

SUPREME COURT OF YUKON

Citation: *Petersen v Yukon (Government of)*,
2025 YKSC 33

Date: 20250605
S.C. No. 24-A0045
Registry: Whitehorse

BETWEEN:

ERIC PETERSEN

PETITIONER

AND

YUKON GOVERNMENT (LANDS MANAGEMENT BRANCH)

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner

Arthur Mauro

Counsel for the Respondent

Kimberly Sova

REASONS FOR DECISION

OVERVIEW

[1] This petition raises issues surrounding the complex land management process in the Yukon, including the importance of clear communication of options and procedure.

[2] The petitioner seeks a declaration that the lease between him and the Yukon government for the land in question is being held in trust by the Yukon government in his favour; and an order that this trust be terminated and legal and beneficial ownership be transferred to the petitioner. In the alternative, the petitioner seeks an order that a lease over the lands be provided until the purpose for which the existing lease was created is fulfilled.

[3] Essentially, the petitioner wants the existing lease over 5.9 hectares, in the Agay Mene Special Management Area created under the Carcross Tagish First Nation (“CTFN”) Final Agreement, to continue through a renewal or a replacement lease until discussions can occur in the management planning process about the possibility of permanent tenure. He says this Court can obligate the Yukon government to do so through the mechanism of a trust created by the lease or through the fulfilment of a contractual term in the lease.

[4] The Yukon government opposes the orders sought on the basis that the lease does not create a trust due to an absence of certainty of intention, one of the essential requirements to establish a trust, and the fact that they are not in a fiduciary relationship with the petitioner. They also say the lease terms do not obligate the Yukon government to renew or replace the lease indefinitely. They note they are obligated by the CTFN Final Agreement to create a park in the Agay Mene Special Management Area, thereby preventing them from disposing of any land within the area except with the consent of the First Nations.

[5] For the following reasons, I deny the petition. However, because of the absence of clarity about process, options, and possible outcomes provided to the petitioner by the Yukon government, leading him to pursue this litigation, he is entitled to recover his costs from the Yukon government on a party and party basis.

ISSUES

[6] Does the lease between the petitioner and the Yukon government for the leased lands create a trust over them, generating an enforceable obligation on the Yukon government to continue to protect the leased lands for the benefit of the petitioner until a

more permanent tenure may be discussed in the management planning process for the Agay Mene Special Management Area?

[7] Does the lease create an enforceable contractual obligation on the Yukon government to continue to protect the leased lands?

BACKGROUND

[8] The petitioner, along with Stuart Withers as a joint tenant, was granted a lease with the federal government Department of Indian and Northern Affairs for a property at approximately Kilometre 40 on the east side of Atlin Road, on July 14, 1981. There was no access to the Atlin Road from the property. Nevertheless, they built a cabin and some improvements on the property. It was classified as recreational property.

[9] In August 1984, the petitioner applied to the Federal/Territorial Lands Advisory Committee (“FTLAC”), a federal review and recommendation body for land dispositions in the Yukon, for an enlargement of the leased property to get access to the Atlin Road, for improvements such as a sauna and a well, to increase his privacy and eventually obtain a possible title to a two-hectare lot. The federal government rejected his application in September 1984, because “recreational lease lot expansions were not possible to grant” at that time, and the timber cutting operation adjoining the lease was an unsatisfactory situation.

[10] The Yukon government advised the petitioner in December 1984, in response to his request, that on transfer of administration and control of the land from the federal government to the Yukon, they would revise his lease classification from recreational to residential and entertain an application for an enlargement under the lot enlargement program.

[11] Administration and control of the leased property was transferred from the federal government to the Commissioner of Yukon on February 7, 1985. The surrounding lands were not transferred and remained in control of the federal government.

[12] Title to the leased land was registered on August 22, 1986, to Eric Petersen and Stuart Withers as joint tenants.

[13] On January 7, 1987, the federal government rejected the petitioner's second lot enlargement application because a portion of the area he applied for was withdrawn from disposition due to its identification as a site-specific selection by the CTFN in the Yukon First Nation land claim negotiations. The petitioner revised the boundaries in his application to avoid the site selected area. However, on May 7, 1987, the federal government denied the petitioner's application again, because the lot was still classified as recreational. The Supervisor of Lands advised the enlargement would be considered if he wanted to use the site for rural residential purposes and build a dwelling for \$20,000 or more.

