SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Tarka*, 2023 YKSC 45

Date: 20230811
S.C. No. 21-A0079
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON

PLAINTIFF

AND

LEN TARKA AND ERIC DELONG

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — Kimberly Sova

Counsel for the Defendants — Vincent Larochelle

REASONS FOR DECISION

Introduction

[1] This is an application by the defendants Len Tarka and Eric DeLong ("the defendants") for an order requiring the plaintiff Yukon government to answer certain interrogatories.

[2] The underlying claim brought by the Yukon government is for an order for vacant possession and payment of occupation rent for land and a house located at the street address, 6088 – 6th Avenue, Whitehorse, also described as the property comprising all of Block 320 and a portion of Lot 467 (the "Property"). The plaintiff claims the defendant

Len Tarka entered into a lease with the Yukon government for the Property on October 1,1991 for a term of up to 30 years or the life of the lessee from October 1, 1991, pursuant to the Squatter Policy in place at that time. The plaintiff further claims that at the time it was entered into, the lease was subject to the *Territorial Lands (Yukon) Act*, SY 2003, c 17 and its *Regulations*, and the *Lands Act,* RSY 2002, c 132 (the "*Lands Act*") and its *Regulations*. Under the statutes, the maximum term of the lease is 30 years. Thus the plaintiff says the period of the life of the lessee is relevant only if it is less than 30 years. The defendants dispute this.

[3] The defendant Len Tarka began subletting the Property in 1996. The current sublessee is the defendant Eric DeLong. The lease expired on September 30, 2021 and was not renewed for reasons related to the location of the Property in an area subject to landslides from the clay escarpment above the Property.

[4] The defendant Eric DeLong continues to reside on the Property, despite receiving notices from the Yukon government informing him and Len Tarka of the expiry date of the lease before and after that date and demanding vacant possession.

[5] The defendant Len Tarka began living on the Property in 1973. In 1988, he was granted the lease after applying to and receiving the recommendation from the Yukon Squatter Review Panel established under the Squatter Policy. The defendants claim the lease signed on November 14, 1991 created a life interest in the Property, meaning that Len Tarka continues to have legal possession of the Property until his death. Len Tarka was 75 years old as at December 16, 2021, the date the statement of defence was filed.

[6] Alternatively, the defendants seek relief in equity based on Len Tarka's reliance on representations by the Yukon government of his legitimate life tenure interest in the Property.

[7] To their credit, the parties have narrowed the number of questions in dispute from 46 to 25. Several of the outstanding 25 questions were decided or agreed upon during the hearing of this application. In the following I will address those resolved at the hearing as well as those for which the disposition was reserved.

Applicable Rules

[8] The *Rules of Court* of the Supreme Court of Yukon ("*Rules of Court*") set out the parameters for determining this application with some assistance from the common law in their interpretation or in the alternative.

[9] The applicable Rules are:

> **Rule 1(6)**
>
> The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,
>
> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
>
> (c) the complexity of the proceeding.
>
> **Rule 29(1)**
>
> The purpose of interrogatories is to obtain evidence in a timely and cost effective manner and reduce or eliminate the need of or time required for oral examination for discovery.

> **Rule 29(6)**
>
> Where a person objects to answering an interrogatory on the ground of privilege or on the ground that it does not relate to a matter in issue in the action, the person may make the objection in an affidavit in answer.
>
> **Rule 29(8)**
>
> Where a party objects to an interrogatory on the grounds that it is not necessary for disposing fairly of the action or that the costs of answering would be unreasonable, that party may apply to the court to strike out the interrogatory, and the court shall take into account any offer by that party to make admissions, to produce documents or to give oral discovery.

[10] A matter in issue in the action as stated in R. 29(6) has been interpreted to mean "information which may--not which must--either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary" (*Ross River Dena Council v The Attorney General of* Canada, 2009 YKSC 04 at para. 10, quoting from *Peter Kiewit Sons Co of Canada Ltd v British Columbia Hydro & Power Authority*, (1982) 134 DLR (3d) 154 (BCSC) and *The Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company* (1882), 11 QBD 55 (CA)).

[11] In addition, the pleadings are essential to the determination of what relates to a matter at issue in the action.

Allegation of title fraud

[12] The defendants have broadened the scope of their interrogatories beyond the pleadings. Their basis for doing so without amending their pleadings is their wish to obtain further information from the Yukon government before formally alleging title fraud in their pleadings, which they say may be a relevant defence in this matter. They say

they are exercising due diligence by asking the questions first, in case there is insufficient basis for the allegation of fraud.

