COURT OF APPEAL OF YUKON

Citation: *Ross River Dena Council v. Yukon*, 2020 YKCA 10

Date: 20200430
Docket: 19-YU844

Between:

Ross River Dena Council

Appellant
(Plaintiff)

And

Government of Yukon

Respondent
(Defendant)

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris
The Honourable Madam Justice Shaner

On appeal from: An order of the Supreme Court of Yukon, dated May 27, 2019 (*Ross River Dena Council v. Yukon*, 2019 YKSC 26, Whitehorse Registry Docket 16-A0120).

Counsel for the Appellant:	S. Walsh
Counsel for the Respondent:	I. Fraser K. Mercier
Place and Date of Hearing:	Whitehorse, Yukon November 14, 2019
Place and Date of Judgment:	Vancouver, British Columbia April 30, 2020

Written Reasons by:
The Honourable Madam Justice Shaner

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris

Summary:

Ross River Dena Council (RRDC) appeals an order dismissing its claim for declaratory relief. RRDC asserts a claim to Aboriginal title over land in Yukon. The claim is a strong one, but has not been established. Yukon issues hunting licences and seals which permit harvesting big game on the claimed land and in other areas within its territorial boundaries. The Supreme Court of Yukon has previously held, and Yukon continues to accept, that issuing licences and seals triggers Yukon's duty to consult on wildlife matters. Here, RRDC sought declarations that Yukon had a further, specific duty to consult with respect to potential adverse effects on the "incidents of Aboriginal title" set out in Tsilhqot'n Nation v. British Columbia, 2014 SCC 44. RRDC argued that Yukon had to consult regarding the fact that hunters who are issued licences and seals use and occupy RRDC's claimed territory. The judge below found that Yukon had discharged its duty to consult on wildlife matters, and that Yukon had no obligation to literally apply the incidents of established title to consultation. On appeal, RRDC argues that the judge erred by improperly focussing on wildlife matters rather than the use and occupation of RRDC's claimed lands by hunters who are issued licences, and by finding that the incidents of Aboriginal title do not apply to asserted claims. Held: Appeal dismissed. RRDC does not have established title and, therefore, does not presently have the right to exclusive use and occupation of the claimed lands. RRDC did not identify any adverse effect on its claim other than impacts on wildlife. The fact that hunters might enter the land is not, without more, an adverse effect as contemplated by Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73.

Reasons for Judgment of the Honourable Madam Justice Shaner:

OVERVIEW

[1] Ross River Dena Council ("RRDC") appeals from an order dismissing its claim for declaratory relief in the Supreme Court of Yukon. The key point of contention at the Supreme Court, and before this Court on appeal, was RRDC's assertion that Yukon's issuance of hunting licences and seals adversely affects RRDC's claim of Aboriginal title, for reasons other than any impact on wildlife in the area. Yukon issues the licences and seals under the *Wildlife Act,* R.S.Y. 2002, c. 229 and *Regulations*. The land subject to RRDC's title claim is traditional Kaska territory situated in Yukon (the "Ross River Area"). The reasons for judgment accompanying the order under appeal are indexed at *Ross River Dena Council v. Yukon*, 2019 YKSC 26.

[2] RRDC is part of the Kaska Nation, who are one of the "aboriginal peoples of Canada" referred to in s. 35(1) of the *Constitution Act, 1982*. Yukon acknowledges that RRDC has a strong *prima facie* case for its claim to Aboriginal title over the Ross River Area and that the strength of the claim requires Yukon to engage in deep consultation with RRDC whenever Yukon contemplates conduct that might adversely affect the title claimed, under *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 44. The parties have been in negotiations for several years. To date, RRDC's claim has not been resolved by either a treaty or a declaration.

[3] In 2015, the Supreme Court of Yukon heard a closely related claim for declaratory relief: *Ross River Dena Council v. Yukon,* 2015 YKSC 45 ["*RRDC 2015*"]. In that case, RRDC sought a declaration that Yukon had a duty to consult with and, where appropriate, accommodate RRDC before issuing the hunting licences and seals. The Court concluded that issuing the licences and seals had the potential to adversely affect the amount of wildlife available for subsistence hunting for the RRDC's members, thereby triggering Yukon's duty to consult: *RRDC 2015* at paras. 54–58. Yukon had acknowledged that it had a duty to consult. The Court also found that Yukon had fulfilled its duty to consult and accommodate: at paras. 79–86. Having found that Yukon was appropriately acknowledging and discharging its constitutional obligations, and noting that Yukon "should continue to do so without … a Declaration from the Court", Veale, J. (as he then was) declined to issue a declaration: at paras. 95–99.