[14] In November 2002, the petitioner made another application for lot enlargement, originally for an additional 1.7 hectares. FTLAC and the Yukon Territory Land Application Review Committee ("LARC") together accepted it for review, given the imminence of devolution of administration and control of lands in the Yukon from the federal government to the territorial government. Before the review, on January 7, 2003, the petitioner and Stuart Withers increased their application to eight hectares, to include a better spot to build a house, to have one lot that encompassed the bench, the current lot and the field in front of the cabin, to fire smart the area, and to take advantage of the absence of neighbours and development.

[15] At the meeting of the Committees on February 13, 2003 to consider the application, CTFN opposed the application because it was within the Agay Mene Special Management Area, meaning an environmentally protected space. Their land claim was in final draft form and was expected to be finalized within six to 12 months; the land uses, land management, and wildlife in the area such as caribou and deer, were all currently being considered. The federal government wanted to assess timber values of the land and Yukon government Community Services considered eight hectares was excessive for the present use because it could lead to unplanned subdivision. They suggested reconfiguration to encompass the field, the direct access to highway, and portion of ridge area.

[16] The FTLAC and LARC recommended approval to lease a reconfigured area of four hectares, until such time as more permanent tenure could be discussed through the management planning process for the special management area. No new improvements were authorized on the leased property until after that time and the Department of Environment was to report on caribou and other wildlife information from a current government study, and complete an archaeological assessment of the bench that summer.

[17] On March 6, 2003, the federal government advised the petitioner of their acceptance of the Committees' recommendation: a 4.79-hectare lease for enlargement purposes. On March 31, 2003, the petitioner received the lease for signature. The lease was between the Government of Yukon as represented by the Manager, Client Services, Lands Branch, Department of Energy, Mines and Resources, and Eric Petersen and Stuart Withers as joint tenants.

[18] On April 1, 2003, the federal Lands Branch devolved administration and control of all federal lands to the Yukon Lands Branch.

[19] On April 8, 2003, the Yukon Lands Branch provided the petitioner with an executed copy of lease dated as of March 1, 2003, subject to the *Territorial Lands (Yukon) Act*, SY 2003, c 17, and *Regulations*, for a five-year term, with the ability to renew for another five years upon essentially the same terms and conditions. It included in clause 19.12 – “[t]he said land is leased only until such time as more permanent tenure can be discussed through the planning process for the proposed special management area” and confirmed in clause 19.13 that no improvements were to be placed on the land during the term of the lease. The lease stated the land was to be used for residential purposes only.

[20] The petitioner removed Stuart Withers’ name from the title to the titled property on April 9, 2003.

[21] On March 18, 2004, an Implementation policy analyst employed by the Yukon government recommended that the petitioner make an application to purchase the lease as this might provide the land with more protection in the context of the land claim. The petitioner did not do this.

[22] On July 6, 2004, the lease was amended to reflect boundary adjustments and the removal of Stuart Withers from both the titled property and the lot enlargement application. The leased area increased from 4.97 hectares to 5.9 hectares.

[23] On October 22, 2005, the CTFN Final Agreement was signed, and the special management area called Agay Mene Natural Environment Park (the “Park”) was established. Schedule D to Chapter 10 of the final agreement provided that the Yukon

shall designate the area as a natural environment park pursuant to the *Parks and Land Certainty Act*, RSY 2002, c 165, “[a]s soon as practicable after the Effective Date of this Agreement” (3.2), which was January 9, 2006. This has not occurred. Any titled land registered at or before the final agreement was signed (3.3.3) and any Crown Land subject to an agreement for sale or a lease containing an option to purchase issued by government on or before the effective date of the Agreement (3.3.4) were to be exempted from the Park once created under the statute.

[24] Schedule D also provided that a steering committee be established no later than 24 months after the effective date (2006) of the Agreement to prepare and recommend a management plan for the Park to CTFN, Teslin Tlingit Council (“TTC”), and Yukon government (4.1), and that the committee endeavour to make the recommendation within 36 months of its appointment (5.1). The steering committee was to consider and have the management plan address a number of matters (5.3) including land use and recreational use; and the management plan preparation was to include a process for public consultation, including consultation with Carcross Tagish people and TTC (5.6). There was no evidence that this has occurred.

