eight weeks before the sale date. On the afternoon of each sale, Alberta Energy published the name of the successful bidder and the amount paid with respect to each lease.

[13] Alberta Energy offers a free electronic email subscription by which subscribers receive direct email notification of all offerings, notices and sales. Finally, it provides an additional, free of charge, source of information for First Nations and Métis settlements in Alberta, through an interactive mapping website called the "Aboriginal Community Link". This link provides all posting and sales information regarding leases. It was operative at the relevant time but ACFN did not make use of it. ACFN did not advise when it actually learned of the leases. In argument, both at Queen's Bench

and on this appeal, counsel for ACFN alleged that a lack of resources and other priorities played a role in ACFN's failure to use the Aboriginal Community Link. However, the evidence discloses that ACFN offices are computer equipped and use internet services.

Issues and Standard of Review

[14] ACFN's factum lists three grounds of appeal. They are:

> 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 proceedings, 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.

[15] The Minister argues that ACFN's grounds are really a challenge to the reasons rather than being an appeal from the result. The Minister submits that the case management judge determined that the Originating Notice was filed long after the six months limitation, that most of the relief sought was subject to the limitation, and that time runs from the date that the leases were granted or made public, dependant on the existence of the duty to consult. The Minister argues that the issues in this appeal are really about each of these decisions, that there is support in the record for each of these decisions, and that they are reasonable. Finally, the Minister argues that because the case management judge applied the correct legal test for summary dismissal, the exercise of his discretion to grant summary dismissal is to be assessed on the reasonableness standard of review.

[16] We conclude that the dispute about the proper characterization of the grounds of appeal makes no difference in this case. ACFN is arguing that the case management judge made extricable errors of law in his analysis. If the alleged errors are extricable errors of law, they are reviewed on

the correctness standard. Otherwise the "errors" go to the reasonableness of the case management judge's decisions. Of course, if the alleged errors are not errors at all the case management judge's decisions, presumptively, will be reasonable.

Analysis

1. The Six Month Limitation Does Not Apply to the Declaratory Relief

[17] The Originating Notice filed by ACFN sought a *certiorari* order and a variety of declaratory relief. ACFN agrees that the six month limitation in rule 753.11 would apply to its request for an order quashing the granting of the leases. It also sought, as an alternative to an order quashing the challenged tenures, an order staying the challenged tenures and prohibiting further steps in reliance on them. ACFN restricts its argument respecting the quashing order to its position that the six months did not start running before it filed its Originating Notice because it did not have notice of the granting of the leases.

[18] With respect to the declaratory relief, the case management judge ruled that it was inextricably tied to ACFN's request that the leases be set aside or stayed. He therefore held that rule 753.11 applied. Rule 753.11 states:

> 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. [emphasis added]
>
> (2) Rule 548 does not apply to this Rule.

[19] In its Originating Notice, ACFN sought the following declarations:

> 1. A declaration that the Minister has a duty to consult and, if indicated, to accommodate the ACFN prior to the granting of the Challenged Tenures [...];
>
> 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 [...];
>
> 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; [...]

[20] In his reasons, the case management judge held that the first two declarations sought by ACFN are tied to specific administrative decisions made by the Minister, i.e. the granting of the leases. He held that granting of the first two requested declarations would be, in substance, an attack on the validity of the leases. In reaching this decision, he relied on the decisions in ***Simlote***, ***Babiuk v. Calgary (City)*** (1992), 133 A.R. 21 (Q.B.) and ***AUPE***, all of which state that relief which is cloaked as something other than a direct challenge to an administrative act or decision but which, in substance, has the same effect is caught by the six month limitation set out in the rule.

[21] Although ACFN argues that the relief sought here should be regarded as true declaratory relief along the lines of what was sought in ***AltaLink Management Ltd. v. Edmonton (City)***, 2005 ABQB 222, 281 A.R. 307, ***Urban Development Institute v. Rocky View (Municipal District No. 44)***, 2002 ABQB 651, 8 Alta. L.R. (4th) 273, ***Telus Communications Inc. v. Opportunity (Municipal District No. 17)*** (1998), 235 A.R. 258 and ***Dwyer v. College of Physicians & Surgeons of Alberta*** (1989), 98 A.R. 81 (Q.B.), those cases are all distinguishable because no specific administrative decision was being challenged. In this case, the first two declarations sought by ACFN challenge the leases.

