# SUPREME COURT OF YUKON

Citation: *Yukon Big Game Outfitters Ltd. v. Yukon (Government of)*, 2021 YKSC 16

Date: 20210305
S.C. No. 20-AP003
Registry: Whitehorse

BETWEEN:

YUKON BIG GAME OUTFITTERS LTD.

PETITIONER

AND

GOVERNMENT OF YUKON (MINISTER OF THE ENVIRONMENT)

RESPONDENT

Before Chief Justice S.M. Duncan

Appearances:
Vincent Larochelle — Counsel for the Petitioner
Elaine Cairns — Counsel for the Respondent

**RULING**
**(Application for judicial review of two decisions to be heard together; and for further documents)**

## Introduction

[1] There are two related issues raised by the petitioner in this preliminary application. The first is a request under Rule 54(4) of the Supreme Court of Yukon *Rules of Court* ("Rules") to judicially review two decisions together. The resolution of this issue requires a determination of the dates of the decisions being reviewed. The second issue is a request for the production of additional documents, based on Rule 54. Although the petitioner refers to Rule 54(17) and (25) in his application, in his petition he makes a request under Rule 54(19)-(20), which he says has not been fulfilled. This

second issue will be determined in part by the dates of the decisions to be reviewed and their scope.

**Background**

[2] The petitioner, Yukon Big Game Outfitters Ltd. ("YBGO") has since 2012/13 held an outfitting concession located in the traditional territory of Ross River Dena Council ("RRDC"). YBGO receives an annual operating certificate under s. 54 of the *Wildlife Act*, R.S.Y. 2002, c. 229, authorizing it to guide people to hunt wild game in that concession area, on the basis of the conditions on the operating certificate prescribed by regulations and imposed by the Minister of Environment. As well YBGO must comply with the *Wildlife Act* and any conditions imposed on its concession.

[3] The conditions imposed by the Minister on the annual operating certificates have included quotas for the Finlayson Caribou Herd since 2007/08 in this outfitting concession. Until 2015, multi-year quotas of seven caribou per year were issued, which also allowed unused quotas in one year to carry over into the following year. Starting in 2015, only one-year quotas of seven caribou were issued, although the ability to carry over unused quotas from previous years was still possible. This continued up until the 2018/19 hunting season.

[4] The respondent Government of Yukon (Minister of Environment) ("YG") notified YBGO by letter dated July 30, 2018, that their operating certificate quota for the Finlayson Caribou Herd would be set to zero for 2019/20 hunting season. On April 18, 2019, YBGO signed its 2019/20 operating certificate, objecting to the zero quota for the Finlayson Caribou Herd. This triggered a hearing under s. 127 of the *Wildlife Act*.

[5] The hearing of YBGO's objection to the zero quota occurred on December 3, 2019 before the Concession and Compensation Review Board ("CCRB"). YG and YBGO appeared and provided evidence and submissions. The CCRB issued a report and recommendations to the Minister that included providing YBGO with a quota of two to four Finlayson Caribou Herd bulls annually, or a total allowable harvest of eight over two years.

[6] After considering the CCRB report, the Minister issued a letter to the Chairperson of the CCRB, dated March 24, 2020, with reasons for her confirmation of the zero quota for the 2019/20 hunting season. Among those reasons were concerns about the decline of the Finlayson Caribou Herd and the effect of subsistence harvesting by RRDC members.

[7] YG had notified YBGO by letter dated July 31, 2019 that its Finlayson Caribou Herd quota for the 2020/21 season would again be zero. YG invited YBGO to meet with officials in relation to that quota. A meeting was held on May 26, 2020 at which YBGO provided information for Environment officials to consider in finalizing the operating certificate conditions quota.

[8] On July 10, 2020, YG confirmed by letter to YBGO that the quota for the Finlayson Caribou Herd would remain at zero for the 2020/21 hunting season. The reasons included recent concerns expressed by the RRDC about caribou harvest in the area, and a consideration of technical and local information. On August 19, 2020, YBGO signed the operating certificate with an objection to the zero quota. This objection could not be referred to a hearing before the CCRB because once conditions are imposed by the Minister which are the same as conditions for which a hearing

before the CCRB was requested and a report issued, a further referral to the CCRB is statutorily precluded (s. 127(3), *Wildlife Act*).

