SUPREME COURT OF YUKON

Citation: Western Copper Corporation v. Yukon Water Board, 2010 YKSC 61

Date: 20101021
S.C. No. 10-A0048
Registry: Whitehorse

Between:

WESTERN COPPER CORPORATION and CARMACKS COPPER LTD.

Petitioners

And

YUKON WATER BOARD and YUKON GOVERNMENT

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Brad Armstrong	Counsel for Western Copper Corporation and Carmacks Copper Ltd.
Laurie Henderson	Counsel for Yukon Government
Arthur Pape	Counsel for Little Salmon/Carmacks First Nation and Selkirk First Nation
Zeb Brown	Counsel for Yukon Conservation Society

REASONS FOR JUDGMENT

INTRODUCTION

[1] Western Copper Corporation and Carmacks Copper Ltd. (“Western Copper”) have filed a Petition applying for leave to appeal and appealing the decision of the Yukon Water Board (the “Water Board”) denying a water licence to Western Copper for their proposed heap leach mining project, called the Carmacks Copper Project.

[2] The Little Salmon/Carmacks First Nation and the Selkirk First Nation (the “First Nations”) seek to be respondents in this proceeding. The Yukon Conservation Society (the “Society”) also seeks to be a respondent.

[3] Western Copper brings this application for an order that the First Nations and the Society be granted intervener status.

[4] The difference between a respondent and an intervener is significant. An intervener may be permitted to file affidavits, a written submission and make oral representations, but its participation may be limited by the court. A respondent, on the other hand, is a full party and, amongst other applicable Rules, can seek court costs and be subject to court costs, as well as having the right to appeal the court’s decision.

[5] The issue of the status of the First Nations and the Society was first raised at a Case Management meeting on July 21, 2010. At that time, all parties consented to a Case Management Order making the First Nations and the Society full party respondents in the proceeding, on the understanding that all parties would be exposed to costs orders and have the right of appeal.

[6] Counsel for Western Copper indicated at the meeting that his client was not seeking a costs order against the First Nations or the Society and he wanted to be sure the right approach was taken. Counsel was specifically concerned about the right of appeal which would attach to respondent status.

[7] Before the next Case Management meeting, counsel for Western Copper wrote a letter seeking to reconsider the respondent status issue.

[8] Several letters written by counsel for Western Copper, the First Nations and the Society were filed at a Case Management meeting on August 30, 2010. These are the written submissions for the application.

[9] While the court does not encourage counsel to resile from consent agreements made at Case Management meetings, I am of the view that the issue of whether a party is a respondent or an intervener is a significant one. As the Case Management Consent Order had not been filed, it was appropriate to permit the issue to be heard in court based upon the letters filed by counsel.

THE WATER BOARD DECISION

[10] On May 10, 2010, the Yukon Water Board denied Western Copper's application for a Type A Licence for their quartz mining project near Williams Creek. The Carmacks Copper Project involves a heap leach technology to leach, detoxify and manage the discharges from the mining project.

[11] Without going into the entire 39-page decision in detail, the Yukon Water Board found the heap leach technology unproven and that Western Copper had not satisfied the Water Board that the waste produced would be "treated and disposed of in a manner that is appropriate for the maintenance of proposed water quality standards in lower Williams Creek."

[12] The Water Board found that the proposal has merit, but it had not been "proven that it (sic) could be a clear, effective and enforceable licensing provision."

[13] The Water Board encouraged Western Copper to continue to engage and consult with all parties as it moved forward to address the deficiencies detailed in the decision.

[14] The Water Board noted that it had considered nine volumes of material and heard evidence from a number of witnesses over a period of seven days.

[15] The Water Board received "interventions" from the following parties:

- Fisheries and Oceans Canada;

- Yukon Conservation Society;
- Selkirk First Nation;
- Little Salmon/Carmacks First Nation;
- Selkirk Renewable Resources Council;
- Environment Canada; and
- Government of Yukon – Environment.

[16] As indicated, only the First Nations and the Society seek respondent status as the Petition already names the Water Board and the Yukon Government as Respondents. I understand that the remaining parties who participated in the hearing before the Water Board do not wish to appear in this court proceeding. All the organizations and governments named above were referred to as both “parties” and “interveners” in the Water Board hearing. No special status was granted to the governments of Canada and Yukon, Little Salmon/Carmacks First Nation or Selkirk First Nation.