[25] On November 14, 2007, the petitioner entered into a second lease for a five-year term, until February 28, 2013, replacing the April 7, 2003 lease. It contained a renewal clause and the same provisions as in the 2003 lease, except that the leased land was now 5.9 hectares instead of 4.79 hectares.

[26] On August 28, 2012, the lease was assigned to Eric Petersen and Sean Kristian Petersen to reflect the new names on the titled land.

[27] In January 2013, a replacement lease was sent to the petitioner. Numerous changes were made by the government and there was initially no renewal section. During February, March, and April, the petitioner corresponded by email with Lands Branch to discuss the changes.

[28] On April 30, 2013, a third lease for a five-year term, until February 28, 2018, was signed by the Yukon government and Eric Petersen and Sean Petersen. It included a replacement clause, a renewal clause, and the same provisions as in the previous leases.

[29] On June 5, 2014, the administrative plan survey of the Park was registered on title.

[30] On January 23, 2018, the petitioner and Sean Petersen entered into a fourth lease for five years, until February 28, 2023. It was not a replacement lease, and it did contain a renewal clause allowing for renewal of five years and the same provisions as in the previous leases.

[31] Over this entire period, the petitioner heard nothing about the management planning process under the final agreement.

[32] During 2020, the petitioner attempted to move the matter forward by providing a letter to the Yukon government proposing a reduction of the total area he was requesting for enlargement purposes to two hectares. No response was received from the Yukon government.

[33] During March 2021, the petitioner met and emailed with the CTFN Director of Lands, to discuss his enlargement application and to provide a copy of his revised proposal and his own sketch. Shortly thereafter, in May 2021, the petitioner sent a

professionally created sketch prepared by Challenger Geomatics. During the meeting, the CTFN Director had no substantive comments and indicated his expectation that the Yukon government would consult with the petitioner. He did not respond to the sketches sent to him.

[34] Between June 2021 and October 2022, the petitioner corresponded by letter, phone, and email with the new Director of the Yukon Lands Management Branch, in an unsuccessful attempt to resolve the issue.

[35] In April 2023, the Yukon government emailed the petitioner to advise a fifth lease was being prepared. The petitioner received it in June 2023, and entered into it along with Sean Petersen on January 15, 2024, for a five-year term, from March 1, 2023, to February 29, 2028. It did not contain a renewal clause and there was a fee increase. At that point the petitioner had engaged legal counsel, who was advised by the Yukon government that a lease could only be renewed once, after which it had to be replaced, subject to the Yukon government's review and approval.

[36] As of the date of the application hearing, no order in council has established the Park.

[37] No evidence was provided about the status of any management planning discussions.

PARTIES' POSITIONS

[38] The petitioner says the purpose of the lease from the outset was to continue to hold the leased land on his behalf until more permanent tenure of that land could be discussed. This, he says, is in effect mandated by the terms of the lease either by the trust that he says it creates, or by contract. He relies specifically on the phrase "the said

Land is leased only until such time as more permanent tenure can be discussed through a planning process”, plus the intention of the parties, evident from the surrounding circumstances. The petitioner argues that the exercise of discretion by the Yukon government in this case must result in an ongoing lease for the petitioner until more permanent tenure can be discussed, enforceable by this Court.

[39] The Yukon government denies the existence of a trust because the lease lacks the requisite certainties, especially given its creation by a public authority whose responsibility is to act in the best interests of society as a whole. The leases were for five-year terms and the clause relied on by the petitioner was in effect an early termination clause. There was uncertainty at the outset and that uncertainty is ongoing, which is why the leases were recommended as a form of delay until “circumstances were more settled and a full and proper discussion on the application could be had” (Respondent’s Outline at para. 26). There was no obligation on the government from the lease or the surrounding circumstances to do anything other than review any application for title by the petitioner once made, in the context of their obligations under legislation and the final agreement. At most, they say the petitioner’s right to re-apply for title is preserved by the lease language, and there is sufficient time before March 2028 for an application to be considered and/or discussions to occur.

LAW

What is a trust?