[22] ACFN relies on a series of British Columbia decisions in which declaratory relief was granted where aboriginal constitutional issues were at stake as demonstrating that declaratory relief is often granted with respect to breaches of such rights: ***Haida Nation***; ***Gitxsan First Nation v. British Columbia (Minister of Forests)***, 2002 BCSC 1701, 10 B.C.L.R. (4th) 126; ***Wii'litswx v. British Columbia (Minister of Forests)***, 2008 BCSC 1139, 80 Admin. L.R. (4th) 217; ***Wii'litswx v. British Columbia (Minister of Forests)***, 2008 BCSC 1620, 88 Admin. L.R. (4th) 109***; West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)***, 2010 BCSC 359, 6 B.C.L.R. (5th) 94. However, none of the British Columbia decisions considered whether they were sought out of time having regard to an applicable limitation.

[23] In ***Papachase Indian Band No. 136 v. Canada (Attorney General)***, 2004 ABQB 655, 365 A.R. 1, rev'd on other grounds ***Lameman* (ABCA)**, rev'd ***Lameman* (SCC)**, Slatter J. (as he then was) considered the issue of declarations which attack an administrative decision or act. At paras. 113 and 114, he stated:

The laws of England had long had a six month limitation period for an application for certiorari. The original English statutes only applied to certiorari against the decisions of Justices of the Peace, and they have no application to these proceedings, even if they did become a part of the law of the *Northwest Territories: Ostrowski v. Saskatchewan (Beef Stabilization Board)* (1993), 109 Sask. R. 40, 101 D.L.R. (4th) 511 (C.A.). By 1968 (at the latest) Alberta Rule 742 applied the six-month limitation period to all applications for certiorari, regardless of the decision-maker being impugned. Accordingly, by 1968 at the latest, time would have run with respect to any of the decisions in question. The provisions of the new *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.), transferring the jurisdiction to review the decisions of federal decision-makers to the Federal Court, did not come into effect until 1970, at which time the limitation period under the provincial Rules of Court (which previously applied to the review of federal decisions) would already have expired.

The Applicants in this case have not applied for certiorari, although they have applied for declarations that the various decisions they challenge are void. 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.U.D. 673, 69 Alta. L.R. (2d) 401 (C.A.); *Re Babiub* (1992), 133 A.R. 21, 4 Alberta 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. I note also that public law remedies are discretionary and can be denied for delay in prosecution: *Chippewas of Sarnia Band v. Canada (Attorney General)*, (2000), 195 D.L.R. (4th) 135 (Ont. C.A.) at paras. 262 ff. They can also be denied when they provide no effective remedy. Declaring a decision to be invalid when there is no way to avoid its consequences is pointless.

[24] This Court reversed this decision on other grounds, but the Supreme Court restored the initial decision: ***Lameman* (SCC)**.

[25] We conclude that the case management judge applied the correct law. This application involved no extricable legal error, nor any palpable error of fact. The first ground advanced by ACFN is without merit.

Constructive Notice

[26] The case management judge proceeded on the assumption that there was a duty to consult on the part of the Minister. He also assumed that the duty to consult was met when notice was given to ACFN of the decision that triggered the duty. We conclude that notice is not required to trigger the duty. The Supreme Court, in ***Lameman***, confirmed that limitations law applies to Aboriginal constitutional claims and that they apply to such claims in the same way as they apply to other claims affected by the limitation. At para. 13 of ***Lameman* (SCC),** the court stated:

> This Court emphasized in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, that the rules on limitation periods apply

> to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated at para. 121 of *Wewaykum*:
>
> Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

[27] In Alberta, Rule 753.11 has been strictly construed. Unless there is a clear and stated obligation to provide notice of a decision, the six-month limitation runs from the date of the decision. If there is a clear obligation to provide notice then the limitation runs from the date notice is given: ***Babiuk***; ***AUPE***; ***Urban Development***; ***Johannesson v. Alberta (Workers' Compensation Appeals Commission)*** (1995), 175 A.R. 34 (Q.B.); ***Edmonton (City) v. Gaffney*** (1999) 313 A.R. 161, [1999] 4 M.P.L.R. (3d) 99 (Q.B.). In ***Peixeiro v. Haberman***, [1997] 3 S.C.R. 549, the Supreme Court confirmed that when a limitation runs from an event which clearly occurs, without the regard to the injured party's knowledge, the discoverability principle does not apply.