[17] The Water Board’s decision notes that it has specific responsibilities under Chapter 14 of the First Nations’ Umbrella Final Agreements, which are now First Nation Final Agreements. It also indicates that the Carmacks Copper Project is in the Traditional Territories of the First Nations and the nearest downstream parcel of Settlement Land, identified as LSCS-30B1 and belonging to the Little Salmon/Carmacks First Nation, is approximately 4.9 km from Williams Creek.

[18] The Water Board heard testimony from representatives of the First Nations and Elders about the resources and traditional use of the project area. The Water Board noted that it was unable to reach a conclusion on whether the quality of water flowing

adjacent to the First Nation Settlement Lands will or will not be substantially unaltered by the proposed Carmacks Copper Project.

[19] It is my understanding that the Little Salmon/Carmacks First Nation played a significant role in cross-examining the applicant's witnesses and by presenting the Elders and an expert witness. The Society played an active role in the hearing as well.

THE PETITION

[20] In their petition to this Court, Western Copper is appealing the Water Board's decision pursuant to s. 26(1) of the *Waters Act*, S.Y. 2003, c. 19, which permits an appeal from a decision of the Water Board on a question of law or jurisdiction. Section 26 reads as follows:

> (1) An appeal lies from a decision or order of the Board to the Supreme Court on a question of law or a question of jurisdiction, on leave being obtained from that Court on application made within forty-five days after the making of that decision or order or within such further time as that Court, or a judge of it, under special circumstances allows.
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> (2) No appeal lies after leave has been obtained under subsection (1) unless the notice of appeal is filed in the Supreme Court within sixty days after the making of the order granting leave to appeal.

[21] Section 26 sets out a two-step process involving firstly an application for leave and, if leave is granted, the filing of a notice of appeal. By Case Management Order dated June 29, 2010, the application for leave to appeal and the hearing of the appeal have been consolidated and will be heard at the same time.

[22] It is important to understand the nature of the appeal. Counsel for Western Copper says it only directly affects the Water Board as a matter of law or jurisdiction, and seeks no order "which directly affects the legal rights or interests of the First Nations or the Society".

[23] Western Copper seeks a declaration that the Water Board is a “territorial agency” that is required to “implement” the Yukon Government decision document (the “Decision Document”) issued on September 12, 2008, by the Territorial Minister under the provisions of the *Yukon Environmental and Socio-Economic Assessment Act,* S.C. 2003, c. 7, (*YESAA*). In the Decision Document, the Territorial Minister accepted the recommendation of the Executive Committee of the Yukon Environmental and Socio-economic Assessment Board (YESAB) to proceed with the Carmacks Copper Project. The purpose of the *YESAA* is to provide a comprehensive, neutrally-conducted assessment of the environmental and socio-economic effects of a project or activity.

[24] Further, Western Copper seeks a declaration that in issuing a water licence, the Water Board, in accordance with s. 86 of *YESAA*, must not grant rights or set terms that conflict with the Decision Document.

[25] Western Copper applies for an order setting aside those parts of the Water Board’s decision which conflict with the recommendations of the Executive Committee of YESAB, the Decision Document, and the Quartz Mining Licence QML-0007, issued by the Minister of Energy, Mines and Resources under the *Quartz Mining Act,* S.Y. 2003, c. 14*.*

[26] In essence, Western Copper seeks an order remitting the Water Board decision back to the Water Board with a direction that the Water Board implement the Decision Document and set terms and conditions in a water licence that are not in conflict with the Decision Document.

[27] Western Copper, in this application, seeks to limit the First Nations and Society to intervener status so they cannot appeal this Court’s decision.

[28] This appeal has both private and public interest aspects. Western Copper wishes to be granted a water licence which could be described as a private interest matter. At the same time, the appeal will determine the jurisdiction and power of the Water Board in relation to the Yukon Government, and these are matters of public interest.

ISSUES

[29] The issues to be determined are as follows:

1. Are the First Nations and the Society respondents under the *Rules of Court* without application?
2. Should the First Nations and the Society be limited to intervener status?

