

# SUPREME COURT OF YUKON

Citation: *837386 Yukon Inc. v Yukon (Government of)*  
2023 YKSC 11

Date: 20230308  
S.C. No.: 22-AP010  
Registry: Whitehorse

Between

837386 Yukon Inc.

Petitioner

and

Government of Yukon and Yukon First Nation Chamber of Commerce

Respondent

Before Justice A. Kent

Counsel for the petitioner

Geoff Bowman

Counsel for the respondent, Government of Yukon

I.H. Fraser

Counsel for the respondent, Yukon First Nation  
Chamber of Commerce

Mark E. Wallace  
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## REASONS FOR DECISION

### Introduction

[1] In February 2021, the Government of Yukon (“Yukon”) introduced a First Nations Procurement Policy (the “Policy”) in s. 11 of the Highways and Public Works

Procurement Policy. The objectives of the Policy were stated as:

11(1)(a) The Government is committed to:

- (i) Providing Yukon First Nations People with opportunities to participate in the Yukon economy and develop economic self-reliance as part of broader efforts to achieve equality of outcomes for Yukon First Nations People.

(ii) Ensuring Procurement processes are undertaken in accordance with the provisions of Yukon First Nation Final Agreements.

(iii) Advancing reconciliation, renewing the relationships with Yukon First Nations, and respecting treaty and Aboriginal rights and title, based on respect, cooperation, and partnership.

[2] The Policy also set out several Principles to guide decision-making and contribute to the success of the Policy. The Policy stated that there would be no changes to the Policy without first considering advice from Yukon First Nations about any proposed changes.

[3] The Policy can generally be described as providing benefits to Yukon First Nations Businesses (the “Businesses”) including bid value reductions for projects that the Businesses bid on.

[4] To take advantage of the bid reduction provisions, a business had to meet certain ownership requirements. The relevant provision in this case is in s. 1(2)(qq) – a corporation that has at least 51% of the corporation’s voting shares owned by a Yukon First Nation Person or an organization described in ss. 1(2)(qq)(i) or (ii). It goes on to say:

A Yukon First Nation Business seeking to be verified on the Yukon First Nation Business Registry will also be required to sufficiently prove that:

- (i) it is beneficially owned and actively controlled by one or more Yukon First Nations businesses or Yukon First Nation Persons; and
- (ii) the bona fide purpose of the business is to provide substantial benefits, whether financial or otherwise, to a Yukon First Nation business or Yukon First Nation Person.

Businesses that meet the above criteria will be listed on the Yukon First Nation Business Registry. The verification process timelines are subject to the complexity of the business application.

[5] The Yukon First Nation Chamber of Commerce (“YFNCC”) administers the Yukon First Nations Registry (the “Registry”). The Registry is identified in the Policy as set out above and in certain Yukon documentation that will be itemized below. The Petitioner, 837386 Yukon Inc. (“837386”), applied to have its name added to the Registry. 837386 applied because it thought that it needed to be on the Registry to qualify for the benefits of the Policy. Its application was refused, and it is that refusal which forms the basis of this review.

[6] There is a Project Funding Agreement between Yukon and YFNCC (the “Agreement”). The full document was never provided to 837386 so was not part of this application. Yukon only provided those portions of the Agreement from pages 16-18 and some appendices so it is not possible to determine if the missing portions disclose any objectives for the agreement. An appendix of the Agreement begins with the statement:

The Government of Yukon (“YG”) recently launched the Yukon First Nations Business Registry (the “Registry”) ...

[7] And then says:

YG and the Yukon First Nations Caucus has [sic] identified Yukon First Nations Chamber of Commerce (“YFNCC”) as a strategic partner to take on responsibility for administering the Registry and managing components of the verifications process.

[8] It also says that the business registry process and verification guide may be updated through mutual agreement of the Executive Director of the YFNCC and the Director of the Procurement Support Centre.

