IN THE SUPREME COURT OF YUKON

Citation: *Ta'an Kwach'an Council* v. *Government of Yukon et al.*, 2008 YKSC 54

Date: 20080728
S.C. No. 08-A0052
Registry: Whitehorse

Between:

TA'AN KWACH'AN COUNCIL

Petitioner

And

DENNIS FENTIE, PREMIER and GOVERNMENT OF YUKON

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Roger S. Watts	Counsel for the petitioner
Penelope Gawn and Mike Winstanley	Counsel for the respondents

REASONS FOR JUDGMENT
(Interlocutory Injunction)

INTRODUCTION

[1] Ta'an Kwach'an Council, a Yukon First Nation situated near Whitehorse, has filed a petition seeking a number of declarations from the court to the effect that the Government of Yukon must consult with the First Nation before concluding a public tender for land owned by the Government in downtown Whitehorse. The First Nation has brought an interlocutory injunction application to suspend the public tender process until the hearing of its petition.

[2] The facts in this case are based on an exchange of letters between the Chiefs of two Yukon First Nations and the Premier of Yukon regarding certain waterfront land and do not appear to be in great dispute, subject of course to interpretation. To that end, the court suggested that the parties proceed immediately to a hearing on the merits to avoid any further inconvenience that might be caused by any delay. The First Nation expressed interest but the Government of Yukon declined. To be fair, the Government of Yukon may have declined because of the late filing of submissions and authorities by counsel for the First Nation. An adjournment was offered but declined. Several dates are available in August and September for the hearing on the merits.

FACTS

[3] The Ta'an Kwach'an Council signed a Final Agreement with the Government of Canada and the Government of Yukon on January 13, 2002. In the Final Agreement, the Ta'an Kwach'an Council received, among other things, certain Settlement Lands along the Yukon River waterfront in downtown Whitehorse, in consideration of which the First Nation released its aboriginal claims, right, title and interest to Non-Settlement Land.

[4] On December 14, 2006, the Government of Yukon entered into an agreement of purchase and sale with the City of Whitehorse for Lots 23 and 40 (the waterfront land) close to a parcel of Ta'an Kwach'an Council Settlement Land. The waterfront land was originally held by third parties and was not available for selection in the land claim negotiations. Coincidentally, the Kwanlin Dun First Nation which is situate in the City of Whitehorse, also has Settlement Land close to the waterfront land.

[5] The two First Nations had expressed their interest in acquiring the waterfront land to the City of Whitehorse in 2004 and they subsequently met with Premier Fentie in April

2005, to discuss their interest in the waterfront land. The waterfront land is within the traditional territory of each First Nation.

[6] The Premier wrote to the Chiefs of the First Nations on April 26, 2005, confirming the discussion and indicating:

> "… the Yukon Government is prepared to discuss the various options available for these two properties, including the possible sale of these lots, with the Kwanlin Dun First Nation and the Ta'an Kwach'an Council once the Canada Winter Games have been completed in 2007."

[7] Further correspondence from Kwanlin Dun First Nation indicated that the waterfront land would complement its plans for a cultural centre as well as a mixture of commercial, retail and office space on waterfront land that Kwanlin Dun selected in its Final Agreement. The Premier also indicated that the Government of Yukon "must act in the public interest regarding the future disposition of these lands."

[8] On March 19, 2007, the Chief of Ta'an Kwach'an Council wrote the Premier of Yukon confirming that the Canada Winter Games were completed. She suggested a meeting to discuss their interest in purchasing the lands. The Premier replied on June 6, 2007, that once the transfer of the lands was completed and the lands were held by the Commissioner, "we will be in a position to meet to discuss various available disposal options for the properties," subject to the public interest.

[9] There was no further communication from the Premier about the lands until he telephoned the Chief of Ta'an Kwach'an Council on June 19, 2008, to advise that he intended to advertise the lands for sale by public tender.

[10] The Premier followed up with a letter dated June 20, 2008 notifying the First Nation of the public tender to be advertised on June 25, 2008 with a tender opening date of July 17, 2008. The letter concluded:

> "In closing, I encourage and look forward to First Nation Government participation in the bidding process. If successful, your government will be able to take advantage of this unique opportunity and undertake a substantial endeavour on the Whitehorse waterfront of which all Yukon people can be proud. I wish you every success."

[11] The Chief made several attempts to speak to the Premier but the Premier did not return her calls.