[40] The common law of trusts has a long and complex history, rooted in the Middle Ages, and adapted gradually over time. Trusts can exist in a myriad of fact situations – funds set up for a child’s future education, funds bequeathed through a will to a person

who has poor financial management skills or who is under-age, or monies obtained through a fund-raising drive for charitable relief for victims of fire. Trusts can exist not only in the areas of family, estates, and charities, but also in business – such as mutual fund trusts, pension fund trusts, real estate investment trusts. As noted by D.W.M. Waters, M.R. Gillen and L.D. Smith, eds, in *Waters' Law of Trusts in Canada*, 5th ed., (Toronto: Thomson, 2021) ("*Waters*") at 10, the "definition of a 'trust' has always been elusive ... Probably the most that can be said is that the trust is a property holding, or property holding and management, device where the property in question constitutes a segregated fund." At page 3, *Waters* says: "The essential features of a common law trust ... are a segregated fund comprising an asset or a number of assets, a person or purpose as the object of the trust with exclusive right to the enjoyment of the fund or its dedication, and a person holding title to the asset or assets held in the trust and in some instances administering or managing the fund." The trustee has powers and obligations, which they must exercise exclusively in favour of the beneficiary, who in turn has the legal right to compel performance of those obligations. Many Canadian courts have confirmed the following description of a trust: "A trust is an equitable fiduciary obligation, binding a person (called a trustee) to deal with property (called trust property) owned and controlled by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries ...), of whom he may himself be one, and any one of whom may enforce the obligation." D.J. Hayton, P. Matthews & C. Mitchell, *Underhill and Hayton Law of Trusts and Trustees*, 19th ed. (London: LexisNexis Butterworths, 2016).

[41] The creation of a trust requires the trust property be vested in the trustee and the establishment of three certainties: certainty of intention to create a trust, certainty of the subject matter of the trust, and certainty of the object or purpose of the trust: *Suen v Suen*, 2013 BCCA 313 at para. 45. The party asserting the trust's existence must prove the existence of all three of these certainties on a balance of probabilities: *Xu v Hu*, 2021 BCCA 2 ("*Xu*") at para. 13.

[42] Certainty of intention requires that the settlor intended to benefit the person through a trust (*Xu* at paras. 16-17). Certainty of intention can be found to exist where a person who owns property transfers it to another (the trustee) with the intention that the trustee hold and manage the property for the exclusive benefit of others: *Angus v Port Hope (Municipality)*, 2017 ONCA 566 at para. 98. Intention can be express or implied and can arise from words or actions of the settlor (*Xu* at para. 15). Conduct in the form of "sequence of transactions or circumstances may suffice" *Mosiuk v Nagel's Debt Review Inc.*, 2017 SKQB 173 at para 51. Technical, legal words such as 'trust' are not necessary. Courts can consider the surrounding circumstances and the context in determining intention.

[43] Certainty of subject matter of the trust means the subject matter of the trust is ascertained or ascertainable.

[44] Certainty of object of the trust means those who are benefiting from the actions of the trustee are ascertained or ascertainable.

Fiduciary relationship and status of government

[45] Where a government is involved, different considerations apply. As noted by *Waters* at 31-2, governmental authority arises mainly from statute, treaty agreement or

prerogative. The interpretation of that source of authority determines whether the Crown is a trustee in the sense of a private law trust – a “true trust”- or whether the Crown is carrying out a “political trust”, meaning the government through the public servants is trusted to fulfill its obligations to citizens. In the case of a private law or true trust where the government is a trustee, the beneficiary has the ability to have the government’s conduct reviewed and enforced in the courts. Where the ‘trust’ is characterized as a “political” duty, the courts have no jurisdiction over the government’s conduct as a “trustee.”

[46] *Waters* notes that in certain circumstances a government may be found to owe a fiduciary duty to its citizens or group of citizens, which in turn may create an obligation similar to that owing under a “true trust.”, or put another way, importing this private law concept into the government context. For example, in *Guerin v R*, [1984] 2 SCR 335 (“*Guerin*”), in the context of an Indian band’s surrender of reserve land to the Crown for the purpose of a lease for a golf course, the Supreme Court of Canada held for the first time that the Crown had a fiduciary duty, enforceable by the courts, to deal with the land for the benefit of the Indians. This duty arose from the obligation of the Crown under successive Indian Acts, including the one in place at that time, to act for the benefit of the Indians when they are surrendering their otherwise inalienable reserve lands. The Crown exercises its duty by interposing itself between the Indians and the prospective lessees or purchasers, to prevent the Indians from being exploited. Section 18(1) of the *Indian Act*, RSC, 1985, c I-5, confirmed the responsibility of the Crown to protect the interests of the Indians in dealings with third parties and conferred on the Crown the discretion to determine the best interests of the Indians. This obligation to act for the

benefit of another with the obligation carrying with it a discretionary power, created a fiduciary relationship (*Guerin*). Over the years, this concept has been expanded considerably, especially after the introduction of s. 35 into the *Constitution Act, 1982*,¹ through cases such as *R v Sparrow*, [1990] 1 SCR 1075; *Wewaykum Indian Band v Canada*, 2002 SCC 79; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, and many others. Waters noted the only cases post-*Guerin* involving the Crown's fiduciary obligations were related to aboriginal interests (*Waters* at 33).

