

SUPREME COURT OF YUKON

Citation: *Duke Ventures Ltd. v. Yukon Government*,
2012 YKSC 58

Date: 20120716
S.C. No. 11-A0120
Registry: Whitehorse

Between:

Duke Ventures Ltd.

Petitioner

And

Yukon Government, Forest Management Branch (FMB)

Respondent

Before: Mr. Justice G.C. Hawco

Appearances:

Romeo Leduc
Mike Winstanley

Appearing on his own behalf
Counsel for the Respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] Romeo Leduc is the principle, indeed, the only, shareholder of Duke Ventures Ltd., the Petitioner ("Duke"). He is a logger/forester of some 37 years experience. His business consists primarily of cutting and selling trees for fuel. These trees are almost exclusively trees which have been attacked by the spruce bark beetle. The effect on our forests is too often quite visible.

[2] Mr. Leduc lives in Haines Junction. Most of his cutting goes on in that area. He is quite familiar with the area, having walked over most of it. He is aware of the ground

and the soil conditions, particularly the areas affected by water. He is concerned with and for his environment. He would consider himself a steward of the land.

[3] I give this brief introduction because it is important to keep this in mind in the context of his application to the Court. He seeks to set aside two decisions of the Respondent, Yukon Government, Forest Management Branch ("FMB"). These decisions have been made in answer to two separate applications which he had made to harvest timber on two separate blocks of land in the Haines Junction area. Those blocks are known as Block 13 South, with respect to which an application was made on the 11th day of April, 2011, and Block 15, with respect to an application made on June 12, 2009 and again on June 29, 2010.

[4] Mr. Leduc claims that the Respondent had a bias against his company and therefore acted unfairly. He seeks an order compelling the Respondent to issue a cutting license for both blocks.

[5] For the reasons which follow, I must deny Mr. Leduc's request and dismiss his application.

BACKGROUND

[6] Mr. Lyle Dinn, presently Director of FMB, which is a part of the Department of Energy, Mines and Resources for the Yukon Government, presented a brief history of the development and management of the Yukon's forest resources by way of an affidavit filed in these proceedings on March 26, 2012. Included in the FMB's responsibilities are the collecting and maintaining of an inventory of forest resources; forest management planning; timber supply analysis; identifying and allocating timber harvesting areas; conducting consultation on proposed harvesting areas; preparing

environmental assessments of proposed timber harvesting projects; and issuing authorization to harvest timber which includes living or dead trees. The various First Nations are very much involved in the planning and management of forest resources. In Haines Junction, the Champagne and Aishihik First Nations have a Final Land Claim Agreement in effect within and around the Haines Junction area.

[7] On April 1, 2003, and until January 31, 2011, timber harvesting in the Yukon was administered pursuant to timber regulations made under the *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17. On January 31, 2011, the *Forest Resources Act*, S.Y. 2008, c. 15 (“*FRA*”) came into force. It is significantly more comprehensive than the former regulations under the *Territorial Lands (Yukon) Act*. The purpose of the *FRA* is to promote the sustainable use to forest resources by ensuring that the environmental, economic, social and cultural interest of all users of the forest are considered with a need to promote the health of the forests.

[8] In the various regions of the Yukon, forest management plans are prepared. They are a requirement of the Yukon First Nation Final Agreements.

[9] In 2004, a “strategic forest management plan” (“SMFP”) was completed for the Champagne and Aishihik First Nations. An additional requirement unique to the SMFP just described was to complete an integrated landscape plan. This was completed in 2007 and provided more specific direction and sets priorities for specific types of activities within identified zones within the planning region and provided guidelines for preparing timber harvesting plans.

[10] The soils in the Haines Junction area are predominately fine textured silts and silty clay loams. These types of soils occur in the top 40 cm of the soil profile where all

of the tree roots grow. These fine textured soils are highly susceptible to compaction from heavy harvesting equipment. Compaction of the soil will impact the ability of roots to penetrate and will limit forest productivity. The approach chosen in the integrated landscape plan referred to above was to winter harvest these fine texture soils when the ground is frozen and they are not susceptible to compaction. The integrated landscape plan provides that most harvesting is expected to occur in the winter months, as operating on frozen ground limits site disturbance and makes access less costly. The plan also states that summer harvesting may be planned to maintain employment opportunities provided site disturbance guidelines and other values can be accommodated.