THE *RULES OF COURT*

[30] The *Rules of Court* of the Supreme Court of Yukon became effective September 15, 2008. The *Rules of Court* were prescribed by the Commissioner in Executive Council on April 23, 2009 by Order-in-Council 2009/65.

[31] To a great extent the *Rules* are similar to the former *Rules of Court* of British Columbia, which they replace. However, there are differences that may lead to different results.

[32] Rule 10 of the Yukon *Rules of Court* governs petitions and Rule 10(3) requires a petition to be served on “all persons whose interests may be affected by the order sought”. Under Rule 10(5), a respondent who wishes to receive notice of the time and date of the hearing must file a Response in Form 11 and the affidavits it intends to rely upon. The word “respondent” is defined in Rule 1(13) to include “a person entitled to notice of a petition”.

[33] Western Copper chose to file a petition for the application for leave to appeal, presumably because Rule 53 (“Appeals”) says that an appeal is governed by the

Waters Act which requires the granting of leave to appeal before filing the notice of appeal. Rule 53 states that appeals shall be commenced by filing a notice of appeal. Rule 53(5) requires the notice of appeal, similar to a petition, to be served on "all other persons who may be affected by the order sought". Rule 53(7) requires that a person who intends to oppose the appeal shall enter an appearance.

[34] Rule 54 governs applications for judicial review. Judicial reviews are also commenced by petition in Form 2 (Rule 54(3)). Rule 54(5) requires the applicant to "name as a respondent every person directly affected by the order sought in the application". Pursuant to Rule 54(6), the applicant shall serve notice of the application on all respondents, the decision-maker and "any other person who participated in the proceeding".

[35] Having filed a petition, Rule 48 of the new *Rules of Court* applies for the purpose of setting the petition down for a hearing. Rule 48(2) defines respondent as "a person who has delivered a response in Form 11", which refers back to Rule 10(5)(a) for petitions and Rule 54(10) for judicial reviews.

[36] In summary, I note that the Rules for petitions, appeals and judicial reviews all similarly define who is to be served and become a respondent. For petitions, it is persons "whose interests may be affected by the order sought". For appeals, it is persons "who may be affected by the order sought". For judicial review, it is every person "directly affected by the order sought". Despite the slight differences in wording, I find that these definitions are functionally equivalent. I also note that the judicial review rule is unique in that it requires service on all persons who participated in the tribunal proceeding.

[37] I also note that the Supreme Court of Canada, in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, stated at para. 21 that “the term "judicial review" embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal.” The only distinction relates to the standard of review.

[38] Although, for reasons that follow, I find it has no application here, Rule 15(5) provides for the addition and removal of parties as follows:

> (a) At any stage of a proceeding, the court on application by any person may
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> > (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,
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> > (ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
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> > (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
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> > > (A) with any relief claimed in the proceeding, or
> > >
> > > (B) with the subject matter of the proceeding,
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> which, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

...

The *Waters Act*

[39] The Yukon Water Board Rules of Procedure provide for significant public participation in its hearings.

[40] Section 19(1) of the *Waters Act* gives the Water Board the discretion to hold a public hearing for certain licences “where satisfied that it would be in the public interest.” Under s. 19(2)(a) “a public hearing shall be held” where the application is for the issuance of the type A licence, unless the Board receives no notification that any person intends to appear and make representations. The Board is required under s. 21 to publish notice of each application in a newspaper of general circulation.

[41] Section 22 of the *Waters Act* permits the Board to make rules respecting:

> (c) the procedure for making representations and complaints to it, the conduct of hearings before it, and generally the manner of conducting any business before it;

[42] The Yukon Water Board Rules of Procedure provide that “party” means “a Person who is an Applicant, a Claimant, or an Intervener or a Licensee”. An Intervener is defined as a person who has filed a written statement. Rule 8 is entitled “Intervention” and it indicates that “Anyone wanting to make representations to the Board ... can intervene by filing a written submission”. An Intervener is entitled to receive a copy of the applicant’s response and may be included in a pre-hearing conference to determine procedure at the hearing. Rule 16.3 permits the parties to question the applicant and interveners may make presentations. The applicant may respond and will be subject to questions from all other parties.

ANALYSIS

Issue 1.: Are the First Nations and the Society respondents under the Rules of Court without application?