[47] The Supreme Court of Canada in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 ("*Elder Advocates*") at para. 44, confirmed the exceptional circumstances of a fiduciary relationship in the public law context, noting the duty of a fiduciary is one of utmost loyalty to the beneficiary, which is inherently at odds with the governmental responsibility to "act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups". The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v Canada*, 2001 FCT 1408 at para. 178. Government obligations and responsibilities create circumstances that distinguish government actions from those of an individual, and "make it necessary to scrutinize with greater care the words and circumstances alleged to impose a trust" *Aura Ventures Corp v Vancouver (City)*, 2023 BCCA 209 at para. 46, quoting *Tito v Waddell (No. 2)*, [1977] Ch. 106 (Eng. Ch. Div.) at 211-212.

¹ *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c. 11.

ANALYSIS

The test of the three essential certainties for a trust is not met

[48] The lease does not meet the test of the three certainties required to establish a trust.

[49] The wording of the clause in the lease that is relied on to create the intention, the nature and context of a lease, and the legislative framework governing the actions of the Yukon government are factors that support a lack of certainty of intention.

[50] The subject matter of the lease – that is, the leased lands – changed over the years, supporting an absence of certainty.

[51] The people who were intended to benefit from the lease also changed over the years. While the petitioner has been a constant, originally Stuart Withers was a party to the lease, and in later years Sean Petersen was added to the lease, contributing to a lack of certainty.

[52] There is no fiduciary relationship between the Yukon government and the petitioner that can substitute for a trust. The Yukon government is not obligated to act exclusively for the benefit of the petitioner and in fact this conflicts with its other public duties and obligations to its citizens, including Yukon First Nations who have signed a modern treaty with the Yukon and federal governments.

[53] Finally, there is no legal or factual basis for the request for an order that the trust be terminated and legal and beneficial ownership be transferred to the petitioner. This relief was not pursued at the hearing. The focus of the petitioner's argument was for relief that the lease over the lands continue to be provided until the purpose of the lease

can be fulfilled: that is, until more permanent tenure can be discussed during the management planning process for the special management area.

Certainty of intention

[54] The trust's intention is normally derived from the settlor, who owns the property in question and transfers it to a trustee to hold it for the exclusive benefit of others. Here, both the federal government before devolution and the Yukon government after devolution, used the same language that appeared in the lease and was relied on by the petitioner to create the intention for the trust. A settlor can also be a trustee. Thus, in this case whether the settlor is the federal or the Yukon government may not matter.

[55] There were no express words creating a trust in this case. The clause about the lease and a permanent tenure discussion relied on by the petitioner to create the trust in the first and subsequent leases does not establish the requisite intention. The Yukon government's continual renewal or replacement of the lease since 2003 on five-year terms, despite the wording of the *Territorial Lands (Yukon) Act and Regulations*, while consistent with the clause in the lease relied on by the petitioner, is not sufficiently certain to support the intention posited by the petitioner.

[56] This lease clause originated from the petitioner's failed lot enlargement application in 2003. At that time, the application of the petitioner and Stuart Withers to enlarge their .4 of a hectare titled lot to eight hectares was opposed by the CTFN because the proposed enlargement was within the special management area they had selected. The CTFN final agreement was still in draft at that time. There was also concern about the size of the lot expressed by the Yukon government Community Services representative, who considered it excessive for the proposed purpose and

feared it could lead to unplanned subdivision. Further delays were encouraged by the Yukon government's Heritage branch as they wanted to do an archeological assessment of the bench, and the Yukon government's Environment branch who wanted to review the upcoming survey of caribou in the area. The Committees' recommendation, accepted by the Yukon government, of a lease of a reconfigured area of four hectares reflected the concerns expressed. The lot enlargement application was not approved, thereby preserving the special management area. The recommendation was a temporary lease, that allowed for the possibility of a future permanent tenure by the petitioner, pending the outcome of discussions. In other words, it was an interim step, not a decision, to preserve the ability of the petitioner to apply again for titled land in that location, once further environmental and heritage information was received, the CTFN final agreement was completed, and a management planning process was underway, with the benefit of updated information and the finality of the final agreement.

