COURT OF APPEAL OF YUKON

Citation: *The First Nation of Nacho Nyak Dun v. Yukon*, 2015 YKCA 12

Date: 20150609
Docket: 14-YU752

Between:

The First Nation of Nacho Nyak Dun, The Tr'ondëk Hwëch'in, Yukon Chapter-Canadian Parks and Wilderness Society, Yukon Conservation Society, Gill Cracknell, Karen Baltgailis

Respondents
(Plaintiffs)

And

Government of Yukon

Appellant
(Respondent)

And

The Gwich'in Tribal Council

Intervenor

Correction: The front cover was corrected on July 15, 2015

Before: The Honourable The Honourable Chief Justice Bauman
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated December 2, 2014
(*The First Nation of Nacho Nyak Dun v. Yukon (Government of*), 2014 YKSC 69, Whitehorse Docket 13-A0142)

Oral Reasons for Judgment

Counsel for the Appellant: J.B. Laskin, J. Terry, J. Roth

Counsel for the Respondents: T.R. Berger, Q.C., M.D. Rosling, C.P.S. Riley

Counsel for the Intervenor: Jeff Langlois

Counsel for the Proposed Intervenor:	G.W. Whittle M.E. Whittle
Place and Date of Hearing:	Whitehorse, Yukon May 25, 2015
Place and Date of Judgment:	Whitehorse, Yukon June 9, 2015

Summary:

Application for intervenor status by the Yukon Planning Council. The underlying appeal concerns the process for developing a land use plan under Chapter 11 of the Umbrella Final Agreement between Canada, the Yukon and the Council for Yukon Indians. All parties oppose the application. Held: Application dismissed. The Council seeks to expand the scope of the litigation and may commandeer the proceedings.

I.

[1] **BAUMAN C.J.Y.C.A.**: The Yukon Planning Council applies for intervenor status in this appeal by the Yukon from a judgment of Mr. Justice Veale dated 2 December 2014, with reasons indexed as 2014 YKSC 69.

[2] The litigation concerns Chapter 11 of the Umbrella Final Agreement entered into on 29 May 1993 by Canada, the Yukon and the Council for Yukon Indians. That chapter sets out a process for developing a land use plan for the Peel Watershed in the Yukon. It is incorporated by reference into the Final Agreements of Canada and the Yukon with the First Nation of Nacho Nyak Dun, with the Tr'ondek Hwech'in and with the Vuntut Gwitch'in First Nation.

[3] Mr. Justice Veale described the litigation so (at paras. 1-4):

> The plaintiffs initially commenced this action against the Government of Yukon to obtain a declaration that the Final Recommended Plan of the Peel Watershed Planning Commission dated July 22, 2011 ... is the approved regional land use plan for the Peel Watershed, pursuant to ss. 11.6.0 and of the Final Agreements of the plaintiff First Nations. This position is supported by the intervener, the Gwich'in Tribal Council, which represents a Gwich'in First Nation based in the Northwest Territories but with Traditional Territory in the Peel Watershed.
>
> The Government of Yukon pleads that the plaintiffs' action should be dismissed with the result that the Government's Peel Watershed Regional Land Use Plan of January 2014 ... is the approved plan pursuant to s. 11.6.3.2 of the Final Agreements.
>
> At the end of the hearing in July 2014 and at the subsequent remedies hearing on October 24, 2014, the plaintiffs abandoned the declaration they initially sought. They now seek a declaration that the Government approved plan be quashed and that the final consultation pursuant to s. 11.6.3.2 be re-conducted with a specific court direction limiting the modifications of the Government of Yukon.
>
> The Government of Yukon denies that the Government approved plan should be quashed. But in the event it is, the Government of Yukon submits that the

> planning process be returned to the stage of proposed modifications with reasons pursuant to s. 11.6.3, requiring the Government of Yukon's modifications to be resubmitted as proposed modifications to the Peel Watershed Planning Commission[.]

[4] It will be seen from this description that, at bottom, the *lis* before the Court centers on the land use approval process under s. 11.6 of Chapter 11 and the scope of the remedy for any breaches of that process.

[5] Sections 11.6.0 to 11.6.3 of Chapter 11 provide as follows:

> 11.6.0 **Approval Process for Land Use Plans**
>
> 11.6.1 A Regional Land Use Planning Commission shall forward its recommended regional land use plan to Government and each affected Yukon First Nation.
>
> 11.6.2 Government, after Consultation with any affected Yukon First Nation and any affected Yukon community, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying on Non-Settlement Land.
>
> 11.6.3 If Government rejects or proposes modifications to the recommended plan, it shall forward either the proposed modifications with written reasons, or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon:
>
> 11.6.3.1 The Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to Government, with written reasons; and
>
> 11.6.3.2 Government shall then approve, reject or modify that part of the plan recommended under 11.6.3.1 applying on Non-Settlement Land, after Consultation with any affected Yukon First Nation and any affected community.

[6] Sections 11.6.4 through 11.6.5.2 are mirroring provisions applicable to the First Nations.

[7] Ultimately, this litigation is focused on the roles of "Government" (that is, the Yukon) and the affected Yukon First Nations (here, the respondents) in the approval process for land use plans.

