COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Edzerza v. Kwanlin Dün First Nation***, 2008 YKCA 8

Date: 20080702
Docket: CA07-YU582

Between:

Jennifer Edzerza, Helen Charlie and Jacine Fox

Appellants
(Petitioners)

And

Kwanlin Dün First Nation, Mike Smith, Shirley Dawson, Jessie Dawson, Allan Taylor, Bill Webber, Ann Smith, Edith Baker and Jennifer Mauro

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

A.W.L. Roothman — Counsel for the Appellants

G.W. Whittle — Counsel for the Respondents

Place and Date of Hearing: Whitehorse, Yukon Territory, May 26, 2008

Place and Date of Judgment: Vancouver, British Columbia, July 2, 2008

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] The petitioners appealed the order of Mr. Justice Darichuk, dated 11 May 2007 and indexed as 2007 YKSC 27, staying proceedings commenced by the petitioners to challenge the election rules under which the Chief and Council of Kwanlin Dün First Nation ("Kwanlin Dün") were elected in June 2005. At the conclusion of the hearing of the appeal, the appeal was dismissed with reasons to follow. These are the reasons for the dismissal of the appeal.

Background

[2] The Council for Yukon Indians, the Federal Government and the Government of the Yukon Territory negotiated an Umbrella Final Agreement that was executed on 29 May 1993. The umbrella agreement was intended to be a blueprint for final agreements between Yukon first nations, the Federal Government and the Yukon Government, and it was contemplated that each final agreement would include provisions specific to each first nation. One of the items of the umbrella agreement intended to be incorporated into final agreements was a provision stipulating that the parties would negotiate for self-government agreements appropriate to the circumstances of the first nation and in accordance with the Constitution of Canada.

[3] When two of the Yukon first nations had entered into final agreements and self-government agreements with the Federal Government and the Yukon Government, the Yukon Legislative Assembly enacted the ***First Nations (Yukon)***

Self-Government Act, S.Y. 1993, c. 5, (now R.S.Y. 2002, c. 90) approving these self-government agreements and authorizing the Commissioner in Executive Council to approve subsequent self-government agreements with Yukon first nations, including Kwanlin Dün.

[4] In 1994, when additional Yukon first nations had entered into self-government agreements, Parliament enacted the ***Yukon First Nations Self-Government Act***, S.C. 1994, c. 35. The Act brought into effect the self-government agreements that had been concluded, and authorized the Governor in Council to bring subsequent self-government agreements with Yukon first nations into effect. The Act also contained the following provisions relevant to this appeal:

(a) Section 6(1) –

> 6. (1) When the self-government agreement of a first nation is brought into effect, the first nation ... succeeds to the rights, titles, interests, obligations, assets and liabilities of its predecessor band and that band ceases to exist.

(b) Section 8(1)(e) –

> 8. (1) The constitution of a first nation ... shall, in a manner consistent with its self-government agreement, provide for
>
> * * *
>
> (e) challenging the validity of the laws of the first nation and quashing invalid laws;

(c) Section 10(4) –

> (4) A law enacted by a first nation ... comes into force at the beginning of the day following its enactment, or at such later time as is specified in the law.

(d) Section 11(1) –

> 11. (1) A first nation ... has, to the extent provided by its self-government agreement,
>
> (a) the exclusive power to enact laws in relation to [certain specified] matters ...;
>
> (b) the power to enact laws applicable in Yukon in relation to [other specified] matters ....

(e) Section 14 –

> 14. Until an agreement respecting the administration of justice is in effect between a first nation ..., Her Majesty and the Yukon Government, or until the expiration of any interim period provided by the first nation's self-government agreement for the purpose of reaching such an agreement, whichever occurs earlier,
>
> (a) the courts of Yukon have, subject to paragraph (b), jurisdiction in respect of laws enacted by the first nation according to the respective jurisdictions of those courts under territorial laws;
>
> (b) the Territorial Court of Yukon has exclusive original jurisdiction in relation to the prosecution of offences under laws enacted by the first nation;...

(f) Section 15(1) –

> 15. (1) For greater certainty and subject to section 14, the Supreme Court of Yukon has jurisdiction in respect of any action or proceeding arising out of this Act or out of a self-government agreement of a first nation ....

