

SUPREME COURT OF YUKON

Citation: *Chance Oil and Gas Limited v Yukon (Energy, Mines and Resources)*,
2023 YKSC 4

Date: 202300116
S.C. No. 17-A0002
Registry: Whitehorse

BETWEEN:

CHANCE OIL AND GAS LIMITED

PLAINTIFF

AND

THE GOVERNMENT OF YUKON, DEPARTMENT OF ENERGY MINES
AND RESOURCES (OIL AND GAS BRANCH), AND THE MINISTER OF
ENERGY, MINES AND RESOURCES AS REPRESENTATIVE OF THE
GOVERNMENT OF YUKON

DEFENDANTS

Before Justice E.M. Campbell

Appearances:

Counsel for the plaintiff

Raymond Chartier,
Chase Holthe and
Oz Douglas
(by videoconference)

Counsel for the defendants

I.H. Fraser and
Kelly McGill

REASONS FOR DECISION

[1] At the case management conference of December 9, 2022, in this matter, I ruled on several issues opposing the parties with respect to the steps the Government of Yukon (“Yukon”) must take to fulfill its obligation to provide a further and better affidavit of documents (as ordered in my decision of September 1, 2021 (2021 YKSC 44)), as well as the scope of its document discovery obligations.

[2] Among other things, the parties disagree on the list of issues Yukon must apply to its document collection to determine what records are relevant and, therefore, must be included in its affidavit of documents and produced, subject to privilege. Chance Oil and Gas Limited (“Chance”) argues that Yukon must apply, at least, the list of issues it identified and submitted to the Court (see Appendix A).

[3] While Yukon agrees that some issues identified by Chance are relevant, it argues others are too broad and not relevant to matters in issue between the parties in this case.

[4] On December 9, 2022, after hearing the parties, I ordered that Yukon apply the following issues from Chance’s list to its collection of documents to determine relevance:

- 1a)-c);
- 2b);
- 3f), g), and i);
- 4a)-g). However, with respect to issues c) and d), Yukon does not have to include specific accounting materials, billings, invoices, etc. in its affidavit of documents.
- 5a)-c); and
- 6a).

[5] I reserved my decision on issues 3a)-e), h) and j) as well as issue 6.

Issue 3: The Moratorium

[6] Issue 3 pertains to records related to Yukon’s decision to impose a Moratorium on hydraulic fracturing in the territory including the process involving the Select Committee on hydraulic fracturing.

[7] Yukon submits that it should not have to include records that relate to issues 3 a)-e), h) and j) because they relate to policy considerations and the merits of Yukon’s policy decision to impose a Moratorium on hydraulic fracturing. Yukon submits these

issues are not relevant to the determination of Chance's remaining causes of action.

Yukon argues the Court of Appeal of Yukon (2021 YKCA 6 on appeal from 2021 YKSC 3, leave to appeal to Supreme Court of Canada dismissed August 4, 2022, [2022] SCCA No 32) struck Chance's cause of action in unlawful cancellation of its permits, and the matter before the Court is not a judicial review. Therefore, Yukon's motive, intent, or reasons for enacting the Moratorium are not relevant to matters in issue in this case.

[8] In addition, Yukon submits it should not be ordered to collect records on the issue listed at 3j) "Whether or not the Moratorium was used as a way to stop activity in Eagle Plain without cancelling Chance's permits" because this constitutes an allegation of bad faith or intentional misconduct that Chance did not plead in its statement of claim. Yukon submits this is important because there are costs implications for Chance if it were to specifically make and fail to prove such an allegation against Yukon.

[9] Chance relies on the recent decision of the Supreme Court of Canada in *Annapolis Group Inc. v Halifax Regional Municipality*, 2022 SCC 36 ("*Annapolis*"), to submit that Yukon's intent, motive, or reasons to impose the Moratorium on hydraulic fracturing, and its understanding of its actions (including whether Yukon proceeded in that manner to avoid paying compensation) are relevant to Chance's cause of action in *de facto* expropriation. Chance submits that, as a result, it does not have to specifically plead bad faith, fraud, or misfeasance in public office for intent or motive to have material relevance in this action. In addition, Chance submits it did specifically plead that the Moratorium was a way to stop activity in the Eagle Plain Basin without cancelling Chance's permits.

