

## **CANADIAN ADMINISTRATIVE LAW – SAMPLE QUESTION AND ANSWER**

**Session:** Substantive Constraints

**Topic:** Standard of Review – Aboriginal and Treaty Rights (2)

**Recommended time:** 60 Minutes

**Score:** 100 Marks

**Author:** **Manuel Akinshola**

### **Facts**

You are an articling student at a law firm in downtown Calgary. Just as you were about closing for work yesterday, your principal invited you to his office and sought your opinion on a matter that was just taken over from another counsel.

According to him, the Athabasca Chipewyan First Nation (ACFN) had retained the firm in respect of a pending matter. The background facts are that ACFN is the host community to Royale Stallion Oil Inc., an Albertan registered oil and gas company which obtained an oil mining license about nineteen years ago. The company had since then been mining and prospecting for oil in the fields allocated to it pursuant to the license which was granted for an initial period of twenty years, renewable for a further term of ten years.

Last winter, the company applied to Alberta Energy Regulator for a renewal of its prospecting license as provided under the contract. Also, the company applied to take over another oil field in the same community which has been abandoned for over three years. Both applications have been granted by the Regulator.

ACFN through their erstwhile counsel then filed a Regulatory Appeal under the Responsible Energy Development Act (REDA) which provides that parties dissatisfied with the decision of Alberta Energy Regulator may submit a request for appeal to the Chief Hearing Commissioner

appointed pursuant to the Act. The Hearing Panel upheld the decision of the Regulator, holding that there was no duty to consult ACFN before the renewal and takeover approvals.

ACFN has now lodged an appeal at the Court of Appeal in line with the provision of the REDA which provides for appeal to the Court for judicial review. ACFN's main grounds for the appeal are two-fold: firstly, that the Hearing Panel erred in law by not holding that the renewal and takeover decisions were made in breach of ACFN's right to be consulted before any action was taken by the Regulator, pursuant to their constitutional rights under s. 35 of the Constitution. ACFN asserts that the action of the Regulator might harm their treaty protected rights to hunt for food and fish. The erstwhile counsel to ACFN had submitted that the constitutional duty to consult is triggered by an existing Aboriginal or Treaty Right so long as the Crown had actual or constructive notice of it. He concluded that the duty requires that an inquiry be made as to whether the decision of the Regulator might adversely affect these rights.

Secondly, that the renewal and takeover will cause additional substantial environmental degradation, deforestation, toxicity, loss of biodiversity and pollution, thus fuelling climate change and disrupting wildlife and the community's social life. ACFN argues that the particular method of Dual-Wall Reverse-Circulation Drilling adopted by Stallion Royale exacerbates these problems because technological research has shown that the Air Rotary Drilling method is most suited for drilling the ACFN's soft sedimentary rock land formation.

Counsel to Royale Stallion Oil Inc. argues to the contrary. To her, the argument of ACFN is not the law. While she concedes that ACFN did have existing rights to hunt and fish for food over an area of land that includes the company's oilfields, nonetheless, ACFN adduced no evidence that these Treaty Rights might be harmed in some non-trivial manner by the renewal or takeover. Because, the duty to consult would only have arisen when there is evidence of a possibility that the renewal and takeover granted by the Regulator may harm an Aboriginal or Treaty Right. But in this case, there is no such evidence before the Regulator to trigger the duty. And since the ACFN did not adduce any evidence to show that a duty to consult was triggered by the possibility of harm, the regulator was right in granting the renewal and the appeal is without merit.

Secondly, the counsel submits that the company had been conducting mining and prospecting operations for the past nineteen years on the same land for which a treaty right is being claimed

by ACFN, using the same method of drilling. Neither the renewal nor takeover expanded the scope of the Company's operations. Further, she argues that ACFN failed to identify the specific harm or damage that has been occasioned by the company's method of drilling and have only generalised the impacts of drilling on the environment. They have equally not shown that any of those environmental impacts listed by them will arise as a result of the renewal or takeover.

Your principal discloses to you that he needs your opinion on the applicable standard of review on the two issues before the Court of Appeal. He wants you to be alert to the fact that the arguments of ACFN and Royale Stallion raise both factual and legal issues which may elicit multiple standards and that you should put these into consideration before coming to a conclusion.

You promised to submit a memo on this before lunch tomorrow. Prepare the memo on the applicable standard of judicial review on the issues raised on appeal.