SUPREME COURT OF YUKON

Citation: *First Nation of Na-Cho Nyäk Dun v Yukon (Government of)*, 2021 YKSC 43

Date: 20210825
S.C. No. 20-AP013
Registry: Whitehorse

BETWEEN:

FIRST NATION OF NA-CHO NYÄK DUN

PETITIONER

AND

GOVERNMENT OF YUKON AND METALLIC MINERALS CORP.

RESPONDENTS

Before Chief Justice S.M. Duncan

Counsel for the petitioner	Nuri G. Frame, Tasha Manoranjan and Daniel Goudge
Counsel for the respondent, Government of Yukon	Kimberly Sova and Julie DesBrisay
Counsel for the respondent, Metallic Minerals Corp.	James R. Tucker

REASONS FOR DECISION

Introduction

[1] This application by the respondent Yukon government to strike four of the declarations sought by the petitioner, First Nation of Na-Cho Nyäk Dun ("FNNND"), invites an inquiry into the purpose and scope of judicial reviews, as well as the proper test for a motion to strike.

[2] In the underlying petition, FNNND has brought a judicial review of a single decision of the Yukon government to vary a recommendation of the Yukon Environmental and Socio-economic Assessment Board ("YESAB"). The decision approves with some additional terms and conditions the YESAB recommendation to allow Metallic Minerals Corp. ("Metallic Minerals"), a mining exploration company, to undertake exploration activities every summer for a 10-year period, in the Tsé Tagé (Beaver River) watershed area. That area is part of the traditional territory of FNNND and is the subject of a land use planning process.

[3] The issue raised by this application to strike parts of the petition is whether the allegations that the Yukon government decision breaches certain duties flowing from the honour of the Crown, the Final Agreement, and an Intergovernmental Agreement, and in addition breaches the duty of good faith in contractual performance owed by the Yukon government are without merit or improperly pleaded or otherwise inappropriate to be heard by this Court by way of judicial review.

[4] Metallic Minerals takes no position on this application and counsel did not appear at the hearing.

Background

[5] FNNND is a self-governing Yukon First Nation. It signed, along with the governments of Canada and Yukon, a comprehensive land claims agreement, including a Final Agreement (the "Treaty") and a Self-Government Agreement in 1993. Its traditional territory extends over 160,000km², 130,000 km² of which are within the boundaries of the Yukon.

[6] Metallic Minerals is a publicly traded mining exploration company incorporated under the laws of British Columbia. It is focused on the acquisition and development of high-grade silver and gold in the Yukon. It applied for a Class III Quartz Mining Land-Use Approval for its LOTR Project (the "Project") under the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*").

[7] Yukon government issued a decision document through its Director of Mineral Resources, under s. 75 of *YESAA*. The decision document varied the recommendation of YESAB to approve the Project, by adding eight new conditions.

[8] The Project consists of 52 quartz claims over 1,086.8 hectares. It is located entirely within the traditional territory of the Na-Cho Nyäk Dun and, more specifically, entirely with the Tsé Tagé watershed area. This area is also referred to as a portion of the Stewart River watershed.

[9] Metallic Minerals submitted its application for approval of the Project to YESAB on February 11, 2020. The application seeks approval for activities including prospecting, geological mapping and rock sampling, soil sampling, ground and airborne geophysics, drone aerial photography, heli-portable excavation, trenching, drilling, bedrock interface sampling and bedrock sampling. In order to carry out these activities, Metallic Minerals wants to construct:

a) new temporary and permanent trails up to 5 km and 3 km long, and 5 m wide;

b) new roads up to 2 km long and 5 m wide;

c) new cut lines up to 5 km long and 1.5 m wide;

d) new corridors up to 2.5 km long and 1.5 m wide;

e) up to 50 new clearings up to 500 m²;

f) a new 600 m² camp to house 20 seasonal workers;

g) a new 60 m² helipad;

h) up to 100 trenches 15 m long, 2.5 m wide and 2 m deep; and

i) up to 150 drill holes to a depth of 100 m.

Helicopter use is proposed for up to three hours each day.

[10] On July 24, 2020, YESAB issued its evaluation report, after receiving submissions from various entities affected by the Project, including FNNND, a local outfitter with an overlapping concession, and Yukon Tourism. YESAB's report acknowledged that the Project is within the Tsé Tagé planning area. The report stated at p. 2 the proposed activities were "likely to have significant adverse effects on wildlife and wildlife habitat, environmental resources, and heritage resources". It recommended the Project be allowed to proceed, with certain terms and conditions.