[12] The Chief of Ta'an Kwach'an Council wrote the Premier on July 15, 2008 requesting that he retract the public tender process and meet with the two First Nations to reach an agreement for the transfer of the waterfront land.

[13] The public tender proceeded and the Ta'an Kwach'an Council filed its petition on July 16, 2008. On the same day, counsel for the parties appeared in court and agreed to suspend the tender process until this application for an interlocutory injunction could be heard on July 23, 2008. On the latter date, the parties agreed that the bids could be opened as it might affect the position of the parties. Two bids were received, one from Ta'an Kwach'an Council and one from Vuntut Gwichin First Nation. The Vuntut Gwichin bid was the highest for each property comprising the waterfront land.

[14] The Director of the Lands Branch of the Government of Yukon filed an affidavit explaining the history of the waterfront land. He explained that he decided to coordinate the Government of Yukon tender with the City of Whitehorse tender which was

proceeding on July 18, 2008, for different lots on the waterfront. The City of Whitehorse did not receive any bids on its lots.

[15] The Director advised that the *Lands Act,* R.S.Y. 2002 did not apply but the Government of Yukon adheres to the spirit and intent of the *Lands Act*. He stated:

> "Section 3(2) of the *Lands Act* provides that the Minister may dispose of Yukon lands only after receiving an application or by public tender."

[16] He also stated that the land should be sold for not less than the appraised value which had been established by a commercial appraisal, obtained by the City of Whitehorse.

[17] On July 18, 2008, the Vuntut Gwichin advised the Government of Yukon that it would be looking to the government for any damages suffered by it as a result of this court proceeding.

[18] The Director further stated:

> "In my opinion the integrity of the commercial tendering process would be severely impacted if an injunction is granted because the current bidders were the only ones to organize and submit their bids within the time limitation. If it is decided that another tender call is required, the current bidders would be prejudiced as another tender will provide an opportunity for others to submit bids. The bidders are also prejudiced by having their deposits held in the interim. It is important therefore that the sealed bids be opened as soon as possible."

[19] The Ta'an Kwach'an Council has given its undertaking to pay any damages that may arise out of the granting of an injunction.

THE LAW OF INTERLOCUTORY INJUNCTIONS

[20] The parties agree that *RJR – MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311, provides the test that must be satisfied by the applicant to obtain an interlocutory injunction. The Ta'an Kwach'an Council must establish that:

1. There is a serious question to be tried.
2. The applicant will suffer irreparable harm if the injunction is not granted.
3. The balance of convenience, taking into account the public interest, must favour the injunction.

[21] Failure to satisfy any one of these branches results in a dismissal of the interlocutory injunction application.

[22] *RJR – MacDonald* gives the following helpful guidance to the chambers judge in applying the three part test.

Serious question

[23] The judge, in determining whether the applicant has demonstrated a serious question to be tried, must make a preliminary assessment of the merits of the case. The claim must not be frivolous or vexatious. The threshold is a low one, except in a few rare circumstances.

Irreparable harm

[24] Irreparable harm refers to the nature of the harm rather than to its magnitude.

[25] At para. 59, of *RJR – MacDonald*, the Supreme Court says that "irreparable" refers to harm which cannot be quantified in monetary terms or which cannot be cured, usually

because one party cannot collect damages from the other. The Court also says at para. 58 that:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[26] The Supreme Court also recognized at paras. 60 and 61 that the task of assessing irreparable damage is different in Charter cases because damages are not the primary remedy. Thus, it states that even where financial damage is capable of quantification, it could constitute irreparable harm.

Balance of convenience

[27] The Supreme Court stated in *RJR – MacDonald* at para. 62, that:

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

[28] There are many factors to be considered depending on the circumstances of each case. The Supreme Court stated that the public interest is a "special factor" but "the government has no monopoly on the public interest" (para. 65, *RJR – MacDonald).*

[29] Specifically the court stated:

> [66] It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a

> decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.
>
> [68] When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

[30] It is also useful to review the recent decision of the Federal Court of Appeal in *Musqueam Indian Band* v. *Canada,* 2008 FCA 214. In that case, Canada was proceeding to sell office space, including the Sinclair Centre in downtown Vancouver. On March 9, 2007, Canada announced it would proceed with marketing these properties and notified a number of bands including the Musqueam, who were in the process of negotiating a treaty with Canada and claim all of Vancouver, and beyond, as its traditional territory. The Musqueam raised a number of issues by letter dated March 29, 2007, including the Crown's obligation to accommodate aboriginal interests, the fact that the properties could form part of their settlement and the Musqueam need for more land for housing.

