SUPREME COURT OF YUKON

Citation: *Vincent v. Yukon (Minister of Energy, Mines and Resources)*, 2019 YKSC 12

Date: 20190228
S.C. No. 18-A0116
Registry: Whitehorse

BETWEEN

MICHEL VINCENT AND MICHAEL HEYDORF

PLAINTIFFS

AND

HON. RANJ PILLAI
MINISTER OF ENERGY, MINES AND RESOURCES
GOVERNMENT OF YUKON AND TR'ONDËK HWËCH'IN

DEFENDANTS

Before Chief Justice R.S. Veale

Appearances:

Michel Vincent	Appearing on his own behalf
Michael Heydorf	Appearing on his own behalf
Julie DesBrisay	Counsel for the Defendants, Minister of Energy, Mines and Resources, Government of Yukon
Micah S. Clark and Ewa Holender	Counsel for Tr'ondëk Hwëch'in

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiffs, Michel Vincent and Michael Heydorf, for an extension of the November 30, 2018 expiry dates of five of their placer mining claims (the "expired claims"), pending the outcome of this litigation. The plaintiffs also seek an abridgement of time to bring the application.

[2] The defendants, Minister of Energy, Mines and Resources and Tr'ondëk Hwëch'in, oppose the application. They state that the plaintiffs are in effect seeking a mandatory interlocutory injunction against the Mining Recorder, directing her either to grant relief from forfeiture of the five expired claims under ss. 42(3) of the *Placer Mining Act,* S.Y. 2003, c. 13, (the "*Act*"), or to accept the plaintiffs' assessment work and renew the expired claims. They submit that the plaintiffs have not met the test for a mandatory interlocutory injunction.

[3] For the reasons that follow, I dismiss the plaintiffs' application, without prejudice to the reinstatement of the expired claims after trial.

BACKGROUND

[4] Mr. Vincent and Mr. Heydorf recorded the expired claims before October 2, 1989.

[5] On September 15, 1998, the Tr'ondëk Hwëch'in Final Agreement (the "Final Agreement") became effective. Tr'ondëk Hwëch'in selected parcel TH C-4B/D as Category B Settlement Land. Category B Settlement Land is defined in the Final Agreement to mean that Tr'ondëk Hwëch'in have the rights, obligations and liabilities equivalent to fee simple, including rights to Specified Substances (as defined in the Agreement and not at issue in this application). However, ownership of Mines and Minerals and the right to work the Mines and Minerals are reserved. Category B Settlement Land is also subject to any licence, permit or other right issued by Government for the use of land or other resources existing at the date the land became Settlement Land (see ss. 5.10.2.2 and 5.4.2 of the Final Agreement). The expired claims all predate and overlap, either in part or completely, with parcel TH C-4B/D.

[6] Tr'ondëk Hwëch'in have been using parcel TH C-4B/D as a residential subdivision consisting of over 50 homes and supporting infrastructure since approximately 2001.

Placer Mining Act

[7] The *Act* applies to land for which the mine and mineral rights are under the administration and control of the Commissioner of Yukon, including Mines and Minerals in Category B Settlement Land.

[8] Section 41 of the *Act* requires the plaintiffs to do assessment work every year to the value of $200 in order to maintain the claims in good standing. If the assessment work is not done according to the *Act* then ss. 42(1) provides that title to the claims is forfeited.

[9] Sections 41 and 42 are in Part 1 of the *Act*. Subsection 2(5) of Part 1 states that Part 1 is subject to Part 2 and the regulations made under Part 2. Part 2, titled Land Use and Reclamation, sets out requirements for different types of land use in the context of placer mining. The purpose of Part 2 is in s. 100:

> … to ensure the development and viability of a sustainable, competitive and healthy placer mining industry that operates in a manner that upholds the essential socio-economic and environmental values of the Yukon and respects the aboriginal and treaty rights referred to in section 35 of the Constitution Act, 1982.