[11] After YESAB issued its report and recommendation a Yukon government official requested comments from FNNND. FNNND responded to various Yukon government officials, including the Minister of Energy, Mines and Resources, that the Yukon government should not issue its decision document approving the Project until the Beaver River Land Use Plan ("BRLUP") required by the Intergovernmental Agreement (explained below) was concluded and approved. FNNND also noted that the purpose of the Treaty and specifically the Chapter on land use planning was to ensure meaningful participation by FNNND in the management of land, water and resources throughout its traditional territory, in equal partnership with Canada and Yukon. If the Project application were approved, FNNND would consider it a breach of the Yukon

government's constitutional and legal duties flowing from the honour of the Crown, the Treaty and the Intergovernmental Agreement.

[12] In January 2018, FNNND and the Yukon government had entered into an Intergovernmental Agreement (the "Agreement") to prepare a plan for the portion of the Stewart River watershed, identified on a map attached to the Agreement, in accordance with the Agreement, called the BRLUP. The Agreement was precipitated by the proposed construction by ATAC Resources Ltd., another mining exploration company, of an all-season, single lane tote road (an unpaved road for carrying supplies) to support exploration and development at another mineral deposit site in the same watershed area. The objectives of the Agreement included promoting collaboration with respect to the use and management of land, water and resources, including fish and wildlife and their habitat, within the planning area; taking into account traditional land use by Nacho Nyak Dun citizens and their traditional and land management practices; and promoting development that does not undermine the ecological and social systems upon which Nacho Nyak Dun citizens and their culture are dependent.

[13] The Agreement also provided that if YESAB recommended a project inconsistent with the BRLUP, the parties may agree that the project proceed subject to certain terms and conditions.

[14] The Agreement further stated the parties will not issue any licence, permit or other authorization for the construction of the tote road until the BRLUP was approved.

[15] FNNND and the Yukon government have been working on the development of the BRLUP for over three years. Discussions are ongoing and it is likely to be completed in the next 12-24 months.

[16] The claims of Metallic Minerals comprising the Project were not staked until 2018 and 2019, after the Agreement was signed.

[17] The Agreement was considered by FNNND to be consistent with the promises made in the Treaty, and in particular Chapter 11, land use planning.

[18] A Yukon government official from the Mineral Resources Branch responded by letter to FNNND's concerns about the Project breaching the Treaty and the Agreement. The letter stated among other things, that "the Final Agreements do not contemplate the cessation of all development activities until land use plans are complete" and that "the need to suspend mining activities in the Beaver River Land Use area has not been identified by all parties."

[19] Yukon government then issued its decision document on February 19, 2021, varying the recommendation and terms and conditions of the YESAB report. The decision document did not set out reasons for the conclusion that the decision was not a breach of the duties flowing from the honour of the Crown, or a breach of the Agreement. Eight terms and conditions were added to the YESAB report and recommendation by the decision document. None of these conditions addressed FNNND's concerns about ensuring any regulatory approval was consistent with the process of developing a BRLUP.

[20] The decision document is not a regulatory authorization, licence or permit, but it is a necessary decision in order to allow the regulator(s) to consider authorizing the activities in the Project.

[21] The Yukon government does **not** seek to strike the following remedies sought by FNNND in this judicial review: quashing and setting aside the decision document; the

declaration that Yukon breached its duty to consult and if necessary accommodate its s. 35 rights in relation to the Project; an interlocutory injunction against issuing any licence, permit, or other authorization for the Project pending the resolution of this application for judicial review; and a prohibition by way of interlocutory injunction against Metallic Minerals from conducting work on the Project pending the resolution of this application for judicial review.

Legal Principles – application to strike

[22] Rule 20(26) of the *Rules of Court* of the Supreme Court of Yukon (the "*Rules*") provides:

> At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court

No evidence is admissible on an application under (a). Evidence is admissible under the other three subsections (Rule 20(29)).

(a) No reasonable claim

[23] The Supreme Court of Canada set out the elements of the modern test to be met on a motion to strike pleadings on the basis of no reasonable claim and its purpose in

R v Imperial Tobacco Canada Ltd, 2011 SCC 42 ("*Imperial Tobacco*") at paras. 19-25. It must be plain and obvious that the claim has no reasonable prospect of success. The assessment must be done on the basis of the pleading, the particulars, and any documents incorporated by reference. The facts in the pleading must be read generously and accepted as true, unless they are manifestly incapable of being proven. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show.