[43] The Yukon *Rules of Court* set out the object of the rules as follows:

> 1(6) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process

> involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
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> (a) the dollar amount involved in the proceeding,
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> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
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> (c) the complexity of the proceeding.

[44] In addition to the object of achieving the "inexpensive determination of every proceeding on its merits", the new *Rules of Court* introduce the principle of proportionality. The latter is not specifically engaged in this application, but it reinforces the intention of the court to continually secure an "inexpensive determination" of cases procedurally and on the merits.

[45] Rules 1(7) and 36 of the *Rules of Court* introduce mandatory case management of most proceedings, so that issues like the one before the Court may be first considered in a co-operative process. Case management has proven to be an effective tool in moving cases forward expeditiously without the necessity of formal applications. Nevertheless, the object of the *Rules* is also to secure "the just ... determination" of every proceeding, and hence this application.

[46] The application is distinct in the sense that all the "persons" with an interest in Western Copper Project and who participated in the Water Board hearing have been served. It is not a proceeding where persons who "may be affected by the order sought" need to be ascertained.

[47] A party filing a petition may, in the first instance, choose who it wishes to name as respondents, on the understanding that all those who participated in the proceeding below or any person who may be affected by the order sought must be served

according to Rules 10 and 54. By definition in Rule 1 a person entitled to notice of a petition is a respondent.

[48] This application has proceeded on the understanding that a respondent is exposed to the remedy of court costs, for or against, and has a right of appeal, subject to any provision to the contrary in the underlying statute. Hence, participants or affected persons who have been served with a petition or notice of appeal must give serious consideration to filing an appearance as a respondent in an appeal that follows a Water Board hearing.

[49] I find that the plain meaning of the *Rules of Court* is that a person entitled to notice of a petition becomes a respondent simply by filing an appearance under Rule 10(5). Rule 48(2) confirms that status following the delivery of a response. Thus, at the initial stage when a person is served with a petition relating to the review of a tribunal proceeding they have participated in, they have three choices:

1. they can do nothing and not participate in the proceeding;
2. they can file an appearance and a response, thereby becoming a party respondent with the right of appeal and court costs exposure; or
3. they can apply for intervener status to avoid court costs exposure.

[50] I find that Rule 15(5)(a) has no application here.

[51] There are advantages to proceeding on this basis:

1. the party status of all interested persons who file an appearance is established at the outset;
2. an interested person who files an appearance as a respondent has costs consequences and a right of appeal;

3. in circumstances where respondent status is not appropriate, the status of a party may be discussed in case management; and

4. the petitioner or an "interested person" may apply to obtain intervener status for such person.

[52] Western Copper is not without remedies in this situation. It may apply to limit a person to intervener status where it considers respondent status inappropriate, relying upon the common law and the inherent jurisdiction of the Court. In this case, the primary concern of Western Copper is that the First Nations and the Society should not have the right to appeal in a proceeding in which there is no claim against them and in which Western Copper submits they have no direct interest at stake.

RESPONDENTS OR INTERVENERS

Issue 2.: **Should the First Nations and the Society be limited to intervener status?**

[53] Although I have decided that the First Nations and the Society are respondents under the Yukon *Rules of Court*, I am going to consider the British Columbia cases cited by counsel to determine whether, as contended by Western Copper, intervener status is appropriate for the First Nations and the Society. The Society also raised the issue of public interest standing which I shall refer to below.

[54] There are two cases that counsel focussed upon. The First Nations and the Society rely upon *British Columbia (Police Complaint Commission) v. Murphy et al.,* 2003 BCSC 279, (the "*Murphy* case"). Western Copper relies primarily on *Kitimat (District) v. British Columbia (Ministry of Energy and Mines)*, 2006 BCCA 562 (the "*Alcan* case"). Both *Murphy* and *Alcan* were applications for judicial review.

The *Murphy* Case

[55] In the *Murphy* case, a number of individuals filed complaints with the Police Complaints Commissioner (the "Commissioner") alleging wrongdoing on the part of various members of the Vancouver Police Department at a public protest. The Commissioner ordered a hearing into the incident and appointed an adjudicator to preside over the public hearing. A short time later, the Commissioner advised the adjudicator that he was withdrawing the notice of public hearing. The complainants objected, and the adjudicator ruled that the Commissioner did not have the authority to withdraw the complaint when the complainants objected to the withdrawal.

