Date: 20060406

Docket: T-2344-93

Citation: 2006 FC 435

BETWEEN:

CHIEF JOHN EAR acting on his own behalf and on behalf of all the other members of the Bearspaw Band of the Stoney Band and Tribe and on behalf of the Stoney Tribe and all its members

-and-

CHIEF KEN SOLDIER acting on his own behalf and on behalf of all the other members of the Chiniki Band of the Stoney Band and Tribe and on behalf of the Stoney Tribe and all its members

-and-

CHIEF ERNEST WESLEY acting on his own behalf and on behalf of all the other members of the Wesley Band of the Stoney Band and Tribe and on behalf of the Stoney Tribe and all its members

-and-

THE STONEY BAND AND TRIBE

Plaintiffs

and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, Parliament Buildings, Ottawa, Ontario

-and-

THE HONOURABLE PAULINE BROWES, Minister of Indian Affairs and Northern Development, Parliament Buildings, Ottawa, Ontario

-and-

THE HONOURABLE GILLES LOISELLE, Minister of Finance, Parliament Buildings, Ottawa, Ontario

Defendants

REASONS FOR ORDER

GIBSON J.

[1] On the 12th of October, 2005, the Plaintiffs filed two motions for summary judgment or alternative relief against the Defendants, each very similar in form. One motion relates to a claim for damages and other relief by reason of the alleged failure of the Defendants to collect all of the royalties alleged to be due and payable to the Defendants, for the benefit of the Plaintiffs, under certain oil and gas leases on certain of the Plaintiffs' reserve lands, which leases were entered into by Canada with PanCanadian Petroleum Ltd. ("PanCanadian"). The second motion seeks equivalent relief in relation to oil and gas leases on the same reserve lands which were entered into with Chevron Canada Resources Limited, Imperial Oil Resources Limited and Shell Canada Limited.

[2] Both motions are supported by the same evidence and raise common issues. The distinction lies in the fact that the PanCanadian motion is directly related to judgments of the Court of Queen's Bench of Alberta and the Alberta Court of Appeal against PanCanadian but not against the other lessees.

[3] The motions were heard together. These reasons underlie the disposition of both motions. The PanCanadian motion will be dealt with first and more comprehensively reflecting the manner in which the two motions were presented before this Court.

PART I – THE PANCANADIAN MOTION

INTRODUCTION

[4] By motion filed the 12th of October, 2005, the Plaintiffs, as Applicants, seek the following relief:

> 1. An Order for Summary Judgment in favour of the Plaintiffs against the Defendants ("Her Majesty"), for damages suffered by the Plaintiffs resulting from Her Majesty's breach of Her trust, fiduciary, statutory or equitable duties and obligations to the Plaintiffs when:
>
> (a) Her Majesty knowingly or negligently allowed PanCanadian Petroleum Ltd. ("PanCanadian") to deduct from royalties that were due and owing to Her Majesty, in trust and on behalf of the Plaintiffs, Take or Pay financing charges ("TOPGAS") and operating, marketing and administrative charges ("OMAC"); and
>
> (b) Her Majesty failed to collect from PanCanadian all such TOPGAS financing charges and OMAC that were wrongfully deducted from the royalties that were reserved, due and owing,
>
> in the sum of $1,992,399.00 plus interest as claimed under the summary judgment procedure contained in Rules 213 through 219 of the *Federal Court Rules, 1998*;
>
> 2. In the alternative, an Order:
>
> (a) specifying and defining which material facts are not in dispute and defining which issues are to be tried;
>
> (b) for payment into Court of all or part of the claim;
>
> (c) for security for costs; and
>
> (d) limiting the nature and scope of the examination for discovery to matters not covered by the affidavits filed on the motion for summary judgment or by any cross-examinations on them and providing for their use at trial in the same manner as an examination for discovery.
>
> as contemplated and allowed by Rule 218 of the *Federal Court Rules, 1998*.
>
> 3. Costs for this application; and,
>
> 4. Such further and other relief as this Honourable Court might permit.

[5] This motion for summary judgment seeks judgment in respect of a relatively small but significant element of a claim filed on behalf of the Plaintiffs/Applicants on the 30th of September, 1993. The relevant extract from the statement of claim is quoted below under the heading "The Grounds for the Motion". Progress towards trial on the statement of claim has, by agreement between the parties and under monitoring by this Court through case management, been very

limited. Many of the issues raised in the statement of claim, and much of the historical background, are parallel to the issues and historical background in The Samson Indian Band and Nation litigation on court file T-2022-89 where the trial to date has extended over more than four years and where a partial judgment issued on the 30th of November, 2005[1]. That partial judgment is now under appeal[2]. Recommencement of the Samson trial has not been scheduled but when the trial is recommenced, it is anticipated that it will once again entail very long hearings. To the Court's knowledge, it is not anticipated that this action will go to trial prior to at least completion of the remaining portions of the Samson trial.

[6] The element of the claim in this action on which summary judgment is now sought is unique to this action in that it has no direct equivalent in the Samson action. Thus, argue the Plaintiffs, it would be unconscionable to further delay disposition on the singular and unique issue on which summary judgment is sought.

[7] The style of cause that appears above is, in some respects, not entirely clear and in some elements is badly out of date. In brief, the Plaintiffs/Applicants are the Stoney Nakoda First Nations comprising the Bearspaw First Nation, the Chiniki First Nation and the Wesley First Nation. The Stoney Nakoda First Nations are a "band" within the meaning given that term in subsection 2(1) of the *Indian Act*[3].

[8] For the purposes of this motion, the Defendants/Respondents are solely Her Majesty the Queen in Right of Canada, as represented at all material times by Indian Oil and Gas Canada, ("IOGC"), an

[1] 2005 FC 1622.
[2] A-629-05 filed December 21, 2005.
[3] R.S.C. 1985, c. I-6.

agency operating within the Department of Indian Affairs and Northern Development responsible for discharging the Crown's statutory obligations pursuant to the *Indian Oil and Gas Act*[4] and regulations made thereunder.

THE GROUNDS FOR THE MOTION

[9] In the PanCanadian Notice of Motion before the Court, the grounds for the motion are stated to include the following:

> 1. On or about September 22, 1877 and December 4, 1877 Her Majesty the Queen of Great Britain concluded and agreed to Treaty No. 7 with Blackfeet and other Indian Tribes at the Blackfoot Crossing of Bow River and Fort Macleod ("Treaty No. 7").
>
> 2. The ancestors of the Plaintiffs concluded and agreed to Treaty No. 7 on or about September 22, 1877 at Blackfoot Crossing.
>
> 3. Pursuant to Treaty No. 7, Reserve Lands described below were set aside for the exclusive use and benefit of the Plaintiffs with underlying title to the said Reserve Lands vested in Her Majesty the Queen in Right of Canada. The Plaintiffs use and occupy certain lands, including its natural resources, which have been set apart for them by, *inter alia*, Order in Council P.C. 1151 and designated as, *inter alia*, Indian Reserves Nos. 142, 143, 144, and 142B (the "Reserve Lands"). The Reserve Lands are under the exclusive control, administration and management of Her Majesty.
>
> 4. The mineral rights at issue are part of Indian Reserves set aside for the Plaintiffs under Treaty No. 7 as well as under, *inter alia*, Order in Council P.C. 1151. Between 1926 and 1962, pursuant to Treaty No. 7, the Plaintiffs granted nine surrenders (the "Surrenders") of their mineral rights in trust to His Majesty and Her Majesty in Right of Canada. These Surrenders were on similar terms and provide in part:
>
> > TO HAVE AND TO HOLD the same unto His said Majesty the King, his heirs and successors forever, **in trust to lease the same** to such person or persons, **and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people. (Emphasis added.)**
>
> 5. Her Majesty is, by virtue of, *inter alia*, Treaty No. 7, the Surrenders, the *Indian Act*, the *Indian Oil and Gas Act* and the *Indian Oil and Gas Regulations*, a trustee or fiduciary of the natural resources underlying the Reserve Lands as well as the royalties reserved, due and owing therefrom.
>
> 6. Pursuant to Treaty No. 7, the Surrenders, the *Indian Act*, the *Indian Oil and Gas Act* and the *Indian Oil and Gas Regulations*, Her Majesty has, on behalf of the Plaintiffs, entered into various mineral leases with a third party oil and gas producer, PanCanadian Petroleum Limited ("PanCanadian"). By operation of law, the mineral leases incorporate the provisions of the *Indian Oil and Gas Act* and the *Indian Oil and Gas Regulations*.