[10] Yukon submits that *Annapolis* is distinguishable because, in that case, the allegations are that the public authority (the Halifax Regional Municipality) intended to extract and did extract an advantage from its zoning decision regarding the plaintiff's lands (property) in that it added value to its park system. Also, it is alleged the public authority was promoting the lands at issue as a public park and treating the lands as part of its park system. Yukon submits that, in this case, there is no explicit allegation in Chance's statement of claim of any particular advantage Yukon intended to extract and extracted from the Moratorium.

[11] I agree to a large extent with Chance. In *Annapolis*, the majority of the Supreme Court of Canada held that the motive or intent of the public authority in regulating property is not an element of the test for constructive (*de facto*) taking. However, it also held that the public authority's objective, motive or intent is a relevant consideration or a "material fact" in that it may provide evidence that reveals a constructive taking has occurred:

[52] ... The public authority's intention is not an *element* of the test for constructive takings at common law. Again, the mischief addressed by the doctrine is one of advantage and effects, not that a public authority acted in bad faith or with an otherwise ulterior motive. Indeed, this Court held in *CPR* that, even if the City's purpose were to "enable the inhabitants to use the corridor for walking and cycling," its bylaw, *in effect*, neither encouraged trespassing nor prevented the historical and current use of the land (para. 33) and therefore could not be said to have deprived the landowner of all reasonable uses.

[53] This does not mean, however, that intention is *irrelevant* to the inquiry. Indeed, the case law we discuss below suggests that the objectives pursued by the state may be *some evidence of* constructive taking. Stated differently, the intention to take constructively, if proven by the claimant, may support a finding that the landowner has lost all

reasonable uses of their land (inasmuch as a finding of this effect can be supported by evidence that such an effect was intended). But the absence of evidence of the state's intention does not preclude a property holder's claim. It follows that intent may constitute a "material fact" in the context of a constructive taking claim. We stress, however, that the focus of the inquiry must remain on *the effects of state action.*

[54] A brief review of the jurisprudence illustrates the supporting role of intention in assessing constructive taking claims. In *Manitoba Fisheries*, at p. 111, as we have already recalled, Ritchie J. endorsed a passage from *Ulster Transport Authority* highlighting the relevance of intention in constructive taking cases. The key portion of this passage merits repeating: ". . . the relevant prohibition cannot but constitute a taking if my views as to its effect and underlying intention are correct" (emphasis added). Thus the objective pursued by the state was considered (*Ulster Transport Authority*, at pp. 113 and 116; *Manitoba Fisheries*, at pp. 111-13) in distinguishing between a mere regulatory prohibition and the constructive taking of a business through the establishment of a public monopoly.

[55] Likewise, in *Lynch* — which Halifax acknowledges was correctly decided — the Court of Appeal of Newfoundland and Labrador treated the City's intention in refusing to allow any development on the subject watershed land as germane to whether a constructive taking had occurred. In concluding it had, the court referred to the City's express intention "to take away the Lynches' right to appropriate the groundwater on their land" so as to secure the City's "right to a continuous flow of uncontaminated groundwater downstream to [its] water facilities" (para. 60). Moreover, the City took the view that securing this objective required the prohibition of "all activity on the Lynch property" (para. 62). The City's intention, as implemented by its officials, thus indicated that the land in issue had been constructively taken.

[56] The Quebec Court of Appeal's decision in *Benjamin* further illustrates how intent may support a finding of a constructive taking. There, a zoning bylaw designated the claimant's property as a "park", and the City [translation] "knowingly" used the land in issue as an extension of its own park for 14 years (para. 50). The City — inadvertently at first — installed a fence and lampposts and created a trail on

the claimant's land, which was effectively incorporated into an adjacent public park. The City then manifested its intention to achieve that very effect by refusing to remove the fence after receiving a demand letter from the claimant. On appeal, the City offered to remove the fence and lampposts, but only if the claimant accepted to adequately maintain his own land for *public* safety. The Court of Appeal characterized the City's behaviour as an [translation] "abuse of right" and underscored its lack of "goodwill" to either formally expropriate the claimant's land or permit reasonable uses thereof (paras. 49, 54 and 59). The plans transparently set out by the City thus indicated that the claimant would continue to be deprived of all reasonable uses of his land indefinitely. In these circumstances, the City's intent buttressed the finding of disguised expropriation arising from the bylaw and the persistent use of the claimant's land.

