SUPREME COURT OF YUKON

Citation: *Yukon Big Game Outfitters Ltd. v Yukon (Government of)*, 2021 YKSC 51

Date: 20210928
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

Counsel for the petitioner — Vincent Larochelle

Counsel for the respondent — Elaine Cairns

REASONS FOR DECISION

Introduction

[1] This is an interlocutory application by the respondent Government of Yukon (Minister of the Environment) ("Yukon government") to strike certain affidavit evidence filed by the petitioner, Yukon Big Game Outfitters Ltd. ("YBGO"). Two affidavits were filed in support of the petition, which is an application for judicial review of two government decisions to establish a quota of zero for the hunting of the Finlayson caribou herd in YBGO's outfitting concession during the 2019-20 and 2020-21 seasons.

[2] The key question raised by this interlocutory application is whether admission of the affidavit evidence is consistent with the limited supervisory jurisdiction of the Court in a judicial review (*Air Canada v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 ("*Air Canada*") at para. 39). A secondary determination is the application of the general principles and rules on the content of affidavit evidence.

Background

[3] Since the 2012-13 hunting season, YBGO has held and operated outfitting concession area #20. It is located in south-central Yukon in and around the traditional territory of the Ross River Dena Council ("RRDC"). YBGO offers hunts to clients for caribou, along with other game. The *Wildlife Act*, RSY 2002, c 229, regulates the operation of outfitters in part through the issuance of annual operating certificates. These certificates can contain conditions that establish quotas to limit hunting of certain species of wildlife for that outfitter. Over the years YBGO has held the concession, they have enjoyed three or four-year quotas for hunting Finlayson herd caribou that work out to approximately seven caribou per year, with the possibility to hunt more in one year, as long as the total multi-year quota is not exceeded. The Minister's decisions to establish a quota of zero for hunting caribou from the Finlayson herd for the 2019-20 and 2020-21 seasons resulted in this underlying application for judicial review.

[4] The process for establishing quotas of game for outfitters is at issue in this underlying application. It is not necessary or appropriate to go into further detail at this time.

[5] The record before the decision-makers was filed by Yukon government for the underlying application, through affidavits from Matt Clarke and Joanne Flinn.

[6] The grounds for the YBGO application for judicial review are relevant because of YBGO's argument that they justify some of the affidavit evidence they seek to introduce. YBGO alleges the decisions are unreasonable because they were made for irrelevant or improper purposes; failed to consider relevant factors; failed to address issues raised by the petitioner and the Concession and Compensation Review Board ("CCRB"); and are inconsistent with the *Wildlife Act*. YBGO further alleges the Minister erred in holding she had no jurisdiction to consider compensation for the reduction in quota; she failed to consider and apply the Guidelines to Establish Outfitter Quotas (the "Guidelines") when YBGO had a legitimate expectation they would be applied; she erred in interpreting the interaction among the Guidelines, the *Wildlife Act* and the Umbrella Final Agreement. Finally, YBGO says the decisions were procedurally flawed because YBGO did not have a hearing with the Minister or other officials; Yukon government did not form an *ad hoc* committee; and the Minister provided insufficient reasons for her decision.

[7] The Yukon government notes that the record on an application for judicial review is limited to the record before the original decision-maker, with some exceptions. The government says the exceptions do not apply to the paragraphs in dispute in this case, and the petitioner has interpreted them too broadly. The Yukon government also argues that the affidavits contain expert opinion, argument, and statements of information and belief that do not include the source, all of which is prohibited by the jurisprudence or Rule 49 of the *Rules of Court* of the Supreme Court of Yukon.

[8] YBGO has agreed to remove some or all of the disputed paragraphs in the affidavits after discussion with counsel and hearing oral arguments. However, there remain multiple paragraphs at issue. YBGO's main arguments are that the disputed

paragraphs fall under one or more of the exceptions to the original record recognized in the jurisprudence, and/or that they are necessary to support one or more of the grounds of the application for judicial review.