[4] R.S.C. 1985, c. I-7.

7. The "Regulations" in effect at the material time were the *Indian Oil and Gas Regulations*, C.R.C. 1978, c. 963; as am. S.O.R. 81/340 passed in April 1977 (the "*1977 Regulations*"). These were enacted pursuant to section 4 of the *Indian Oil and Gas Act*, R.S.C. 1985, c. 1-7.

8. The royalty reserved for and collected by Her Majesty on behalf of the Plaintiffs has been significantly less than what is provided for under the terms of the *Indian Oil and Gas Act*, the *1977 Regulations* and the terms of the mineral leases. The underpayment of royalties arises, *inter alia*, by reason of Her Majesty allowing unauthorized deductions from the selling price of the royalty portion of the natural gas produced from the Reserve Lands. These unauthorized deductions include, *inter alia*, TOPGAS financing charges and OMAC.

9. PanCanadian deducted TOPGAS financing charges from January 1, 1982 until October 31, 1994 while OMAC had been deducted since November 1, 1986.

10. Her Majesty first discovered that TOPGAS financing charges and OMAC were being deducted from the Plaintiffs' royalty interest in 1988 when Her Majesty conducted audits of another lessee on the Reserve Lands, Gulf Canada Ltd.

11. Following the receipt of a report and legal opinion on the deductibility of TOPGAS financing charges and OMAC, Her Majesty issued to PanCanadian a demand for the payment of the unpaid portion of the Plaintiffs' royalty interest on January 28, 1991. PanCanadian refused to comply with this demand.

12. The Plaintiffs first became aware of the improper deductions from its royalty interest, when informed and notified of same by its trustee or fiduciary, Her Majesty, in or about February 1991.

13. When PanCanadian refused to comply with Her Majesty's directions to pay, Her Majesty advised the Plaintiffs that if it wished to pursue this matter then it must do so on its own.

14. Under circumstances where Her Majesty, as trustee or fiduciary, had a genuine reason for doubt as to what Her Majesty ought to do, Her Majesty had a duty to apply to the Court for directions. Her Majesty failed or neglected to take such steps or any other further steps to collect the unpaid portion of the Plaintiffs' royalty interest, or to prevent the continued deduction of TOPGAS financing charges and OMAC, until February 26, 1999.

15. On September 30, 1993, the Plaintiffs instituted the present proceedings. Among other allegations, the Plaintiffs specifically allege at paragraph 33:

> "The Defendant Her Majesty has breached Her trust or fiduciary obligations and duties to the Plaintiffs in respect of the administration, management and supervision of the natural resources of the Stoney Reserves and of the said oil and gas leases, particularly:
> (a) in failing to ensure that Plaintiffs received all the royalties to which they were entitled under the oil and gas leases and in a timely manner; …
> (e) in failing to properly apply the Indian Act, the Indian Oil and Gas Act and the Regulations respectively thereunder;
> (f) in failing to take action on deficiencies;
> (g) in allowing the improper, excessive and unjustifiable deductions, including gas cost allowances, from the royalties payable to the Plaintiffs …"

Moreover, on May 3, 1993, the Plaintiffs, on its own behalf, filed a Statement of Claim in the Court of Queen's Bench of Alberta against PanCanadian. ("PanCanadian Action")

16. Pursuant to a Notice of Constitutional Question that was filed and served by the Plaintiffs in the PanCanadian Action, Her Majesty the Queen in Right of Alberta participated in and advanced its own arguments at the trial of the PanCanadian Action. The Plaintiffs'

fiduciary and trustee, Her Majesty, elected to take no position in either the oral or written arguments.

17. In a judgment dated April 9, 1998, the trial judge held that since the *Indian Oil and Gas Act, 1977 Regulations* and the mineral leases did not allow for these deductions, TOPGAS financing charges and OMAC should not be taken into account when royalty interest is being calculated.

18. PanCanadian appealed this decision and the Alberta Court of Appeal, by judgment dated July 24, 2000, held that TOPGAS and OMAC were not permitted deductions under the legislation regulating oil and gas production on reserve lands and that these changes should not have been deducted when calculating the royalties due and owing to the Plaintiffs.

19. This decision was not appealed to the Supreme Court of Canada.

20. Her Majesty the Queen in Right of Alberta intervened at the Alberta Court of Appeal. Her Majesty, though well aware of the appeal, did not participate either through written or oral submissions.

21. The trial judge held that pursuant to the Alberta *Limitation of Actions Act*, R.S.A. 1980, c. L-15, the Plaintiffs were entitled to a ten-year limitation period. At the Alberta Court of Appeal the applicable limitation period was reduced to six years. Neither the trial judge nor the Alberta Court of Appeal addressed the constitutional applicability of provincial limitation legislation as it applies to lands reserved for Indians. Further, neither the trial judge nor the Alberta Court of Appeal addressed whether there is an applicable limitation period as between Her Majesty and the Plaintiffs or as between Her Majesty and PanCanadian Petroleum Limited.

22. On February 26, 1999, Her Majesty, on behalf of the Plaintiffs, filed a statement of claim in the Court of Queen's Bench of Alberta ("Q.B. Action No. 9901-03744") against essentially all of the lessees operating on the Reserve Lands, including PanCanadian, claiming recovery of improperly deducted TOPGAS financing charges and OMAC deductions. At or about the same time, Her Majesty filed eighteen similar actions on behalf of other First Nations.

23. Based on the calculations of Her Majesty and PanCanadian, Her Majesty, by allowing PanCanadian to deduct TOPGAS financing charges and OMAC, has failed to collect at least $1,992,399.00, plus interest, of the Plaintiff's royalties to which the Plaintiff is entitled, during the period of January 1, 1982 and April 1, 1987.

24. The Plaintiffs claim of $1,992,399.00 represents the difference between the net amount of royalties that Her Majesty failed to collect, as a result of Her Majesty's breach of its fiduciary or trust obligations to the Plaintiffs, and the amount of royalties recovered by the Plaintiffs in the PanCanadian Action.

25. There is no genuine issue to be tried as the Alberta Court of Queen's Bench and the Alberta Court of Appeal have held that TOPGAS financing charges and OMAC were improper deductions from the royalties reserved for Her Majesty on behalf of the Plaintiff. Her Majesty has adopted the said findings of the PanCanadian Action when Her Majesty filed its own claim against PanCanadian Petroleum Ltd. and other lessees in Q.B. Action No. 9901-03744.

26. There is no genuine defence to the quantum of damages claimed by the Plaintiffs against Her Majesty as the Plaintiffs rely upon Her Majesty's and PanCanadian's own recalculations of the value of the royalties that Her Majesty failed to collect and allowed to be withheld by PanCanadian.