[5] On 1 April 2005, Kwanlin Dün became a self-governing first nation under the federal and territorial Acts, and its constitution (the "Constitution") came into effect. On the same day, the Chief and Council then in office purported to enact a document entitled *Rules and Procedures for Conduct of a Vote for Chief & Council, Kwanlin Dün First Nation, April 2005* (the "April 2005 Election Rules"). The election

of the Chief and Council in June 2005 was conducted in accordance with the April 2005 Election Rules.

[6] The petitioners took the position that the April 2005 Election Rules had not been enacted in the manner required by the Constitution and had not replaced the Kwanlin Dün "Election and Referendum Code", which was set out as Schedule 3 to the Constitution. The petitioners maintained the June 2005 election to be invalid because it had not been conducted in accordance with the Election and Referendum Code.

[7] The Constitution contains processes for resolving disputes. Section 21 of the Constitution establishes five branches of government. Two of the branches are the Council (including the Chief) and the Judicial Council. Section 47 of the Constitution provides that a citizen may request the Council to reconsider any of its decisions on the grounds, among others, that the decision was inconsistent with the Constitution and that the decision was made in a manner inconsistent with the procedures described in the Constitution for the enactment or amendment of Kwanlin Dün First Nation law.

[8] Chapter Eight of the Constitution deals generally with the Judicial Council, including its composition, powers and responsibilities. Section 56(1)(d) authorizes the Judicial Council to consider an application challenging a decision of the Council on any ground set out in section 47.

[9] Section 52(1) of the Constitution provides that, subject to subsection (2), the validity of a Kwanlin Dün law may be challenged in the Yukon Supreme Court. Subsection (2) reads as follows:

> Before a person may challenge the validity of a Kwanlin Dün First Nation law in the Yukon Supreme Court, that person must first exhaust any other procedures established by Kwanlin Dün legislation for challenging the validity of that law.

[10] The petitioners initially took two steps to challenge the validity of the April 2005 Election Rules and the June 2005 election. On 28 June 2005, the petitioners issued a notice of appeal to the Kwanlin Dün Judicial Council. However, at that time, steps had not yet been taken to appoint the five members of the Judicial Council. On 4 July 2005, the petitioners commenced the proceeding in the Yukon Supreme Court.

[11] On 7 July 2005, the individual who had been the Chief Electoral Officer under the pre-Constitution election regulations for Kwanlin Dün purported to constitute an election appeals board (the “Election Appeals Board”) to deal with the issue regarding the validity of the April 2005 Election Rules. As a result, the Supreme Court proceeding was stayed by order of Foisy J. made on 21 July 2005.

[12] On 21 July 2005, the Election Appeals Board initially decided that it had jurisdiction to deal with the matter but, on an application by Kwanlin Dün for judicial review of the decision, the Federal Court held on 27 September 2006 that the Board did not have jurisdiction and issued an order prohibiting it from ruling on the

constitutional validity of the April 2005 Election Rules (see ***Kwanlin Dün First Nation v. Edzerza***, 2006 FC 1147, 300 F.T.R. 87).

[13] On 18 July 2005, the petitioners had made a request pursuant to section 47 of the Constitution that the Chief and Council reconsider the decision enacting the April 2005 Election Rules. They asked that the April 2005 Election Rules be repealed and that the June 2005 election be declared void. At a meeting on 7 September 2005 convened to consider this request, the Chief and Council passed a motion repealing the April 2005 Election Rules. The motion did not deal with the status of the June 2005 election.

[14] On 4 October 2005, the Chief and Council passed two motions of enactment. The first motion repealed the part of the Kwanlin Dün Election and Referendum Code dealing with elections (with the exception of a transitional provision relating to pre-existing forms) and enacted *Rules and Procedures for Conduct of a Vote for Chief & Council Kwanlin Dün First Nation (October 2005)* (the “October 2005 Election Rules”). The October 2005 Election Rules were the same as the April 2005 Election Rules except that they contained an extra section purporting to deem them to have come into effect on 1 April 2005 and purporting to deem the June 2005 election to have been conducted in accordance with the October 2005 Election Rules.