[9] YBGO seeks to judicially review the decisions to reduce their Finlayson Caribou Herd quota to zero for both the 2019/20 and 2020/21 hunting seasons. YBGO seeks the decisions be quashed on the following grounds: they are unreasonable because they were made for irrelevant or improper purposes; failed to consider relevant factors; failed to address issues raised by YBGO and the CCRB; and are inconsistent with the *Wildlife Act* principles and purposes. Further, YBGO says the Minister incorrectly interpreted the scope of her jurisdiction and of the CCRB's jurisdiction under the *Wildlife Act* by incorrectly or unreasonably deciding she had no jurisdiction to consider compensation for the reduction in quota. She failed to consider and apply the *Guidelines to Establish Outfitter Quotas* ("Guidelines"), and YBGO had a legitimate expectation that these Guidelines would be applied when the decisions were made. She incorrectly interpreted the interaction between the Guidelines, the *Wildlife Act* and the *Umbrella Final Agreements* and confused the non-applicability of certain *UFA* provisions with the Guidelines. Finally, YBGO says the decisions were procedurally flawed because YBGO did not have a hearing; there was no *ad hoc* committee formed; and the Minister provided insufficient reasoning for her decisions and did not respond to the concerns raised by YBGO and the CCRB.

**Issue #1: Should the decisions setting zero quota for the 2019/20 and 2020/21 years be heard together?**

***Decisions for both years in one judicial review***

[10] Rule 54(4) provides that an application for judicial review is limited to a single decision, unless the court orders otherwise.

[11] YG does not oppose YBGO's request to hear the decisions to impose a condition on the annual operating certificates issued to YBGO of zero quota for the Finlayson Caribou Herd for the two hunting seasons in one judicial review. The issue in dispute is what constitutes those decisions and when were they made, addressed below.

[12] Following the reasoning of this Court in *Schaer v. Ferbey*, 2018 YKSC 17, I agree there is a connection and continuum between the two decisions for the two years, and it is expected that the evidence and legal arguments will be related.

[13] Jurisprudence from the Federal Court, which has a similar rule (Rule 302) restricting an application for judicial review to a single "order", sets out applicable criteria and principles. If there are continuing acts or decisions, they may be reviewed together without offending the rule, as long as the acts do not involve two different parties, two different factual situations, two different types of relief sought and two different decision-making bodies (see: *Truehope Nutritional Support Ltd. v. Canada (Attorney General)*, 2004 FC 658, paras. 6-9; *Lessard-Gauvin v. Attorney General of Canada*, 2016 FC 227, ("*Lessard-Gauvin*") para. 6).

[14] Here, the decisions to impose a condition on YBGO's annual operating certificates of a zero quota for both years arise from the same fact situation – concern over the conservation of the Finlayson Caribou Herd and subsistence harvesting

requirements. The decisions are both made ultimately by the Minister. The same relief is sought by YBGO for both decisions – that is, that they be quashed, and on the same grounds. The evidence and legal arguments are likely to be the same for both, although there may be some factual differences related to differences in processes followed in different years.

***The decisions to be reviewed***

[15] There is a dispute over what decisions are to be reviewed and when were they made.

[16] YBGO says the decisions imposing a zero quota condition are in fact really the same decision on a continuum, beginning in 2018, and ending in 2020.

[17] YG says the decisions are specific and limited. They are the Minister's letter of March 24, 2020 for the 2019/20 year, and the letter from the Environment official, Robert Florkiewicz, on behalf of the Minister, of July 10, 2020 for the 2020/21 year.

[18] I agree with YG that the decisions of March 24, 2020 and July 10, 2020 are the two decisions that should be judicially reviewed together.

[19] The March 24, 2020 decision was made after the internal administrative remedy provided by statute and available to YBGO was exhausted – that is, the hearing before the CCRB, and their subsequent report with recommendations. Although I agree with YBGO that the July 30, 2018 letter was a decision to impose a zero quota, it was not the final one. The final decision was issued by the Minister in her March 24, 2020 letter in which she gave reasons for rejecting the recommendations of the CCRB. The *Wildlife Act* sets out her powers:

> 127(12) After considering the Concession and Compensation Review Board's report, the Minister may

> confirm the conditions he or she imposed on the authorization or decide to remove or amend them.

[20] The Minister could have issued a different quota as a condition on the operating certificate after reviewing the CCRB's report. Any quota other than a zero quota would have been some form of remedy for YBGO. The zero quota was not final until after the CCRB proceedings were held, its report and recommendations were issued and reviewed by the Minister, and she made her final decision to confirm the initial zero quota under s. 127(12).

[21] The Federal Court jurisprudence under Rule 302 establishes a doctrine of exhaustion that has two consequences. The doctrine means that judicial review is only available when the decision is not subject to statutory remedy, or, if it is, that statutory remedy has been exhausted (*Lessard-Gauvin*, para. 7).

[22] The first consequence is that a judicial review sought of the decision of an administrative decision-maker where an internal remedy has not yet been exhausted, may not be heard. This is not applicable here.