> 27. As a trustee or fiduciary of the Plaintiffs' natural resources and the royalties reserved on the sale of said natural resources, Her Majesty has no genuine limitation defence as against its beneficiary, the Plaintiffs.
>
> 28. The Plaintiffs' claim is an appropriate case for disposition under the summary judgment procedures contained in Rules 213 through 219 of the *Federal Court Rules, 1998* since:
>
> a. The issues of fact and law are not complex, are straight forward and have been dealt with by the Alberta Court of Queen's Bench and the Alberta Court of Appeal in the PanCanadian Action;
> b. There are no genuine issues or defences to be tried;
> c. There are no issues of credibility;
> d. It would be unfairly prejudicial to the Plaintiffs to be delayed in the prosecution of this one portion of its claim in these proceedings, which are easily and conveniently severed from the main action, by the protracted proceedings anticipated for the determination of the remainder of its claim against Her Majesty;
> e. Her Majesty would not be prejudiced in any way if this portion of the Plaintiffs' claim were judged summarily.
>
> 29. The present motion is without prejudice to the more comprehensive position of the Plaintiffs respecting treaty and aboriginal rights in the principal action herein.
>
> 30. Such further grounds as this Honourable Court might permit.

[10] Much of the foregoing that is background is essentially not in dispute. Not surprisingly, there was a good deal of concern expressed by counsel for the Defendants/Respondents regarding the appropriate characterization of the relationship between the Crown and the Plaintiffs/Applicants in the management of the Plaintiffs'/Applicants' royalty interests deriving from the oil and gas leases that are central to this matter and, flowing from that relationship, the extent of the Defendants'/Respondents' duties and responsibilities. More will be said about those issues later in these reasons.

[11] The following comments relate to specific paragraphs in the foregoing quotation.

[12] With respect to paragraphs 3 and 4, only lands comprising and gas resources underlying Reserves Nos. 142, 143 and 144, and royalty revenue from those gas resources, are at issue. Those Reserves comprise a large tract of land, more particularly 109 square miles, situated to the west of Calgary, Alberta, on both sides of the Bow River which runs through the reserves from west to east.

A survey sketch of the reserves, dated the 23rd of January, 1889, is attached as Schedule I to these reasons.[5] The gas reserves at issue are all situated in an area of the Reserves known as the Jumping Pound gas field.

[13] The allegation in paragraph 12 as to when the Plaintiffs/Applicants first became aware of the improper TOPGAS financing charges and OMAC deductions deducted in the computation of their royalty interest is in dispute. Counsel for the Defendants/Respondents urges that the Plaintiffs/Applicants may have been well aware of the issues surrounding TOPGAS financing charges and OMAC deductions perhaps years before February, of 1991 and that the evidence in this regard that is before the Court is quite unsatisfactory.

[14] I am satisfied that paragraph 13 does not tell a complete story. While it is clear on the evidence before the Court that the Defendants/Respondents advised the Plaintiffs/Applicants that if they wished to litigate the issue of TOPGAS financing charges and OMAC deductions, they should institute litigation themselves, at the same time, the Crown offered to provide the Plaintiffs/Applicants "technical support" in relation to any such litigation and, indeed, it was not in dispute that the critical evidence brought forward at the trial of the action referred to in paragraphs 15, 16 and 17 was provided through the testimony of a senior official of IOGC. It is also clear on the evidence before the Court that, for some time before so advising the Plaintiffs/Applicants regarding institution of litigation, certain officials in IOGC, with or without authority, were advising the Plaintiffs/Applicants that, if institution of litigation became necessary, the Crown would take that step.

[5] Source: Motion Record of the Applicants, Book I, Tab C3.

[15] The substance of paragraph 14 is at the heart of the motion before the Court.

[16] Paragraph 15 is an extract from the Plaintiffs'/Applicants' Statement of claim that is extracted to form a basis of this motion.

[17] The quantum identified in paragraphs 23 and 24 is very much in doubt. Counsel for the Defendants/Respondents undertook before the Court to produce an up-to-date quantum with a rationale for that quantum and to share it with counsel for the Plaintiffs/Applicants. During the course of the hearing of this matter the Court expressed a wish that counsel endeavour to reach agreement on the appropriate quantum and to jointly provide advice to the Court in this regard. The Court is optimistic that any dispute over quantum can be settled between the parties.

[18] The brief comments above with respect to paragraphs 23 and 24 interrelate with the position taken on behalf of the Plaintiffs/Applicants in paragraph 26.

[19] The Crown rejects the allegation in paragraph 27.

[20] Counsel for the Defendants/Respondents do not agree with the allegation in paragraph 28a. Counsel for the Defendants/Respondents fundamentality disagree with the allegation in paragraph 28b that there are "…no genuine issues or defences to be tried…" underlying the motion before the Court, and the allegation in paragraph 28e that the Defendants/Respondents would not be prejudiced if the claim here at issue were dealt with summarily.

SUBSTANTIVE ISSUES

[21] Drawing on the foregoing "Grounds for the Motion", the memoranda submitted on behalf of the parties and the representations of counsel at hearing, I am satisfied that on this motion for summary judgment, the substantive issues before the Court are the following:

(a) the appropriate characterization of the relationship between the Crown on the one hand and the Plaintiffs/Applicants on the other in respect to the administration of the oil and gas leases between the Crown and PanCanadian and, more particularly, the duties flowing from that relationship regarding collection of the full amount of royalties payable;

(b) if a duty on the part of the Crown to collect the full amount of royalties payable is found to exist and to not have been fulfilled, whether the Plaintiffs/Applicants are entitled to damages against the Defendants/Respondents and, if so, whether a limitations defence is available to the Defendants/Respondents;

(c) if a limitations defence is available to the Defendants/Respondents, the date from which that defence should run and the length of the limitation period;

(d) if the Plaintiffs/Applicants are found to be entitled to damages, whether they are also entitled to recover interest on those damages and, if so, the calculation of such interest; and

(e) costs.

[22] As a preliminary matter, the issue of whether this is an appropriate element of the Plaintiffs/Applicants much broader claim to be dealt with on summary judgment must be addressed.

SUMMARY JUDGMENT

a) General Principles

[23] The relevant Rules of this Court with respect to summary judgment are Rules 213 to 219. Those Rules are set out in full in Schedule II to these reasons. Rule 216(1) provides that summary judgment may be granted where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence. In *Apotex Inc. v. Canada*[6], my colleague, Justice Russell, wrote at paragraph 10:

> The burden lies with the moving party to establish that there is no genuine issue to be tried, but both parties must "put their best foot forward" to enable the Motions Judge to decide whether or not there is a genuine issue for trial, and the judge is required to take "a hard look" at the merits and, if possible, make findings of fact and law if the materials allow this.

The obligation of a respondent in this regard is somewhat qualified. More will be said about this shortly.

[24] Seven general principles derived from the case law pertaining to summary judgment that are often quoted are set out in the reasons of my colleague Justice Tremblay-Lamer in *Granville Shipping Co. v. Pegasus Lines Ltd.*[7] at paragraph 8. Those general principles are the following:

> 1. The purpose of the provisions [of the Federal Court Rules] is to allow the Court to summarily dispense with cases which ought not to proceed to trial because there is no genuine issue to be tried…;
> 2. There is no determinative test…but Stone J. A. [of the Federal Court of Appeal] seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*… . It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
> 3. Each case should be interpreted in reference to its own contextual framework…;
> 4. Provincial practice rules…can aid in interpretation…;
> 5. This Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court…;
> 6. On the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so….;
> 7. In the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge… . The mere existence of apparent conflict in the evidence does not preclude summary judgement; the Court should

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[6] [2003] F.C.J. No. 593 (F.C.T.D.).
[7] [1996] 2 F.C. 853 (F.C.T.D.).

> take a "hard look" at the merits and decide if there are issues of credibility to be resolved… .
>
> [citations omitted]

[25] The following more recent cases from the Federal Court of Appeal are instructive.