[56] In an application for judicial review filed by the Commissioner, the Supreme Court of British Columbia found that the Commissioner had the authority to unilaterally withdraw a notice of public hearing.

[57] The relevant issue in this case was whether the complainants should have been joined as respondents to the petition of the Commissioner. The *Police Act* gave the complainants the right to make oral and written submissions at the public hearing, but it did not confer a right to cross-examine witnesses. The *Police Act* also contained a limited right to appeal the decision of an adjudicator.

[58] The Court examined the issue of standing based upon a common law threshold. The court, noted at para. 50:

> Under the common law, parties to a proceeding, or persons who could have been parties to a proceeding, will generally have a right to bring an application for judicial review. Further, persons who have an identifiable interest in a decision which makes them exceptionally affected by it may also have the right to bring a judicial review application.

[59] The court concluded, at paras. 53 and 57, as follows:

> [53] I have concluded that the applicants, pursuant to both grounds of Rule 15(5)(a)(ii), should be joined as respondents in this proceeding. As the applicants were participants in the proceedings before the adjudicator they ought to have been named in the petition. They made full submissions to the adjudicator on the very question that is now before this court. The participation of the applicants before the adjudicator distinguishes this case from ARC Resources. Both textbooks which have been cited suggest that all participants in an administrative hearing should be named as respondents to any judicial review proceeding connected with it. I do not accept the PCC's submission that the complainants were not parties to the public hearing.
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> …
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> [57] I do not accept that the grant of intervener status is sufficient to ensure the matter is effectively adjudicated upon. As previously noted, as interveners the applicants have no right to appeal if the petition is successful. The petition raises a matter of significant public interest going to the powers of the PCC. It comes to this court as a matter of first instance. It is a question not without difficulty. The applicants should not be deprived of the right to take the matter further if they are not satisfied with the outcome. (my emphasis)

The *Alcan* Case

[60] The District of Kitimat and the Mayor brought a petition for judicial review seeking various orders that the instruments regulating Alcan Inc. were beyond the authority of the regulator. Specifically, The District of Kitimat applied for declarations that the Minister of Energy and Mines did not have the power to authorize the sale of power outside Kitimat, and that the power generated by Alcan could only be used for the aluminium industry or in the District of Kitimat. The petitioners did not name Alcan as a party to the petition. Alcan applied to be named as a respondent. The trial judge denied the application, and Alcan appealed. The Court of Appeal granted Alcan respondent status.

[61] In this case, Alcan was served with the petition, entered an appearance and filed a response and affidavits concerning the issues in dispute. Despite this, the District of Kitimat and the Mayor took the position that Alcan was not a respondent in the proceeding and should instead be added as an intervener. Alcan sought full party status in order to have a right of appeal.

[62] The former British Columbia *Rules* defined "respondent" as a "person who has delivered a response in Form 124". Thus, in the *Rules of Court* applicable to the *Alcan* case, a person who "may" be affected was served with a petition, and seemed to become a respondent by filing and delivering a response in Form 124.

[63] However, the Court of Appeal ruled that receiving service and filing a response did not automatically make Alcan a respondent for three reasons:

1. such an interpretation may have the "undesired effect of discouraging a petitioner from the broad service that appears to be intended by that Rule" (para. 20);
2. it is inconsistent to leave the designation of respondent within the sole control of any broad class of persons who may have been served under Rule 10(4) (para. 21); and
3. Rule 51A is procedural, and the definition of respondent in Rule 51A is for use within that rule only (para. 22).

[64] The Court of Appeal went on to say that Alcan was entitled to be joined under both Rules 15(5)(a)(ii) (ought to have been joined or whose participation is necessary to ensure effectual adjudication) and 15(5)(a)(iii) (where there is a question or issue between a person and any party relating to the relief or subject-matter of the petition) (para. 26).

[65] The court stated that under Rule 15(5)(a)(ii), the direct interests of Alcan “might be affected” by granting the relief requested (para. 32).

[66] Similarly, the court decided Rule 15(5)(a)(iii) “applies where there may be between the party seeking to be added and any party to the litigation, a question or issue related to “relief claimed in the proceeding” or “the subject matter of the proceeding”” (para. 35); i.e. an interest in the object and the subject of the litigation. Again, the Court held that Alcan had a direct interest in the litigation.