[23] The second consequence is that once the statutory remedy or administrative process has been exhausted, the final determination is reviewable, not the initial decision or any interim decision. The court will only consider the decision from the higher administrative level (*Lessard-Gauvin*, para. 10).

[24] In *Lessard-Gauvin*, the applicant sought a review of the decision of the Department of Employment and Social Development Canada to remove his application from an external appointment staffing process for failure to meet one of the essential qualifications. He also sought judicial review of the later decision of the Public Service Commission of Canada not to conduct an investigation of his complaint to them about

this appointment process. The Federal Court denied the applicant's request, holding that "to admit the judicial review of both the decision of the final administrative level and the decision on which that decision-making authority had to rule…. 'would inject an alien element into Parliament's design'" (*C.B. Powell Limited* at para. 28; quoted in *Lessard-Gauvin* at para. 13). The Federal Court rejected the applicant's argument that this process did not provide him with an adequate remedy.

[25] Here, YBGO argues that the July 2018 decision was the initial decision, part of the continuum and should be part of the judicial review. The facts are different from those in *Lessard-Gauvin* as both decisions in this case emanate from the Minister. There is no hierarchy in the decision-making process. However, the March 24, 2020 decision was made after the benefit of a hearing, recommendations and report from an administrative body, the CCRB. That decision provides reasons, while the July 2018 letter contains less detail. Based on the principles and rationale from the jurisprudence, the March 24, 2020 decision of the Minister, as the final step in the administrative statutory review process, is what ought to be reviewed, not the July 2018 decision.

[26] The decision to impose the zero quota condition for the 2020/21 year was issued by letter dated July 10, 2020 from Robert Florkiewicz. That letter is the second decision to be reviewed.

[27] There will be an order under Rule 54(4) that both the decision of March 24, 2020 and the decision of July 10, 2020 will be judicially reviewed.

**Issue #2: Disclosure of additional materials from YG**

[28] This issue may be premature, given the early stages of this judicial review. This application has been brought before YG has filed its responding affidavits and exhibits.

[29] The application is based on Rules 54(17) and (25). Rule 54(17) provides that the court may order other material be filed if it considers the record to be incomplete. Rule 54(25) provides that when a party has requested relevant material from a decision-maker and there is an objection to this request, the court may order that all or part of the material requested be forwarded to the registry. Rule 54(19) is also relevant here, as YBGO in its petition requested that YG provide "all information used and considered by the respondent in deciding to reduce petitioner's Caribou Quota to zero starting in 2019." YG objected to disclosing solicitor-client privileged material and any material that is public and/or already in the possession of YBGO, that is, the material before the CCRB. YG described its relevant documents as: 1) for the March 24, 2020 decision: the CCRB's report, dated January 24, 2020; the Government of Yukon's PowerPoint on the Finlayson Caribou Herd; and the court decision *Ross River Dena Council v. Yukon (Government of)*, 2015 YKSC 45; and 2) for the July 10, 2020 decision: YBGO's PowerPoint presentation at the May 26, 2020 meeting with YG.

[30] All of these documents listed by YG are relevant. But the matter does not end here.

[31] The general principles applicable to document disclosure in judicial reviews are:

i. Documents that may have affected the making of the challenged decision by the decision-maker are obviously relevant: *Cameron v. Yukon,* 2010 YKSC 58, at para. 11.

ii. A document is relevant if it may affect the decision the court will make on the application for judicial review: *Canada (Human Rights Commission) v. Pathak,* [1995] 2 F.C. 455 (C.A.).

iii. The relevance of the documents requested must necessarily be determined in relation to the grounds of review: *Cameron* at para. 11.

iv. Materials that were not before the decision-maker may be considered relevant where it is alleged that the decision-maker breached procedural fairness or committed jurisdictional error: *Gagliano v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities - Gomery Commission),* 2006 FC 720; *Cameron* at para. 12. Relevancy should still be determined by reference to the grounds for judicial review set out in the application and the court still has a discretion whether to order production: *Gagliano.*

v. The rules of production in judicial review are to ensure that the record that was before the decision-maker is before the Court. They are not intended to facilitate discovery of all documents that may be in the possession of the decision-maker: *Canada (Attorney General) v. Canada (Information Commissioner),* [1998] 1 F.C. 337 (F.C.T.D.); *McDougall v. Canada (Attorney General),* 2009 FC 1286.

vi. Judicial review proceedings are summary in nature. Demands for disclosure of additional documents must be justified by evidence to show relevance, or by arguments that they fall under one of the exceptions (*The Access Information Agency Inc. v. Attorney General of Canada (Transport*

*Canada)*, 2007 FCA 224, paras. 17, 20-21; *Pauktuutit, Inuit Women's Assn. v. Canada*, 2003 FCT 165, paras. 5-11; *Humane Society of Canada Foundation v. Minister of National Revenue*, 2018 FCA 66, paras. 8-12; *Association of Universities and Colleges of Canada and The University of Manitoba v. The Canadian Copyright Licensing Agency, Operating as "Access Copyright"*, 2012 FCA 22, paras. 19-20).