[11] Any person applying for a harvesting license must submit an application to the Director of FMB. That person then makes the decision in accordance with the *FRA* and the various plans and procedures to which I have referred. A district office of the Yukon Environment and Socio-Economic Assessment office may make a recommendation that a project proceed; however, the ultimate decision comes from the Director of the FMB.

[12] With that background and the Introduction, let us now proceed with what led to this application.

BLOCK 15

[13] Let me deal firstly with Block 15.

[14] On June 12, 2009, Duke applied for a Timber Permit application (#HJ-9/10-008) for 10,000 cubic metres of "beetle kill wood".

[15] On June 15, 2009, Duke submitted a proposal to the Yukon Environmental and Socio-Economic Assessment Board ("YESAB") in Haines Junction in support of its

application. In that application, Mr. Leduc had included an all-season access road into Block 15 as well as summer harvesting. Mr. Dinn was of the view that Mr. Leduc's proposal was not consistent with the approved Pine-Canyon THP and on July 2, 2009, Mr. Damien Burns, a forester with the FMB, advised Mr. Leduc that his application would not be considered at this time on the basis that it was not consistent with FMB's allocation objectives and strategies. On the same date, Mr. Burns advised the YESAB office in Haines Junction that FMB did not support Mr. Leduc's application.

[16] On June 29, 2010, Duke submitted a second Timber Permit application (#HJ-10/11-06) for the Marshall Creek area in Block 15.

[17] On July 8, 2010, Ms. Diane Reed, former Director of FMB, notified Mr. Leduc that his most recent application would not be approved on the basis that what was currently allocated to this company was sufficient volume for the winter 2010/11. Mr. Leduc indicated to someone within FMB that he would appeal Ms. Reed's decision.

[18] In response to an email from Mr. Leduc, Mr. John Ryder, an environmental assessment analyst employed with the Yukon Department of the Environment, stated that after conducting a site visit to Block 15, the northern portion of the Block contained soils suitable for summer road construction and harvesting and that subject to further assessment by YESAB, his department would support summer logging there. Mr. Ryder went on to say that the southern portion of Block 15 contained wet soils and ground which was not suitable for summer road building and logging.

[19] From September 12, 2010 through to October 31, 2011, correspondence went back and forth between Mr. Leduc and various members of the FMB.

[20] Meetings took place between Mr. Leduc and a number of the FMB representatives. Positions were laid out and options reviewed. A position consistently taken by FMB, before and after reviewing Mr. Leduc's request was that Mr. Leduc could not get the right to summer harvest on Block 15. On October 31, 2011, a written decision was issued by the then Acting Director of the FMB, Patrick MacDonell, signed a decision which permitted the construction of an all-season road but did not permit harvesting during the summer.

[21] Mr. Leduc wishes this Court to set aside Mr. MacDonell's decision on the basis of bias and on the basis that the block in question, Block 15, is suitable to both construct an all-season road and harvest wood from that block during the summer months.

BLOCK 13

[22] Mr. Leduc maintains that the FMB approved a harvesting permit for his competitor, Dimok Timber Ltd. ("Dimok") for the South half of Block 13B in 2010, without conditions, while placing conditions on his permit for the North half of Block 13 at about the same time.

[23] I have examined the licenses issued by FMB to Dimok on August 12, 2010 and to Duke on August 27, 2010. Both appear to be identical except for Block 13 being north for the timber volumes and slightly different Fuel Spills Contingency Plan requirements for both permits. With respect to timber volumes, Duke was awarded 2,900 cubic metres while Dimok was awarded 3,336 cubic metres.

[24] Duke's Fuel Spill Contingency Plan appears to be more comprehensive than Dimok's.

[25] I fail to see, nor has the Petitioner pointed out, any particular advantage to Dimok other than a slightly greater volume. I know of no reason why this should or should not occur. I see no basis for criticizing the slight difference in these two licenses.

