**Date: 20070212**

**Docket: A-150-06**

**Citation: 2007 FCA 39**



**CORAM:** **NOËL J.A.**
**SHARLOW J.A.**
**RYER J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

**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**

**Appellant**

**and**

**CHIEF JOHN EAR acting on his own behalf and on behalf of 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 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 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**

**Respondents**

Heard at Calgary, Alberta, on January 22 and 23, 2007.
Judgment delivered at Ottawa, Ontario, on February 12, 2007.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: NOËL J.A.
RYER J.A.

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**CORAM:** **NOËL J.A.**
**SHARLOW J.A.**
**RYER J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA and ALL**

**Appellant**

**and**

**CHIEF JOHN EAR acting on his own behalf and on behalf of 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 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 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**

**Respondents**

## REASONS FOR JUDGMENT

**SHARLOW J.A.**

[1] This is an appeal and cross appeal of a judgment of the Federal Court dismissing the motion of the respondents for summary judgment and granting the respondents "leave to re-apply on the

materials before the Court supplemented by such further and better evidence as the parties deem appropriate" (2006 FC 435). The Crown is appealing the portion of the judgment that grants the respondents leave to re-apply for summary judgment based on further evidence. The respondents are cross-appealing the dismissal of their motion for summary judgment.



**BACKGROUND**

[2] The respondents are the Chiefs and members of the Bearspaw Band, the Chiniki Band and the Wesley Band of the Stoney First Nation. For convenience, I will refer to the respondents collectively as "the Stoney Nation".

[3] The members of the Stoney Nation have a number of reserves in the Province of Alberta. Over the years, the Stoney Nation has surrendered to the Crown certain oil and gas rights relating to portions of those reserves to facilitate the commercial exploitation of those rights. The Crown, as the holder of legal title pursuant to those surrenders, has entered into leases with PanCanadian Petroleum Limited, Chevron Canada Resources Ltd., Imperial Oil Resources Canada Limited, and Shell Canada Limited (collectively, the "producers") pursuant to which the producers have taken and sold natural gas from wells they have developed on the surrendered reserve land.

[4] At all material times, the right of the producers to take the natural gas from the surrendered reserve land was subject to the their obligation to pay a royalty pursuant to subsection 4(1) of the *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7, which reads as follows (emphasis added):

| | |
|---|---|
| **4.** (1) Notwithstanding any term or condition in any grant, lease, permit, licence or other disposition or any provision in any regulation respecting oil or gas or both oil and gas or the terms and conditions of any agreement respecting royalties in relation to oil or | **4.** (1) Nonobstant les modalités d'une concession, d'un bail, d'un permis, d'une licence ou d'un autre acte d'aliénation, les dispositions d'un règlement sur le pétrole ou sur le gaz ou les modalités d'un accord sur les redevances applicables au pétrole ou au gaz, |

| | |
|---|---|
| gas or both oil and gas, whether granted, issued, made or entered into before or after December 20, 1974, but subject to subsection (2), all oil and gas obtained from Indian lands after April 22, 1977 is subject to the payment to Her Majesty in right of Canada, **in trust** for the Indian bands concerned, of the royalties prescribed from time to time by the regulations. | qu'ils soient ou non survenus avant le 20 décembre 1974, mais sous réserve du paragraphe (2), le pétrole et le gaz tirés des terres indiennes après le 22 avril 1977 sont assujettis au paiement à Sa Majesté du chef du Canada, **en fiducie** pour les bandes indiennes concernées, des redevances réglementaires. |



[5] The regulations referred to in subsection 4(1) of the *Indian Oil and Gas Act* are the *Indian Oil and Gas Regulations*, C.R.C. 1978, c. 963 (revoked by the *Indian Oil and Gas Regulations, 1995*, SOR/94-753, effective January 1, 1995). For the purposes of this appeal, the key provisions of the *Indian Oil and Gas Regulations* are subsection 21(1) and subsection 2(2) of Schedule I, which read as follows (emphasis added):