[24] The purpose of giving the court power to strike a claim with no reasonable prospect of success is to promote litigation efficiency and to reduce time and cost. Weeding out unmeritorious claims allows resources to be devoted to the claims with a reasonable chance of success. "The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice" (*Imperial Tobacco* at para. 20).

[25] The high bar on an application to strike pleadings was confirmed by the Supreme Court of Canada in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras. 64-66. The court reiterated that the facts pleaded are assumed to be true and that a court must construe the pleading generously and overlook defects that are drafting deficiencies. Only material facts capable of being proven need be accepted as true.

[26] Allegations based on speculation or assumptions, bare allegations or bald assertions without any factual foundation, pleadings of law, or allegations that are patently ridiculous or incapable of proof, do not have to be accepted as true (*Northern Cross (Yukon) Ltd v Yukon (Energy, Mines and Resources*), 2021 YKSC 3 at para. 16, and the cases cited therein).

[27] The pleading should not be struck solely on the basis of the complexity of the issues, the novelty of the claims being advanced, or the apparent strength of the defences to the claim.

[28] This test has been applied in the Yukon in *Wood v Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16; *North America Construction (1993) Ltd v Yukon Energy Corporation*, 2019 YKSC 42; *Northern Cross*; *Grove v Yukon (Government of)*, 2021 YKSC 34 ("*Grove*"); *Mao v Grove,* 2020 YKSC 23; *Brown v Canada (Attorney General*), 2019 YKSC 21; and *DKA v TH*, 2011 YKCA 5.

(b), (c), and (d) Unnecessary, scandalous, frivolous or vexatious; prejudice, embarrass or delay the fair hearing; abuse of the process of the court

[29] The Yukon government also challenges certain of the declarations and parts of the petition on the grounds that they are unnecessary, scandalous, frivolous or vexatious; they may prejudice, embarrass or delay the fair hearing of the proceeding; or they are an abuse of the process of the court.

[30] The Supreme Court of Yukon in *Sidhu v Canada (The Attorney General)*, 2015 YKSC 53 at para 8, adopted the findings of the British Columbia Supreme Court in *Citizens for Foreign Aid Reform Inc v Canadian Jewish Congress*, [1999] BCJ No 2160 ("*Citizens*") on the meaning of the terms "unnecessary", "scandalous", "frivolous," "vexatious" and "embarrassing" at para. 47:

> Irrelevancy and **embarrassment** are both established when pleadings are so confusing that it is difficult to understand what is being pleaded. … An "**embarrassing**" and "**scandalous**" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues. … An allegation which is **scandalous** will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as **scandalous**. … A pleading is

> "**unnecessary**" or "**vexatious**" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law … A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable. … A pleading is "**frivolous**" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel … . [citations omitted; emphasis added]

[31] In *McDiarmid v Yukon (Government of),* 2014 YKSC 31, a decision that has been followed by this Court several times (*Northern Cross (Yukon) Ltd v Yukon (Energy, Mines and Resources)*, 2021 YKSC 3; *North America Construction (1993) Ltd v Yukon Energy Corp*, 2019 YKSC 42; *Vachon v Twa*, 2019 YKSC 37 ("*Vachon*"); and *Wood v Yukon (Director of Occupational Health and Safety)*, 2018 YKCA 16), the court described the test for an unnecessary, scandalous, frivolous or vexatious pleading as requiring the defendant to demonstrate that the pleading is groundless or manifestly futile, or that it is not in an intelligible form, or that it was instituted without any reasonable grounds whatsoever or for an ulterior purpose: *McNutt v Canada (Attorney General)*, 2004 BCSC 1113; *Hartmann v Amourgis*, [2008] 168 ACWS (3d) 40 (ONSC).

[32] "Abuse of process" has been interpreted broadly by courts. It may be found:

> … where proceedings involve a deception of the court or constitute a mere sham; where process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose … (*Citizens* at para. 52).

[33] A finding of abuse of process generally allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice (*Vachon* at para. 8).