Issues

[9] Are the disputed paragraphs in the affidavits part of the record before the decision-makers, or do they fall under a permissible exception to limiting evidence to the original record? Does the content of the disputed paragraphs comply with the requirements for affidavits set out in Rule 49(12) and the jurisprudence?

Legal Principles

Limitation of evidence to the record before the decision-maker and basis for exceptions

[10] A determination of the admissibility of evidence must be considered in the context of the supervisory role of the Court in a judicial review, in contrast to the fact-finding and decision-making role of the first level decision-maker. The recognition of the differing roles of administrative decision-makers and courts is "rooted in larger values that continually manifest themselves in the administrative law cases. These values – the rule of law, good administration, democracy and the separation of powers – animate all of administrative law" (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 ("*Bernard*") at para. 18).

[11] The Court's role in a judicial review and its effect on admissibility of evidence was set out clearly by the Federal Court of Appeal in *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 at paras. 17-19, and adopted in *Connolly v Canada (Attorney General)*, 2014 FCA 294, *Delios v Canada (Attorney*

General), 2015 FCA 117 ("*Delios*") at paras. 41-42, and *Bernard*. Although decided by the Federal Court of Appeal in the context of the *Federal Courts Act*, R.S.C., 1985, c. F-7, the principles in *Access Copyright* are applicable here:

> [17] …it is for the [administrative decision-maker] - not this Court – to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy…
>
> [18] Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the [administrative decision-maker's] decision. **This Court can only review the overall legality of what the [administrative decision-maker] has done, not delve into or re-decide the merits of what the [administrative decision-maker] has done.**
>
> [19] Because of this demarcation of roles between this Court and the [administrative decision-maker], this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. **Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the [administrative decision-maker]. In other words, evidence that was not before the [administrative decision-maker] and that goes to the merits of the matter before the [administrative decision-maker] is not admissible in an application for judicial review in this Court.** As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-5 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." …[emphasis added]

[12] The Court of Appeal for British Columbia summarized the determination of the admissibility of affidavit evidence on judicial review as follows in *Air Canada* at para. 39:

> … Evidence that was before the tribunal is clearly admissible before the court. Evidence that casts light on the manner in

> which the tribunal made its decision will also be admissible within tight limits. Factual evidence setting out the procedures followed by the tribunal, or providing information showing that the tribunal was not impartial will also be admissible.

[13] The Court of Appeal for British Columbia set out their preference for applying a principled approach to the admissibility of affidavit evidence, rather than categorizing exceptions and applying them without reference to context. In their view, understanding the context of each case is necessary in making the admissibility determination. The courts have consistently set out three categories of exceptions, grounded in the rationale for the general rule and administrative law values. Courts have also noted the exceptions are not closed.

[14] A review of the recent jurisprudence not only suggests that courts should exercise a cautious approach to the categorization of exceptions, but also that these exceptions are limited by the administrative law values and the distinct roles of the courts and administrative decision-makers.

[15] With these caveats in mind, I will describe the three stated exceptions.

a) Background information - It consists of:

> … non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. … [R]eviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy - that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule (*Delios,* para. 45).

Background information is intended to be a summary or highlight of the evidence in the record that is relevant to the merits of the decision before the decision-maker. It is not new information.

b) Evidence not in the record - An affidavit may be admissible in a judicial review if it sets out the complete absence of evidence in a certain area on the record. An example of the use of this exception is where an administrative decision is alleged to be unreasonable because the decision-maker relied on a finding of fact not supported by any evidence.

c) Evidence relevant to natural justice, procedural fairness, improper purpose, or fraud - If there is any evidence in these areas that was not available at the time of the original administrative decision and does not interfere with the role of the decision-maker as merits decider, then it may be admissible on review. An example of this expressed by the court in *Bernard* is where evidence emerges after the fact that the decision-maker had accepted a bribe before issuing their decision.