| | |
|---|---|
| **21.** (1) Except as otherwise provided in a special agreement under subsection 5(2) of the Act, the royalty on oil and gas obtained from or attributable to a contract area shall be the royalty computed in accordance with Schedule I, as amended from time to time, and **shall be paid to Her Majesty in right of Canada in trust for the Indian band concerned**. | **21.** (1) Sauf indication contraire dans un accord spécial visé au paragraphe 5(2) de la Loi, la redevance sur le pétrole et le gaz obtenu d'une zone sous bail ou attribuable à cette zone est celle calculée selon l'annexe 1, telle que modifiée au besoin, et **est payable à Sa Majesté du chef du Canada, en fiducie, à l'intention de la bande d'Indiens concernée.** |
| SCHEDULE I | ANNEXE I |
| **2.** (2) The royalty to be computed, levied and collected on gas obtained from or attributable to a contract area shall comprise the basic royalty of 25 per cent of the gas obtained from or attributable to the contract area plus the applicable supplementary royalty determined in accordance with subsection (3), all quantities to be calculated at the time and place of production free and clear of any deduction whatsoever except as provided under subsection (4). | **2.** (2) La redevance calculée, imposée et perçue pour le gaz produit dans une zone sous contrat ou attribuable à cette zone comprend la redevance de base de 25 pour cent de la production de gaz dans une zone sous contrat ou attribuable à cette zone et la redevance supplémentaire appliquable déterminée selon le paragraphe (3); toutes les quantités sont calculées à la date et au lieu de la production, sans aucune déduction, sauf pour ce qui figure au paragraphe (4). |

[6] In this case there is no "special agreement under subsection 5(2)" of the *Indian Oil and Gas Act*, as referred to in subsection 21(1) of the *Indian Oil and Gas Regulations*, and subsection 2(4) of Schedule I is not applicable. Therefore, the producers of all natural gas taken from the surrendered reserve land in issue in this case must pay royalties to the Crown in trust for the band that surrendered the reserve land, and the royalties must be determined on the basis of the rate stipulated in subsection 2(2) of Schedule I.



[7] The Minister of Indian Affairs and Northern Development is responsible for the administration of the *Indian Oil and Gas Act* and the *Indian Oil and Gas Regulations*. Certain specific responsibilities under the *Indian Oil and Gas Regulations* are assigned to an official of that Department called the Manager of Indian Minerals. In my view, nothing in this case turns on whether any specific aspect of the administration of the *Indian Oil and Gas Regulations* is the responsibility of the Minister or the Manager of Indian Minerals. As between the Crown and the Stoney Nation, all of those responsibilities are those of the Crown.

**A. The TOPGAS and OMAC Deductions**

[8] From January 1, 1982 and for many years after that, the producers applied the statutory royalty rate to the sale price of the natural gas after deducting amounts referred to as "TOPGAS" (a financing charge). From November 1, 1986, the producers also deducted amounts referred to as "OMAC" (operating, marketing and administration charges). The Crown obtained details of the TOPGAS and OMAC deductions as the result of an audit completed in 1988.

[9] The complex history of the TOPGAS and OMAC charges need not be explained here. It is enough to say that until the disposition of the Alberta litigation described below, there was a dispute

between the producers on the one hand, and the Crown and the Stoney Nation on the other, as to whether or not the producers were entitled as a matter of law to deduct those charges in computing the sale price of natural gas for the purposes of quantifying the royalty payable under the *Indian Oil and Gas Act*.



[10] The Crown sent the producers letters in 1991 asserting the position of the Crown that the deductions were not permitted, and demanding payment of the unpaid portion of the royalties. The producers maintained that the deductions were permitted. The letters led to meetings and negotiations, but did not result in any payment.

[11] In and after 1991, there were discussions and meetings between the Crown and the Stoney Nation, culminating in a decision by the Crown, apparently made in 1993, not to attempt to collect the underpayment by litigation. The Stoney Nation was informed of that decision in 1993. At the same time, the Crown also informed the Stoney Nation that they could commence such an action themselves, and if they did so, the Crown would provide support and assistance.

**B. The Alberta Actions**

[12] On May 3, 1993, the Stoney Nation commenced an action in the Alberta Court of Queen's Bench against PanCanadian for recovery of the unpaid amounts. In 1997, the Stoney Nation commenced similar actions against Shell, Chevron and Imperial.

[13] The Crown participated in the 1993 action against PanCanadian as an intervener. The only contribution the Crown made to the proceedings (apart from providing the evidence upon which the Stoney Nation largely relied), was to inform the Alberta Court of Queen's Bench that any order

made for the payment of royalties should direct that the payment be made to the Crown in trust, as required by the *Indian Oil and Gas Act*.