[10] The Government of Yukon introduced a regulation in Part 2 of the *Act* as a legislative response to a decision of the Court of Appeal for Yukon in 2012 (*Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, ("*RRDC*")). That decision obligated the Government of Yukon to notify and where appropriate, consult with and accommodate Ross River Dena Council before allowing any mining exploration

activities to take place within the Ross River area, to the extent that those activities may prejudicially affect Aboriginal rights claimed by Ross River Dena Council.

Placer Mining Exploration

[11] Mining exploration activities fall within four categories - Class 1, 2, 3 or 4 - depending on the type of activity. The Court of Appeal for Yukon in *RRDC* noted that Class 1 exploration programs are "less intensive and cover smaller areas than Class 2, 3 and 4 programs [but] they can still have a substantial impact on the land" (para. 25). Further, the court stated "they may still seriously impede or prevent the enjoyment of some Aboriginal rights in more than a transient or trivial manner" (para. 33). Class 1 exploration activities include "the clearing of land, the construction of lines, corridors and temporary trails, the use of explosives, the removal of subsurface rock", all within specified limits (para. 25).

[12] The *Class 1 Notification Areas Regulation*, O.I.C. 2013/221 (the "*Regulation*") was enacted pursuant to s. 116 of the *Act*. It has been amended since 2013 to add more prescribed areas than the Ross River area. The prescribed areas now include TH C-4B/D and all of Tr'ondëk Hwëch'in traditional territory, in which notification to the Government of Yukon must be provided before Class 1 exploration activities can be carried out. Notification enables the Government of Yukon to consult with the potentially affected First Nation before the work begins. If part of a mining claim is in a prescribed area and another part is not in prescribed area, all of it is deemed to be in the prescribed area (s. 3 of the *Regulation*). The prescribed areas include both Settlement land and Crown land.

[13] The plaintiffs were notified by the Chief, Mining Land Use in the Mineral Resources Branch by letter dated November 18, 2015, of the requirement to file and receive approval of a Class 1 Notification before doing any Class 1 work on their claims.

The Plaintiffs' Application

[14] The Mining Recorder rejected the plaintiffs' assessment work (test-drilling, a Class 1 placer land use operation) applicable to their claims overlapping with TH C-4B/D, proof of which was filed in support of the annual renewal of the grants of claims. The plaintiffs did not submit a Class 1 Notification form before completing the Class 1 work. As a result, the Mining Recorder advised the plaintiffs by letters dated December 27, 2017 and January 17, 2018, of the refusal. Her reasons were that the plaintiffs had carried out Class 1 activities on the land that overlapped with TH C-4B/D, without first filing and receiving approval of a Class 1 Notification, as required by the *Regulation*. The refused forms referenced s. 2(5) and stated: "No Class 1 Notice".

[15] The refusal of the assessment work meant the claims expired on November 30, 2018.

[16] Approximately 10 months after receiving the refusal letters, by letter dated October 10, 2018, the plaintiffs requested relief under ss. 42(3) of the *Act*. Specifically, the letter from Mr. Heydorf requested relief to allow for the completion of a legal action, at that time not yet started, challenging the initial rejection of their assessment work. On October 18, 2018, the Mining Recorder refused this request for relief because the scope of ss. 42(3) did not include allowing for the completion of a lawsuit.

[17] The plaintiffs now apply to this Court to request that the expiration date of the five claims be extended until the completion of this legal action.

[18] The plaintiffs say in their legal action that the requirement to provide a Class 1 notification under the *Act* conflicts with the Final Agreement provisions that they say permit the plaintiffs to exercise their rights to their claims without the consent of Tr'ondëk Hwëch'in. They argue that the Final Agreement takes precedence over the *Act* and *Regulations* because of its protection under the *Constitution* of Canada.

[19] The plaintiffs' legal action may alternatively be characterized as a challenge to the decision of the Mining Recorder to refuse the assessment work, in the form of a judicial review.

[20] Similarly, this interlocutory application may be characterized as a legal challenge to the Mining Recorder's decision to refuse to grant relief from forfeiture under ss. 42(3) of the *Act,* pending the final outcome of this litigation.