[13] The relevance of this issue, the defendants say, is that if the title to the Property was obtained fraudulently, the plaintiff may only have equitable title to the Property, which they say may affect the relief sought.

[14] The concern expressed by the defendants is that the title raised to Lot 467 in 1998 by the Yukon government was done where there had previously been title raised. They say this may not be permissible under the *Land Titles Act, 1991,* assuming it applies. The defendants are also concerned about the timing of the raising of title, done at the same time as the lawsuit brought by the Yukon government against Robert McCallum (the "McCallum lawsuit").

[15] Robert McCallum had also applied under the Squatter Policy to the Yukon Squatter Review Panel. His property was beside the Property, and included part of Lot 467. A step in that lawsuit was a court-ordered survey. The contracted surveyor and the Yukon government disagreed about the survey's scope. The Yukon government requested only the eastern boundary be surveyed, while the surveyor proceeded to survey the entire lot. The surveyor also raised some questions about the legitimacy of the title claims by the Yukon government to Lot 467. Ultimately the survey was never finalized as the Yukon government cancelled the contract when the surveyor failed to deliver the requested product on time (it had not been provided over 13 months after the due date).

[16] The lawsuit was eventually discontinued. Robert McCallum passed away. Information about the lawsuit was obtained by the defendants from his estate or through

responses to access to information requests. The defendants allege that the title was raised to Lot 467 at that timeby the Yukon government “to buttress their claim” against Robert McCallum.

[17] The defendants raise concerns about the Yukon government requesting that the survey ordered by the Court in the McCallum lawsuit for Lot 467 be restricted to the eastern boundary of the property. They suggest this change is some evidence of fraudulent or deceptive conduct in relation to the title asserted by the plaintiff in the McCallum lawsuit.

[18] The Yukon government’s first response is that the allegations related to title fraud are improper because it is not pleaded. However, they have agreed to address the arguments for the purpose of the interrogatories dispute. Maintaining that the central issue in dispute is whether the lease is valid, current, and not expired, the Yukon government says they answered many of the interrogatories based on a generous reading of the pleading, including the possibility of title fraud. This is a more than reasonable position for the Yukon government to take in order to bring the dispute about the questions to resolution.

[19] The Yukon government notes they entered into the lease with Len Tarka in 1991, before title was raised by the Yukon government. In 1970 the Yukon government obtained administration and control of the land in question from the federal government (with the exception of Block 320, explained below in para. 20). This was sufficient authority for Yukon government to enter into a lease with Len Tarka. Lot 467 was carved out of existing title at that time, referred to as 168BB. Lot 467 as it currently exists did not exist at the time of the 1970 transfer of administration and control; it was

created when title was raised in 1998. The survey used to raise title to Lot 467 was done in 1963, before the Yukon government had administration and control over the land.

[20] In addition to Lot 467, part of the Property consists of land that was an undeveloped portion of Lambert Street titled to the City of Whitehorse. The City of Whitehorse subdivided that portion titled to it and transferred it to the Yukon government in 1991. It was referred to as Block 320. All of Block 320 became subject to the lease between Len Tarka and the Yukon government.

[21] The Yukon government notes that Yukon has a Torrens system of land title, meaning that title to land is indefeasible except for cases of title fraud. A certificate of title is evidence of title, unless fraud actively participated in by the Yukon government is proven.

Questions to be resolved

- **Interrogatory #5**:

  > Please provide a chain of title with respect to Block 320 and the predecessor parcel containing Block 320, dating back to at least 1950. [Please see the revised #96, #97, #98, which encompass part of this question.]

  Ruling: The Yukon government is not required to answer this question.

- **Interrogatories #6, #7, #8:**

  > Did subdivision of parcels underlying or containing (or previously underlying or containing) Lot 467 or Block 320 occur in the last 40 years?
  >
  > If so, please provide any documents relating to the application for subdivision and approval.
  >
  > If subdivision was required but no application for subdivision exists, or if approval was not granted, please provide any

> information or documents in the Plaintiff's possession on this point.

Ruling: All previously answered.

- **Interrogatory #12:**

> A survey of Lot 467 was previously ordered by the Supreme Court of Yukon in relation to Lot 467 in the context of Mr. McCallum's lawsuit 96-A0133. The survey was aborted. Please provide any correspondence, documents, memorandum or other information in the Plaintiff's possession with respect to the ordering of this survey.