Legal principles – nature of judicial review and declaratory relief

[34] Judicial review is an exercise of the court's supervisory function, to ensure that decision-makers act within the scope of their delegated authority. The Supreme Court of Canada summarized the role of the court aptly in *Dunsmuir v New Brunswick*, 2008 SCC 9 ("*Dunsmuir*") at para. 28:

> By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. **The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.** [emphasis added]

[35] Although the Supreme Court of Canada revised the framework for determining the standard of review and the conduct of reasonableness review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*"), that decision did not override the principles underlying judicial review articulated in *Dunsmuir* – broadly stated, "that judicial review functions to maintain the rule of law while giving effect to legislative intent" (*Vavilov* at para. 2).

[36] Declarations are appropriate discretionary remedies to be sought in an application for judicial review. Rule 54(1) explicitly permits this. In *Ewert v Canada*, 2018 SCC 30 at para. 81, the Supreme Court of Canada has stated a court may grant a declaration in its discretion:

> … where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought [citations omitted].

Analysis

Breach of duty to diligently implement Treaty promises including promise to engage in land use planning set out in Chapter 11 of the Treaty – Rule 20(26)(b), (c), and (d)

[37] FNNND pleads that the Treaty it entered into with the governments of Yukon and Canada in 1993 represented the promise of a new relationship built on mutual respect and equal partnership. At its core was the commitment of the Yukon government (and government of Canada) to guarantee meaningful participation to FNNND in decision-making affecting its traditional territory. FNNND says that in fulfillment of this commitment, the Yukon government promised to work with FNNND to create a land use plan for the Nacho Nyak Dun traditional territory to guide resource development decisions within it, as set out in Chapter 11 of the Treaty. The Yukon government has failed to start a comprehensive land use planning process under the Treaty, but has engaged in a partial process through the Agreement for the BRLUP. FNNND says the Yukon government's decision to approve Metallic Minerals' application has undermined the land use planning promise in the Treaty.

[38] The Yukon government seeks to strike this declaration and the paragraphs (not specified) in the petition supporting it on the basis that they are unnecessary, embarrassing, and scandalous, or an abuse of process.

[39] This argument has three parts:

a) judicial reviews are summary in nature and this declaration raises complex matters of fact and law not suitable for determination on a judicial review but more suitable for a trial;

b) extensive evidence will be required to interpret and apply Chapter 11 and as this evidence was not before the decision-maker it is extrinsic, not part of the record;

c) other interested entities, such as the government of Canada, a signatory to the Treaty, other Yukon First Nations with traditional territory overlapping with FNNND traditional territory, and the Yukon Land Use Planning Council, may be affected by interpretations of the Treaty in this case if it proceeds and they are not parties to this proceeding. The court should not make declarations on complex interpretation questions without all affected parties present.

[40] I agree with counsel for FNNND that these arguments raised by counsel for Yukon government do not correspond to the jurisprudential interpretation of unnecessary, embarrassing, scandalous or abuse of process. Further, the arguments do not the meet the test on a motion to strike for the following reasons.

Too complex for judicial review

[41] Although this argument by FNNND does raise complex and possibly novel legal considerations, this is not enough to support a striking of the pleading.

[42] Chapter 11 of the Treaty has been considered by the Supreme Court of Canada. Its objective was described in *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para. 47, as to “ensure First Nations meaningfully participate in land use management in their traditional territories.” It “is designed to foster a positive, mutually respectful, and long-term relationship between the parties to the Final Agreements.”

[43] This Chapter 11 purpose is consistent with the Supreme Court of Canada's finding in that same case of the purpose of the Treaty itself: "intended to foster a positive and mutually respectful long-term relationship between the signatories" (at para. 10).

[44] The Treaty is constitutionally protected by s. 35(1) of the *Constitution Act, 1982*. Section 35 recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, including treaty rights that exist by way of land claims agreements. Section 6(1) of the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, states that a Yukon Final Agreement or Transboundary Agreement is in effect a land claims agreement within the meaning of s. 35 of the *Constitution* (*First Nation of Nacho Nyak Dun v Yukon*, cited above, at para. 8).

[45] The Supreme Court of Canada has recognized that diligent implementation of promises that are constitutional obligations is required by the honour of the Crown. The purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Canadian sovereignty. It requires the Crown to act honourably in its dealings with Aboriginal people. It "flows from the guarantee of Aboriginal rights in s. 35(1) of the Constitution." Duties that flow from the honour of the Crown vary with the situation because it speaks to how obligations that attract it must be fulfilled (*Manitoba Metis Federation Inc v Canad*a (*Attorney General*), 2013 SCC 14 ("*Manitoba Metis Federation*") at 627).