[67] The Court of Appeal cited the decision in the *Murphy* case, but distinguished it on the basis that the party that was added to the judicial review was also a party in the hearing below (para. 47).

The First Nations

[68] Counsel for Western Copper, submits that the *Murphy* case is distinguishable because there the parties were the original complainants. Here, the First Nations were not complainants but rather “interveners” on Western Copper’s Water Board application.

[69] Further, unlike the *Alcan* case, counsel submits that the First Nations have no “direct interest”, as the relief sought by Western Copper does not directly affect them, unlike the relief sought in *Alcan*, which directly affected the commercial interests of Alcan.

[70] Counsel for Western Copper submits, quite correctly in a literal sense, that this appeal does not directly affect the water-related interests of the First Nations. Rather, it is submitted by counsel that:

> This appeal addresses only the question of whether the Water Board breached the legal requirements of YESSA or exceeded its jurisdiction under YESSA and the *Waters Act.* There is no challenge to any provision of the Final Agreements.

> In these proceedings the interests of the First Nations are fully accommodated by their participation as intervenors in the proceedings with the right to file affidavits and to present arguments. It is neither necessary nor appropriate to provide the First Nations with a freestanding right of appeal in the event that neither [Western Copper] nor the Water Board chooses to appeal from a decision of the Yukon Supreme Court.

[71] In other words, Western Copper submits that the appeal relates directly to the Water Board and its jurisdiction, implying that the First Nations have no direct interest in the jurisdiction of the Water Board sufficient to afford them the right of appeal.

[72] I do not agree with this submission. The narrow “direct interest” approach would limit all but Western Copper, the Water Board and the Yukon Government from being full parties. The factual context of this case is quite different than the *Alcan* case, and I have concluded that the First Nations should be respondents.

[73] I am of the view that the First Nations do have a “direct interest” in the appeal because the result, if Western Copper is successful, is that the Water Board will have to implement the Decision Document. In other words, the Carmacks Copper Project will proceed subject to appropriate conditions. I find it difficult to understand how that outcome would not affect the direct interests of the First Nations.

[74] There are as well a number of other factors I have taken into consideration.

[75] Firstly, the wording of s. 26(1), the appeal provision in the *Waters Act*, is broad and can be interpreted as granting an appeal to ‘Interveners’ and ‘Applicants’ alike. To decide that the First Nations are not entitled to be respondents would result in denying a right that they are arguably entitled to by statute. If they had filed the petition for review, there is no question that they would have party standing.

[76] Secondly, the First Nations were full participants in the Water Board hearing and to the same extent as the governments of Canada and Yukon. Yukon First Nations, who have signed Final Land Claims Agreements and Self-Government Agreements have a government-to-government relationship with Canada and Yukon: see *Little Salmon/Carmacks First Nation v. Yukon*, 2007 YKSC 28, at para. 11 and *Ta'an Kwachan v. Yukon (Premier)*, 2008 YKSC 60, at para. 3. Western Copper added the Yukon Government as a party "because of its role in representing the interests of the Government as a whole". It is of some significance that the Yukon Government takes the same view as Western Copper in the substantive issue under appeal. The First Nations oppose that view.

[77] Thirdly, as the Water Board states in its decision at p. 34:

> The UFA recognizes the Board and delegates specific responsibilities upon the Board within Chapter 14 of the Umbrella Final Agreement. The Carmacks Copper Project is located within the Traditional Territories of Little Salmon/Carmacks First Nation and Selkirk First Nation.

[78] Chapter 14 of the Final Agreements of the Little Salmon/Carmacks and Selkirk First Nations sets out that the Council for Yukon Indians shall nominate one-third of the members of the Water Board. Chapter 14 addresses specific water rights of Yukon Indian Persons as well as Yukon First Nations, Yukon's management rights, water rights of other parties and, under section 14.8.0 of the Agreements, the "Protection of Quantity, Quality and Rate of Flow of Water". In my view, Chapter 14 gives a First Nation a very direct interest in any application for a water licence in its Traditional Territory, and any court application that affects the powers or jurisdiction of the Water Board might certainly impact the negotiated rights under the Final Agreements. It would be unfair to give a right of appeal to the Yukon Government while denying the right of

appeal to the First Nations that negotiated Chapter 14 with the Yukon Government and Canada.