[26] In *J.H.C. v. Canada (Minister of Citizenship and Immigration)*[8], Justice Evans, for the Court, wrote at paragraphs 10-12 and 14:

> In our opinion, it is clear from the materials before us that the appellants' claim should not be decided without a trial. Indeed, counsel for the appellants concedes that a trial is necessary to quantify the damages. As for the issue of liability, the appellants will have to prove much more than the fact that Mr. C. was removed from Canada in breach of paragraph 50(1)(a), the only issue decided by Brockenshire J.
>
> Not every administrative action taken in contravention of a statutory provision results in a right to monetary compensation. Our law does not recognize a general tort of causing loss by *ultra vires* acts or by conduct that violates a person's constitutional rights. In order to recover damages, the appellants may have to prove, among other things, not only that Mr. C.'s removal was unlawful (the question that is *res judicata*), but also that the officials involved in the events surrounding his removal acted with malice, recklessness or in breach of a duty of care that they owed to Mr. C., or that the removal gave rise to a claim by the appellants, other than Mr. C. himself under subsection 6(1) of the *Family Law Act*, … .
>
> That the appellants cannot simply base their claim for damages on the order of Brockenshire J. appears to be acknowledged in their Statement of Claim. For example, in paragraph 28, they assert that, in ordering Mr. C.'s removal, the expulsions officer was "reckless and…[acted] without regard to his constitutional rights" and that there was no reasonable basis on which the warrant for his arrest could have been issued. Further, in paragraph 31, the appellants state that an allegedly defamatory letter given to Jamaican authorities when Mr. C. arrived was written by immigration officials "with malice". Moreover, difficult questions may arise on these issues as to whether, if the officials were mistaken, their mistakes were mistakes of law or of fact, and whether anything turns on that distinction in this context.
>
> ….
>
> In our view, however, the Motions Judge was correct to refuse to grant the appellants' motion for summary judgment because the appellants' statement of claim evidently raises a multitude of difficult issues of law and fact that can properly be decided only on the basis of the kind of full factual record that is developed after a trial. ….
>
> [one citation omitted, emphasis added]

[27] The reference in the second above quoted paragraph to "…or in breach of a duty of care that they owed to Mr. C., …" is directly on point here and of course we are here concerned with, once

[8] [2002] F.C.J. No. 392 (F.C.A.).

again in the terms of that paragraph, "…administrative action taken [, or here allegedly not taken,] in contravention of a statutory provision…". Further, counsel for the Defendants/Respondents urges, in the terms of the last quoted paragraph, that the claim here before the Court "…evidently raises a multitude of difficult issues of law and fact that can properly be decided only on the basis of the kind of full factual record that is developed after a trial."

[28] In *MacNeil Estate v. Canada (Department of Indian and Northern Affairs)*[9], Justice Sexton wrote at paragraphs 37 and 38:

> …Indeed, rule 215 only requires that the party responding to the motion for summary judgment put his best foot forward by setting out facts "showing that there is a genuine issue for trial." Nowhere in the Rules is a responding party required to bring forward sufficient evidence so that genuine issues for trial may be resolved on a motion for summary judgment. As a result, once the motions judge decides that there is a genuine issue for trial, the discretion given to him to nevertheless grant summary judgment by deciding the questions of fact could result in unfairness.
>
> The form of evidence available during motions and at trials is also significantly different. At a trial, the parties are provided with an opportunity to tell their story to the court both by giving oral evidence themselves and by offering the oral evidence of other witnesses. As a result of this *viva voce* evidence, the Trial Judge is in the best position to properly assess credibility and to sift through and weigh the evidence. On a motion for summary judgment, the judge is presented with affidavit evidence and does not have the opportunity to see and hear the evidence of witnesses. Without *viva voce* evidence, a motions judge faced with a genuine issue for trial cannot properly assess creditability or sift through and weigh the evidence.….
>
> [emphasis in original]

Justice Sexton continued at paragraph 39:

> All of this is not to say that summary judgment does not have a role to play in resolving subsidiary issues which can result in a shorter trial and in some cases, where there is no genuine issue for trial found, obviating the need for a trial at all. In *Irving Ungerman Ltd. v. Galanis* …, Morden A.C.J.O. stated…:
>
> > A litigant's "day in court" in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings, the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense.
>
> …
>
> [emphasis added, citations omitted]

[9] [2004] 3 F.C. 3 (F.C.A.).

[29] In *Trojan Technologies Inc. v. Suntec Environmental Inc.*[10], Justice Pelletier, for the Court, wrote at paragraph 20:

> It is not necessary for the purposes of this appeal to define the outer limits of the operation of the summary judgment rules since the limitation which is relevant to this appeal is already well established. The jurisprudence is clear that issues of creditability ought not to be decided on summary judgment applications. …The Motions Judge was aware of this distinction and was at great pains to point out that, in his view, no serious issues of credibility arose. With the greatest of respect, I am unable to agree with the Motions Judge's assessment. [citation omitted]

[30] Finally, my colleague Justice Snider wrote in *Apotex Inc. v. Merck & Co.*[11] at paragraphs 12 and 26:

> While I agree that the Court can deal with complex issues on motions for summary judgment, the facts of each case must be examined closely to determine whether there are genuine issues for trial or whether a question of law should be dealt with on a summary basis. There are fundamental differences between preliminary motions and trials. One effect of summary judgment is that a party will be precluded from presenting any evidence to the trial judge in respect of the issue that is the subject of a successful motion for summary judgment. The trial judge will not hear *viva voce* evidence on the issue and will not be ruling on the matter. In effect, one party will lose its "day in court". While this cannot be determinative, the severity of the impact on the losing party requires that the motions judge proceed with a careful analysis.
> …
> The task of the Court in interpreting legislation is comprised of more than one step. The Court must first look at the words; do these words have a plain and ordinary meaning or is there ambiguity or lack of clarity? Secondly, the context of the legislation must be examined. What is the history of the provision in question? What is the scheme of the statute? What is its object? What policy considerations were in the mind of Parliament or, in the case of regulations, the Governor in Council? This second part of the analysis could warrant a variation from the grammatical or ordinary sense of the word. And, regardless of how clear and unambiguous the words of a provision may be, the further analysis must be carried out. Indeed, a failure to determine the intention of the legislature in enacting a particular provision has been found, by the Supreme Court of Canada, to be an error …. . It follows that, where there are conflicting but not unreasonable interpretations available, the contextual framework of the legislation becomes even more important.
>
> [emphasis added, citation omitted]

[31] While counsel before the Court differed in their view of the complexity of the issues on this motion for summary judgment, an example of a summary judgment motion that was dealt with and

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[10] (2004) 239 D.L.R. (4th) 536 (F.C.A.).
[11] (2004), F.T.R. 82.

that involved at least an equivalent degree of complexity to that on the motion now before the Court can be found in *Semiahmoo Indian Band v. Canada*[12]. On the facts of this matter, the context surrounding the enactment of the *Indian Oil and Gas Act* and regulations made thereunder is, I am satisfied, relevant to a determination.

b) Application of the foregoing principles to this motion

[32] I was the Motions Judges to whom Justice Pelletier referred in the quotation from *Trojan*, *supra*. Here, I am satisfied a distinction can be drawn. In *Trojan*, there was expert evidence before the Court and there was a clear dispute on that evidence, albeit, I had concluded, with respect to issues well within the purview of a trial judge to adjudicate on the basis of the material before the Court. Here, there is no expert evidence before the Court and, counsel for the Defendants/Respondents to the contrary, I am satisfied that none is required[13]. Nor, on the non-expert evidence before the Court, and I will have more to say about that evidence shortly, is there significant, indeed if any, contradiction.

i) Just, most expeditious and least expensive determination

[33] None of the foregoing authorities refer to Rule 3 of the *Federal Court Rules* that requires the *Rules* as a whole to be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits. The focus of the foregoing authorities would appear to be on securing the most just determination of every proceeding on its merits and I agree with the authorities that that principle cannot be compromised. That being said, I am satisfied

[12] [1998] 1 F.C. 3 (F.C.A.).
[13] See, for example, *Samson Indian Band and Nation v. the Queen, supra*, footnote 1, page 318, paragraph 696.

that it is appropriate that it must be weighed against expedition and expense. Here, expedition is a very serious consideration.