[32] There is no definition of the record in the Rules. This may be in part because the record is flexible and can change depending on the type of decision that is being reviewed, who is making the decision, the process leading up to the decision, and the grounds of judicial review. In an administrative decision such as this one, it is more difficult to define the record, than it is when an adjudicative decision is being reviewed. Along with the Rules identified above allowing the court to order disclosure of materials, Rule 54(16) allows a party to file a supplementary record or affidavits, with leave of the court, suggesting that flexibility is necessary in certain circumstances.

[33] The legal principles are clear that whatever type of decision is being reviewed, the material that was before the decision-maker when they made their decision is relevant.

[34] In this case, the March 24, 2020 decision shows the Minister referred to certain material. The Court does not know the content of the CCRB record, which is clearly relevant and not objected to by YG, or what other documents were available to the Minister before the March 24, 2020 decision. Any documents referred to or taken into account by the Minister that affected her March 24, 2020 decision, in addition to the documents before the CCRB on December 3, 2019, must be disclosed.

[35] Specifically, the Minister's March 24, 2020 conclusion is: "[t]aking into account what is reasonably necessary for conservation of the declining Finlayson Herd, the challenges of wildlife management in an area and a significant subsistence harvest, I confirm [YBGO] Finlayson Herd quota of zero for the 2019/20 season."

[36] Any documents relevant to the conclusion of what is reasonably necessary for conservation of the declining Finlayson Herd; any materials relevant to the factor of the challenges of wildlife management in an area; and any materials relevant to the factor of a significant subsistence harvest, must be disclosed. This includes the previous and existing data related to the Finlayson Herd referred to in the Minister's letter.

[37] In the July 10, 2020 decision, Mr. Florkiewicz refers to specific material that was considered before he made the decision to maintain a zero quota. He writes:

> … our interest is to be informed with as much information and input on the current status of the herd. This includes the information you provided and consideration of the technical and local information, including the recent concerns expressed by the Ross River Dena Council regarding caribou harvest in the area.

[38] Any documents relating to the technical and local information being considered, and the recent concerns of RRDC about caribou harvest in the area that affected the decision-maker's decision must be disclosed.

[39] The material affecting both decisions is relevant to the grounds of judicial review. It is relevant to whether the decisions were made for irrelevant purposes; whether the decision-maker failed to consider relevant factors or to address issues raised by YBGO and the CCRB; and whether the decisions were inconsistent with the purposes and principles of the *Wildlife Act*. The material is also relevant to a determination of whether the Guidelines were considered and applied, and to an assessment of the interaction

between the Guidelines, the *Wildlife Act* and the Umbrella Final Agreement. The material will affect the decision that the Court has to make.

[40] The ground of the absence of procedural fairness in arriving at the decisions is not necessary to consider at this stage. The crux of YBGO's position is their request to see all the material before the decision-maker that affected her decisions. The order addresses this request.

[41] YG expressed confidentiality concerns about disclosing materials from its discussions with RRDC in fulfillment of the government's constitutional obligation to consult with them before taking any action that may adversely affect Indigenous rights.

[42] This order does not contemplate the disclosure of details of confidential meetings or negotiations. Instead, relevant producible documents in this judicial review include any underlying factual documentation and/or data about the Finlayson Herd provided to YG, or gathered by YG, as well as materials setting out concerns expressed by RRDC about caribou harvest that were taken into account by the Minister in her decisions.

[43] Again, because the Court does not know what documents were before the Minister in making her decisions, it is impossible to make any ruling on this issue other than in general terms as set out above. If the confidentiality issue continues to be of concern to YG, it may be spoken to in case management.

**Conclusion**

[44] I therefore make the following order:

i. The decision of March 24, 2020 and the decision of July 10, 2020 will be judicially reviewed in this application.

ii. All documents that were taken into account by the Minister or her delegate while she was making her decisions shall be disclosed to YBGO. This includes any documents that affected the March 24, 2020 decision by the Minister and any documents that affected the July 10, 2020 decision by the Minister through her delegate, Robert Florkiewicz, Wildlife Harvest Programs Negotiator, subject to any valid privilege claims over those documents.

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DUNCAN C.J.