[28] In our view, the Legislature intended the limitation to operate without regard to the potential applicant's knowledge. The rule is operative upon the "decision or Act" occurring, not the date the decision or act is communicated to potential parties. This is the interpretation given by the Nova Scotia Court of Appeal to the equivalent rule applicable in Nova Scotia. In ***Cental Halifax Community Association v. Halifax***, 2007 NSCA 29, 280 D.L.R. (4th) 506, leave denied [2007] S.C.C.A. No. 279, the court gave four reasons for concluding that the clock starts on the making of the decision: (a) the clear language of the provision; (b) the extraordinary nature of the certiorari remedy and the corresponding need for definitive timelines; (c) the generous six month window to apply; and (d) the Court's inherent jurisdiction to address the extraordinary abuse if necessary: at para. 21.

[29] We conclude that there was no need for the case management judge to consider the issue of constructive notice as notice was not required. However, we also conclude that the case management judge did not err in his analysis of the constructive notice (assuming notice is required). The appellant agrees that the analysis of this question is a mixed fact and law exercise but argues that the case management judge erred because he made decisions without a full appreciation of the factual background and that such a full appreciation could only be gained through the full judicial review process.

[30] Unfortunately, much of what appears to be missing from ACFN's standpoint was within its ability to adduce. Parties resisting a summary dismissal are required to put their best case forward, once a *prima facie* case for dismissal is made out by the applicant: ***Lameman* (SCC)** at para. 11; ***Lameman* (ABCA)** at para. 12; ***Trosin v. ScotiaMcLeod***, 2005 ABCA 410 at para. 7. In this case, ACFN never provided evidence of when it became aware of the leases. It now complains that a full judicial review is required to flesh out the issue of notice. However, judicial reviews are normally conducted on the basis of written records. In this case, the record would not include anything about when ACFN actually became aware of the leases. ACFN did file an affidavit stating that when the leases were first posted, it had computers in its office but used a dial up modem to access on line services. The affidavit also states that staff members were mostly computer illiterate and really did not use computers. The affidavit says nothing about when ACFN learned of the leases or about when high speed internet service was put into its offices. If ACFN wanted that evidence before a judicial review judge, it would have to adduce that information in some form. Otherwise, the only information before the court would be counsel's speculation regarding why the systems in place did not provide ACFN with notice of the postings and leases.

[31] ACFN argues that the duty to consult requires proof by the Minister that he gave actual notice to it. In effect, it argues that the limitation has not yet started to run.

[32] In our view, this argument distorts the interplay of limitations and Aboriginal constitutional rights. ***Lameman* (SCC)** makes it clear that general limitations law applies to such claims. Even the most generous interpretation of limitations statutes leads to the commencement of the limitations clock on the aggrieved party's discovery of the injury. Here, the aggrieved party, ACFN, has to have discovered the wrong, as it has filed for judicial review.

[33] Moreover, the discoverablity principle, as applied to limitations has always been interpreted to include an objective component. That is, the wrong is assumed to be discovered when it would reasonably have been expected to be discovered: ***Yugraneft Corp. v. Rexx Management Corp***., 2010 SCC 19, [2010] 1 S.C.R. 649 at para. 60; ***Gayton v. Lacasse***, 2010 ABCA 123, 482 A.R. 179 at para. 20. In this context, the methods of disseminating information regarding the posting and granting of leases are relevant. We conclude that the evidence adduced by the Minister regarding public notification of the leases placed a positive obligation on ACFN to show that it could not be expected have known about the leases until sometime within six months of filing its Originating Notice and that, in fact, it did not know about the leases until then. The case management judge did not err in concluding that the notice provided was sufficient in the circumstances.

[34] ACFN's third ground is also about constructive notice. It essentially is a restatement of the second ground. Again this ground assumes an obligation to provide notice in some form and is reviewed on the standard applicable to issues of mixed fact and law. We perceive no palpable error in the case management judge's analysis. It is not unreasonable and is certainly not palpably wrong

to expect that the notice provided by the Minister would have brought the leases to ACFN's attention shortly after posting. This ground is also without merit.

Conclusion

[35] This appeal is dismissed.

Appeal heard on November 5th, 2010

Memorandum filed at Edmonton, Alberta
this 28th day of January, 2011

Ritter J.A.

Bielby J.A.

Read J.

Appearances:

R.J.M. Janes, K.M. Brooks, J.L. Biem and J.C. Nelson
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