[46] One of the well-accepted purposes of judicial review is to ensure that the decision being reviewed was legal. Part of determining whether a decision is legal is whether it is constitutional. If a government decision arguably has the effect of

breaching a constitutional obligation it is an appropriate matter for the supervisory role of the court. For example, the Supreme Court of Canada in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*., 2017 SCC 41, in considering whether the Crown met its duty to consult in the context of a regulatory agency's decision to approve a pipeline modification project, said "the regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal" (at para. 32).

[47] In fact, the determination of whether the obligation of the duty to consult flowing from the honour of the Crown and s. 35 of the *Constitution* was met by the Yukon government was done by way of an application for judicial review in the case of *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 ("*Beckman*"). In that case the Supreme Court of Canada said at para. 47 that an application for judicial review was "perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation". Administrative law can "give full weight to the constitutional interests of the First Nation."

[48] While determining constitutional obligations and their fulfillment is a matter of some legal complexity, and may involve novel arguments, the courts have been clear that the vehicle of a judicial review to do this assessment is appropriate. Complexity and novel arguments are not valid reasons to strike a claim (*Grove* at para. 22).

[49] In this case, the constitutional obligations alleged to have been breached are different from the duty to consult obligation arising from the honour of the Crown (not contested here) that has been considered in other judicial reviews. However, the failure to diligently implement Treaty promises, including the promise of land use planning, is

also alleged in this case to arise from the honour of the Crown and s. 35 rights. There is no reason why this determination cannot be made on judicial review, similar to the determination of the duty to consult obligation, arising from the same sources.

[50] The remedy of a declaration for this alleged breach is also suitable for FNNND to seek in judicial review. The Supreme Court of Canada stated in *Manitoba Metis Federation* that "declaratory relief may be the only way to give effect to the honour of the Crown" (at para. 143). Judicial declarations of existing Aboriginal rights have become the primary remedy for securing those rights (*Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at paras. 247-250). Declarations are also useful "to enable parties to know their rights and to avoid future disputes" (*Yasin v Ontario*, 2018 ONCA 417 at para. 10).

[51] Here the pre-conditions set out above in paragraph 36 for a declaration to be issued are met. The Court has jurisdiction; it is a real, not theoretical issue; and both parties have an interest in pursuing or opposing the remedy. The declarations sought relate to Aboriginal rights and giving effect to honour of the Crown. They will assist the parties in avoiding future disputes by setting out their respective rights and obligations.

[52] This is an appropriate matter to be considered in a judicial review and does not meet the test on a motion to strike.

Extensive evidence not in the record

[53] The Yukon government stated there is extensive evidence required on the complex factual, legal and interpretive issues raised by this allegation, most of which is not in the record that was before the decision-maker. Counsel did not provide examples of the kind of evidence contemplated.

[54] FNNND pleaded that during the consultation process on the draft decision document after the YESAB evaluation report was received, they repeatedly and urgently told Yukon government officials, including the Minister of Energy, Mines and Resources, that a decision to approve the YESAB recommendation with conditions would undermine the purpose of Chapter 11 in the Treaty, would be a breach of the duties emanating from the honour of the Crown, and would be unconstitutional.

[55] The Yukon government official from the Minerals Branch responsible for engagement with FNNND on this Project responded to FNNND's expressed concerns. She referred to the Yukon government's interpretation of the Treaty and Chapter 11, in this context that is, that "the Final Agreements do not contemplate the cessation of all development activities until land use plans are complete." The Yukon government proceeded to issue its decision document, with knowledge of the concerns expressed in this petition by FNNND. As a result this evidence should be part of the record that was before the decision-maker.

[56] In any event, extrinsic evidence is permitted under Rule 54(11), which allows the applicant to file affidavit evidence and documentary exhibits (in addition to the record of the decision-maker).

[57] The possible requirement of extensive and further evidence is not a sufficient basis to strike this declaration and (unspecified) related paragraphs in the petition.