[57] This situation is full of variables. First, the petitioner does not indicate the date on which he says the trust was created - was it the recommendation of the FTLAC and LARC in February 2023, the March 6, 2003 letter to the petitioner, or the lease as of March 1, 2003? Second, there is no indication of what more permanent tenure would be – i.e. title, a long-term lease with conditions, something else? Third, there is no time period referenced for the discussions to occur, because at that time, and perhaps still to this day, the timing of the unfolding events was not known. Fourth, it is unclear who will engage in the discussions, how they will occur, when they will occur, who will initiate them, who is responsible for involving the petitioner, what his role will be, and what will be the role of the Yukon government. Fifth, it is unclear if and when discussions occur,

at what point does the lease end – once discussions commence, during the discussions, when the discussions are over?

[58] The uncertainty of this clause’s meaning and how it will be implemented is further evidenced by the attempts of the petitioner over the years to discuss more permanent tenure with the Yukon First Nations and with the Yukon government, without success. No one has approached him to involve him in any management planning processes for the special management area. This absence of clarity about process and implementation of the condition relied on to create the trust reveals an uncertainty of intention.

[59] Next, the clause in the lease relied on by the petitioner to create the trust is one of many clauses in the lease. There is no dispute that the lease is a contract or agreement between the government and the petitioner. There are many reasons why a lease can be terminated that have nothing to do with the discussions about a more permanent tenure. The petitioner has obligations under the lease, including paying an annual fee and taxes, taking reasonable precautions to prevent fire from occurring, and disposing of all timber and slash cleared on the land in accordance with direction from the forest officer and satisfactory to the Yukon government. Paragraph four of the lease provides that “breach of any clause shall be a fundamental breach of the lease and may result in termination.” The petitioner relies on the permanent tenure clause to create the trust, but ignores the rest of the legal instrument of which this clause is one small part. While the purpose of the lease may originate with this clause, that purpose cannot overwhelm the entire contract and render the additional clauses meaningless. The Yukon government cannot be required by this Court to continue to grant a lease to the

petitioner primarily because of one clause in the lease, in the context of an entire contractual arrangement established by the lease, regardless of the actions of the parties to the lease.

[60] Further, there were changes discussed during the lease replacement process in 2013 over a four-month period before a new lease was in place. This kind of uncertainty in the document which is the source of the trust, is incompatible with the establishment of a trust.

[61] Finally, there are legislative requirements that govern the lease. The lease incorporates the terms of the *Territorial Lands (Yukon) Act* and the *Territorial Land Regulations*. This statute provides the authority to the Yukon government to enter into leases. The statute and regulations include a limitation of the term of a lease to 30 years, and a limitation of one renewal for each lease. One of the leases did not comply with this requirement as it was a second renewal. The current lease does not contain a renewal clause for that reason and the petitioner would be required to apply for a new lease, subject to the approval and discretion of the Yukon government. These legislative requirements can result in the possibility that the lease may not be able to be replaced or renewed because of the legislated time limitations, assuming discussions do not occur within a certain period of time. This contributes to an uncertainty of intention.

[62] While the *Parks and Land Certainty Act* is part of the context, given the obligation in the final agreement on the Yukon government to establish the Park, I agree with the petitioner that until the Park is created, it is not part of the legislative requirements. However, the final agreement's obligation on the Yukon government to create the Park in the proposed enlargement area adds to the context of uncertainty.

Certainty of subject matter

[63] It is necessary for the subject matter to be ascertained or ascertainable. The petitioner says the subject matter is clear from the sketch attached to the lease outlining the boundaries of the leased land. However, the boundaries and the size of the proposed enlargement have not been consistent. In 2002, the petitioner's application was for an eight-hectare lot enlargement, while the lease granted as a result of that application in 2003 was for 4.79 hectares. In 2004, the boundaries were reconfigured and the amount of leased land became 5.9 hectares. From the lease entered into in 2007 to the present, the boundaries of land did not change. However, in 2022, the petitioner proposed to the Yukon government that the lot enlargement for consideration be reduced to two hectares from the 5.9 hectares. Although this request was made in the spirit of compromise and resolution, this along with the other changes over the years raises uncertainty about the property that is the subject of the trust.