[26] He further maintains that the FMB breached its duty of fairness when it awarded a harvesting permit to Dimok for Block 13B in 2011 while turning down his application to harvest timber on the same land.

[27] The licenses referred to above were both set to expire on April 30, 2011. On March 18, 2011, Dimok applied for Block 14. The principle of Dimok, Mr. John Clunies-Ross realized he had omitted to include a request for Block 13B South in his application of March 18. On April 14, 2011, Mr. Clunies-Ross amended his original application to include Block 13B South.

[28] On April 19, 2011, Duke applied for a license for Block 13B South as well.

[29] On September 2, 2011, Mr. Bill Beard, FMB operations manager, requested a summary of the costs that Dimok invested to date on the shared road system. He stated that the costs would be one of the factors to be considered by the Director in the license determination for Block 13B south.

[30] On September 5, 2011, Mr. Leduc responded to FMB's request for a summary of the road costs. Mr. Leduc's response made it clear that both parties had invested money into the initial construction of the road and pointed out that he had had some major issues with Dimok under their shared road agreement. On September 26, 2011, Mr. MacDonell, in response to an inquiry from Mr. Leduc, advised Mr. Leduc that because there was a prior application for the same area, he would be seeking legal advice and would be making a decision in due course.

[31] On October 18, 2011, Mr. MacDonell issued his decision with respect to the applications by Dimok and Duke. He went through the legislative decision-making authority, including the applicable regulations under the *FRA*. He reviewed the comments made by Mr. Leduc with respect to the Dimok application. He reviewed the comments made by the Champagne and Aishihik First Nation. He reviewed the restrictions set forth in section 20 of the *FRA* with respect to harvesting licenses. He reviewed the requirements under section 32 of the regulations and considered a number of additional factors which he considered in making his decision.

[32] On the last page of his decision, he set forth the reasons why he had come to his decision to award the timber license for Block 13B South to Dimok.

[33] Mr. Leduc argued before this Court that Dimok had exaggerated its costs while Duke had minimized its costs. This, he alleged, gave Dimok an advantage which it should not have had.

[34] I have read the decision of Mr. MacDonell. I am not at all satisfied that this was a contributing factor in his decision.

[35] The Petitioner appealed the decision of Mr. MacDonell and he now seeks to set it aside.

[36] I have read Mr. Leduc's filed materials. I have listened and heard his representations and arguments to this Court. I have read the affidavits of Mr. Dinn, together with all the attachments which document quite thoroughly the history of the present management of the forests in the Yukon and in the Haines Junction particularly.

[37] Mr. Leduc is a man of conviction and passion. He professes to have an intimate knowledge of the land with which we are concerned. He firmly believes the FMB people

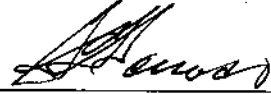
with whom he deals with do not know what they are doing and they make their decisions from afar, both literally and figuratively.

[38] I am satisfied that the Director's decision of October 18, 2011 was made after a thorough review of the history of the individual parties involved and the legislative requirements as set forth in the *FRA* and their regulations. Mr. MacDonell had no reason to accept one application and reject the other. He took everything into consideration that he should have. He had a discretion, he exercised that discretion. He set forth all of the factors which he considered to be relevant. The decision is a reasonable one.

[39] The Respondent's position with respect to Block 15 was made in accordance with applicable regulations and legislation. The proper steps were followed. The decision was made in accordance with applicable timber harvesting plan for the area. Consideration was given to the environment, the position set forth by the Champagne and Aishihik First Nation.

[40] If I were of the view that the decision of the Respondent with respect to either Block was unreasonable, or if undue process had not been followed, or if there was any basis whatsoever for finding of bias, I would have the right to quash the decision. I have no such concerns. The fact that Mr. Leduc does not agree with the positions taken is not enough. The fact that he may, indeed, be a knowledgeable, experienced and seasoned logger is not enough. The forests of the Yukon must be managed in accordance with the appropriate legislation. They appear to be being managed in accordance with the appropriate legislation. No member of the Respondent has appeared to act in an unfair, oppressive or in bad faith against the Petitioner.

[41] As stated earlier, the Petitioner's application must fail. The parties may speak to me with respect to costs.



HAWCO, J.