[4] In the case now under appeal, RRDC asked specifically for a declaration that the issuance of hunting licences and seals might adversely affect the claimed Aboriginal title of RRDC's members in the Ross River Area "by permitting conduct in that Area inconsistent with Aboriginal title." The key difference between this case and *RRDC 2015* is that RRDC now argues that Yukon must consult it with respect to alleged potential adverse impacts on the "incidents of Aboriginal title" set out in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 73.

[5] Chief Justice Veale found that Yukon had discharged its duty to consult on wildlife matters (as in *RRDC 2015*). Further, on the central issue arising in this appeal, he found RRDC had not established that, notwithstanding Yukon's consultation on wildlife matters, Yukon had a further duty to consult RRDC with respect to alleged potential adverse impacts on the suite of rights and interests set out as incidents of Aboriginal title in *Tsilhqot'in Nation*. For the reasons that follow, I agree with the Chief Justice and would dismiss the appeal.

THE LEGAL FRAMEWORK

[6] It is useful to summarize the applicable legal principles.

[7] There is a distinction between Aboriginal title that is established and that which is asserted. Established Aboriginal title confers ownership rights similar to those associated with fee simple. These ownership rights or "incidents of title" include the right to decide how the land will be used; the right to enjoy and occupy the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage it: *Tsilhqot'in Nation* at para. 73; *Delgamuukw v*. *British Columbia,* [1997] 3 S.C.R. 1010 at para. 117.

[8] Where governments and third parties want to use land that is the subject of established Aboriginal title, they must first obtain the consent of the Aboriginal title holders. Where consent is not obtained, a government's recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*: *Tsilhqot'in Nation* at para. 76. To that end, a government must demonstrate that non-consensual incursions are undertaken in accordance with the duty to consult; that they are justified on the basis of a compelling and substantial public interest; and that they are consistent with the Crown's fiduciary duty to the Aboriginal title holders: *Tsilhqot'in Nation* at para. 80.

[9] RRDC's title is not yet established. It has only a claimed title, albeit a strong one. Aboriginal title that is claimed, but not established, does not confer ownership rights.

[10] Where title is not established, the duty to consult arises when the Crown has real or constructive knowledge of the potential existence of an Aboriginal right or title and contemplates action which might adversely affect that right or title: *Haida Nation* at para. 35. The purpose of the duty to consult is not to provide claimants immediately with what they could be entitled to upon proving or settling their claims. Rather, it is intended as a mechanism to preserve Aboriginal interests while land and resource claims are ongoing, or where the proposed action may interfere with a claimed right or title: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43 at para. 33; *Ka'A'Gee Tu First Nation v. Canada (Attorney General),* 2012 FC 297 at para. 123.

[11] In *Rio Tinto* at para. 31, the legal test for determining whether the duty to consult arises was broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. The first two elements are not in issue here; however, the third element is at the heart of this appeal. It is explained in *Rio Tinto* as follows:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> [46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[12] The content of the duty to consult in any particular case will vary, depending on the strength of the claim and proposed government action. In *Haida Nation* at

paras. 43–46, it was described as falling along a spectrum. At one end, where the claim is weak, the Aboriginal right is limited and the potential harm is minor, the duty may be discharged by giving notice, disclosing information and discussing. At the other end, where the claim is strong, the right is significant to the claimant and the risk of harm is high, deep consultation may be required. Deep consultation may include an opportunity for the claimant to make formal submissions and formal participation in the decision-making process. The requirements will vary from case to case, depending on the circumstances: see also *Tsilhqot'in Nation* at paras. 89–91.

THE DECISION BELOW

[13] RRDC sought the following declaratory relief in the Supreme Court of Yukon (paraphrased):

a) a declaration that issuing hunting licences and seals under the *Wildlife Act* and *Regulations* might adversely affect the claimed Aboriginal title by permitting conduct inconsistent with it;

b) a declaration that Yukon has a duty to consult with and, where appropriate, accommodate RRDC before issuing the licences and seals which allow those to whom they are issued to enter the land comprising the claim to harvest big game; and

c) a declaration that Yukon failed to consult and, where appropriate, accommodate the RRDC before issuing the licences and seals in each of the 2016/2017, 2017/2018 and 2018/2019 hunting seasons.