Rule 49(12) and law applicable to affidavit content

[16] This Rule of Court provides that affidavits may include only what the affiant would be permitted to state in evidence at trial. An exception to this is an affidavit may contain information and belief of the affiant, as long as the source of that information is given, on an interlocutory application, or by leave of the court at trial or in chambers.

[17] A basic rule for affidavit evidence is that a deponent should state relevant facts only, without gloss or explanation (*Duyvenbode v Canada (Attorney General),* 2009 FCA 120). If opinion is to be given, the affiant should be qualified as an expert to give the opinion and its foundation should be provided (*Ross River Dena Council v The*

Attorney General of Canada, 2008 YKSC 45 ("*Ross River Dena Council*") at para. 12, quoting from *Johnson v Couture*, 2002 BCSC 1804 at paras. 13-16). This Court at para. 11 of the *Ross River Dena Council* decision also adopted the finding in *Chamberlain v the School District No. 36 (Surrey)*, [1998] BCJ No. 29232 (SC) at para. 28: "Personal opinions or a deponent's reactions to events generally should not be included in affidavits". The court in that case further stated "argument on issues from deponents serves only to increase the depth of the court file and to confuse the fact-finding exercise." Argument should not be submitted in the "guise of evidence".

[18] A distinguishing factor of the *Ross River Dena Council* case is that it was a civil action, not an application for judicial review. The judge was not exercising a supervisory role, but instead was engaged in a fact-finding function at the first instance. Hence the reference to argument on issues confusing the fact-finding exercise is not entirely relevant here. However, the limitations of evidence in a judicial review to the record before the original decision-maker enhances the effect in this case of the above principles expressed in *Ross River Dena Council* by the court of first instance. If those limitations on opinion and argument in an affidavit apply to the evidentiary record before the original decision-maker, they are even more applicable in the supervisory context where new evidence is generally impermissible.

Application of Legal Principles to the Affidavit Evidence

[19] I will address each affidavit in turn. I will first set out the disputed paragraphs which YBGO has conceded may be fully or partially removed. I will then set out the paragraphs in dispute, and the objections raised by Yukon government. I will provide my

rulings on the disputed paragraphs, on a sequential basis, grouped if appropriate. The rulings are based on the legal principles applied in context.

Affidavit of Shawn Raymond

[20] There are many paragraphs in the Shawn Raymond affidavit to which the Yukon government objects, in some cases for more than one reason.

[21] YBGO counsel conceded in advance of the hearing of this application that paragraphs 22, 27, 28, 58, 64, 67, 68 and 69 can be removed.

[22] At the hearing YBGO counsel further conceded that the following paragraphs or parts of paragraphs could be amended or removed:

- paragraph 17 – substitute “increasing” for “exploding”;
- paragraph 18 – remove “significantly” and “dramatically stabilized since 2015” in the second sentence;
- paragraph 23 – remove “There are two key concepts in understanding a herd population stability”;
- paragraph 46 – remove “and utter”;
- paragraph 54 – add “partially” before “agreed with my submissions”;
- paragraph 55 – remove quotation marks around “confirmed”;
- paragraph 57 – remove “and no reasonably necessary management actions have been taken in this respect for decades”;
- paragraph 59 – remove “of zero”;
- paragraph 63 – remove “Somewhat ironically”;
- paragraph 70 – remove “on a seemingly permanent basis”;
- paragraph 73 – remove completely;

- paragraph 77 – remove third sentence – “It is therefore surprising that a multi-year quota was not granted despite extensive attempts at cooperation with RRDC”;
- paragraph 84 – remove “this is a convenient excuse”.

[23] Yukon government counsel agreed at the hearing to withdraw their objection to paragraphs 81 and 82.

[24] The following sets out the paragraphs at issue, briefly states the objection, and my ruling:

- Paragraph 5: Objection – i) irrelevant to dispute; and ii) information and belief without stating source.