[9] The roles and responsibilities of YFNCC and Yukon are itemized in the Agreement. YFNCC is responsible for the administration of the Registry and the verification process. It is responsible for confirming whether the Businesses are following the requirements of the Registry. Any communications about the Registry require the final approval of Yukon and Yukon must approve any proposed changes that will impact the role of the Registry and the verification process. Registry staff will have computer user accounts through Yukon. Yukon will establish the Yukon First Nation business verification guide and “confirm via the Registry that businesses meet the definition of YFN Business when applying Yukon First Nations Participation Measures described in” s. 11 of the Policy.

[10] The Agreement goes on to say the following:

In order for a business to qualify for Yukon First Nation Participation Measures described in GAM 2.6 Section 11, related to YFN business ownership and/or location, they must be verified and listed on the Registry prior to closing of the procurement.

[11] Mr. Zaccarelli received two letters from the Minister of Highways and Public Works. The first one, dated February 10, 2022, says in part:

... That feedback has focused on ensuring that the verification and review process properly designates Yukon First Nation businesses and aligning the interpretation of the definition with the goals and intent of the First Nation Procurement Policy. Yukon Government has begun work with our Yukon First Nation partners through the Technical Working Group to review the business verification process.

The Yukon First Nation Business Registry is the body that verifies and lists Yukon First Nation businesses. As this is a new process for everyone, there may be delays in processing some applications to the Registry. ...

[12] The second letter is dated March 3, 2022. It says in part:

... As you would have been recently notified by the Yukon First Nation Chamber of Commerce (YFNCC), the Yukon government has approved an update to the Yukon First Nation Business definition. ...

...

It is important that the Yukon Government ensures that Yukon First Nation businesses are being thoroughly verified.

...

[13] In a document entitled Bid Value Reductions it says:

It is important to note that [i]f you own a Yukon First Nations business and you're interested in using bid-value reductions for ownership or location, you must be a verified business on the registry.

[14] On an information poster published by Yukon, it says in part:

If you are a YFN business you will need to be listed on the Yukon First Nations Business Registry to receive ownership or locations BVRs. When businesses apply to the Yukon First Nations Business Registry, they go through a verification process to confirm they are a YFN-owned business and their location. You do not need to be verified to receive BVRs for employing YFN labour.

[15] On another informational document, it says:

The registry supports the proper administration of the policy. Businesses must be in the registry in order to:

- apply for ownership and business location bid-value reductions;

...

[16] 837386 was incorporated in early 2021 by Nicholas Zaccarelli. He owns 75% of the shares and Mr. Paramjit Sidhu owns the remaining 25%. Mr. Sidhu is the owner of P.S. Sidhu Trucking Ltd. a well-established construction company in Yukon. Both are directors of 837386. There is a Unanimous Shareholders Agreement (“USA”) providing

that decisions of 837386 are to be by consensus, but if there is a disagreement, Mr. Zaccarelli has a deciding vote. Mr. Zaccarelli is a member of the First Nation of Na-Cho Nyak Dun, confirmed through his Certificate of Indian Status issued in December 2020.

[17] 837386 applied to be included on the Registry in December 2021. Throughout much of 2022, Mr. Zaccarelli followed up with employees and cabinet members of Yukon and then with Mr. Mark Koepke about the application. On June 23, 2022, Mr. Koepke sent an email to Mr. Zaccarelli that said that 837386's application to be put on the Registry was denied because 837386 could not be verified as a Yukon First Nations Business as defined by the Policy. Mr. Zaccarelli wrote back asking for a 'debrief', to which Mr. Koepke replied that he would "pull together a written debriefing with the reasons for the decision". He also advised that he had the option to appeal the decisions and said that he would provide Mr. Zaccarelli with information about the process. He said that the first step would be the debriefing. At no time was Mr. Zaccarelli advised that he did not have to be on the Registry to qualify for the bid value reduction.

[18] On July 7, 2022, Mr. Koepke sent a written document, entitled 'debrief on Rejected Application – 837386 Yukon Inc.'. Mr. Zaccarelli had also asked for the file materials. Mr. Koepke refused to provide anything else but said he was prepared to answer questions or provide clarification over the phone or in writing.