[34] The factual situation that gives rise to this motion dates back to the period from 1988 to 1993. As earlier indicated, the litigation giving rise to this motion, in the opinion of this judge, will be long coming to trial. In that regard, my opinion contrasts with that of former Associate Chief Justice Jerome of the Trial Division of the Federal Court of Canada who, in oral reasons from the bench, dismissing a motion not unlike that here before the Court, estimated that it would be possible to bring the *Samson* action earlier referred to to trial in one (1) year[14]. Those reasons were delivered from the bench on the 6th of May, 1992. That matter first came to trial in May of 2000 and, as earlier indicated, continued at trial for more than four (4) years and the trial is not yet completed. I am concerned that the trial of this action will suffer a similar fate. Further, dealing with this discrete issue in the context of a trial would, I am satisfied, not lead to the "least expensive" determination of the issue here before the Court.

[35] None of the foregoing is to suggest that "just determination" should be left out of the equation but I draw support for my view that this matter can reasonably be determined on a summary judgment motion from the quotation from reasons of Associate Chief Justice Morden that appears above in a paragraph quoted from *MacNeil*[15] to the effect that, where there is no genuine issue which requires a trial, the holding of a trial is unnecessary and accordingly, represents a failure of procedural justice. Here, on the evidence before the Court, such as it is, I am satisfied that there is no genuine issue for trial save as to quantum of damages, if any, and I am satisfied that that issue

[14] Plaintiffs'/Applicants' Motion Record, Volume XV, Tab 57, page 3834, lines 17 and 18.
[15] *Supra*, footnote 9.

will either be settled by agreement or could be settled on a reference. The issues of fact are not overly complex. The issues of law, while complex, have been the subject of substantial jurisprudential guidance. There are, to this point, no issues of credibility. Finally, to further delay determination of this discreet element would be unfairly prejudicial to the Plaintiffs/Applicants and, I am satisfied, to determine it summarily would not be significantly prejudicial to the Defendants/Respondents.

ii) Best foot forward

[36] That is not the end of the matter. The principles governing summary judgment cited above require that each side, on a motion for summary judgment, put its best foot forward. That is not to say that a respondent on such a motion need adduce all of the evidence that it might bring forward at trial. Rather, it is to say that a respondent must bring forward evidence available to it that tends to establish that there is a genuine issue for trial.[16]

[37] The "best foot forward" principle is not merely a question of quantum of evidence. The evidence here, in terms of quantum, is substantial and, in many respects, is satisfactory. That being said, Rule 81 provides that affidavits should be confined to facts within the personal knowledge of the deponent, except on motions where statements as to the deponent's belief with the grounds therefore, may be accepted. Rule 81 further provides that an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts. The exception allowing for information and belief evidence in affidavits on motions should, I am satisfied, be narrowly interpreted on a motion for summary judgment such as that here before the Court, where a party is seeking a final disposition in respect of an issue or issues.

[16] See: MacNeil Estate, paragraph 37, *supra*, paragraph [28] of these reasons.

c) The evidence here before the Court

[38] Only two affidavits were placed before the Court on this application, one on behalf of the Plaintiffs/Applicants and the other on behalf of the Defendants/Respondents. Both of the affiants were cross-examined on their affidavits and provided reasonably extensive responses to undertakings. The Defendants/Respondents, in particular, provided very extensive documentary production. The PanCanadian reasons for decisions in the Alberta Court of Queen's Bench[17] and in the Alberta Court of Appeal[18], as well as a partial transcript of the proceedings before the Alberta Court of Queen's Bench[19] were also before the Court and constituted highly relevant evidence as well as judicial authority in the case of the two sets of reasons for decision. The two decisions related directly to the propriety of TOPGAS financing charges and OMAC deductions in the computation of royalties payable to the Crown on behalf of the Plaintiffs/Applicants by PanCanadian where, I am satisfied, the Defendants/Respondents were privies to the Plaintiffs/Applicants for the purpose of the *issue estoppel* analysis in *Danyluk v. Ainsworth Technologies Inc.*[20].

i) The Plaintiffs'/Applicants' affiant, his affidavit and exhibits and his cross examination

[39] The Plaintiffs'/Applicants' affiant is Ian Getty who describes himself as Research Director for the Plaintiffs/Applicants. He attests that from 1980 to the 21st of January, 2004, the date on which his affidavit was sworn, he was employed by the Plaintiffs/Applicants and that during that period of time he held various titles and positions including Acting Tribal Administrator, Nakoda Institute Learning Centre, University instructor in History, and Research Director. His affidavit extends to

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[17] *Stoney Tribal Council v. PanCanadian Petroleum Ltd.* [1999] 1 W.W.R. 41.
[18] *Stoney Tribal Council v. PanCanadian Petroleum Ltd.* (2000), 261 A.R. 289.
[19] Plaintiffs' Application Record, Book II, Tab 33.
[20] [2001] 2 S.C.R. 460 at paragraphs 18 *et seq*.

ninety-six (96) paragraphs, a number of which attest to historical facts which are not in dispute. A number of other paragraphs of his affidavit are in the nature of submissions or argument. All of forty-three (43) of the paragraphs of his affidavit are sworn on information and belief.

[40] Mr. Getty was cross-examined on his affidavit on the 27th and 28th of April, 2004. In response to a question as to his involvement with the Plaintiffs'/Applicants' ongoing oil and gas issues from the early 1980s, Mr. Getty responded:

> The -- when I said direct knowledge, in this context, I was -- I would say my most direct knowledge has been in the last few weeks or since I've been coordinator of litigation where I've had to become informed with all of the affidavits and materials and documents.
> …
> Prior to that, as the research director, I was all -- I was often asked to attend certain meetings, for example, with -- with IOGC,…so I notice in Mr. Eickmeier's affidavit there were some minutes of meetings between the Stoney chiefs in 1991, and apparently I was at one of those meetings, 'cause my name is down as one of the attendees.
> ….
> But, you know, he [Mr. Eickmeir] had some notes from several meetings, and that was the only one I was -- apparently I was only present at one. I was probably there not because I was -- I was involved with the gas issue, I was probably there because I needed to get the chiefs to sign something or I had to talk to the tribal administrator about something, so I would sit in on the meeting and just -- I'm here, I might as well listen in or I had to wait till -- till I had an opportunity to -- to discuss with whoever I wanted to meet with.
>
> So my direct knowledge would -- I would call it peripheral knowledge. I was aware of the -- I was aware of the actions. I was aware of the importance of the actions. I would sometime sit in on discussions about the actions, but I was never -- I wasn't involved in -- in directing anything or even compiling information at that time. …[21]
>
> [emphasis added]

[41] Mr. Getty acknowledged that the Plaintiffs/Applicants dealt with the Defendants/Respondents on gas issues from in or about 1987, through legal counsel. He continued:

> …I am aware there was an Oil and Gas Committee [of the Plaintiffs/Applicants], and basically I believe they were the -- there was a councillor from each band sitting on that Oil and Gas Committee, and they would be the ones who would sit with -- with the tribal administrator and the lawyer and would sit down, for example, with these meetings that I was noticing the minutes from in the early '90s there, around 1990/'91.

[21] Plaintiffs'/Applicants' Motion Record, book VI, tab A, pages 1129 and 1130.