  Ruling: This is legitimate background information. It describes the location and size of Concession area #20, as well as its accessibility and remoteness. It is an orienting statement to introduce YBGO. As it is written by Shawn Raymond, one of the owners and operators of the YBGO, it is implicit that this information is known to him.

- Paragraphs 7-13 but not paragraph 12: Objection -i) irrelevant to dispute; ii) paragraph 13 is opinion and argument.

  Ruling: I agree that paragraphs 7, 9, and 10 are irrelevant to the dispute before the Court and it is not apparent that they contain information that was in the record before the original decision-maker. They shall be struck. However, paragraphs 8, 11, and 13 contain background information that includes information that was either in the record or known to the decision-maker and is useful to the Court in understanding the nature of YBGO’s

relationship with RRDC, and YBGO's activities of mountain caribou hunting.

Paragraph 13 is objected to on the basis of opinion and argument because of its statement that YBGO has a long-standing reputation for offering mountain caribou hunts to its clients for many decades. This is a statement of fact, not opinion or argument. It is orienting background information about YBGO.

- Paragraphs 14-15: Objections -i) irrelevant to dispute; ii) information and belief without stating the source; and iii) evidence going to the merits of the decision under review.

  Ruling: There is a contradiction in these objections. It is unclear how the paragraphs can be at the same time irrelevant to the dispute and evidence going to the merits of the decision under review. In my view, they are relevant to the dispute. Paragraph 14 is appropriate background information and expected knowledge of the owner-operator affiant of the game in his concession area. Paragraph 15 appears to be on information and belief without the source stated. This information was part of the record before the decision-maker. I find it is appropriate factual background information that assists in understanding the nature of the dispute. It should include the source of the information and I will grant leave under Rule 49(12) to allow this paragraph to remain and for an amendment to provide the source of the information.

- Paragraphs 16-26: Objections – i) statements of information and belief without stating the source; ii) evidence going to the merits of the decision under review; iii) paragraphs 17-19 and 21-25 provide opinion and argument, possibly expert opinion; iv) paragraph 26 duplicates information already on the record.

  Ruling: Paragraphs 16, 17 (with amendment set out above in paragraph 22), 18 (with amendment set out above in paragraph 22), and 20 contain appropriate background information that assists the court in understanding the nature of the dispute. The concessions by YBGO counsel in paragraphs 17 and 18 removed the argumentative aspects. I agree that they set out information without stating the source. I will grant leave under Rule 49(12) to allow the paragraphs and set out the source of this information. While it may be evidence going to the merits of the decisions under review, Yukon government makes no submission that this evidence was not before the decision-maker and it appears in the record before the Court. As noted above in the quote in paragraph 11, both factors must exist for part of an affidavit to be struck on this basis.

  Paragraph 19 is worded in a way that can be interpreted as argument – that is, the trapping of wolves by local trappers and hunting of grizzly bears by YBGO in the Finlayson caribou calving grounds contributed to the stabilization of the herd. Although counsel for YBGO indicated that his intention was to state a correlation among these activities and not assert

cause and effect, its placement in the affidavit and its ambiguous wording suggests argument. It shall be struck on that basis.

Paragraph 21 is argument. It is an interpretation of the caribou herd population estimates of 2007 and 2017. It shall be struck.

Paragraph 23 without the first sentence is appropriate background information and not opinion evidence. It requires slight redrafting as the new first sentence is an incomplete sentence.

Paragraphs 24 and 25 select certain information from and present argument about the government's "Scientific Guidelines for the Management of the Finlayson Herd." These Scientific Guidelines are part of the record. Arguments in these paragraphs interpreting the Scientific Guidelines that are connected to the grounds for judicial review can be made in the outline and/or final oral submissions. These paragraphs shall be struck.

Paragraph 26 is appropriate background information that helps to situate the dispute in context. It should specify the source of the information beyond "Figures released by the government", however. Leave is granted under Rule 49(12) to allow this paragraph to remain and to add the source.

- Paragraphs 30, 31: Objection – duplicates information before the Court as part of the record.

