SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Yukon Environmental and Socio-economic Assessment Board*, 2024 YKSC 42

Date: 20240904
S.C. No.23-AP002
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON
(Director, Mineral Resources Branch,
Department of Energy, Mine and Resources)

Petitioner

AND

YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT BOARD (Dawson City Designed Office)
TR'ONDËK HWËCH'IN, FIRST NATION OF NA-CHO NYÄK DUN, and
SILVER47 EXPLORATION CORP.

Respondents

Before Chief Justice S.M. Duncan

Counsel for the Government of Yukon	Ian Fraser and Kimberly Sova
Counsel for the Yukon Environmental and Socio-Economic Assessment Board	Kate Phipps and Brook Land-Murphy
Counsel for Silver47 Exploration Corp.	Joshua A. Jantzi
Counsel for Tr'ondëk Hwëch'in	Micah S.Clark
Counsel for First Nation of Na-Cho Nyäk Dun	Tasha Paramalingam
Counsel for the Attorney General of Canada	Marlaine Anderson-Lindsay and Keith Cruz

REASONS FOR DECISION
(Application by Attorney General of Canada to be added as a respondent)

Overview

[1] The Yukon government is judicially reviewing a decision of the Dawson City Designated Office ("Designated Office") of the Yukon Environmental and Socio-Economic Assessment Board ("YESAB") that recommended an exploration project proposed by Silver47 Exploration Corp. ("Silver47") not proceed. The location of the proposed project is the Peel Watershed Regional Land Use Plan ("PWRLUP") in the traditional territories of the First Nation of Na-Cho Nyäk Dun ("FNNND") and the Tr'ondek Hwech'in First Nation ("THFN").

[2] The issue in this application is whether the Attorney General of Canada ("AGC") can be a full party respondent in the judicial review proceeding. Initially, the Yukon government named only YESAB as the respondent and served notice on Silver47, FNNND, THFN, and the AGC under Rule 54(6) of the *Rules of Court* of the Supreme Court of Yukon (the "*Rules*"). All have filed notices of appearances and are full party respondents except the AGC.

[3] The nature of the AGC's participation arose during a case management conference. The concern related to the scope and purpose of their participation, which in turn was tied to various understandings of the role of YESAB in this judicial review. At the hearing of this application, the only party initially objecting to the AGC's participation as a respondent was Silver47. During the course of the hearing, Silver47 withdrew its objection. YESAB took no position on the AGC's participation as a respondent but raised concerns about any effect of a decision about the AGC's participation on the

scope of YESAB's participation. The other parties were not opposed to AGC participating as a respondent.

[4] The AGC shall participate in the application for judicial review as a full party respondent. This brief ruling is to clarify process points to help with future similar situations, and to articulate some applicable principles in the determination of respondents in an application for judicial review.

Background to Judicial Review

[5] The order sought in the application for judicial review is a quashing of the decision of the Designated Office and its remittance to the Designated Office for reconsideration. The Yukon government also seeks a declaration that the Designated Office failed to observe the principles of natural justice or procedural fairness.

[6] The proposed project is a quartz mining exploration program for silver, lead, and zinc, annually for five years, on 779 claims within an area covered by the PWRLUP. It is the first project proposed since the PWRLUP was approved in 2019.

[7] The Designated Office recommended that the project not be allowed to proceed because of significant adverse effects on wildlife and First Nation wellness, water resources, heritage resources, and wilderness experience. The effects on wildlife and First Nation wellness were assessed as high magnitude, irreversible, and unable to be mitigated. The effects in the other areas could be mitigated through terms and conditions.

[8] The PWRLUP was developed by a Commission consisting of six public members nominated by the FNNND, THFN, Gwich'in Tribal Council, Vuntut Gwitch'in First Nation, and Yukon government. The PWRLUP makes recommendations and provides guidance on environmental protection, heritage and culture protection, and economic

development. Policy Recommendation #3 in Appendix C of the Plan provides: "Ensure adequate wildlife and habitat baseline data collection is completed prior to any development activities occurring in the Peel Watershed Planning Region". The decision from the Designated Office referenced the absence of adequate baseline data from the proponent that could have helped to recommend mitigation measures of the project effects on wildlife.

[9] The Yukon government says the decision was unreasonable because the Designated Office conducted its evaluation of the project even though it said it had not received adequate baseline data; it did not notify the proponent of the requirement to provide baseline data at a higher standard given the requirements of the PWRLUP; and it conflated the proponent's failure to provide baseline data and the resulting non-conformity with the PWRLUP with adverse effects of the project on First Nation wellness.

[10] Silver47 says in its response to the Petition that the decision was unreasonable in part because the Designated Office failed to consider applicable legislation, specifically the definition of development in the *Quartz Mining Act*, SY 2003, c. 14 ("*Quartz Mining Act*") – "… the construction of a facility or work for the production of minerals" (s. 129(1)(b)) and how it is different from the definition of exploration in the same statute.