[31] Canada advertised the property sale on May 1, 2007 and had an informational meeting with the Musqueam for about one hour. The Musqueam were told that Canada would be able to repurchase the property. Canada requested information from the Musqueam on the "special significance" of the property to the Musqueam and were

provided with expert reports on the historical use of the area which did not address their claim about a land shortage or any unique attachment to the properties in particular.

[32] Canada proceeded to sell the properties for a price in excess of $100,000,000 with leasebacks that included the right of Canada to repurchase the properties at the end of the leases and a first right of refusal if the owner wished to sell the properties. Canada stated that it had fulfilled its obligation to consult.

[33] At the time of the injunction hearing, Canada estimated that delay would cost a $33 million reduction in purchase price based upon a 12 month judicial review.

[34] On September 28, 2007, the motions judge granted the interlocutory injunction restraining the sale until the full hearing on whether there was a failure of the Crown to consult Musqueam. He ordered Musqueam to serve and file an undertaking in damages in favour of Canada in the amount of two million dollars.

[35] The Federal Court of Appeal reversed the decision of the motions judge and dismissed the motion for an interlocutory injunction. The court made some significant comments on interlocutory injunctions which place the Musqueam case in its context:

> [4] The effect of the Motions Judge's approach to the test laid out in *RJR-MacDonald* is to provide aboriginal groups (who complain that the federal government has failed to consult them) with what amounts to a veto over the federal government transferring title to property located in any area claimed as traditional territory of that group, despite the fact that the Aboriginal group has made no claim that (1) possible degradation to the property affecting its aboriginal rights might occur in the event the property is transferred; and (2) it requires that specific property for its own use. Such a result eliminates the need for the aboriginal group to show irreparable harm and does not respect the balance between societal interests and aboriginal interests that the Supreme Court of Canada was attempting to achieve in developing the duty to consult grounded in the honour of the Crown.

and later,

> [59] It was argued that refusing an injunction in this case would set a precedent in that the Crown could always claim that there was no irreparable harm because damages could always be an adequate remedy. I do not agree. Each case has its own particular facts. Where an Aboriginal band leads evidence of unique need, special connections to the land in question, or a potential change in the character of the land in question, the result may well be different.

[36] It is important to clarify that the Supreme Court of Canada has already stated that the duty to consult, grounded in the honour of the Crown, does not give a First Nation any *veto* right. The Federal Court of Appeal, in my view, has used the word "*veto*" only as to "the effect of the motion judge's approach" based upon the particular facts of the Musqueam case. In the case before me no veto is sought, nor would it be granted.

[37] The Federal Court of Appeal found that the Musqueam failed to establish the necessary requirements for irreparable harm because the Musqueam could receive monetary compensation equal to the value of the properties and buy vacant land. Canada also retained the right to repurchase the properties.

[38] Further, the balance of convenience favoured Canada because of the inadequate and limited undertaking as to damages ordered by the motions judge.

[39] The Federal Court of Appeal was critical of the motions judge's use of the term "fairly arguable" on the serious questions branch but did not find it necessary to pursue the serious question issue because of its decision to dismiss the interlocutory injunction application on the irreparable harm and balance of convenience branches. It is worth noting that the Musqueam case is based upon an Indian band in the process of negotiating a land claim whereas the Ta'an Kwach'an Council has a signed treaty.

APPLICATION TO THE FACTS

Serious question

[40] Ta'an Kwach'an council submits that there are two serious questions to be considered. The first is whether the Government of Yukon has a duty to consult and accommodate based upon the signed Final Agreement and the principles established in *Mikisew Cree First Nation* v. *Canada*, 2005 SCC 69. The second is whether the Government of Yukon has a duty of procedural fairness grounded in the honour of the Crown that arises out of the exchange of correspondence between the Ta'an Kwach'an Council and the Premier of Yukon.

[41] I am mindful of the Supreme Court admonition to conduct a limited review of the question to be tried at a future hearing. Although I don't consider the legal question to be one of those rare exceptions requiring greater analysis, some discussion is warranted.

[42] The Government of Yukon submits that Ta'an Kwach'an Council has released its aboriginal title against the land in question which was in third party hands at the date of the Final Agreement. Although the property lies in the traditional territory of the Ta'an Kwach'an, the Government of Yukon says there is no adverse effect on treaty rights that would engage the duty to consult and accommodate. Indeed, there is no reference in the correspondence to treaty rights in the Final Agreement. Ta'an Kwach'an Council submits that Chapter 22, entitled Economic Development Measures, is engaged.