  Ruling: This is helpful background information. Necessarily, background information duplicates the record, as it summarizes or highlights

information in the record. Here, it is presented appropriately in a neutral way.

- Paragraphs 32, 33: Objection - opinion and argument. Paragraph 33 is irrelevant.

  Ruling: I agree that paragraph 32 is advocacy because it presents an argument about how the government and industry recognize the importance of multi-year quotas. It shall be struck. Paragraph 33, however, is a statement of fact of how far in advance hunts are planned and the effect of multi-year quotas. It is background information to the dispute, relevant, and is presented in a factual way.

- Paragraph 34: Objection – irrelevant to dispute.

  Ruling: I agree that this paragraph does not appear relevant to the dispute and is not helpful background information. It shall be struck.

- Paragraph 35: Objection – i) argument and opinion; ii) irrelevant to dispute.

  Ruling: I agree that this paragraph is argument because it discusses damages to YBGO resulting from cancellation of hunts implicitly as a result of no multi-year quotas. It shall be struck.

- Paragraphs 36-45: Objection – irrelevant to dispute.

  Ruling: These paragraphs set out briefly the process starting in 2015 of the granting of quotas to YBGO for caribou each year. The facts are presented in a neutral way, not as opinion or argument. These paragraphs, while not directly relevant to the decisions being reviewed (for

the 2019-20 and 2020-21 seasons), provide useful background information and context to the Court to enhance the understanding of the current dispute. There is no suggestion that this information is not part of the record before the original decision-maker.

- Paragraphs 46-48: Objection – opinion and argument.

  Ruling: Paragraph 46 – the phrase "to my complete [and utter] surprise" is argument and shall be struck. YBGO counsel already agreed to remove "and utter". The rest of the paragraph can remain.

  Paragraph 47 – This paragraph is argument because it sets out YBGO's interpretation of one aspect of the Yukon government's wildlife management decision-making, that is, harvesting by RRDC. The government's decision-making process is described in the record before the Court, and affidavit evidence singling out YBGO's interpretation of one aspect of it is inappropriate. It shall be struck.

  Paragraph 48 – It is unclear what "this decision" in the first sentence refers to – if it is the letter of July 30, 2018, this is not the decision under review, making this paragraph irrelevant. Yukon government's alleged lack of consultation with YBGO or alleged failure to request submissions from them may be relevant for YBGO's legitimate expectations argument in the process leading up to the decisions at issue. But these process steps and the timing and extent of YBGO's participation should be in the record before the decision-maker and this Court. YBGO can make arguments about the Yukon government's alleged failure to meet legitimate

expectations from the process set out in the record. The second sentence of paragraph 48 is clearly argument. The whole paragraph shall be struck.

- Paragraph 49: Objection – irrelevant.

  Ruling: Given my ruling that paragraphs 8 and 11 remain in the affidavit, this paragraph is now not relevant or necessary to be included. It shall be struck.

- Paragraph 50: Objection – i) argument and opinion; ii) statement of information and belief without the source; and iii) information that was known before the decisions were made and could have been communicated to the decision-maker.

  Ruling: I agree with the Yukon government that these statements appear to set out information and belief obtained from unspecified sources within RRDC. Without these sources, the statements read as though they are the opinion of the affiant. Setting out the sources of the information and belief would make this paragraph less objectionable, but it does not address the third objection. I agree with the Yukon government that this is information relevant to the decisions under review that could have been part of the record before the original decision-maker. Assuming it was not part of the record before the original decision-maker, then it is new evidence generally impermissible on judicial review. It is not covered by the three recognized exceptions. It is not background information as it is not part of the record. The paragraph does not refer to an absence of evidence on the record; instead, it provides new substantive evidence that may go to

the merits of the original decision. It may be relevant to YBGO's argument about procedural fairness, but it could have been provided as part of the record before the original decision-maker. If it was part of the record before the decision-maker, then it is not necessary to be included in an affidavit, and can be referred to in argument. For these reasons, paragraph 50 shall be struck.