[8] The Yukon Planning Council, established by s. 11.3.0 of Chapter 11, also has a role in the land use planning process. By s. 11.3.3, the Council:

> 11.3.3 ... shall make recommendations to Government and each affected Yukon First Nation on the following:
>
> 11.3.3.1 land use planning, including policies, goals and priorities, in the Yukon;
>
> 11.3.3.2 the identification of planning regions and priorities for the preparation of regional land use plans;
>
> 11.3.3.3 the general terms of reference, including timeframes, for each Regional Land Use Planning Commission;
>
> 11.3.3.4 the boundary of each planning region; and
>
> 11.3.3.5 such other matters as Government and each affected Yukon First Nation may agree.

II.

[9] The parties oppose the Yukon Planning Council's application for intervenor status. In essence, they submit that the Council wishes to advance argument on issues which are not before the Court on this appeal. They highlight the following passages from the Council's Memorandum of Argument (at paras. 22-23) as capturing the essential positions that the Council wishes to advance in the appeal:

> The Council's position on this appeal is based upon its belief that, pursuant to Chapter 11 of the Treaties, it has a primary role in the common land use planning process in the Peel Watershed and that this appeal provides to the parties, the Signatories, the Council and the public the opportunity to have that role interpreted and clarified.
>
> The Council's position is that, upon this appeal, the proper interpretation of the land use planning process established by the Signatories is the core issue. If granted leave to intervene, the Council's position on this issue will be that, section 11.3.0, by its language and the application of the *Interpretation Act,* taking into consideration the intention of the Signatories in their use of the word "shall", created for the Council a right to make recommendations. The Council was established to ensure that there is an independent and impartial body to make objective and neutral recommendations to the Signatories on all aspects of the common land use planning process. The Signatories viewed such a body as being necessary because neither they nor the commissions could be impartial in respect of land use planning. For example, the commissions have the local perspective and the Council has the "global" perspective. The Signatories realized that the disposition of lands and resources in the Yukon would ultimately be irreversible. The Signatories realized that, if because of partisanship or because of their respective requirements, they failed to observe or ignored the consequences of land use planning decisions they intended to make, irreparable harm could result which would not be in the public interest. As such, they established the Council and expressed their collective desire that the Council be granted an unfettered right to make these independent, impartial, objective and neutral recommendations. That right, they agreed, imposed upon each of them the

> duty to seek out and obtain recommendations from the Council on any and all aspects of land use planning. The Signatories have a duty to, upon receiving recommendations, direct those recommendations to the person in respect of whom the recommendations are made. As such, the Signatories intended and expected the courts to interpret section 11.3.0 in accordance with the intentions the Signatories and the Respondent First Nations have expressed in the preamble and section 11.1.0, as granting to the Council a right with a corresponding duty cast upon each of the Signatories and each of the affected First Nations.

[10] It is the submission of the parties that, however interesting and worthwhile an inquiry into these matters might be, these issues are not engaged in this appeal; they were not put in play by the parties, nor were they dealt with by Mr. Justice Veale in the court below.

III.

[11] The applicant and the parties have cited the leading cases on applications for intervenor status including *Friedmann v. MacGarvie,* 2012 BCCA 109; *FortisBC Inc.* v. *Shaw Cablesystems Limited,* 2010 BCCA 606; *Ward v. Clark,* 2001 BCCA 264.

[12] In *Friedmann,* Madam Justice Bennett quoted (at para. 17) from *U.T.U., Locals 1778 & 1923 v. B.C. Rail Ltd.* (1990), 45 C.P.C. (2d) 33 (B.C.C.A. Chambers) at para. 6:

> Intervener status may also be granted if there is no direct interest in the issues between the parties but the applicant has an interest in the “public law issues”. The Court will then consider the issues in that particular case and will consider whether the intervener will bring a new or different perspective to the consideration of the issues, or will make a useful contribution towards resolving the issues, always bearing in mind that the intervention will not be permitted if it would result in injustice to the parties.

[13] Madam Justice Bennett continued (at para. 19):

> The potential concern at this stage is whether the proposed intervenor would change the issues or expand the scope of the litigation, thereby commandeering the proceedings and placing an undue burden on the parties to respond to arguments and issues immaterial to their private action: *Ward v. Clark,* 2001 BCCA 264 at paras. 6-11; applied in *FortisBC Inc.* v. *Shaw Cablesystems Limited,* 2010 BCCA 606 (Chambers) at para. 17. In *Canadian Broadcasting Corporation v. Luo,* 2008 BCCA 335 (Chambers) at para. 18, for example, Rowles J.A. noted in dismissing the application for intervenor

> status that the applicant wished to present arguments on the constitutional division of powers, whereas the appeal likely came down to an issue of statutory interpretation.

[14] *FortisBC* and *Ward* are to the same effect (at paras. 17 and 6, respectively).

[15] In my view, considering the positions the Council wishes to advance, the parties' concern that the Council seeks to expand the scope of the litigation, "thereby commandeering the proceedings", is fully justified. In the circumstances, this concern strongly militates against allowing the Council to intervene. I dismiss the application with costs to the parties as requested.

"The Honourable Chief Justice Bauman"