[57] In short, the underlying objective pursued by a public authority may provide supporting evidence for a constructive taking claim. But it is neither necessary nor sufficient. The case law indicates that the assessment of intent has proved helpful in distinguishing between mere regulations in the public interest and takings requiring compensation at common law. What ultimately matters, however, *irrespective* of matters of intent, is whether the state-imposed restrictions on the property conferred an advantage on the state that *effectively* amounts to a taking (*Tener*, at pp. 563-65, per Estey J., and pp. 551-52, per Wilson J.; *Manitoba Fisheries*, at p. 118). [underline my emphasis, italics already added]

[12] Paragraph 56.2 of Chance's Amended Amended Fresh Statement of Claim ("SOC") alleges that Chance's permits were the only ones in the territory impacted by the Moratorium because it was the only company conducting oil and gas activities in the area affected by the Moratorium when it was implemented. Also, in that paragraph, Chance alleges that the timing and impact of the Moratorium are indications it was implemented to prevent Chance from moving forward with and obtaining the necessary approval(s) for its planned and announced development program under its permits that

focused on unconventional resources, which was only possible using hydraulic fracturing.

[13] Also, at para. 74.1 of the SOC, Chance alleges the Moratorium covers all types of hydraulic fracturing even those required and critical to the exploration, development and production of both conventional and unconventional resources.

[14] In addition, at para. 75 of the SOC, Chance pleads that by enacting the Moratorium, Yukon has in effect confiscated all of its rights to exploit or extract the oil and gas resources conferred upon it by its permits. It also pleads the Moratorium results in a benefit or advantage to Yukon with the removal of an encumbrance on Yukon's lands subject to Chance's permits. Also, when read as a whole, the SOC alleges that by implementing the Moratorium, Yukon effectively cancelled its permits without paying Chance the compensation to which it is entitled.

[15] Based on *Annapolis* and the pleadings, I am of the view that records containing information regarding Yukon's motive, intent, objective, or reasons to enact the Moratorium and for carving out part of the territory from the effect of that Moratorium when it was implemented may provide evidence relevant to the determination of whether there was constructive (*de facto*) taking in this case. This is sufficient to meet the low threshold for document discovery established by the *Rules of Court* of the Supreme Court of Yukon.

[16] However, my finding does not mean that all the records in possession, control, or power of Yukon regarding the Select Committee and the Moratorium, which falls under the issues listed at 3a)-e), h) and j) meet the relevance threshold. Only those that contain information regarding Yukon's motive, intent, objective, or reasons to announce

and proceed with the Select Committee process, to enact the Moratorium, and carve out the Liard Basin when it was implemented, as well as the timing of those decisions, do. This would include, but would not be limited to, records related to the discussions that led to Yukon's decision(s), the information sought (or decision not to seek further information), received, consulted, relied on, or disregarded by Yukon to make those decision(s), as well as records related to the timing of the Select Committee process and the Moratorium. In addition, to avoid any misunderstanding, any records related to the Moratorium or the Select Committee process that contains information regarding other issues I ordered Yukon to apply to its collection of documents would also meet the relevance threshold for document discovery.

[17] Finally, I am of the view that records related to the issue of jurisdiction or authority under which the Moratorium was implemented (3e)) may also provide information relevant to the issue of damages or compensation (provided by statute or not) to which Chance may be entitled if it is successful in this action.

[18] Based on the above, Yukon shall identify, from its collection of documents, and produce, subject to privilege, those records that contain information regarding Issues 3a)-e), h) and j) to the extent described and ordered in these reasons for decision.

Issue 6: Benefits received by Yukon

[19] Chance argues the nature and extent of benefits (monetary or otherwise) received by Yukon as a result of the work done by Chance in the Yukon relates to matters in issue between the parties in this case.

[20] Chance submits the nature and extent of Yukon's benefits have been put at issue by its unjust enrichment claim as well as its negligent misrepresentation claim. It also

submits that Yukon's advertisement in relation to oil and gas exploration in the territory refers to how this type of activity benefits Yukon and its economy.