Absence of other affected parties

[58] The Yukon government's concern that the Court should not make an interpretive ruling on the Treaty in the absence of the government of Canada, other potentially affected First Nations, or the Yukon Land Planning Council also cannot support a

motion to strike. The remedy in a case where potentially affected parties are not before the court is not to strike the matter because of their absence. One possible remedy is for any of the parties or the Court to advise others who they think may be affected of the matter. If others believe it is in their interest to participate, they may seek status as an intervenor or even a party. In this case, at this stage, I do not see the provision of notice by the Court as warranted. The effects of the decision document are on the parties before the Court. Interpretation of documents is regularly done by courts without the presence of all entities who will or may be affected by that interpretation.

[59] For example, at the trial level in the case of *Beckman*, neither Canada nor any other Yukon First Nation were represented even though novel arguments about the duty to consult, the honour of the Crown, and the interpretation of the Final Agreement in that case were raised. That changed on appeal, when other affected parties intervened to provide legal arguments.

[60] There is no basis for striking any of this declaration and related paragraphs for the reasons stated above. Significantly, there is no basis in fact or argument for a finding that any part of this declaration and supporting paragraphs are groundless, futile, unintelligible in form, or instituted without reasonable grounds or for ulterior purpose. They are not useless or unnecessary.

Breach of duty to act in a way that accomplishes the intended purpose of the Treaty - Rule 20(26)(a), (b), (c), and (d)

[61] The Yukon government's arguments to strike this declaration under Rule 20(26)(b),(c) and (d) are the same as above. For the same reasons, I reject these arguments as a basis for an application to strike this declaration.

[62] The complexity of any facts and legal argument about the intended purposes of the Treaty as they relate to the decision document in this case is not a bar to a judicial review for the same reasons set out in paragraphs 41-49 above.

[63] FNNND's position in this matter was communicated to Yukon government officials before the decision was issued. It is part of the record in this proceeding.

[64] There are other more appropriate remedies than striking to hear from potentially affected parties. None of these reasons in any event meets the legal test for striking under the Rule.

[65] The Yukon government also seeks to strike this declaration and related paragraphs under Rule 20(26)(a) (plain and obvious that it is bound to fail) on the basis it is improperly pleaded. The Yukon government says there is no way to know what declaration FNNND is seeking because there are no particulars about what the intended purpose of the Treaty is and no facts alleging a breach.

[66] FNNND objects, saying paras. 39-41 of the petition set out the intended purpose of the Treaty and para. 91 sets out the alleged breach.

[67] I agree with FNNND with the exception of correcting a typographical error – the alleged breach of the Treaty is set out in para. 90 of the petition, not para. 91.

[68] Paragraphs 39-41 of the petition explain the overriding purpose of the Treaty as reconciling FNNND with the Crown's assertion of sovereignty and then quote the preamble to the Treaty; describe the Treaty as a living instrument that forms a legal basis for creating a new, positive and mutually respectful long-term relationship of equal partnership between the Crown and the FNNND; and state that the establishment and implementation of a land use planning process under Chapter 11 is essential to ensure

FNNND's meaningful participation in the management of the land, water and resources in their traditional territory.

[69] The petition further states at paragraph 90 that the decision at issue is contrary to the Treaty's promise of ensuring meaningful participation by FNNND in the management of the Nacho Nyak Dun traditional territory, specifically through development and implementation of a land use plan for the traditional territory as set out in Chapter 11. This undermines the overriding purpose of reconciliation.

[70] This is clearly and succinctly pleaded, not vague, and contains sufficient facts when read with the petition as a whole, to support arguments for the declaration sought. It does not meet the legal test for an application to strike under Rule 20(26)(a).

Breach of duty to keep promises in Intergovernmental Agreement to develop a Beaver River Land Use Plan, in furtherance of Treaty promises - Rule 20(26)(a)

[71] FNNND says the Agreement requires the completion of the planning process before resource development activities are authorized in the planning area. The Yukon government decision document breaches the Agreement as it approves the proposed exploration activities in the planning area before the BRLUP is finalized.

[72] The Yukon government says it is plain and obvious that this allegation must be struck because no facts are pleaded to support a breach of its obligations under the Agreement. Specifically, the Yukon government makes the following four arguments:

a) the Agreement is solely related to a proposal by ATAC Resources Ltd. to construct a tote road in the Beaver River watershed area and no licence, permit or other authorization for the construction of the tote road has been issued, and there is no obligation under the Agreement to halt the

issuance of a licence, permit or other authorization for any other development project before the approval of the BRLUP;

b) there is no mention of Metallic Minerals or the Project in the Agreement;

c) FNNND's concession that the planning process under the Agreement is "well-progressed and likely to be completed within 12-24 months", suggests there is no breach of the obligations in the Agreement; and

d) the objectives set out in para. 1(e) of the Agreement do not obligate the Yukon government to do anything as they are the objectives of the planning committee and not the parties.