[43] The second question is not related to the Final Agreement. Ta'an Kwach'an Council submits that there is a free standing duty of procedural fairness grounded in the honour of the Crown, that is independent of any treaty. There is undoubtedly a common law duty of procedural fairness and Ta'an Kwach'an Council submits this duty is

enhanced when the Yukon Government deals with First Nations. It relies upon the principle expressed by McLachlin, C.J., in *Haida Nation* v. *British Columbia (Minister of Forests)* 2004 SCC 73, a case decided in the context of the duty to consult and accommodate:

> [16] The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

[44] This theme was again addressed by Binnie J. in the *Mikisew Cree* case which involved the interpretation of an historic treaty. He stated at paras. 51 and 54:

> [51] … The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow, Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.
>
> [54] … Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

[45] It is not necessary to examine these submissions extensively until the hearing of the petition. In my preliminary view, the facts in this case raise a serious question to be tried with respect to the duty of procedural fairness and the honour of the Crown.

Irreparable harm

[46] The Government of Yukon submits that the Ta'an Kwach'an Council has no special "legal interest" in the land and characterizes the communication as a commercial discussion with a "developer" giving rise to no greater duty than that owed to a private developer.

[47] The Government of Yukon also submits that there is other land available from the City of Whitehorse in the waterfront area so that the harm is not irreparable.

[48] The Ta'an Kwach'an Council takes the position that what is at stake is whether the First Nation has the right to a *bona fide* good faith discussion with the Government of Yukon on "the various options available", to use the Premier's words, for the waterfront land. In other words, it is not seeking a declaration that it is entitled to the waterfront land.

[49] The claim of the First Nation to a *bona fide* good faith discussion can be distinguished from the Musqueam case. The waterfront land in Whitehorse is clearly identified and the reason for their interest is clearly stated. It relates to their economic development and enhancement of their settlement lands on the Whitehorse waterfront.

[50] This is not a case of a claim for damages arising from a failure to discuss various options available for the sale of particular land. It is a case where the claim (if it succeeds at the hearing on the merits) is to have a *bona fide* discussion, which should take place with the *status quo* preserved. In my view, this is not a case where irreparable harm is a question of monetary damage but rather whether the failure to grant the relief would render the further hearing on the merits futile or pointless as the specific waterfront land would be sold. I find that the irreparable harm branch is satisfied on the facts of this

application, as a failure to grant the interlocutory injunction would destroy the essence of the petitioner's case: that is, there would be no opportunity to have a *bona fide* good faith discussion of the various options available for the waterfront land. If there is an obligation to discuss the disposal, it must take place before the waterfront lands are sold.

Balance of convenience

[51] The Government of Yukon submits that the commercial tendering process would be "severely impacted" if the injunction is granted because the current bidders would be prejudiced if another tender bid is required. It also raises the questions of damage that will be suffered if the Vuntut Gwichin suffer damage in delay or for other reasons. It further submits that there are other City lots that could be available.

[52] The issue of damage in monetary terms is satisfied by the unlimited undertaking of the Ta'an Kwach'an Council to pay any damages that may be suffered by the Government of Yukon. The other City lots are of a different size and in a different location. But more to the point, the case is really about whether the honour of the Crown is engaged to require a *bona fide* discussion about the specific waterfront land.

[53] The Ta'an Kwach'an Council submits that there is no urgency in concluding the tender process and that there is a public interest in preserving the land in its present state pending the hearing of its case.

[54] The public interest in concluding the tender process does not have the same financial magnitude or consequences as in the Musqueam case and unlike that case, there has been no attempt to discuss the various options available. The public interest in concluding this tendering process must be weighed against the public interest in upholding the duty of procedural fairness grounded in the honour of the Crown. I

conclude that the balance of convenience favours maintaining the *status quo* until there is a hearing on the merits.

DECISION

[55] I grant the application for an interlocutory injunction and suspend the tendering process pending the hearing of the petition. I order that Ta'an Kwach'an Council shall abide by an order that this court may make as to damages and that the Ta'an Kwach'an Council file and serve a further affidavit undertaking to pay any such damages that may be ordered by the court.

[56] I have advised counsel of several dates available to hear the petition in August and September.

Veale J.