> There was a Stoney Oil and Gas Committee. I couldn't tell you exactly when it was formed. It would probably would have been -- I suspect most of the committees -- we got going structures -- committee structures going about 1985.[22]

Mr. Getty continued:

> We did create an Oil and Gas Department in 1997 I believe, and this is headed up by John Snow Jr., the eldest son of Chief John Snow, and so we have had an oil and gas -- I won't say department. He's a one-man show, if I may put it that way. He's a well-educated Stoney. He has his masters degree and very knowledgeable, has worked for various oil companies in Calgary in the '80s or probably '90s. I guess he was still in school in the '80s, and he came from one of the oil companies here in Calgary Husky or Shell or somebody like -- of that caliber to head up our oil and gas -- call it a department, but basically he's -- he is the department, and he does -- is still employed with the Nation in that capacity.[23]

[42] Mr. Getty acknowledged on cross-examination that he did not talk with members of, or people who may have been members of, the Plaintiffs'/Applicants' Oil and Gas Committee in preparing his affidavit. He testified that the knowledge underlying his affidavit was essentially drawn from "…what I've read."[24] Following that acknowledgement, Mr. Getty identified Felix Poucette, a retired councillor for the Wesley Band in the /70s and /80s and Lawrence Crawler as two former members of the Oil and Gas Committee who "…stuck to my mind." With respect to Mr. Poucette, Mr. Getty testified:

> But Felix Poucette particularly is one I know who -- if I had a --I guess what I'm saying is, if I wanted to find out what was going on, I would go to Felix, or if I was directed to get information, he's the one I probably would rely on.
> …
> He's a very intelligent gentleman and very knowledgeable councillor.[25]

[43] As to his knowledge of TOPGAS and OMAC issues, Mr. Getty testified:

> A lot of the -- of my knowledge -- the best explanation I obtained of TOPGAS and OMAC is from Bill Currie's [an IOGC officer] testimony at [the PanCanadian] trial. I found that very, very informative, so a lot of what he recounts of how they became aware of it in 1988 and the actions they took and so on are really from his testimony, and so when I'm replying to you, was I personally aware back in '88 to '99? Although I was around then, I was not aware of this.[26]

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[22] Plaintiffs'/Applicants' Motion Record, book VI, tab A, pages 1132-33.
[23] Plaintiffs'/Applicants' Motion Record, book VI, tab A, page 1134.
[24] Plaintiffs'/Applicants' Motion Record, book VI, tab A, page 1135.
[25] Plaintiffs'/Applicants' Motion Record, book VI, tab A, page 1137.
[26] Plaintiffs'/Applicants' Motion Record, book VI, tab A, page 1197.

[44] A general review of responses to undertakings provided by the Plaintiffs/Applicants following the cross-examination of Mr. Getty, as well as a review of elements of the Defendants'/ Respondents' documentary productions establishes that, in addition to Mr. Poucette and Mr. Crawler, Chief John Snow, former chief of the Wesley Band, was also familiar with oil and gas issues relevant to the Plaintiffs/Applicants from at least as early as 1989.

ii) The Defendants'/Respondents' Affiant

[45] The Respondent's sole affiant was James R. Eickmeier who attests that, from October 19, 1987 when, or shortly before, IOGC became operational, to October, 1991, he was the Executive Director of IOGC and, as such, was responsible for its operation with his accountability being to the Deputy Minister of the Department of Indian Affairs and Northern Development, administratively, through the Assistant Deputy Minister of Economic Development. Mr. Eickmeier describes IOGC as "…an agency operating within the Federal Department of Indian Affairs and Northern Development with responsibility for managing the disposition of non-renewable oil and gas resources underlying Indian reserve lands." In paragraph 5 of his affidavit, Mr. Eickmeier testifies:

> …In its administration of Indian oil and gas resources, IOGC did not exert exclusive control and authority over the Indian oil and gas resources. The *Indian Oil and Gas Act* and the *Regulations* required IOGC to consult with or obtain the approval of Indian Bands on many aspects of oil and gas resource administration.[27]

[46] At paragraph 33 of his affidavit, Mr. Eickmeier attests to a meeting between IOGC representatives and representatives of the Plaintiffs/Applicants on the 8th of January, 1991. Minutes of that meeting[28] record the following with respect to a discussion at the meeting of the TOPGAS financing charges issue:

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[27] Plaintiffs'/Applicants' Motion Record, book V, page 883.
[28] Plaintiffs'/Applicants' Motion Record, book V, tab 11, page 938.

> The TOPGAS issue refers to a "Take or Pay" arrangement with TCPL [Trans Canada Pipeline] which resulted in a buried interest charge applied to gas price beginning in approximately 1982. The presentation [presumably by IOGC participants] included a handout which summarized the companies and the potential value of the claims which are involved. It was pointed out that the courts may or may not rule in favour of the claims so these should be addressed with caution.
>
> IOGC, and Jim Eickmeier committed to bring on-side a top legal firm which is knowledgeable on the issue of TOPGAS in order to assist our own justice people.
>
> The Bands would like to further meet to discuss and clarify the TOPGAS issue before sending out a letter to the companies outlining the claim, subsequent to opening negotiations.

[47] Paragraphs 34 and 35 of Mr. Eickmeier's affidavit read in part as follows:

> In October 1990, I was a speaker at the "All Chiefs Oil and Gas Conference" in Edmonton. The Plaintiffs' Chief, John Snow Sr., was present. He asked for comments on TOPGAS. I provided a brief explanation of TOPGAS at the All Chiefs' Conference. It is my recollection that I had earlier discussed the TOPGAS issue during a quarterly meeting with the Indian Resource Counsel of which Chief John Snow Sr. was a member. …
> …
> An All Chiefs Oil and Gas Assembly established the Indian Resource Council in 1987 to represent Band interests in discussions with the Department on the question of increased control of oil and gas resources. …

[48] Paragraphs 66 to 74 and 80, 81 and 85 of Mr. Eickmeier's eighty-seven (87) paragraph affidavit are based on information and belief or understanding. Each attests to events or communications after Mr. Eickmeier left his employment at IOGC. Among those was a communication to the "…Stoney Indian Band" on the 13th of January, 1993 of the fact that "…it had been decided in Ottawa that the Department of Indian Affairs would not pursue the TOPGAS issue."[29] Mr. Eickmeier attests on information and belief that the same message was delivered by IOGC representatives to the Indian Energy Corporation, formerly the Indian Resource Council. There would appear to be no evidence before the Court as to whether the Plaintiffs/Applicants were represented at that meeting.

[29] Plaintiffs'/Applicants' Motion Record, book V, page 904, paragraph 70.

[49] Mr. Eickmeier was extensively cross-examined on his affidavit. During the course of that cross-examination, some forty-six (46) undertakings were given. The responses to those undertakings[30] reflect extensive claims of privilege and notations that the Defendants'/Respondents' document production continued to be "ongoing" in 2004. At the hearing of this matter, counsel for the Defendants/Respondents advised that document production remained "ongoing" in February of 2006.

iii) Conclusion with respect to the evidence before the Court

[50] Neither party has "…put its best foot forward…" either generally as noted in the quotation in paragraph [23] above, or against the less stringent standard applying to respondents that is noted in the quotation in paragraph [28] above. Neither side was limited to a single affiant. Each side chose to self-limit.