[19] Counsel for 837386 asked Mr. Koepke for material from the file and for information about the appeal process. Mr. Koepke responded by indicating that further communication should be to Yukon's Monitor and Review Secretariat. In response to that request, the Procurement Advisor with Yukon's Highways and Public Works

Procurement and Support Centre advised that while an appeal process had been contemplated by both Yukon and the YFNCC, it had become difficult to establish a fair and efficient process. As a result, the Secretariat advised that it was not possible for 837386 to appeal but it could submit a new application.

[20] Counsel repeated his request for information and documents related to the application and the implementation of the Policy. No documents or information were forthcoming. During this same time period Mr. Zaccarelli received a letter from the President of YFNCC, Ms. Michelle Kolla. Ms. Kolla said that since there was no appeal process in existence, Mr. Zaccarelli could submit additional information. The Board of Directors of YFNCC would strike a panel that was not involved in the original application to consider the application as a fresh application.

[21] During the production of documents in preparation for this review, YFNCC produced a document entitled YFNBR Application Review – Comprehensive. It is in the form of a checklist. In that document, in the section on Beneficial Ownership, it states that:

YFNCC interprets “beneficially owned” to mean that the Yukon First Nation owners receive and enjoy the benefits that are commensurate with their nominal share of legal ownership. In other words, the majority of benefits related to ownership, financial or otherwise, cannot accrue to non-Yukon First Nation owners or related entities when Yukon First Nations People are the legal owners of a majority interest.

[22] In the Analysis section, it first states that the percentage-based compensation in the USA:

re-enforces the perception that 837386 Yukon Inc. is not a business designed to perform construction work, realize a profit, and reward its owners through the distribution of net income in proportion to their respective shareholdings.

Rather, this company would appear to be primarily a mechanism through which to flow work to an actual construction company – presumably, P.S. Sidhu Trucking Ltd. ... This arrangement seems unlikely to reward Nic with an amount anywhere near equivalent to 75% of the net profit of construction work ...

[23] In the next paragraph it addresses the “unlikely event” that net income would be distributed to shareholders. It states that nothing in the USA prevents a declaration of dividend to Mr. Sidhu to the exclusion on Mr. Zaccarelli. It then says:

Of course, this could not be done without Nic’s consent as a director, but given the long and close relationship between the Zaccarelli and Sidhu families, as well as 837386 Yukon Inc.’s apparently total reliance on P.S. Sidhu Trucking Ltd. to complete construction work on its behalf, Nic’s compliance in such matters would seem all but guaranteed. ...

[24] The decision is a handwritten paragraph at the end of the document which says:

Upon the review of the assessment of the comprehensive Review, I concur that there is not enough evidence, proof or demonstration of a Yukon First Nation person(s) or entity receiving the benefits from the Yukon First Nations Procurement Policy.

I understand the applicant was asked for documents to evaluate the assessment and none were provided, I question why there is resistance. I understand the USA favours the minority shareholder and that demonstrates a lack of a true control. I would think it is reasonable that the applicant would have an investment in the company, other than in name only, by his own admission, the minority shareholder provided a shareholder’s loan to incorporate the business; the company has no assets nor a purchase agreement for equipment, which does not demonstrate building capacity.

With the review of facts and lack of demonstration and assets, I am declining the application. Mr. Zaccarelli may appeal YFNCC’s decision.

[25] The debrief is a longer typed document which begins with three definitions for ‘beneficially owned’, ‘actively controlled’ and ‘the bona fide purpose is to provide



substantial benefits'. It says that these interpretations have been informed "by ongoing discussions with the policy's stakeholders". The definition of beneficial owner is the same as set out in the Comprehensive Review and set out above. 'Actively controlled' is interpreted to mean that the Yukon First Nation owner controls the formal decision-making processes, controls the day-to-day management of capital, human and other resources that are essential to the operation of the business, and non-Yukon First Nations owners are constrained in their ability to control the business for purposes that primarily advance the interests of the non-Yukon First Nation owner.