[15] The second motion passed on 4 October 2005 enacted the ***Kwanlin Dün First Nation Judicial Council Act***. The members of the Judicial Council were

appointed and sworn in over the following ten-month period, with all of the members of the Judicial Council being sworn in by 12 August 2006.

[16] After the Federal Court issued its decision on 26 September 2006, the Election Appeals Board complied with the decision by dismissing the appeal for want of jurisdiction. The Chief Electoral Officer then issued notice of the results of the 2005 election and, on 4 December 2006, the Chief and Council, elected in the June 2005 election, were sworn into their respective offices.

[17] At a pre-hearing conference held on 15 December 2006, the stay ordered on 21 July 2005 was lifted by Veale J. and the hearing of the petition was scheduled for three days in May 2007.

[18] At the conclusion of the hearing in May 2007, Darichuk J. once again stayed the proceeding. He stayed it on the basis that, as the Judicial Council had jurisdiction to deal with challenges of Kwanlin Dün First Nation law, the petitioners were required to first exhaust other procedures established by Kwanlin Dün legislation for challenging the validity of the law.

Standard of Review

[19] Both counsel cited ***Reza v. Canada***, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61, for the proposition that the standard of review for an appellate court reviewing an exercise of discretion is whether the judge at first instance has given sufficient weight to all relevant considerations.

[20] In ***Reza***, the court paraphrased the test as set out in ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3 at 76-77, 88 D.L.R. (4th) 1. In ***Friends***, at 76, the court quoted with approval the following statement in ***Charles Osenton & Co. v. Johnston***, [1942] A.C. 130 at 138 (H.L.):

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

[21] In ***Elsom v. Elsom***, [1989] 1 S.C.R. 1367 at 1375, 59 D.L.R. (4th) 591, the Supreme Court of Canada explained that an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge "misdirects himself or if his decision is so clearly wrong as to amount to an injustice." This test has been adopted by the court in other decisions, most recently in ***Named Person v. Vancouver Sun***, 2007 SCC 43, [2007] 3 S.C.R. 253 ¶ 123. A trial judge will have misdirected himself or herself if he or she has acted on an incorrect principle of law.

<u>Issues on Appeal</u>

[22] On the appeal, the petitioners asserted that Darichuk J. wrongly exercised his discretion for three reasons. First, the petitioners say they had exhausted all of the

procedures established by Kwanlin Dün legislation in existence when they commenced the proceeding in July 2005. Secondly, they say section 15 of the ***Yukon First Nations Self-Government Act*** was engaged when the October 2005 Election Rules were enacted, and the Supreme Court has jurisdiction pursuant to that Act. Thirdly, they say Darichuk J. did not give sufficient weight to the fact that Kwanlin Dün did not have clean hands because it was responsible for considerable delay in this matter.

First Ground of Appeal

[23] The first ground of appeal is a question of law; namely, whether the chambers judge acted on a wrong principle of law when he held that the petitioners were first required to exhaust other procedures established by Kwanlin Dün legislation before the May 2007 hearing challenging the validity of the law in the Supreme Court.

[24] In interpreting a statute, one should read the words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, its object and the intention of the body enacting it (see ***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42, [2002] 2 S.C.R. 559 ¶ 26). In my opinion, the same approach should be undertaken in interpreting the Constitution.

[25] Giving the words of section 52 their grammatical and ordinary sense, it is my view that the proper time to determine whether a person has exhausted other procedures established by Kwanlin Dün legislation is the time of the hearing before the Supreme Court. It is at that time the person is challenging the validity of the law "in the Yukon Supreme Court". If it had been the intention for the relevant point in

time to be the commencement of the proceeding, the first phrase of subsection (2) would have read something to the effect of “Before a person may commence a proceeding to challenge the validity of a Kwanlin Dün First Nation law in the Yukon Supreme Court ….”

[26] This literal interpretation of section 52 is consistent with the purpose and intent of the Constitution, the federal and territorial Acts and the self-government agreement among Kwanlin Dün and the two levels of government. It has been agreed and legislated that Kwanlin Dün is to be a self-governing first nation, and section 52 should not be given a narrow interpretation that restricts the ability of Kwanlin Dün to be self-governing. The Supreme Court should exercise its jurisdiction only if the prerequisite contained in section 52(2) has clearly been satisfied.