[51] The Plaintiffs'/Applicants' affiant has long experience in the employ of the Plaintiffs/ Applicants. He is an historian by training. That training, given his lack of any first-hand knowledge of gas resource issues, and more particularly, TOPGAS financing charges and OMAC issues faced by his employer in the relevant time period, stood him in good stead in the preparation of his affidavit and during his cross-examination on that affidavit. He clearly familiarized himself in depth with the relevant documentation, much of which was provided by or on behalf of the Defendants /Respondents. He would appear to have had little help flowing from discussions with and documentary records available from those members of the Stoney First Nations who were most knowledgeable at the relevant time in respect of gas production from and resultant royalties from

[30] Plaintiffs'/Applicants' Motion Record, book IX.

the relevant Stoney First Nations Reserves. No explanation was provided to the Court, and none was asked for, as to why a member or members of the First Nations with as much first-hand knowledge as possible was or were not put forward as a further affiant or affiants. It would appear that memories may well have grown dim, despite the importance to the First Nations of the TOPGAS financing charges and OMAC issues, and written records of the First Nations themselves may well have been sparse. But the research would appear to have been well done by Mr. Getty and the opportunity for a further affiant or affiants to refresh his, her or their knowledge could have been well supported.

[52] In the last analysis, the Plaintiffs/Applicants chose to go with only the affidavit of Mr. Getty. In the result, counsel for the Defendants/Respondents advised the Court at hearing that examination of Mr. Getty on his affidavit was, not surprisingly, an exercise in frustration. I conclude that, on the totality of the evidence before the Court, despite the best efforts of Mr. Getty and the substantial documentary evidence put forward on behalf of the Defendants/Respondents, the Plaintiffs/Applicants simply cannot meet the onus on them to succeed on this motion for summary judgment. Too many questions are left unanswered. Too much is left to inference and supposition. That being said, on further and better evidence, I am satisfied that the issues put before the Court for summary judgment are appropriate for such a disposition.

[53] I am equally satisfied that the Defendants/Respondents have failed to put their best foot forward. While the Defendants/Respondents have provided substantial documentary production, Mr. Eickmeier's replies to undertakings are rife with references to the fact that the Defendants'/Respondents' documentary production is not complete and those references were

reiterated before me by counsel for the Defendants/Respondents at hearing almost thirteen (13) years after the commencement of this action.

[54] Mr. Eickmeier's affidavit would appear to be full and complete to the time of his retirement from the position of Executive Director of IOGC. From that time on, he was forced to turn to documentation and to attestations on information and belief when it is hard to believe that another official who remained with IOGC throughout the balance of the relevant time period could not have been made available to put forward an affidavit on personal knowledge. Similarly, another affiant who could speak with authority to critical decisions made outside of IOGC, could undoubtedly have been provided. While I acknowledge that the onus was not on the Defendants/Respondents on this motion for summary judgment, the Defendants/Respondents were under an obligation to put their best foot forward to establish a genuine issue for trial. Given the nature of their relationship to the Plaintiffs/Applicants, however it might be described, they failed to do so. In the result, particularly in light of the nature of the relationship between the Defendants/Respondents and the Plaintiffs/Applicants, the Defendants/Respondents left themselves at risk if I had determined the Plaintiffs'/Applicants' evidence sufficient in a quantitative and qualitative sense to meet their burden on this motion.

CONCLUSION

[55] Based on the foregoing analysis, and taking into account the Court's conclusion on the extensive materials before the Court and the long hearing on this application that, on further and better evidence, the issues here before the Court are appropriate for summary determination in that there would be no genuine issue left for trial, this application for summary judgment will be

dismissed with leave to reapply on the materials before the Court supplemented by such further and better evidence as each of the parties deems appropriate.

COSTS

[56] At the close of hearing, counsel for the Plaintiffs/Applicants urged that, given the "fundamental and important issues" at stake on this application, the Plaintiffs/Applicants should be entitled to their costs, on the ordinary scale, in any event of the cause. In the alternative, counsel urged that costs should be in the cause.

[57] By contrast, counsel for the Defendants/Respondents urged that the Defendants/Respondents should be entitled to their costs, payable forthwith and in any event of the cause.

[58] Given the Court's conclusions, the Court will reserve on the question of costs to await, for a reasonable period of time, further developments. Before issuing an Order as to costs, the Court will convene a teleconference with counsel to hear any further representations on that issue.

PART II – THE CHEVRON CANADA RESOURCES LIMITED, IMPERIAL OIL RESOURCES LIMITED AND SHELL CANADA LIMITED MOTION

[59] As indicated in paragraph 2 of these reasons, both this motion and the PanCanadian motion are supported by the same evidence and raise essentially common issues. In their relatively brief memorandum of fact and law filed on this motion, the Plaintiffs/Applicants identify the following issue unique to this motion:

> Is the decision in the PanCanadian Action determinative of whether the TOPGAS and OMAC charges deducted from the Royalty Interest reserved to Her Majesty, on behalf of the

Plaintiffs, in regard to the Chevon, Imperial and Shell Leases, an unlawful deduction?[31]

Counsel for the Defendants/Respondents, in their Memorandum of Fact and Law, identify the same additional issue, albeit in somewhat different terminology, and further issues relating to the lack of evidence and inadequacy of the evidence to support specific aspects of the motion.

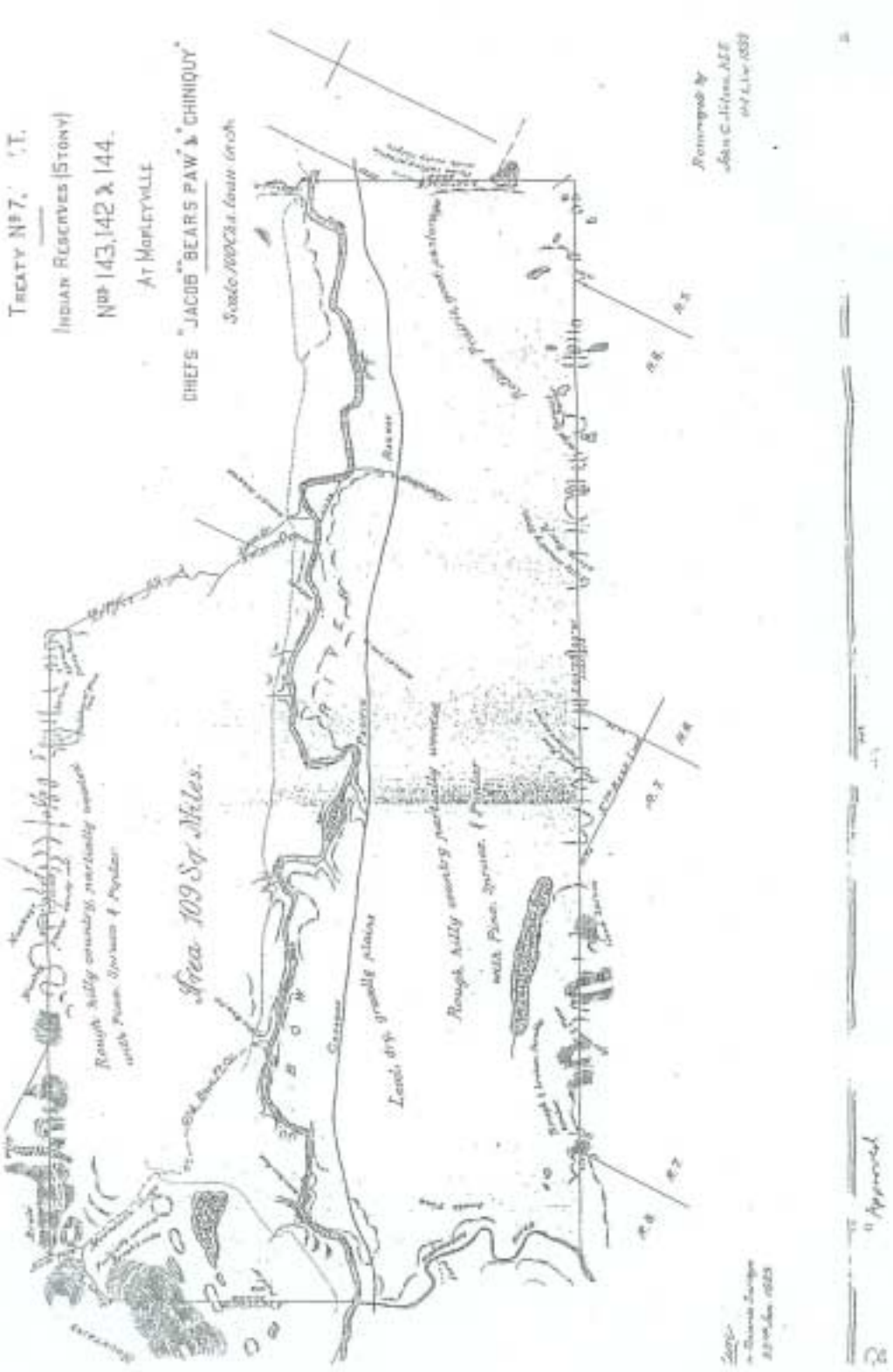
[60] I am satisfied that the additional substantive issue raised on this motion is appropriate for determination on summary judgment and that the concerns expressed earlier in these reasons regarding the inadequacy of the evidence before the Court apply equally on this motion. In the result, a separate order will issue disposing of this motion in a manner identical to that in which the PanCanadian motion will be disposed of.