Ruling: The alleged aborted survey relates to the McCallum lawsuit which was not pursued. The survey used to raise title to Lot 467 in this case was the 1963 survey. This question is not relevant and the Yukon government is not required to answer it. Further, although this was not argued by counsel, it is likely that the implied undertaking rule applies here – Rule 26(3):

> All parties and their lawyers are deemed to undertake not to use evidence or information to which this rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

As this proceeding is different from the McCallum lawsuit, and the survey requested was information and possibly evidence if the McCallum matter had proceeded, it is likely subject to the rule. I use the word likely as there are exceptions to the application of this rule, and since these were not argued here, I will not address this basis further.

- **Interrogatory #13**:

> Please provide any correspondence, document, memorandum or other information in the Plaintiff's possession that relates to the Plaintiff's revocation or cancellation of the surveyor's contract.

Ruling: For the same reasons that Interrogatory #12 is not required to be answered, the Yukon government is not required to answer this question.

- **Interrogatory #15:**

  > Please provide any correspondence, document, memorandum or other information in the Plaintiff's possession that relates to these concerns, including correspondence sent by LTO to other persons, entities or government actors.

  Ruling: The previous question about the concerns of the surveyor and whether the plaintiff took action to address those concerns was answered by the Yukon government. Interrogatory #15 asks for any additional information related to these concerns, including information sent by the Land Titles Office ("LTO") to others. This question offends the rule of proportionality and relevance. The Yukon government is not required to answer this question.

- **Interrogatory #16:**

  > More generally, please provide any correspondence, document, memorandum or other information in the Plaintiff's possession (whether the Land Titles Office or other departments) that relate to the court-ordered survey, whether this information or document was created or obtained prior to, during or after the survey was aborted.

  Ruling: Title to Lot 467 relied on in this lawsuit was based on the 1963 survey, not any other survey. The court-ordered survey in the McCallum lawsuit is not relevant to this lawsuit. Further, the implied undertaking rule is likely applicable because the survey was ordered in a different lawsuit. The Yukon government is not required to answer this question.

- **Interrogatory #19**:

  > After Mr. Lamerton raised concerns about the Plaintiff's title to Lot 467, did the Plaintiff take any action, or seek or attempt to take any action, to prevent Mr. Lamerton from bidding on any future court-ordered survey?

  Ruling: For the reasons noted above, this question is not relevant to this proceeding and far removed from any material issue. The Yukon government is not required to answer this question.

- **Interrogatory #20:**

  > If so, what action(s) were taken or attempted, and why?

  Ruling: This question is a follow up to Interrogatory #19 and, for the same reasons, will not be required to be answered.

- **Interrogatory #25:**

  > Is anyone authorized to permanently remove or destroy original documents or records, including original title documents, from the Land Titles Office (LTO) registry, without recording their removal or destruction?

  Ruling: This question shall be answered. While the relevance is questionable, during submissions it became clear that counsel had the answer and it was not difficult to provide.

- **Interrogatory #26:**

  > What measures have been in place at the LTO since 2000 to ensure that documents or records, including original title documents, are not lost, permanently removed, or destroyed?

  Ruling: This question shall be answered. Again, while the relevance is questionable, during submissions it was clear that counsel had the answer and it was not difficult to provide.

- **Interrogatory #45:**

  > Who accessed the LTO file for Lot 467 and Block 320 between 2000 and present?

  Ruling: This question is disproportionate, and not relevant. The Yukon government is not required to answer this question.

- **Interrogatory #46:**

  > Who had authorized access to the original LTO files and title documents and title folder for Lot 467 and Block 320 between 2000 and present?

  Ruling: This question is disproportionate, and not relevant. The Yukon government is not required to answer this question.

- **Interrogatories #47, #48 and #49:**

  > Has the inspector of land titles, or any authority with the power to investigate such as the RCMP, been informed and investigated these missing documents and/or records?
  >
  > If so, what was the outcome of this investigation?
  >
  > If not, why not?

  Ruling: The Yukon government has already denied in answer to earlier questions that there are any missing documents in the LTO files. As a result, the answers to these three questions are obvious and shall be answered.

- **Interrogatory #56:**

  > Please also indicate what correspondence is missing from the Land Management Branch's, the LTO's or the Department of Justice's internal records regarding Lot 467 and Block 320.

Ruling: This question is impossible to answer. A party cannot answer in general what correspondence is missing from a file, especially when they have denied any missing documents. The Yukon government is not required to answer this question.

- **Interrogatory #57:**

  > Please provide any correspondence or documents exchanged between the Plaintiff and the City of Whitehorse regarding Lot 467 or Block 320.