[11] The YESAB is a result of the implementation of Chapter 12 of the Umbrella Final Agreement ("UFA") the comprehensive land claims agreement finalized in 1993 and signed by the Yukon government, the government of Canada, and the Council of Yukon First Nations ("CYFN"), the negotiating body representing the Yukon First Nations. Each of the 11 Final Agreements contains all the provisions of the UFA, in addition to

specifically negotiated provisions for each First Nation. Chapter 12 of the UFA required the development of federal legislation, *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c. 7 ("*YESAA*"), and the creation of YESAB, for the purpose of conducting environmental and socio-economic assessments of project proposals to determine whether they will have or are likely to have significant adverse environmental or socio-economic effects in the Yukon.

[12] Chapter 11 of the UFA establishes a process for regional land use planning. The PWRLUP was developed under Chapter 11. The decision being reviewed in this case was made in the context of the PWRLUP under Chapter 11.

Analysis

[13] Rule 54(5) of the *Rules* provides that a person shall be named as a respondent to a judicial review application if they are directly affected by the order sought. There is little jurisprudence either from the superior courts of the provinces or the Federal Court interpreting the meaning of directly affected. This Court has recently referenced the decision of the *Kitimat (District) v Alcan Inc*, 2006 BCCA 562, in *Duncan (Litigation Guardian of) v Yukon (Government of*), 2022 YKSC 32 at para. 35, which describes a third party being directly affected if their legal rights or financial position is affected, or they are affected by the precise outcome of the matter between the main parties. The Federal Court of Appeal in *Forest Ethics Advocacy v Canada (National Energy Board)*, 2013 FCA 236 ("*Forest Ethics Advocacy*") at para. 10, has interpreted the phrase "directly affected by the order sought in the application" when naming a respondent in Rule 303 (1)(a) of the *Federal Courts Rules*, SOR/98-106. The Federal Court of Appeal relies on the judicial interpretation of "direct interest" in s. 18.1(1) of the *Federal Courts Act*: RSC, 1985 c.F-17: that is, "when its legal rights are affected, legal obligations are

imposed on it, or it is prejudicially affected in some direct way" (at para. 20, citations omitted).

[14] Earlier decisions of this Court, specifically *Western Copper Corporation v Yukon Water Board*, 2010 YKSC 61 ("*Western Copper*"); *Liard First Nation v Yukon Government and Selwyn Chihong Mining Ltd,* 2011 YKSC 29 ("*Liard First Nation*"); and *White River First Nation v Yukon (Energy, Mines and Resources)*, 2013 YKSC 10, ("*White River"*), have taken a broad approach to the participation of entities as respondents in judicial review applications. The analysis begins from the lens of access to justice and avoidance of costly court applications, in addition to ensuring the Court receives all relevant information. In those cases, this Court held that a person served but not named could indicate their preference for participating (do nothing; become a full party respondent; become an intervener), and if anyone else objected, they could raise the concerns in case management for potential resolution before resorting to a court application. This preferred expeditious process of deciding the matter in case management does not preclude the application of the relevant legal principles at any stage and particularly at the stage of any court application. The Court found it unnecessary in *Liard First Nation* to analyse the meaning of directly affected. The issue in that case was whether YESAB could participate as a respondent in a judicial review of a decision made by the Yukon government after receiving the assessment and recommendation by YESAB. The Court held that YESAB was a proper respondent because it was an independent environmental assessment body that should appropriately represent itself at the hearing; its decision, practices, and recommendations were being attacked and it should be able to respond; and it could offer a useful perspective to the Court. In *Western Copper*, the Court found that the First

Nation was a proper respondent in a judicial review of a decision of the Water Board in relation to a mine in the First Nation's traditional territory. The First Nation was directly affected by a decision of the Water Board, among other things, because of their rights set out in their Final Agreement. In *White River,* the Court found that the Kluane First Nation should have been named as a respondent to the petition brought by White River First Nation alleging the Yukon government breached its duty to consult in permitting Tarsis Resources Ltd. to proceed with a class 3 Mining Land Use permit. Kluane First Nation was directly affected because the Tarsis project was in its traditional territory, it made submissions during the assessment by the Designated Office, and it would be affected whether the Tarsis project proceeded or not.

[15] I will first address the role of YESAB in this application for judicial review. Part of the rationale for the AGC seeking participation as a respondent in this judicial review was its suggestion that it may assume a "protective role" in the event of a limitation imposed on YESAB's submissions in order to preserve its impartiality. In this role, the AGC would assist the Court to make a fully informed decision in accordance with the law by making submissions about the YESAB recommendation in areas where YESAB may not be able to do so.

[16] YESAB's scope of participation also arose in Silver47's written and initial oral submissions. Silver47 argued that the Court should not grant both the AGC and YESAB unrestricted participatory rights, as their submissions would be duplicative. Silver47's position was based on its assumption that the main purpose of the AGC's participation is its protective role where YESAB submissions are limited. Silver47 argues the AGC is not directly affected by the order sought, as this does not affect its legal rights or obligations, nor is it prejudicially affected (*Forest Ethics Advocacy* at para. 20.) If

YESAB were to have full and unrestricted participatory rights, there would be no role for the AGC. If YESAB's participation were restricted to preserve its impartiality, then the AGC could make submissions on the reasonableness of the decision.