[73] I agree with the submissions of FNNND in response to these arguments for the following reasons.

Agreement for tote road and related authorizations only

[74] First, it is not disputed that the catalyst for the Agreement was the proposed construction of the tote road by ATAC Resources Ltd. Further, the prohibition on obtaining a regulatory authorization before the BRLUP was completed extends only to the construction of the tote road in the Agreement and no such authorization has been requested as yet. However, it is accepted by both parties to the Agreement that the Yukon government and FNNND agreed to the preparation of a land use plan for an identified planning area. The process included the establishment of a planning committee, the imposition of interim measures pending plan completion, and the approval and implementation of the plan by the parties. The identified planning area, shown on the map attached as Schedule A to the Agreement, is much larger than the proposed tote road and its immediate surroundings. It includes a portion of the Beaver

River watershed, which encompasses the entire area of the Project in this case. While the Yukon government may argue that the specific obligations in the Agreement may not cover the Project area, this is not plain and obvious. The determination of whether there was a breach of the Agreement in this case will require an interpretation of the Agreement, in the context of the Treaty relationship between the parties.

Metallic Minerals not referenced in Agreement

[75] It is immaterial that Metallic Minerals or the Project were not mentioned in the Agreement. The Agreement pre-dated the Metallic Minerals claims and proposed Project. It is material and relevant, however, that the planning process underway as a result of the Agreement includes the area of the proposed Project by Metallic Minerals.

Planning process progressing well

[76] FNNND did not specifically address this issue, but their statement that the planning process under the Agreement is progressing well does not preclude their argument that the approval of the Project breaches the Agreement. This decision document is a new action outside of the planning process, which could affect the progress and conclusion of the development of the plan.

Objectives in Agreement and planning committee

[77] Finally, FNNND says that the objectives set out in the Agreement apply to the parties' agreement to develop the plan itself, and not just to the planning committee as Yukon government suggests. The determination of which argument is correct is not plain and obvious and will require the Agreement to be interpreted.

[78] The Agreement provides that the planning committee consists of representatives appointed by each of the parties to prepare the plan. The planning committee refers any

disputes or impasse issues to the parties, the planning committee seeks direction and guidance from the parties, and the parties are responsible for their expenses. Once the plan is developed, the parties review it and may approve it or send it back to the planning committee for reconsideration with specific direction or guidance.

[79] The involvement of the parties in directing the planning committee and approving the plan suggests there is an argument that the Agreement contains obligations on the parties themselves, which may have been breached. The parties, not the planning committee, signed the Agreement. It is not plain and obvious, given the wording of the Agreement and the allegations in the petition that FNNND's declaration has no reasonable chance of success. There are facts pleaded in support of the allegations.

Breach of duty to keep promises in Intergovernmental Agreement to develop a Beaver River Land Use Plan, in furtherance of Treaty promises – Rule 20(26)(b), (c), and (d)

[80] The Yukon government argues that this declaration and supporting paragraphs in the petition (unspecified) in the alternative should be struck on the basis that they are unnecessary, embarrassing and scandalous, or an abuse of process.

[81] Specifics set out in support of this ground are:

a) there is insufficient evidence on the record to determine if the promises made in the Agreement have been breached;

b) the determination of whether the Agreement, or some duty based in good faith concerning the Agreement, have been breached will involve the parties in a dispute distinct from the issue before the Court; and

c) the declaration sought is more properly addressed through civil proceedings instead of in a judicial review.

[82] Once again, these arguments do not correspond to the legal interpretation of the wording in Rule 20(26)(b), (c), and (d). None of these arguments meets the test for striking the claim set out in Rule 20(26)(b), (c), and (d) for the following reasons.

Insufficient evidence on record

[83] The first argument about absence of evidence is met by the same response set out above in paragraphs 53-56 about evidence on the record related to breach of the promises in the Treaty and Chapter 11. FNNND's concern about Yukon government's breach of the Agreement, flowing from the Treaty obligations, was raised with the decision-maker before the decision document was issued. It was part of the record. Even if extrinsic evidence is necessary to be introduced in support of this declaration, Rule 54(11) contemplates and allows for it.