  Ruling: This question is too general, disproportionate and of questionable relevance. The Yukon government is not required to answer this question.

- **Interrogatory #58:**

  > Regarding Lot 467, and in relation to its lawsuit with Mr. McCallum, on June 30, 1999, the Plaintiff further amended its Writ of Summons, changing its Statement of Claim from "legal owner" to "beneficial owner entitled to administer and control certain lands". Please provide any documents or information which led the Plaintiff to come to this conclusion.

  Ruling: This question is about the pleading in the McCallum lawsuit. It is not relevant and likely subject to the implied undertaking rule. The Yukon government is not required to answer this question.

- **Interrogatory #69**:

  > Was the Executive Council of Yukon ever advised of falsifications or false documents pertaining to Lot 467 and/or Block 320, and/or the lawsuit against Mr. McCallum?

  Counsel for the defendants narrowed the question during the hearing to a time period of the first six months of 2002. Counsel for the defendants provided counsel for the plaintiff a copy of a document that they say may be an internal Yukon government briefing note obtained through inquiries about the McCallum

lawsuit. The document has different versions with two dates — one in January and one in March 2002. The document gave rise to this question. Counsel for the defendants says this is a simple yes or no answer. Counsel for the plaintiff said the document had no authentication, did not appear on its face to be a Yukon government internal document, and appears to be a kind of settlement document.

Ruling: This question again relates to the McCallum lawsuit, not this proceeding. It is not relevant to this lawsuit. The Yukon government will not be required to answer this question.

- **Interrogatory #86**:

> Please also provide the audio recordings and minutes (and transcripts if available) of any other hearings where life estate leases were approved or recommended for approval by the Panels.

Ruling: This question is disproportionate and not necessary to be answered by the Yukon government. However, during the hearing counsel for the defendants agreed to the following rewording of the question:

> "How were life estate leases described by the Squatter Review Panel to applicants under the Squatter Policy?"

This is a relevant question that may help to advance the disposition of the dispute over the meaning of life estate leases. The Yukon government shall be required to answer this revised question.

- **Interrogatories #94 and #95:**

> How many applicants to the Squatter Review Panel refused the offer of a life estate lease?

> For each such applicant, what was the ultimate outcome of the property in their application? Please provide specifics for each outcome (e.g. were squatter applicants, such as those on the Whitehorse waterfront, subject to lawsuits or were any of these same individuals offered titled land elsewhere either under the Squatter Policy in the Yukon program or any other program or policy, were they paid compensation for their properties, and if so, how much compensation was paid, etc.)

Ruling: Counsel for the defendants argued that the relevance of these questions was that if Len Tarka had refused the life estate lease process, what were his options, and what would the outcome have been? This question is speculative and irrelevant. Len Tarka entered into the lease with the Yukon government as a result of his own application under the Squatter Policy. The determination required in this proceeding is about the interpretation of this lease, not any other outcome. The inquiry into the outcomes for other applicants who may have refused the offer of a life estate lease is not only disproportionate but is also irrelevant and unnecessary to the resolution of this lawsuit. The Yukon government is not required to answer these questions.

- **Interrogatories #96, #97 and #98:**

> Prior to transfer to the Commissioner of Yukon, Block 320 was transferred to the City of Whitehorse pursuant to section 4a of the Territorial Lands Act. How many properties were transferred in the Yukon pursuant to this section 4a?
>
> Does the Plaintiff have any correspondence, documents or memorandum which indicate that section 4a of the Territorial Lands Act does not exist or does not allow the transfer of lands?
>
> Please provide any such correspondence, documents or other written materials.

During the hearing, counsel for the defendants agreed to replace these questions with the following question:

> "On what basis or authority did the City of Whitehorse obtain title to Block 320 and what is the chain of title up to the Yukon government obtaining title in 1991"?

Ruling: I recognize that this overlaps with Interrogatory #5, which was previously considered unnecessary to be answered. However, since the chain of title for Lot 467 was provided, in order to be consistent and complete, the chain of title for Block 320 should be provided. The Yukon government shall answer this revised question.

Order

[22] The Yukon government is required to answer the following Interrogatories:

- #25; #26; #47; #48, #49.
- Interrogatory #86 is replaced with: "How were life estate leases described by the Squatter Review Panel to applicants under the Squatter Policy?" and shall be answered.
- Interrogatories #96, #97 and #98 are replaced with: "On what basis or authority did the City of Whitehorse obtain title to Block 320 and what is the chain of title up to the Yukon government obtaining title in 1991" and shall be answered.

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DUNCAN C.J.