[26] Finally, 'the bona fide purpose is to provide substantial benefits' is interpreted to mean that the potential motivations and subsequent actions of the owners strongly suggest that the realization of substantial benefits by the Yukon First Nations owner rather than the non-Yukon First Nations owner was the genuine and primary consideration for the business arrangement. Possible tests to prove this condition are that the business arrangement pre-dated the establishment of the Registry, the impetus to develop the business was clearly that of the Yukon First Nation owner, and evidence that the impetus to submit and complete the application to the Registry came from the Yukon First Nation owner.

[27] The debrief went on to say that 837386 met none of the criteria. It said that Mr. Sidhu would likely realize the majority of benefits from ownership and control. Due to 837386's lack of capacity in the heavy construction industry, 837386 would need to rely heavily on Mr. Sidhu's business. As a result, "YFNCC contends that the lion's share of financial benefits related to any contracts" would flow through to Mr. Sidhu and his company. It then lists 22 factors that it relied upon to come to this conclusion.

[28] Mr. Koepke was also concerned that in a bid that 837386 submitted, a large majority of the value was a subcontract to Mr. Sidhu's trucking company.

[29] Notes of a meeting between Mr. Koepke and Mr. Zaccarelli indicate that Mr. Zaccarelli had a somewhat vague understanding of the corporate structure of 837386, the USA and any competitive conflict between Mr. Sidhu's company and 837386. He also said that because of Mr. Sidhu's experience in the industry, he would probably defer to him on major decisions.

### **Position of the Parties**

[30] 837386 says that the decision to deny its registration on the Registry was unreasonable and the process was procedurally unfair. There is no formal delegation from Yukon to YFNCC but the documents show that to take advantage of the bid reduction benefits, a company must be on the Registry. 837386 was initially told that it could appeal the decision, but was then told that there was no appeal process because YFNCC was unable to create an appeal process that could be both fair and efficient. In terms of the reasons given, 837386 says that they give meaning to words that are inconsistent with their ordinary usage such as the definition of beneficial ownership; they made assumptions about how Mr. Zaccarelli would act in relation to Mr. Sidhu; they ignored the provisions of the USA; and the reasons contained speculation and conjecture.

[31] Yukon says that the decision not to put 837386 on the Registry was made by YFNCC, not Yukon. Yukon was not the decision-maker and did not delegate any decision-making power to YFNCC. Given that there was no delegation by Yukon to YFNCC, decisions of YFNCC, a voluntary association, are not reviewable.

[32] The passages in documents set out above that said that to qualify for the bid reduction benefits, an entity needed to be on the Registry, were put to counsel for Yukon. Counsel said that that was not the case. An entity could qualify for the benefits without being on the Registry. Since 837386 met the shareholding requirements, I asked Counsel why it did not qualify for the bid reduction benefits since it did not need to be on the Registry to qualify. The response was that there may be other reasons why 837386 may not qualify, but he was unable to identify these reasons.

[33] YFNCC also says that the decision is not reviewable. It cites a provision in the Policy that is the only avenue of review, the application of 837386 was incomplete and 837386 could apply again.

[34] Both Respondents said that the decision was reasonable.

### **Analysis**

[35] First, it is important to acknowledge the objectives of the Policy. Principles of equality and fairness have infused judicial decision-making for centuries. Now, as Canadians move along the path towards reconciliation, when addressing a dispute involving legislation or a policy such as we have here, the judicial reasoning process likewise needs to be infused with the need to address reconciliation in a meaningful way. I do so in this analysis.