[27] As the Kwanlin Dün Judicial Council was fully constituted prior to the hearing in May 2007, the chambers judge was correct in holding that the petitioners had not exhausted all procedures established by Kwanlin Dün legislation. The Supreme Court did not have jurisdiction at the time of the hearing, and the chambers judge did not act on any wrong principle of law in exercising his discretion to grant the stay. Indeed, as the principle of law involved the jurisdiction of the Supreme Court, the chambers judge would have acted on a wrong principle of law if he had declined to grant the stay.

Second Ground of Appeal

[28] The petitioners submitted that once the April 2005 Election Rules were repealed and then re-enacted by the October 2005 Election Rules, the nature of the litigation was no longer limited to a conflict between a Kwanlin Dün law and the Constitution. Rather, they argued, there is now a conflict between a Kwanlin Dün law (i.e., the retrospective aspects of the October 2005 Election Rules) and section 10(4) of the ***Yukon First Nations Self-Government Act***, which provides that a law enacted by a first nation comes into force on the day following its enactment or such later time as is specified in the law. The petitioners intend to argue at the hearing of the merits of their petition that section 10(4) prevented the Chief and Council from making the October 2005 Election Rules retroactive to 1 April 2005. Thus, the petitioners asserted, the Supreme Court has jurisdiction under section 15 of that Act.

[29] Although section 15 of the Act confirms the jurisdiction of the Supreme Court in respect of any proceeding arising out of the Act, it does not deprive the Kwanlin Dün Judicial Council of its jurisdiction. Despite the fact that the petitioners are challenging a different law, the validity of which (in whole or in part) may depend on section 10(4) of the Act, they are still challenging a Kwanlin Dün law. Section 52(2) of the Constitution requires them to first exhaust other procedures under Kwanlin Dün legislation before challenging the validity of the law in the Supreme Court. The fact that section 15 may give jurisdiction to the Supreme Court does not override the prerequisite contained in section 52(2) of the Constitution, which is binding on the petitioners.

[30] In addition, it is my view that this proceeding is not an action or proceeding that can be said to arise out of the Act or Kwanlin Dün's self-government agreement. The proceeding arose initially out of the enactment of the April 2005 Election Rules and now relates to the enactment of the October 2005 Election Rules (although the petition has not yet been amended to reflect this change). The possibility that the validity of all or part of the October 2005 Election Rules may depend on section 10(4) of the Act does not mean that the proceeding arose out of the Act.

Third Ground of Appeal

[31] The final ground relied upon by the petitioners was that the chambers judge should not have exercised his discretion in favour of Kwanlin Dün because it was the source of considerable delay in this matter. The short answer to this argument is that, as stated above, the chambers judge would have acted on a wrong principle of law if he had declined to grant the stay because the Supreme Court did not have jurisdiction unless the petitioners had exhausted all other procedures established by Kwanlin Dün legislation.

[32] It is also my view that the evidence does not show that Kwanlin Dün acted inappropriately by purposely causing delays in an attempt to frustrate the petitioners. Most of the delay resulted from the involvement of the Election Appeals Board. It was constituted on 7 July 2005, two days after this proceeding was commenced, and it was not until the Federal Court issued its decision on 27 September 2006 that it was clear that the Board did not have jurisdiction to decide upon the constitutional validity of the April 2005 Election Rules. Kwanlin Dün cannot be faulted for

challenging the jurisdiction of the Board to decide a constitutional question because the Federal Court agreed with the challenge.

[33] The Judicial Council was fully constituted by the time of the Federal Court's decision. The petitioners chose to press forward with the Supreme Court proceeding rather than exhausting their recourse before the Judicial Council. The petitioners did not point to any delay on the part of Kwanlin Dün after the issuance of the Federal Court's decision.

[34] Even if it was open to the chambers judge to refuse to grant the stay on equitable grounds, it cannot be said that he failed to give appropriate weight to the events preceding the hearing in May 2007.

Conclusion

[35] It is for these reasons that the appeal was dismissed.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Kirkpatrick"