[17] YESAB objected to any attempts by the AGC to speak on its behalf, saying it is independent from both governments and has a unique familiarity with and perspective on the background to these proceedings and its own processes and procedures. While YESAB appreciates the importance of balancing the need for the court's fully informed decision-making with preserving its own impartiality, it notes concerns about impartiality are decreased where a board, like YESAB, exercises regulatory rather than adjudicative functions. YESAB's submissions on the scope of its participation at this application were for the purpose of opposing the granting of relief to the AGC on the basis of this protective role. It says any discussion of limitation on the scope of its submissions should occur if necessary at the judicial review hearing.

[18] YESAB is unlike other federal boards, because although its constituting legislation is federal, it is a product of the UFA, an agreement among three parties – CYFN, representing the 11 signatory First Nations, Canada, and Yukon. The members of YESAB are not delegates of the parties. The federal government can be a decision body under *YESAA*, meaning a federal department who is a regulator and who chooses to accept, reject, or modify a recommendation from YESAB. The federal government is therefore implicated in the decision-making process that is the subject matter of the judicial review, as the Department of Fisheries and Oceans is a decision-body here.

[19] During the hearing of this application, it seemed to be accepted by all that YESAB is an independent board with a perspective and understanding different from those of the governments and First Nations. Further, the *Rules* in the Yukon are unlike

the Federal Courts Rule 303 which precludes the decision-maker from being named as a respondent and requires the AGC to be named as a respondent to defend the decision, where there is no one else to do so. Rule 54(5) in the Yukon by contrast requires the decision-maker to be named as a respondent where there is no one else who can be named.

[20] The applicable principles for the determination of the scope of YESAB's submissions are found in *Ontario (Energy Board) v Ontario Power Generation Inc*., 2015 SCC 44 ("*Ontario Power Generation*"). The Court held that standing of a tribunal was a matter to be determined by the first-instance court in accordance with a principled exercise of that court's discretion, balancing the need for fully informed adjudication against the importance of maintaining tribunal impartiality. However, where there are other respondents, the extent of the tribunal participation may become less important to ensure just outcomes (*Ontario Power Generation* at para. 59).

[21] The determination of the scope of YESAB's submissions in this case will be made in the context of case management and an application, if required, before the hearing of this judicial review. All parties are aware of the governing principles and YESAB has expressly recognized the need to exercise caution in order to preserve the balance between a fully informed court and the impartiality of YESAB, especially given the possibility of the decision being returned to the Designated Office. However, any limitations on the scope of YESAB's submissions are not part of this application.

[22] While the role of the AGC as a default respondent is not this case, it is still necessary to consider that there may be a limit imposed on YESAB's submissions, especially as they relate to the reasonableness of the decision. In that instance, the submissions of the other respondents may be necessary to fill in any gaps so that the

Court can make a fully informed decision. Here, along with Silver47, the two First Nations are respondents. Each has their own perspective and interests. The AGC's participation may be important, as a gap-filling function, similar to that of the other respondents, in particular, the First Nations. In that role, the AGC will be expected to defend the public interest: "the Attorney General's overarching mandate is to assist the Court in reaching a decision that accords with the law" (*Douglas v Canada (Attorney General)*, 2013 FC 451at para. 55). Silver47, during the hearing, accepted this analysis and withdrew their objection to the AGC participating as a respondent.

[23] This gap-filling function in the event of a limit on YESAB's submissions is not the only interest of the AGC in this case, however. The following are other reasons justifying their participation as a respondent.

[24] Canada is a signatory to the Final Agreements and thus a treaty partner along with Yukon and the 11 self-governing First Nations. The AGC has legal obligations under the treaties to ensure the implementation of Chapter 12, the development assessment chapter from which *YESAA* and YESAB were created, and to ensure Chapter 11, the land use planning chapter, is properly interpreted in the context of Chapter 12 and *YESAA*. Canada also has an interest in whether *YESAA* satisfies its legal obligations under the treaties. For example, the remedy sought here of quashing the decision and remitting the matter to the Designated Office for a reconsideration is unprecedented and not provided for in *YESAA*. Further, Silver47's argument that "development" for the purpose of the decision needs to be interpreted consistently with its use in the *Quartz Mining Act* may require a decision that interprets how YESAB should apply other contextual legislation.

Conclusion

[25] Case management is the starting point in this jurisdiction for a resolution of any issue surrounding the appropriate respondents in an application for judicial review. Its determination is a discretionary task guided by the *Rules* and jurisprudence. Discretion requires a consideration of numerous factors, including the nature of the interest of the entity seeking to be a respondent - is it directly affected; is it a public or private interest; is it a decision-maker; the number of other respondents and the nature of their interest; the entity's role in the decision-making process; and the implications of the decision under review.

[26] In this case, the AGC is an appropriate party respondent and the style of cause shall be amended to reflect this.

[27] The parties shall discuss timing of the AGC's submissions in the judicial review and if unable to agree, bring it to case management. A case management conference shall be scheduled after the filing of all parties' submissions in the judicial review for the purpose of discussing any limitations required on any submissions at the hearing of the judicial review.

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DUNCAN C.J.