[14] The action was heard by McIntyre J., whose decision is reported as *Bearspaw, Chiniki and Wesley Bands v. PanCanadian Petroleum Ltd.*, 1998 ABQB 286. I summarize his conclusions as follows. The Stoney Nation, as the beneficiary of the trust in which the leases and royalty interests were held, had standing to pursue a claim against PanCanadian because the Crown, the trustee, had not done so. The statutory scheme does not permit TOPGAS and OMAC charges to be deducted in determining the sale price of natural gas for the purposes of computing royalties payable. It follows that substantial royalties remained unpaid by PanCanadian. The claim of the Stoney Nation against PanCanadian was a proceeding to recover an interest in land, and thus was subject to the 10 year limitation period in section 18(a) of the *Limitation of Actions Act*, R.S.A. 1980, c. L-15. Therefore, the Stoney Nation is entitled to receive the underpayment for the period commencing 10 years prior to the filing of its claim, i.e., from May 3, 1983.

[15] The decision of McIntyre J. was appealed to the Alberta Court of Appeal. The appeal was allowed in part (2000 ABCA 209). The Alberta Court of Appeal agreed that the royalties had been underpaid, for the reasons given by McIntyre J., but held that the action was subject to a six year limitation period because the action was a claim for breach of contract, not to recover an interest in land. On that basis, the judgment was amended to limit the Stoney Nation to a claim for royalties for the period commencing May 3, 1987, six years prior to the commencing of the action. There was no application for leave to appeal that decision to the Supreme Court of Canada.

[16] The status of the actions commenced by the Stoney Nation in 1997 against the other producers is not clear from the record in this case. However, it appears that the producers have now paid all of their royalty obligations in relation to natural gas produced from the Stoney Nation's surrendered lands, or have offered to do so, based on the PanCanadian decision.

[17] In 1999, the Crown commenced an action in the Alberta Court of Queen's Bench against PanCanadian, Chevron, Shell and Imperial for the underpaid royalties in respect of natural gas taken from the Stoney Nation's surrendered lands. That action has been dismissed or discontinued against Chevron. Otherwise, the status of that action is not clear from the record.

**C. Federal Court Proceedings**

[18] On September 30, 1993, the Stoney Nation commenced an action against the Crown in the Federal Court, claiming damages for breach of the Crown's trust or fiduciary obligations to the Stoney Nation in respect of the administration, management and supervision of the natural gas resources of the Stoney reserves, particularly in allowing improper deductions to be made in the determination of the royalties, in failing to collect the outstanding royalties, and in failing to properly apply the *Indian Oil and Gas Act* and the *Indian Oil and Gas Regulations*.

[19] That is the action in which the Stoney Nation made the summary judgment motion that resulted in the order now under appeal. In essence, the Stoney Nation is seeking to collect from the Crown the royalties they cannot collect from the producers because of the six year statutory limitation period.

[20] The Crown denies that it had a legal obligation to commence litigation to collect the unpaid royalties, and also asserts a six year limitations defence, arguing that in any event it is not liable for any lost royalties that were payable before September 30, 1987.

[21] In response to the limitations defence, the Stoney Nation argues that the Crown did not inform them until 1991 of the particulars of the unpaid royalties. They argue that they could not have known the relevant facts before they learned them from the Crown. They say that even the Crown required an audit to learn the relevant facts, which may be attributable in part to the absence of detail in the periodic royalty reports the producers were required to file (a form established by the Crown). The Stoney Nation argues that even if they are fixed with the same knowledge as the Crown (which would be a stretch because the Crown was obliged by subsection 43(1) of the *Indian Oil and Gas Regulations* to keep the royalty information confidential), the Stoney Nation cannot have had knowledge of the relevant facts earlier than the Crown did, in 1988.

**D. The Summary Judgment Motion**

[22] The summary judgment motion was filed by the Stoney Nation on October 12, 2005, twelve years after the statement of claim was filed and five years after the decision of the Alberta Court of Appeal in the Stoney Nation litigation against PanCanadian. When the summary judgment motion was filed, documentary discoveries had been completed (or were well advanced), but oral discoveries had not yet taken place. The record does not disclose the reason for the slow progress of the litigation. The Crown contests the summary judgment motion on the basis that there are triable issues with respect to its liability, and with respect to its limitations defence.