- Paragraph 51: Objection – i) argument and opinion; ii) evidence going to the merits of the decision under review but was not before the decision-maker.

  Ruling: I agree with the Yukon government that given the date of the meeting where this information was communicated – the fall of 2020 – it is not appropriate for this Court to admit it for the purpose of judicial review of decisions taken in 2019 and earlier in 2020. This paragraph shall be struck.

- Paragraphs 52, 53: Objection – duplicates information already on the record.

  Ruling: These paragraphs explain the process that occurred in a neutral way. They help the Court understand the process. They are background information and can remain in the affidavit.

- Paragraph 54: Objection – argument and opinion.

  Ruling: I agree with the Yukon government that the current wording is an interpretation of the CCRB's conclusion and constitutes argument. The

phrase “agreed with my submissions” and the word “accordingly” shall be struck. The rest of the sentence can remain.

- Paragraph 55: Objection – duplicates information already on the record in a non-neutral way.

  Ruling: YBGO counsel agreed to remove the quotation marks around “confirmed”, which he explained was intended to be a quote from the *Wildlife Act*. With that change, any ambiguity about the meaning of the quotation marks is removed. The paragraph is helpful background information to explain the process giving rise to the dispute.

- Paragraphs 56, 57: Objection – argument and opinion.

  Ruling: I agree with the Yukon government that paragraph 56 constitutes argument that may be made in the outline or in oral submissions on the basis of the evidence on the record of the process followed. It shall be struck. Paragraph 57, with the removal of the last phrase as conceded by YBGO, can remain, ending with “subsistence harvest”.

- Paragraphs 59, 60: Objection – duplicates information already in record and wording not entirely accurate.

  Ruling: With the removal “of zero” as conceded by YBGO counsel, paragraph 59 can remain. It is background information that is part of the record and is helpful to assist the Court in understanding the process. If Yukon government counsel disagrees with the wording used (such as “issued”), it can respond in a reply affidavit. Paragraph 60 explains a

procedural step in a neutral way, is helpful to the Court as background information, and can remain.

- Paragraphs 61-72 (not paragraphs 64, 67, 68, 69): Objection – i) argument and opinion; ii) evidence going to the merits of the decision under review - paragraphs 67, 68.

  Ruling: Paragraph 61 – The first two sentences can remain as they are factual and provide helpful background information allowing the Court to understand the process. The third sentence beginning with “This was a one-way hearing…” and ending with “this was a driving force for a quota” is the opinion of the affiant about the government’s motivation for the quota and speculates about information the government did not have. The third sentence shall be struck.

  Paragraph 62 – This is a statement about what YBGO did during the process of establishing a quota. It references their power-point presentation that is part of the record. It is helpful background information and can remain.

  Paragraphs 63, 65, 66, 70, 71, 72 – YBGO counsel argues that these paragraphs, especially 70-72, set out a foundation for its ground of judicial review of the absence of procedural fairness. In my view, these paragraphs are all argument or opinion. They interpret the Scientific Guidelines, or they set out the impact of the process or the decisions on YBGO. The facts necessary to make the arguments are part of the record

and can be made based on the material in the record. These paragraphs shall be struck.

- Paragraph 74: Objection – duplicates information already on the record.

  Ruling: This paragraph again describes a step in the process in a neutral way that is helpful background information to the Court. The word "Instead" at the beginning of the paragraph shall be struck for clarity (given the removal of paragraph 73) and because it is argument.

- Paragraphs 75, 76, 77, 78: Objection – argument and opinion.

  Ruling: These paragraphs are also argument. They set out the impressions, worries, speculations, concerns of YBGO and impacts of the decisions on YBGO. They are not appropriate for affidavit evidence on a judicial review. They shall all be struck, recognizing that YBGO conceded the removal of the second sentence of paragraph 77.

- Paragraphs 83, 84: Objection – argument and opinion.