Breach of Agreement is a dispute distinct from issue before the Court

[84] It is not clear how the determination of whether the Agreement has been breached involves the parties in a dispute distinct from the issue before the Court. Whether there was a breach of the Agreement by Yukon's issuance of a decision to approve Project activities in the planning area before a land use plan was completed, is germane to the issue before the Court. This argument has no merit in support of a motion to strike.

Breach of duty to keep promises better suited to trial

[85] Finally, the use of a judicial review of the decision in this case is appropriate for determining whether or not there was a breach of duty. Just because there is an alleged breach of a contractual obligation does not mean the judicial review process is ousted. Interpretations of the Agreement may be made in the context of judicial review to

determine whether the decision-maker issued her decision in a lawful, reasonable, and fair manner.

[86] None of these arguments supports the striking of these declarations nor the supporting paragraphs in the petition (for example paras. 47, 48, 90, 91). The pleadings are not groundless, futile, unintelligible or brought for an ulterior purpose.

Breach of duty of good faith in contractual performance in relation to Intergovernmental Agreement- Rule 20(26)(a)

[87] FNNND pleads that the Agreement gives rise to a duty of good faith in contractual performance. This requires the parties to perform their contractual duties honestly, reasonably, not capriciously nor arbitrarily, with appropriate regard for the other party's interests. FNNND pleads that the Yukon government breached this duty by failing to act honestly and in good faith, by issuing the decision document approving the Project activities before the BRLUP was completed, instead of after, as contemplated by the Agreement. FNNND further pleads that all development projects in the planning area should be treated consistently with the terms of the Agreement.

[88] The Yukon government argues that this declaration should be struck because:

a) FNNND does not plead any facts to support its allegation that the Yukon government failed to act honestly or knowingly deceived FNNND about matters related to the Agreement;

b) FNNND does not point to a discretion in the contract that was not exercised in good faith;

c) even if there were a broad duty of contractual good faith (which Yukon denies), it does not extend to negotiations or once a contract is at an end; and

d) there is no contractual relationship between the Yukon government and Metallic Minerals so no contractual duty of good faith may be found owing.

[89] FNNND relies on the Supreme Court of Canada statement in *Bhasin v Hrynew*, 2014 SCC 71 at para. 63:

> … there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. … [It requires] that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

[90] The Supreme Court of Canada further stated in that case that one of the types of situations in which a duty of good faith performance has been found to exist is "where one party seeks to evade contractual duties" (*Bhasin*, para. 47)*.*This situation was further explained in *CivicLife.com Inc v Canada (Attorney General)*, [2006] OJ No 2474 (ONCA) at para. 49, as

> … engaging in conduct not strictly prohibited by the letter of the terms of their agreement but that has the effect of defeating rights under the agreement. …

[91] FNNND's pleading that Yukon acted arbitrarily and capriciously by approving the YESAB recommendation to proceed with the Project because it was inconsistent with the obligations in the Agreement as they relate to other projects within the same planning area, is arguably a foundation for a finding of breach of the contractual duty of good faith performance. There is an argument that the decision document had the effect of defeating the objectives set out in s. 1(e) of the Agreement.

[92] Given my acceptance that FNNND has an arguable case on this basis, it is not necessary at this stage of an application to strike for FNNND to point to a contractual discretion that was not exercised in good faith. Nor is there a need to consider the

Yukon government's argument at this stage that contractual good faith does not extend to negotiations or once a contract is at an end. Finally, it is not necessary for there to be a contractual relationship between the Yukon government and Metallic Minerals in order for FNNND to argue that the decision document about the Project was a breach of the Agreement. The issue on this application to strike is the effect of the approval of the Project activities on the good faith performance of the Agreement between the Yukon government and FNNND. No contract with Metallic Minerals is required for this determination. All of these arguments of Yukon government may be made during argument on the merits of this petition.

Such further and other relief as this Court deems just

[93] The Yukon government in its application seeks to strike this claim in the petition. However, it provides no argument as to why. As a result I will not address it.

Conclusion

[94] FNNND's allegations in the petition that are challenged by the Yukon government are all available at law and are supported by the material facts pleaded. While some of the Yukon government's arguments raised here may be relevant on the merits of the hearing of the petition, they are not persuasive for the purpose of meeting the legal tests on an application to strike. The application is dismissed.

[95] Costs may be spoken to in case management if agreement is not possible.

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DUNCAN C.J.