[14] At the application, Yukon argued that the issue of its duty to consult and accommodate where appropriate was addressed in *RRDC 2015*. As noted, Veale C.J. held that Yukon was required to consult with and, where appropriate, accommodate RRDC on "wildlife matters." Consultation on wildlife matters was not RRDC's precise concern in this case, however. Rather, RRDC's position was (and remains) that the claimed Aboriginal title includes the right to the exclusive use and occupation of the Ross River Area. It argues that Yukon's action of issuing hunting licences and seals has a potential adverse effect on the claimed right because it

interferes with the incidents of title by permitting people other than RRDC's members to use and occupy the lands.

[15] In his reasons, Veale C.J. re-affirmed Yukon's obligation, as set out in *RRDC 2015,* to consult and, where appropriate, accommodate RRDC with respect to wildlife matters. He also concluded that given the longstanding constitutional recognition of the asserted claim and the lengthy negotiations that had taken place to that point, deep consultation is required. Yukon does not dispute either of these conclusions.

[16] Chief Justice Veale then identified the core issue between the parties as being whether the incidents of established Aboriginal title, as articulated in *Tsilhqot'in Nation,* can be applied to the duty to consult in an asserted claim. He determined that because RRDC had an asserted claim and not an established one, the consultation framework set out in *Haida Nation* and *Tsilhqot'in Nation* for unestablished claims was the approach to be applied:

> [32] In my view, RRDC is at the claim stage of asserting Aboriginal title. It is not at the final resolution or shortly before the establishment of Aboriginal title.
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> [33] The application of the *Haida Nation* and *Tsilhqot'in Nation* principles to the case at bar requires deep consultation and accommodation, if appropriate. However, RRDC does not have a right to veto any development or impose a duty to agree or require that RRDC consents to any developments in the Ross River Area. Yukon and RRDC must participate in a process of consultation along the *Haida Nation* principles, at the stage of an asserted RRDC claim for title. The ownership principles in para. 73 of *Tsilhqot'in Nation* are based on established title and there is no obligation to literally apply the *Tsilhqot'in Nation* incidents of established title in this "deep consultation" on wildlife matters.
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> [Emphasis added.]

[17] Chief Justice Veale then examined whether Yukon had met its duty to consult and, if appropriate, accommodate RRDC on wildlife matters. He found that Yukon had engaged in extensive and deep consultation and had discharged its duty at the relevant times. Accordingly, he declined to grant the declaratory relief RRDC sought.

GROUNDS OF APPEAL

[18] RRDC bases its appeal on the following grounds:

a) The inquiry in the court below focussed incorrectly on whether Yukon had discharged its duty to consult with the RRDC on "wildlife matters", rather than on Yukon's duty to consult on the potential adverse effect on the use and occupancy of the land over which it has asserted claim which would flow from issuing licences and seals (emphasis added);

b) The Chief Justice erred in ruling RRDC's asserted claim does not include incidents of Aboriginal title set out in *Tsilhqot'in Nation* and as a result, he concluded incorrectly that Yukon's duty to consult does not require consideration of the potential adverse effect of issuing hunting licences and seals on those incidents; and

c) Because Yukon's duty to consult must be discharged prior to issuing licences and seals, the judge erred in dismissing RRDC's requests for declarations to this effect.

ANALYSIS

The Focus of the Inquiry and Ruling on Incidents of Title

[19] The first two grounds of appeal are interrelated and, in my view, neither can succeed.

[20] RRDC argues that by issuing hunting licences and seals, Yukon interferes with its claimed right to exclusive use and occupation of the land. It alleged in its Amended Statement of Claim that this has the potential to adversely affect the RRDC's members' claimed title by allowing the land to be used and occupied for hunting by people other than RRDC members. As I understand it, RRDC's position is that Yukon's consultation on matters pertaining to wildlife management does not satisfy its constitutional obligations; Yukon must also consult regarding the fact that third parties enter RRDC's claimed land to hunt. Further, RRDC's position is not that hunters entering the land cause any cognizable harm to the land (aside from

potential wildlife management harm), but that their presence on the land is itself a violation of the incidents of title which RRDC asserts, specifically the exclusive use and occupation of the land. This requires consultation.