[36] First Nation Peoples and Businesses are given benefits that are not available to other contractors and construction companies. It is for a good purpose – to ensure that they can fully participate in the economy of Yukon and receive substantive equality. Someone needs to ensure that only those who qualify can receive these benefits. The Policy sets out in broad strokes what those qualifications are. There will be a risk that unscrupulous people or businesses who do not qualify attempt to bypass the

qualifications. In this case, YFNCC was concerned about 837386 and whether it was, indeed, established to benefit Mr. Zaccarelli as opposed to using the Policy to benefit Mr. Sidhu's company. There is nothing wrong in engaging in such rigorous oversight, and in fact is necessary to maintain the legitimacy of the Policy.

[37] Both Yukon and YFNCC argue that the decision to refuse to place 837386 on the Registry is not reviewable because YFCNN is a voluntary organization. I agree that if it is a voluntary organization that has not been delegated the responsibility by Yukon to administer the Registry and if being on the Registry is not a prerequisite to qualifying for benefits under s. 11 of the Policy, then the decision is not reviewable (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26; *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22).

[38] That takes me to Yukon's counsel's position that in fact being on the Registry is not a prerequisite of qualifying under the Policy. It is hard to understand that position, considering the reference to the Registry in s. 1(2)(qq) of the Policy, the letters from the Minister, and the statements made in the informational materials that I have set out above. Without the requirement of being on the Registry, the only other qualification to be eligible for the benefits are the ownership requirements set out in s. 1(2)(qq) which 837386 meets. Since 837386 met the ownership requirements, why did Yukon not tell Mr. Zaccarelli not to spend his time with the Registry and concentrate on placing bids?

[39] 837386 makes two arguments. The first is that the process was not fair. I agree that it was not fair in two ways. First, given the discrepancy between the documentation and the position of Yukon's argument during trial, it is unclear what purpose the Registry serves.

[40] The second way it is unfair is the way the Policy was interpreted during the application process. First, YFNCC created a definition for beneficial ownership which is different than the ordinary meaning for that phrase. While there is nothing wrong with having a different definition, it needs to be clear to applicants. In saying this, I do not mean to criticize Mr. Koepke. He was given an unfinished process to work through and he did his best. However, applicants need to have clear rules to respond to before a decision is made. The fact that 837386 was first told that it had an appeal right, and then told that their only remedy (other than judicial review) was to reapply shows that the drafters were still trying to find a workable and fair policy. Likewise, there is a test of sorts set out to use in determining the bona fides of the business. Unfortunately, it is not set out anywhere that is publicly available to potential applicants. 837386 did not have that information in advance.

[41] The construction season in Yukon is short and the quicker that a policy that benefits First Nations people and businesses is put into place, the better it is to address the underlying objectives. However, the process had not been thought through sufficiently. Unfortunately, 837386 was caught in the process. The process was flawed and opaque and was not fair.

[42] Notwithstanding this finding, I propose to address the other issue, namely whether the decision to deny 837386's application was reasonable.

[43] Turning to the reasonableness of the decision, I have cited above what was said in both the handwritten reasons and the debrief. Unfortunately, both contain conjecture without any basis in fact. There is concern about 837386 not having any track record in construction. It is legitimate to examine that issue. It could mean that 837386 will always only be an empty shell benefitting someone who is not otherwise eligible under the

Policy or it could mean that it is a young company with a First Nation person who is starting out and learning the business. There is no evidence that in the case of 837386 it is the former and not the latter.

[44] Having found the process unfair and the reasons given unreasonable, the next step ordinarily is to provide a remedy. My inclination is to make a declaration that at least for a period of time, perhaps one year, 837386 is qualified to take advantage of the benefits of the Policy. Simply directing 837386 to reapply is not a remedy given the continuing opaqueness of the Policy and the uncertainty about whether it even needs to apply. I am reluctant to make a declaration without first having submissions from the parties. Accordingly, I direct that the parties provide me with argument on this issue. This can be done one of two ways. I am happy to receive written submissions, or we can have a virtual hearing. I will leave it to the parties to discuss what process is preferable. The parties will advise the Trial Coordinator no later than March 17, 2023, of the preferred method. If there is no consensus, we will have a virtual hearing.

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KENT J.