"Frederick E. Gibson"
Judge

Ottawa, Ontario
April 6, 2006.

[31] Plaintiffs'/Applicants' Motion Record, (*Chevron et al* Motion), Tab B, page 18, paragraph 20.

Schedule I


TREATY Nº 7.
INDIAN RESERVES (STONY)
Nos 143, 142 & 144.
AT MORLEYVILLE
CHIEFS "JACOB" "BEARS PAW" & "CHINIQUY"
Area 109 Sq. Miles.

SCHEDULE II
FEDERAL COURT RULES, SOR/98-106

213. (1) A plaintiff may, after the defendant has filed a defence, or earlier with leave of the Court, and at any time before the time and place for trial are fixed, bring a motion for summary judgment on all or part of the claim set out in the statement of claim.

213. (1) Le demandeur peut, après le dépôt de la défense du défendeur -- ou avant si la Cour l'autorise -- et avant que l'heure, la date et le lieu de l'instruction soient fixés, présenter une requête pour obtenir un jugement sommaire sur tout ou partie de la réclamation contenue dans la déclaration.

2) A defendant may, after serving and filing a defence and at any time before the time and place for trial are fixed, bring a motion for summary judgment dismissing all or part of the claim set out in the statement of claim.

(2) Le défendeur peut, après avoir signifié et déposé sa défense et avant que l'heure, la date et le lieu de l'instruction soient fixés, présenter une requête pour obtenir un jugement sommaire rejetant tout ou partie de la réclamation contenue dans la déclaration.

214. (1) A party may bring a motion for summary judgment in an action by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.

214. (1) Toute partie peut présenter une requête pour obtenir un jugement sommaire dans une action en signifiant et en déposant un avis de requête et un dossier de requête au moins 20 jours avant la date de l'audition de la requête indiquée dans l'avis.

(2) A party served with a motion for summary judgment shall serve and file a respondent's motion record not later than 10 days before the day set out in the notice of motion for the hearing of the motion.

2) La partie qui reçoit signification d'une requête en jugement sommaire signifie et dépose un dossier de réponse au moins 10 jours avant la date de l'audition de la requête indiquée dans l'avis de requête.

215. A response to a motion for summary judgment shall not rest merely on allegations or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.

215. La réponse à une requête en jugement sommaire ne peut être fondée uniquement sur les allégations ou les dénégations contenues dans les actes de procédure déposés par le requérant. Elle doit plutôt énoncer les faits précis démontrant l'existence d'une véritable question litigieuse.

216. (1) Where on a motion for summary judgment the Court is satisfied that there is no genuine

216. (1) Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas

issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

(2) Where on a motion for summary judgment the Court is satisfied that the only genuine issue is

(2) Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue que la seule véritable question litigieuse est :

(*a*) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

a) le montant auquel le requérant a droit, elle peut ordonner l'instruction de la question ou rendre un jugement sommaire assorti d'un renvoi pour détermination du montant conformément à la règle 153;

b) a question of law, the Court may determine the question and grant summary judgment accordingly.

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

3) Where on a motion for summary judgment the Court decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, if the Court is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law.

(3) Lorsque, par suite d'une requête en jugement sommaire, la Cour conclut qu'il existe une véritable question litigieuse à l'égard d'une déclaration ou d'une défense, elle peut néanmoins rendre un jugement sommaire en faveur d'une partie, soit sur une question particulière, soit de façon générale, si elle parvient à partir de l'ensemble de la preuve à dégager les faits nécessaires pour trancher les questions de fait et de droit.

4) Where a motion for summary judgment is dismissed in whole or in part, the Court may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the usual way or order that the action be conducted as a specially managed proceeding.

(4) Lorsque la requête en jugement sommaire est rejetée en tout ou en partie, la Cour peut ordonner que l'action ou les questions litigieuses qui ne sont pas tranchées par le jugement sommaire soient instruites de la manière habituelle ou elle peut ordonner la tenue d'une instance à gestion spéciale.

217. A plaintiff who obtains summary judgment under these Rules may proceed against the same defendant for any other relief and against any other defendant for the same or any other relief.

217. Le demandeur qui obtient un jugement sommaire aux termes des présentes règles peut poursuivre le même défendeur pour une autre réparation ou poursuivre tout autre défendeur pour la même ou une autre réparation.

218. Where summary judgment is refused or is granted only in part, the Court may make an order specifying which material facts are not in dispute and defining the issues to be tried, including an order

218. Lorsqu'un jugement sommaire est refusé ou n'est accordé qu'en partie, la Cour peut, par ordonnance, préciser les faits substantiels qui ne sont pas en litige et déterminer les questions qui doivent être instruites, ainsi que :

(*a*) for payment into court of all or part of the claim;

a) ordonner la consignation à la Cour d'une somme d'argent représentant la totalité ou une partie de la réclamation;

(*b*) for security for costs; or

b) ordonner la remise d'un cautionnement pour dépens;

c) limiting the nature and scope of the examination for discovery to matters not covered by the affidavits filed on the motion for summary judgment or by any cross-examination on them and providing for their use at trial in the same manner as an examination for discovery.

c) limiter la nature et l'étendue de l'interrogatoire préalable aux questions non visées par les affidavits déposés à l'appui de la requête en jugement sommaire, ou limiter la nature et l'étendue de tout contre-interrogatoire s'y rapportant, et permettre l'utilisation de ces affidavits lors de l'interrogatoire à l'instruction de la même manière qu'à l'interrogatoire préalable.

219. In making an order for summary judgment, the Court may order that enforcement of the summary judgment be stayed pending the determination of any other issue in the action or in a counterclaim or third party claim.

219. Lorsqu'elle rend un jugement sommaire, la Cour peut surseoir à l'exécution forcée de ce jugement jusqu'à la détermination d'une autre question soulevée dans l'action ou dans une demande reconventionnelle ou une mise en cause.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2344-93
STYLE OF CAUSE:	CHIEF JOHN EAR ET AL v. HER MAJESTY THE QUEEN ET AL
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	FEBRUARY 13 to17 and 20 to 22, 2006
REASONS FOR ORDER:	GIBSON, J.
DATED:	April 6, 2006

APPEARANCES:

Mr. James O' Reilly Mr. L. Douglas Rae Mr. W. Tibor Osvath	FOR PLAINTIFF
Mr. Glen Jermyn Ms. Lynn Cunningham	FOR DEFENDANT

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