  Ruling: Paragraph 83 is argument as it is YBGO expressing concern of the outfitting community about the procedure of the quota establishment. It shall be struck.

  Paragraph 84, without the final sentence, is a statement of fact about YBGO's understanding of the reason for certain actions not taken by the government and is background information about the process. It can remain.

Affidavit of Shawn Wasel

[25] This is an affidavit from the executive director of the Yukon Outfitters Association ("YOA"). His involvement at the first level of decision-making was to appear before the CCRB hearing to provide assistance to YBGO.

[26] The Yukon government objects to all of the Shawn Wasel affidavit. Its objections are based on similar arguments as above: opinion and argument (paragraphs 16-38); statements of information and belief without stating the source (paragraphs 17-19, 21-26, 28-33); irrelevant to the dispute (paragraphs 5-14); duplication of information (paragraphs 8 and 15).

[27] YBGO argues that this affidavit situates the Shawn Raymond affidavit and this dispute into context. It provides a factual background to the development of the Guidelines. This is information not known to Shawn Raymond. YBGO argues that the Minister should have considered these Guidelines in making her decisions but did not. The information provided by Shawn Wasel is evidence of what should have occurred in this case, but did not. It provides a factual backdrop for YBGO's argument that the Minister's decision failed to meet the legitimate expectations of YBGO because they deviated from the way quotas had always been established.

[28] **Ruling**: I agree with the Yukon government in this case that the entire affidavit of Shawn Wasel should be struck. I do not accept YBGO's argument that this is background information to support the legitimate expectations argument of the process and principles they say should have been followed by the Minister before making her decision but was not. This affidavit is not necessary for YBGO to make this argument. The Guidelines are part of the record before the original decision-maker and this Court.

YBGO can argue from the existing record that the Guidelines were not followed. The background set out in the Shawn Wasel affidavit is not relevant to the review of the decisions concerning YBGO. All parts of the affidavit that refer to outfitters in general and not YBGO is irrelevant. Evidence of other permitting decisions made by the Minister is irrelevant to the decisions at issue before the Court, and is introduced for the purpose of argument. The history of the development of the Guidelines may be helpful to the applicant's argument that the Guidelines were not followed. But, again, these arguments can be made on the basis of the Guidelines themselves and the documents in the record accompanying them.

[29] In sum, this affidavit is an example of the type of evidence that is impermissible because it is incompatible with the supervisory role of the Court in a judicial review. It supports an approach of asking this Court to substitute its decision for that of the original decision-maker. This is specifically and clearly not the task of this Court. This Court's task is to review the decisions to ensure they were made legally and fairly.

[30] As a final comment, both the Court of Appeal for British Columbia and the Federal Court in their decisions in this area reference the acceptability of affidavit evidence on a judicial review setting out the administrative decision-making process in a neutral, factual way, without spin or advocacy. Often this is done by the party whose process is being challenged, as they will have the most knowledge. In this case, that would be the Yukon government. Here, the Court is receiving a description of parts of the process through the remaining paragraphs in the Shawn Raymond affidavit. It could be helpful for the Yukon government to set out the entire process leading up the decisions, in keeping with the parameters set out in the jurisprudence and the Rules.

Conclusion

[31] To conclude, the following paragraphs in the Shawn Raymond affidavit are struck in their entirety: 7, 9, 10, 19, 21, 24, 25, 32, 34, 35, 47, 48, 49, 50, 51, 56, 63, 65, 66, 70, 71, 72, 75, 76, 77, 78 and 83. Paragraphs 46, 54, 61 and 74 are struck in part in accordance with the reasons above. The applicant is given leave to amend paragraphs 15, 17, 18 and 26 to indicate the source of information and belief.

[32] These changes are in addition to the concessions made by YBGO counsel, and Yukon government counsel, as set out in paragraphs 21, 22, and 23 of these Reasons.

[33] Costs may be spoken to if the parties are unable to agree.

_____

DUNCAN C.J.