[21] RRDC's argument is problematic for two key reasons. First, as Yukon points out, issuing hunting licences does not, in and of itself, give the holder of the hunting licence the right to enter land that it could not otherwise enter. A right to hunt within a region does not confer a right to enter private property situated within that region. A hunting licence is not a defence to trespass: *Wildlife Act*, s. 100.

[22] Second, RRDC's argument is at its core a claim that it can assert a right, at the present time, to control who enters the claimed land and, therefore, Yukon must consult with RRDC whenever it contemplates action that would allow or encourage others to enter the land. This is so, on RRDC's argument, even when the activities conducted by others on its claimed territory have no identifiable adverse impact on the land or the RRDC's members' rights, at present or in the future, other than, circuitously, the very fact that RRDC cannot exclude them. The problem with this is that RRDC has not established Aboriginal title to the Ross River Area; the process is still at the claim stage. Without an established claim, RRDC does not have an exclusive right to control the use and occupation of the land at present, nor does it have a right to veto government action. That being the case, the legal framework set out in *Haida Nation* and *Rio Tinto* applies.

[23] This leads to the root of the problem with these two grounds of appeal. RRDC has not identified any potential adverse impact on the subject matter of its asserted claim which could affect its ability to fully realize the benefits of Aboriginal title, if and when it is finally established. Thus, the third requirement of the framework set out in *Haida Nation* and *Rio Tinto* has not been satisfied.

[24] RRDC argues that the potential harm was clearly articulated in its Amended Statement of Claim. Respectfully, I disagree. What RRDC expressed is a concern that individuals to whom licences and seals have been issued will enter the Ross River Area. That is all. It did not identify how this would have an "appreciable

adverse effect" on RRDC's ability to control the use and occupation of the land in the future, or would otherwise adversely affect its rights or interests, other than potential impacts on wildlife. The evidentiary record contains many examples of RRDC's stated objection to non-RRDC hunters entering the Ross River Area, but no evidence of any adverse effect on the subject matter of the claim.

[25] *Haida Nation* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* 2004 SCC 74, provide helpful illustrations of what is missing in RRDC's arguments both here and at the Supreme Court. In *Taku River,* the First Nation's title was not yet established. The government action was the approval of a project to re-open a mine, which contemplated the construction of an access road. The proposed road was characterized as a relatively small intrusion from a geographical perspective, but it would pass through an area critical to the First Nation's domestic economy and could attract future development. It could "have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim": at para. 31. It would not have been sufficient for the First Nation to argue that approving the mine meant people would enter their claimed territory to access the mine; the duty to consult rested on identifiable adverse effects to the subject matter of the claim.

[26] In *Haida Nation,* the First Nation claimed Aboriginal title to Haida Gwaii and surrounding water. The government action was the transfer of a tree farm licence to a large forestry firm. The identified potential harm was that the licence permitted the firm to continue to harvest old growth cedar, a resource in "limited supply" and of significance to Haida culture. Exploiting Haida Gwaii's forests without consideration of the Haida Nation's claims as those claims were progressing would have risked depriving the Haida Nation of some or all of the benefit of the resource.

[27] Here, no specific concerns have been articulated. There is only an argument that the issuance of hunting licences and seals interferes with RRDC's right to exclusive use and occupancy of the Ross River Area at the present time. As noted, however, this is a right that RRDC does not currently have. Without explaining how

the presence of hunters on its claimed territory could potentially adversely affect its claimed title, the duty to consult as a means to preserve interests in the interim is not engaged.

[28] In my view, the reasons provided by Veale C.J. do not give rise to a finding of error. He correctly found that a claim to Aboriginal title does not confer ownership rights on the claimant, and that, aside from concerns about wildlife, RRDC had not identified any adverse impact caused by the issuance of licences and seals.

Declaratory Relief

[29] With respect to the third ground of appeal, the declarations that RRDC sought in the initial application, and which it now seeks, are tied to the success of the arguments on the first two. Given my conclusions on these, there is no basis for this relief.

DISPOSITION

[30] I would dismiss the appeal.

[31] I would award Yukon its costs as requested in its factum.

"The Honourable Madam Justice Shaner"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Mr. Justice Harris"