[23] The summary judgment motion relates to the unpaid royalties owed by all of the producers, including PanCanadian, as a result of the TOPGAS and OMAC deductions, to the extent they have been rendered uncollectible because of the six year limitation period. The Stoney Nation alleges that the statute barred portion of the unpaid royalties owed by PanCanadian is approximately $2 million, and that the unpaid royalties owed by the other producers amounts to approximately $8 million.

[24] I summarize as follows the factual and legal basis of the Stoney Nation's motion for summary judgment:

a) At all relevant times, the Crown was in control of the leases entered into on the reserve land surrendered by the Stoney Nation, the share of the natural gas production reserved to the Stoney Nation, and the royalty payments relating to that production.

b) The Crown held those leases and related royalty interests in trust for the Stoney Nation.

c) The Crown at all times had a legal obligation to collect all royalties payable by the producers pursuant to those leases.

d) In computing the royalties payable, the producers deducted the TOPGAS charges from January 1, 1982 until October 31, 1994, and the OMAC charges from November 1, 1986.

e) Those deductions were not permitted under the *Indian Oil and Gas Regulations*, with the result that the royalties have been underpaid since January 1, 1982.

f) The Crown discovered the underpayments in 1988 and informed the Stoney Nation of them in 1991.

g) In 1991 the Crown sent letters to the producers demanding payment of the full royalties, and subsequently entered into discussions with the producers.

h) Substantial royalties remain uncollected, namely the amounts barred by the six year limitation period.

i) The Crown took no legal action against the producers in time to stop the producers from claiming the benefit of the applicable limitation period.

j) An action commenced in 1993 by the Stoney Nation against the producers resulted in the recovery of substantial royalties, except those barred by the limitation period.

k) The unpaid and now unrecoverable royalties amount to approximately $2 million payable by PanCanadian, and approximately $8 million payable by the other producers.

l) The Crown is liable to the Stoney Nation for damages equal to the unrecoverable royalties.

[25] Perhaps the most cogent argument of the Stoney Nation in support of its motion for summary judgment is that the Crown could have stopped the application of any limitation period relating to its claim against the producers simply by commencing litigation to collect the unpaid royalties at any time before the end of 1988 (as the improper deductions were first taken in 1982). The fact that the deductibility of the TOPGAS and OMAC charges and the applicability of provincial limitation laws were matters of dispute until the PanCanadian action was concluded are not matters that should reasonably have deterred the Crown from taking the relatively simple measure of filing a protective statement of claim.

[26] The summary judgment motion was supported by the affidavit of Ian Getty sworn January 21, 2004, to which were appended 114 exhibits. Some of the exhibits are historical documents, of limited relevance to the issues in dispute in the summary judgment motion. Of the remaining documents, the key ones are from the Crown's own files. The Stoney Nation was of the view that the factual elements of its claims against the Crown were established in large part by the Crown's own documents. Mr. Getty obviously had no first hand knowledge of those facts. His affidavit, to the extent that it asserts facts derived from the Crown's documents, states the relevant facts as being based on information and belief.

[27] Mr. Getty's affidavit also asserts certain other facts on information and belief that relate to matters that are within the knowledge of the Stoney Nation or its leaders. The most important statement of that kind, which is particularly relevant to the Crown's limitation defence, appears in paragraph 30 of his affidavit. Paragraph 30 reads as follows:

> 30. It is my information and belief that the Plaintiffs were first notified of and became aware of the improper deductions from their royalty interest, including the

> approximate value and magnitude of these improper and unauthorized deductions, when advised of the same by their trustee or fiduciary, Her Majesty, in or about February 1991.

[28] Mr. Getty was cross-examined on his affidavit, and in fulfilling undertakings arising from that cross-examination, he confirmed that he conferred with certain leaders of the Stoney Nation to confirm this statement.

[29] There is an unexplained absence of affidavit evidence from any of the Stoney Nation leaders attesting to the truth of the allegation that they did not know and could not reasonably have known the relevant facts until the Crown informed them in February of 1991. That evidence is relevant to the Crown's limitation defence.