[21] Yukon submits the nature and extent of benefits received as a result of the work done by Chance in the Yukon is not an element of any causes of action pleaded in the statement of claim. Yukon submits Chance confuses the issue of benefits to the Yukon economy in general and benefits obtained by the government of Yukon. Yukon submits that benefits to the Yukon economy do not relate to any matters in issue in this action. In addition, Yukon submits that Chance's claim in unjust enrichment is limited to Chance's work deposits and its rental payments.

[22] At the case management conference of December 9, 2022, I ordered Yukon to produce, subject to privilege, records in its possession related to specific benefits agreements between Chance, Yukon, and First Nations (Issue 6a)). I made this decision because those records may contain information relevant to, among other things, the parties' understanding of the scope of Chance's rights under its permits, the nature of the relationship between the parties, and whether Yukon had a duty to speak about concerns it may have had on the use of hydraulic fracturing or restrictions it may impose on the use of hydraulic fracturing.

[23] Also, specific benefits received by Yukon from Chance in relation to its permits, such as Chance's work deposits and rental payments, are directly related, among other things, to the issue of damages and are, therefore, relevant to matters in issue in this case. In my September 1, 2021 decision, I found that records related to Chance's work deposits and rental payments to Yukon, which constitute direct benefits received by

Yukon, as well as refunds, are relevant to matters in issue in this action (see paras. 155, 159, 182-192).

[24] However, the concept of benefits included in Chance's proposed issue list is broader than those specific benefits that are relevant to the issue of damages. At paras. 80.1 and 80.3 of its SOC, under the section regarding the tort of negligent misrepresentation, Chance alleges that, by actively promoting and encouraging oil and gas exploration and development, Yukon communicated to Chance it should invest and continue to invest in the territory. It also alleges that, as a result, Yukon and its economy benefitted from Chance's significant investment in oil and gas activity in the territory. This broader notion of benefits (monetary or otherwise) to the territory or its economy at large is not, in my view, relevant to the issue of damages and does not, on its own, constitute an essential element of any of Chance's causes of action.

[25] Nonetheless, how a particular business or economic activity impacts or contributes to the economy of a state or a territory is a factor that governments may consider when authorizing, limiting, or prohibiting that activity within its jurisdiction. Costs-benefits analysis may be conducted from time to time to inform government's decision(s) or action(s), including decisions to encourage or limit activities such as oil and gas exploration and production. In that sense, in light of the allegations contained in the SOC in this case, records regarding the nature and extent of the benefits (monetary or otherwise) received by Yukon as a result of the work done by Chance in the territory, as well as the extent to which Yukon knew, considered, and perceived those benefits at times material to this action, may contain information relevant to assess Yukon's

conduct with respect to the tort of negligent misrepresentation, and more specifically with respect to the following elements of that cause of action:

- (i) whether Yukon made false or misleading representations regarding the use of hydraulic fracturing and the rights to explore and exploit certain oil and gas resources for which, according to Chance, hydraulic fracturing is required; and
- (ii) if Yukon had a duty to speak about restrictions on hydraulic fracturing or concerns it may have had with hydraulic fracturing at material times.

[26] This meets the low threshold relevance test applicable at the document discovery stage under the *Rules of Court*.

[27] Therefore, I find Yukon shall identify, from its collection of documents, and produce, subject to privilege, records that contain information regarding Issue 6: “[t]he nature and extent of benefits (monetary or otherwise) received by Yukon as a result of the work done by Chance in the Yukon”.

[28] The parties may request another case management conference if they cannot agree on a timeline for Yukon to provide its further and better affidavit of documents.

[29] As stated at the case management conference of December 9, 2022, the issue of costs will be addressed once Yukon has filed its further and better affidavit of documents.

Appendix A

The following is a list of issues that should be used to identify relevant and material records among the set of records that is returned through keyword searching.