Certainty of object

[64] This certainty requires that the persons benefiting from the actions of the trustee are ascertained or ascertainable. In this case, there have been several changes over the years, contributing to an absence of certainty. The first lease in March 2003 was between the Yukon government and the petitioner and Stuart Withers. The petitioner advised the Lands Branch on March 23, 2004, that Stuart Withers was removed from the first lease, leaving the petitioner as sole leaseholder. The next lease in 2007 was between the Yukon government and the petitioner alone. Then the 2012 lease was assigned to Eric Petersen and Sean Kristian Petersen to reflect the names on the titled land. Although the petitioner has been consistent throughout, other individuals have

been removed or added to the leases. It is uncertain whether the objects will remain the same or be added to in future.

No fiduciary relationship exists between the government and the petitioner

[65] There is no fiduciary relationship between the Yukon government and the petitioner in this situation that could create obligations similar to those under a “true trust”. The existence of a lease between the Yukon government and the petitioner is not enough to create a fiduciary relationship. This is not a situation where the government is compelled to put the best interests of the petitioner before their own, or where they owe a duty of utmost loyalty to the petitioner. The government must act in the interests of all citizens (*Elder Advocates* at para. 49). In this case, the land at issue at the time the lease was created had claims over it from the CTFN, which created certain obligations on the government at that time, and more obligations once the agreement was finalized. There was also an interest in the land asserted by the Taku River Tlingit First Nation. The temporary measure of granting a lease to the petitioner, under the authority of the *Territorial Lands (Yukon) Act*, was a recognition by the government of the existence of competing interests over the same land and the need for those interests to be resolved, initially through discussions, in the context of the land application process, the legislative requirements of the *Territorial Lands (Yukon) Act*, and the legislation creating the final agreements. As stated by the Supreme Court of Canada in *Elder Advocates*, in order to create a fiduciary obligation, the affected interest of an individual “must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement” [emphasis in original] (at para. 51). Here the petitioner had no pre-existing legal entitlement to the leased land.

There is no contractual obligation on the government

[66] Having determined that the lease provision is a contract and not a trust, the next question is whether the Yukon government has a contractual obligation to continue to renew or replace the same lease until the more permanent tenure can be discussed in the management planning process?

[67] The Supreme Court of Canada in *Sattva Capital Corp v Creston Molly Corp*, 2014 SCC 53 at para. 47, described the evolution of contractual interpretation towards a “practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine ‘the intent of the parties and the scope of their understanding’ To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract” [citations omitted].

[68] Looking at the wording of the clause in its ordinary and grammatical meaning, it is an early termination clause. In other words, during the five-year term of the lease, if discussions about permanent tenure occur, the lease ends. It is not legally possible for a term in a contract to bind the parties to certain actions beyond the term of the contract. The renewal or replacement clauses in the lease do not link the renewal to the occurrence of discussions about permanent tenure. The petitioner cannot rely on the current contract provision of a term lease to obtain a court order that the lease continue to be renewed by the Yukon government until certain events external to the parties’ relationship occur.

OBSERVATIONS AND COSTS

[69] My conclusion on the legal arguments raised does not address the reason for the petitioner's initiation of this litigation. While arguably he could have attempted earlier to advance a resolution, and he could have followed the 2004 advice of the implementation policy analyst to apply to purchase the lease, the petitioner worked hard to resolve this situation from 2020 onwards, before resorting to a court application. He reduced the size of the proposed lot enlargement from the 5.9 hectares covered in the lease, to two hectares. With this new proposal, on March 10, 2021, he initiated a meeting with the Director of Lands for CTFN, and shortly after provided him with a professionally prepared sketch and formal letter, to which he received no response.

[70] The petitioner then delivered a comprehensive letter on June 25, 2021, to the Yukon government Director of the Lands Management Branch setting out the history, context, and his proposed resolution of the lot enlargement application. While the Director acknowledged the letter and advised he would pursue a potential resolution, the petitioner received no response. On November 3, 2021, the petitioner sent a second letter to the Yukon government Director requesting an update. The Director advised by email on November 9, 2021, he had been in discussion with "Environment Parks" about the Agay Mene area and management planning. He advised there had not been much progress on the management planning side, but they were talking to Parks about how his issue could be resolved, and he would send another update before the end of the month.