[30] The Crown, in opposing the Stoney Nation's summary judgment motion, submitted the affidavit of James R. Eickmeier sworn March 18, 2004. Mr. Eickmeier was the executive director of Indian Oil and Gas Canada (IOGC) from 1987 to 1991. IOGC is the agency of the Department of Indian Affairs and Northern Development that was specifically responsible for the administration of oil and gas leases on surrendered reserve lands. Mr. Eickmeier was cross examined, but he had no personal knowledge of anything that occurred after 1991. His affidavit does not explain why the Crown did not at least file a protective statement of claim after the audit disclosed the extent of the TOPGAS and OMAC charges or after the producers refused to pay.

[31] Despite these unanswered questions, it seems to me that most of the facts relied upon by the Stoney Band are undisputed. The Crown argues the contrary, but with one exception that I have been able to identify, proof of the relevant facts is in the hands of the Crown. The one exception is

the evidence relating to the date upon which the relevant facts were or should have been known to the Stoney Nation.



[32] The Crown takes issue with the accuracy of the quantification of the unpaid royalties. However, the motions judge concluded, and I agree, that the issues as to the accuracy of the computation appear to be of a relatively minor nature and could be resolved on a reference. The Crown does not argue that there are quantification issues that, by themselves, would or should preclude summary judgment.

[33] The Crown takes issue with characterization of the Crown as a trustee of the leases and royalties, and argues that there is uncertainty about the nature of the legal obligations of the Crown with respect to the collection of the royalties. These are questions of law, not fact. The question of whether the Crown is a trustee of the leases and royalties was resolved against the Crown by the decision of Teitelbaum J. in *Samson Indian Nation and Band v. Canada*, 2005 FC 1622, affirmed 2006 FCA 415. The specific duties of the Crown in its capacity as trustee, including the question of whether the Crown had a legal obligation to take steps to collect the unpaid royalties, are matters to be addressed by legal argument.

[34] The Crown also says that that there are unresolved issues relating to the correct interpretation of the *Indian Oil and Gas Regulations* (and in particular the meaning of the word "collection"), and that evidence is required to resolve issues of statutory interpretation arising from the *Indian Oil and Gas Regulations.* I can conceive of no interpretation that would absolve the Crown of the legal obligation to collect the royalties, and the Crown has not suggested how it might be absolved from that obligation, or who has the collection obligation if the Crown does not.

[35] The Crown argues that further facts may yet be discovered relating to the sophistication and knowledge of the Stoney Nation or its leaders. I am not persuaded that any degree of sophistication and knowledge of the Stoney Nation could result in the Crown being relieved of its legal obligation to collect the royalties. However, those issues might well be relevant to the Crown's limitation defence, if the Stoney Nation continues to assert the issue of discoverability.



**E. The Summary Judment Decision**

[36] The summary judgment motion was heard in February 2006. The hearing lasted for eight days. The motions judge rendered reasons and an order on April 6, 2006. The key portion of the order reads as follows:

> The application is dismissed with leave to re-apply on the materials before the Court, supplemented by such further and better evidence as the parties deem appropriate.

[37] The motions judge reached this conclusion because, although he was satisfied that there is no genuine issue for trial except with respect to quantum (which he noted could be settled by agreement or on a reference), neither the Stoney Nation nor the Crown had put their best foot forward, with the result that there were many unanswered questions. He was clearly right in reaching that conclusion. Although he did not identify the unanswered questions, they would include at least the discoverability issue, and the reason for the Crown's decision not to litigate.

[38] It is worth repeating that the evidence for the Stoney Nation, the party seeking summary judgment, was a single affidavit consisting almost entirely of statements on information and belief. That in itself is not fatal to the summary judgment motion, at least in so far as the affidavit contains

evidence which the Crown is in a better position to adduce. However, the affidavit also contains evidence on information and belief in relation to facts solely within the knowledge of officials of the Stoney Nation who could have provided an affidavit. In my view, the motions judge was correct when he said that he could have inferred from the absence of direct evidence that the Stoney Nation might have learned the relevant facts before the claimed date of 1991.