[79] Fourthly, section 14.8.9 of the Final Agreements gives a Yukon First Nation "standing at all times in a court of competent jurisdiction to seek a declaration as to whether any person substantially altering the quantity, quality or rate of flow, including seasonal rate of flow, of water in that Yukon First Nation's Traditional Territory has a lawful authority to do so."

[80] Although the First Nations are not seeking such a declaration here, this section gives support to the argument that an affected First Nation should be a party to any Water Board application and a respondent to any appeal arising out of a Water Board decision that may affect the power and jurisdiction of the Board to make the kind of ruling at issue in this appeal.

[81] Fifthly, Chapter 14 of the Final Agreements sets out in section 14.11 that a First Nation may apply to the Water Board for a number of remedies against a licensee, and the Board is given powers to amend, suspend or cancel a Water Licence and award compensation. These are unique rights that lend further support to a decision to recognize the First Nations as full party respondents. It would be ironic indeed if the First Nations had the above rights, negotiated in a constitutionally recognized Land Claims Agreement, but were not granted party status in a proceeding where the Court is asked to interpret the power and jurisdiction of the Water Board.

[82] Finally, Chapter 12 of the Final Agreement provides for the general principles of the Development Assessment Legislation, which is the genesis of *YESAA*. The relationship between *YESAA*, the Water Board and the *Waters Act* is at the heart of

Western Copper's petition, and hence it directly affects the interests of the First Nations who negotiated and signed Final Agreements dealing directly with those relationships.

[83] In my view, there is no basis to deny the First Nations respondent status, which includes exposure to court costs and a right of appeal. The First Nations ought to be joined under Rule 15(5)(a)(ii).

The Society

[84] The Society, to use its own words, "has provided a balanced, researched-based (sic) perspective on Yukon environmental issues for the last 42 years." It submits that this petition may affect future environmental assessments and licensing throughout the Yukon. It also submits that it is important for the court to hear "a broader perspective which reflects the vital importance to many Yukoners of the effective functioning of the environmental protection process." The Society wishes to be a full party participant with a right of appeal, despite the possible exposure to court costs. I also take judicial notice of the fact that the Society is one of a very few Yukon-based environmental groups, so there is no spectre of opening flood gates.

[85] In its written submission, the Society noted that Yukon Government's position at the hearing was that the Water Board should issue the licence to Western Copper in a manner that does not conflict with the Decision Document. Thus, the Society submits that it will provide the court with a public perspective that may otherwise be lost.

[86] Counsel for Western Copper submits that the Society cannot rely upon the *Murphy* case, as, again, the Society is not in the same position as those complainants who initiated the complaints against the police. Western Copper agrees that the Society may be an intervener and file a factum and affidavit materials but says it should not

have the right of appeal. Similarly, it distinguishes the Society from the situation in *Alcan* as the Society has no direct interest in the outcome of the court proceedings.

[87] The *Alcan* case is not particularly relevant as it deals with Rule 15(5)(a)(ii) and (iii) and addressed whether a person was a necessary party or had a “direct interest”. Rule 15 does not apply to the issue of public interest standing, which is an alternative basis for granting respondent status to the Society.

[88] Public interest standing has been delineated by the Supreme Court of Canada in a series of decisions involving the standing of private individuals: *Thorsen v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia (Board of Censors) v. McNeil*, [1976] 2 S.C.R. 265; *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575; and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. The issue was also recently addressed in *Morton v. British Columbia (Minister of Agriculture and Lands)*, 2009 BCSC 136 and *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General),* 2010 BCCA 439 (“*Downtown Eastside Sex Workers*”).

[89] The test set out in *Borowski* for establishing the status of a person bringing a suit to declare legislation invalid can be summarized as follows:

1. The legal proceeding raises a serious legal question;
2. The private individual is affected directly or has a genuine interest in the resolution of the question; and
3. There is no other reasonable and effective manner for the legal question to be brought to court.

[90] The *Borowski* case was followed by the *Finlay* case which provided a clear and direct authority for the recognition of public interest standing in questions of statutory authority. Three factors were addressed: the concern about the allocation of scarce

judicial resources and the need to screen out the mere busybody; the need for the courts to have the benefit of contending points of view; and the concern about the proper role of the courts.