[71] On January 12, 2022, having heard nothing, the petitioner wrote again to the Director with a copy of his formal letter and sketch provided to CTFN. Some internal

Yukon government emails show that the Director had communicated with Parks, who said they needed more time, and he was planning to speak to the CTFN Director of Lands. However, he did not respond in writing to the petitioner until March 11, 2022, when, after a phone call with the petitioner, the Director emailed him to ask if he had heard anything further from CTFN. He wrote “we are not willing to entertain the application at this time as the land is designated as a future park, but if there is willingness from CTFN to look into this and allow this area to be included in a land application then we could possibly proceed. I will send you more details in the next couple of weeks.”

[72] The next communication was a phone call between the Director and the petitioner on August 8, 2022, to discuss renewal of the lease, and the petitioner’s reasons of security and privacy for the lot enlargement application. On October 31, 2022, the petitioner wrote again to the Director requesting a renewal of the lease for 30 years, given the purpose of the lease had not yet been fulfilled. There was no response from the Yukon government until April 2023, when an official from Lands Management Branch advised the petitioner by email that they were preparing the next lease and they needed some contact information. In June 2023, the petitioner received the proposed lease for a five-year term, without the renewal clause. By that time the petitioner had retained legal counsel, who questioned the absence of a renewal clause, and was advised that the legislation (the *Territorial Lands (Yukon) Act*) only allowed for one lease renewal, after which the lease had to be replaced “subject to Yukon government’s review and approval.” This was confirmed by Yukon government legal counsel on October 18, 2023. The petitioner filed the petition in this Court on April 9, 2024.

[73] Counsel for Yukon government throughout her submissions argued that the petitioner should have pursued another application for lot enlargement in order to trigger the discussions or obtain a resolution. However, this is contradicted by the Yukon government Director's statement in March 2022, that they were not willing to entertain a lot enlargement application from him at that time. It is also contradicted by Yukon government counsel's own arguments that the CTFN Final Agreement obligates the Yukon government to create a park in the Agay Mene Special Management Area and it is not open to the Yukon government to dispose of land in that area once it is a Park, outside of the terms of the final agreement. Counsel rightly pointed out that CTFN and the TTC must consent to the removal of any land from that area, and there is a constitutional obligation on the Yukon government to consult the Taku River Tlingit First Nation because of their asserted overlapping claim. The obligations created by the CTFN Final Agreement, as well as the constitutional duty to consult, are clear constraints on the Yukon government's management of this land.

[74] On the evidence provided in this case, the Yukon government did not provide a clear explanation to the petitioner about the process and options available to him, did not keep him informed of the reasons for the lack of progress in the planning process for the area, did not attempt to move the matter forward, did not respond substantively to his suggestion for resolution, did not advise him thoroughly of the potential or likely consequences of the real constraints created by the final agreement and constitutional duties, and did not address the expectations they created by continuing to renew or replace the lease for over 20 years, especially after the CTFN Final Agreement came into effect in 2006. Although the petitioner's legal arguments were not successful, his

initiation of this litigation was understandable. The Yukon government's failures to communicate clearly with the petitioner, while at the same time continuing to renew or replace the lease every five years, has kept him in a state of uncertainty for over twenty years.

[75] Legal costs normally follow the event, meaning the successful party recovers their costs from the unsuccessful party. The *Rules of Court* of the Supreme Court of Yukon (Rule 60(9)) allow the Court to order otherwise. This means the Court has discretion to consider all the circumstances of the case that could affect a costs award. Rule 60(15) provides:

Where anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court may order:

- (a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party; or
- (b) that the party pay the costs incurred by any other party by reason of the act or omission.

[76] The petitioner's litigation was an attempt by him to obtain some certainty and to protect his application for lot enlargement. While the petition was unsuccessful in achieving this end, it was a reasonable step taken by him in the circumstances of poor, delayed, and unclear communication from the Yukon government.

[77] For this reason, even though the petitioner's legal arguments were not successful, I will order that party and party costs be paid by the Yukon government. If there is disagreement over the amounts, or if there were settlement discussions that may affect the amounts, this may be spoken to in case management.

CONCLUSION

[78] The petition is dismissed for the above reasons, with costs to the petitioner.

DUNCAN C.J.