[39] The evidence for the Crown, which was attempting to establish the existence of at least one triable issue, was also based on a single affidavit based in part on the first hand knowledge of the affiant, but also based on statements on information and belief with respect to some important events, including facts that would explain the Crown's decision not to pursue the producers for payment. Again, it seems to me that the motions judge would have been entitled to infer, from the absence of direct evidence, that the Crown's decision not to litigate was flawed.

[40] Depending upon which adverse inference the motions judge might have chosen, he could have dismissed the summary judgment motion on the basis of the failure of the Stoney Nation to establish that the requisite knowledge did not exist until 1991. Or, he could have granted the summary judgment motion on the basis that the Crown has no limitations defence and no other justification for its failure to collect the royalties. He did neither of those things. Instead, he dismissed the motion with leave to re-apply on the terms stated above.

## ISSUES ON APPEAL AND CROSS-APPEAL

[41] The Crown appeals the order in so far as it gives the Stoney Nation leave to re-apply for summary judgment on the materials before the Court, supplemented by such further and better

evidence as the parties deem appropriate. The Stoney Nation appeals the dismissal of its summary judgment motion.



[42] There is merit in the Crown's appeal. The powers of the Federal Court on the disposition of a summary judgment motion are to grant the motion or dismiss it, in whole or in part. If the motion is dismissed in its entirety, the motions judge may order the action to proceed to trial. If the motion is dismissed in part, the motions judge may order a trial of the issues not disposed of on the summary judgment motion, and the motions judge may also make certain ancillary orders for payment into court, security for costs, or for the limitation of examinations for discovery. All of these powers are stipulated in Rule 216(4) and 218 of the *Federal Courts Rules*. The order made does not fit within any of these powers.

[43] However, it would have been open to the motions judge to adjourn the summary judgment motion in order to give the parties an opportunity to supplement their evidence. In oral argument, both parties recognized that possibility. In my view, that is the course the motions judge should have taken once he concluded that this case presents a number of discrete legal and factual issues that are amenable to summary disposition and that, given an appropriate evidentiary foundation, it might well be possible to dispose summarily of many of the major issues in this case.

[44] Therefore, it seems to me that the most appropriate disposition of the Crown's appeal is to allow the appeal, set aside the order under appeal and, exercising the authority of this Court to make the order that should have been made, order the adjournment of the motion with a direction to the parties to submit further and better evidence.

[45] Given that disposition of the appeal, it is unnecessary to deal with the cross-appeal on its merits because the summary judgment motion remains alive. However, it seems to me that there are at least three inescapable conclusions. First, the motions judge is bound by the *Samson* case (cited above) to conclude that the Crown is a trustee of the leases and the royalties. Second, there can be no doubt that the Crown has a legal obligation to collect the royalties. Third, despite the fact that the Stoney Nation is entitled to succeed on those points of law, it would have been open to the motions judge to dismiss the summary judgment motion in whole or in part on the basis that there was a triable issue on the discoverability of the relevant facts, an issue upon which the Stoney Nation's evidence was deficient.

[46] The parties should bear their own costs of this appeal.

"K. Sharlow"

J.A.

"I agree
Marc Noël J.A."

"I concur
C. Michael Ryer J.A."

**FEDERAL COURT OF APPEAL**
**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-150-06 |
| **STYLE OF CAUSE:** | HER MAJESTY THE QUEEN IN RIGHT OF CANADA and CHIEF JOHN EAR et al and CHIEF KEN SOLDIER et al and CHIEF ERNEST WESLEY et al and THE STONEY BAND AND TRIBE |
| **PLACE OF HEARING:** | Calgary, Alberta |
| **DATE OF HEARING:** | January 22 and 23, 2007 |
| **REASONS FOR JUDGMENT BY:** | SHARLOW J.A. |
| **CONCURRED IN BY:** | NOËL J.A.<br>RYER J.A. |
| **DATED:** | February 12, 2007 |

**APPEARANCES:**

| | |
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| | FOR THE APPELLANTS |
| Mr. G. Jermyn<br>Mr. S. Martin | |
| Mr. L.D. Rae<br>Mr. W.T. Osvath | FOR THE RESPONDENTS |
| Mr. J. O'Reilly | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada | FOR THE APPELLANTS |
| Rae & Company<br>Calgary, Alberta | FOR THE RESPONDENTS |
| O'Reilly & Associés<br>Montreal, Quebec | FOR THE RESPONDENT |