[91] In *Downtown Eastside Sex Workers*, which was not decided at the time of this hearing, Saunders J.A. stated at para. 23:

> The difference between private interest standing and public interest standing may be explained generally as the difference between standing as a matter of right arising from a direct relationship between the person and the state, and standing granted by a court in the exercise of discretion in a situation where, by definition, that direct relationship is lacking. ...

[92] The Society does not have a "direct interest" in the private interest sense and its status must be considered from the perspective of intervener or public interest standing.

[93] It is not necessary to reiterate the test for intervener status set out in para. 18 of *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2005 BCSC 1435, which summarized the principles from various authorities. Presumably, the parties are in agreement that the Society is entitled, at the very least, to intervener status in this application. The question is whether the Society meets the test for public interest standing and whether public interest standing is applicable when the court action is initiated already by a party with a direct interest.

[94] There is no doubt that the issue of public interest standing has considered the person who initiates the proceeding to challenge legislation or tribunal decisions. In *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at para. 36, Cory J. stated it this way:

> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when,

> on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

[95] Cory J. added at para. 42 that when the legislation is being challenged by other persons, such as refugee claimants, "...the very rationale for the public interest litigation party disappears." He concluded that in those circumstances, intevener status would ensure that the submissions of interveners on issues of public importance would not be lost.

[96] In the case of *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2010 SCC 2, the Supreme Court granted declaratory relief to a public interest group that had not participated in the previous environmental process but brought the application as a test case of the federal government's obligations under *CEAA.*

[97] The case law on public interest standing clearly applies only to persons or organizations that initiate proceedings to challenge a law or decision. I am of the view that if this was a question of the Society appealing the decision of the Water Board, standing would be granted as in MiningWatch Canada. In that sense it would be an anomaly not to grant the Society the same party standing as there is a serious legal question and the Society has a genuine interest in the resolution of the question. However, as the public interest standing law has not been applied in the situation before me, I am of the view that the Society should instead be granted respondent status pursuant to Rule 15(5)(a)(ii) as set out in the *Murphy* case. A grant of intervener status

will not ensure that this matter will be effectively adjudicated upon unless the Society has the right to take the matter further if they are not satisfied with the outcome.

[98] While the *Environment Act*, R.S.Y. 2002, c. 76, is not engaged in this proceeding, the Yukon Government has recognized the right of its citizens to participate fully in decisions that affect the environment. The *Environment Act*, contains the following in its Preamble:

> Recognizing that comprehensive, integrated, and open decision-making processes are essential to the efficient and fair discharge of the environmental responsibilities of the Government of the Yukon; …

[99] Section 5(1) of the *Environment Act* contains, amongst others, the following objectives:

> (f) to fully use the knowledge and experience of Yukon residents in formulating public policy on the environment; and
>
> (g) to facilitate effective participation by Yukon residents in the making of decisions that will affect the environment.

[100] The method chosen by the government to implement these principles is set out in sections 6, 7 and 8 of the *Environment Act* as follows:

> 6 <u>The people of the Yukon have the right to a healthful natural environment</u>.
>
> 7 <u>It is hereby declared that it is in the public interest to provide every person resident in the Yukon with a remedy adequate to protect the natural environment and the public trust</u>.
>
> 8(1) Every adult or corporate person resident in the Yukon who has reasonable grounds to believe that
>
> (a) a person has impaired or is likely to impair the natural environment; or

> (b) the Government of the Yukon has failed to meet its responsibilities as trustee of the public trust to protect the natural environment from actual or likely impairment may commence an action in the Supreme Court.
>
> (2) In this section, and in sections 9 and 14, "activity" includes development.
> (3) The Government of the Yukon may commence an action under paragraph 8(1)(a). (my emphasis)

[101] Thus, the *Environment Act* grants a broad public interest standing to any resident in the Yukon to commence a court action in environmental matters. It would be surprising to have a strong public interest advocacy role after decisions are made and at the same time denying a role in the public process before decisions are made.

DECISION

[102] I order that the First Nations and the Society shall have party respondent status which includes exposure to court costs and a right of appeal.

[103] Costs may be spoken to, if necessary.

VEALE J.