1. Representations and knowledge
 - a. Representations or communications made by Yukon from 2004 to 2016, to the public, industry, or Chance regarding:
 - i. investment in oil and gas resources in the Yukon, whether promotional in nature or otherwise;
 - ii. the permissibility of hydraulic fracturing or any concerns regarding whether hydraulic fracturing should be allowed;
 - iii. the availability of conventional and unconventional oil and gas resources;
 - iv. the right of successful bidders to extract both conventional and unconventional resources; and
 - v. the oil and gas disposition process, including the disposition process generally and the process specific to the right granted in the Eagle Plains Basin.
 - b. Any communications between Yukon and Chance in which representations regarding the following topics might have been made:
 - i. the resources Chance intended to pursue;
 - ii. the resources that were available in the Yukon;
 - iii. the permissibility of hydraulic fracturing or any concerns regarding whether hydraulic fracturing should be allowed;
 - iv. the nature or scope of Chance's oil and gas rights; and
 - v. the effect on Chance of an inability to use hydraulic fracturing.
 - c. Information Yukon received, considered, or possesses regarding:
 - i. the type of resources Chance intended to pursue;
 - ii. whether Chance intended to use hydraulic fracturing;
 - iii. the purpose of Chance's permit grouping applications;
 - iv. the formations targeted by Chance's drilling program;
 - v. the nature, extent, purpose, and focus of Chance's seismic program; and vi. the economics of oil and gas resource extraction in Eagle Plains.

2. The oil and gas disposition process:
 - a. Operation of the oil and gas disposition process in Yukon, generally.
 - b. Nature and scope of rights granted by Yukon oil and gas permits.¹
 - c. Regulation of oil and gas activities in Yukon.
3. The Moratorium:
 - a. The formation of the Select Committee, its Terms of Reference, any steps or processes taken by it, any presentations made to it, its recommendations, and any communication to or from members of the Select Committee.
 - b. Whether any work, research, discussions or consideration of any kind was conducted further to the recommendations made by the Select Committee.
 - c. Reason the Moratorium was implemented, including the basis for the Liard Basin carve out.
 - d. Alternatives to the Moratorium, if any, considered by Yukon and the deliberations which took place related to the announcement of the Moratorium.
 - e. Jurisdiction or authority under which the Moratorium was implemented.
 - f. Consideration, if any, given to the potential effects of the Moratorium on Chance or other energy producers.
 - g. The impact or effects (or anticipated impact or effects) of the Moratorium on Chance's rights under its permits and its operations in the Eagle Plain Basin pursuant to those permits.²
 - h. Recommendations, advice, or correspondence Yukon received from advisory bodies such as the Yukon Technical Liaison Committee or the Yukon Oil & Gas Advisory Committee.
 - i. Definition of "hydraulic fracturing" as understood by Yukon in announcing the Moratorium
 - j. Whether or not the Moratorium was used as a way to stop activity in Eagle Plain without cancelling Chance's permits.
4. Effects on Chance:
 - a. The use of hydraulic fracturing in oil and gas extraction, including whether it is required in certain circumstances.
 - b. Whether hydraulic fracturing was necessary to the meaningful exercise of Chance's rights, including the economical extraction of both conventional and unconventional resources.

- c. Financial compensation payable or potentially payable by Yukon to Chance if the Moratorium were to constitute a cancellation.³
 - d. Expenses incurred by Chance to explore and develop its permits, including:
 - i. rentals paid by Chance on its permits and rentals due by Chance to Yukon on its permits; and
 - ii. application fees paid by Chance as a result of regulatory requirements.
 - e. Chance's concerns, protests, communications, and requests for relief in respect of the Moratorium.
 - f. Yukon's, Chance's, or a third party's expressed views (in possession or control of Yukon) of whether the Moratorium constitutes or not a cancellation of Chance's permits.
 - g. Yukon's, Chance's, or a third party's views regarding the impact of the Moratorium on Chance's rights under its permits or its oil and gas operations.
- 5. Responses (if any) by Yukon to Chance's concerns:
 - a. Consideration and correspondence related to the decision to reimburse Chance's work deposits.
 - b. Consideration and correspondence related to compensation payable to Chance pursuant to Yukon legislation (including the Oil and Gas Act or Expropriation Act), or any compensation owing to Chance as a result of the impact of the Moratorium on Chance's permits.
 - c. Consideration and correspondence related to the decisions regarding Chance's requests for tenure extension.
- 6. The nature and extent of benefits (monetary or otherwise) received by Yukon as a result of the work done by Chance in the Yukon.
 - a. Benefits agreements as between Chance, First Nations, and Yukon.