ISSUE

[21] Can the Court issue a mandatory interlocutory injunction directing the Mining Recorder to grant relief from forfeiture pursuant to ss. 42(3) of the *Act* pending the final determination of the legal action, or directing her to accept the assessment work done by the plaintiffs despite her decision that it did not comply with the *Act*?

[22] Alternatively, if the plaintiffs' application is in effect a judicial review of the Mining Recorder's decision not to grant relief from forfeiture, was the Mining Recorder's decision reasonable?

JURISDICTION

[23] The plaintiffs, who are self-represented, have not set out a clear legal basis in their application for their request. However, the defendants have, in my view, correctly characterized the plaintiffs' application as a request for a mandatory interlocutory

injunction to require the Mining Recorder to extend the expiration of the claims until the end of the litigation. This Court does have the jurisdiction to issue a mandatory interlocutory injunction at common law (*Yukon Francophone School Board No. 23 v. Solicitor General of the Yukon Territory*, 2010 YKSC 34; *2027625 Ontario Ltd. (c.o.b. Doll House) v. Kitchener (City)*, [2007] 39 M.P.L.R. (4th) 250 (O.N.S.C.); *Heritage Duty Free Shop Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2000] A.C.F. No. 2101 (F.C.T.)).

[24] Any inquiry into whether or not the plaintiffs are seeking a stay of certain provisions of the *Act* and whether the Court has jurisdiction to do so is unnecessary.

[25] In considering the alternative characterization of this application as a judicial review, this Court does have jurisdiction to review judicially the decision of the Mining Recorder to refuse to grant relief from forfeiture of the claims pending the outcome of the trial (Rule 54 of the *Rules of Court*).

ANALYSIS

1. Mandatory Interlocutory Injunction

[26] The legal three-part test for a mandatory interlocutory injunction has recently been clarified by the Supreme Court of Canada in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 ("*CBC*"). Courts across the country were divided on whether the first part of the test is satisfied by a finding that there is a serious issue to be tried or by a finding there is a strong *prima facie* case. The Supreme Court of Canada has now clearly stated the three-part test for a mandatory injunction as follows (at para. 18 of *CBC*):

> 1. The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented

> that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
>
> 2. The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> 3. The applicant must show that the balance of convenience favours granting the injunction. (emphasis already added)

(1) Strong *prima facie* case

[27] The Supreme Court of Canada in *CBC* summarized the meaning of a strong *prima facie* case as placing "a burden on the applicant to show a case of such merit that it is very likely to succeed at trial" (para. 17). The Court noted that the reasons for the need to review the merits of the action at this preliminary application stage include the potentially severe and costly consequences for a defendant of a mandatory injunction.

[28] In this case, the plaintiffs need to prove successfully at trial that the Final Agreement provisions operate to exempt the plaintiffs from the application of the *Act* and *Regulations* in such a way that the Mining Recorder must accept the plaintiffs' assessment work on the expired claims without the fulfilment of the Class 1 Notification requirement.

[29] The Final Agreement sections relied on by the plaintiffs are set out in their outline and include ss. 5.4.1.2, 5.4.2.2, 5.4.2.3, 5.6.0, 5.6.1, 5.6.2, 6.3.5 and 18.3.2.

[30] On a review of these sections, and on a preliminary analysis of the arguments presented for this application, I do not interpret the Final Agreement provisions to require the Mining Recorder to exempt the plaintiffs from the application of the *Act* and *Regulations*.

[31] It is true that s. 6.3.5 of the Final Agreement provides that the holder of a right of access to or across Settlement Land, for commercial or non-commercial purposes,

existing as of the Effective Date of the Final Agreement, shall be entitled to exercise those rights as if the land had not become Settlement Land. However, s. 6.3.5 is subject to s. 5.6.0. Section 5.6.2 provides that Government shall administer every Encumbering Right (such as the right to mine) on Settlement Land in the public interest and "in accordance with the Legislation which would apply if Settlement Land were Crown Land" (my emphasis).

[32] Section 18.3.2 of the Final Agreement, allows the exercise of any Existing Mineral Right on Settlement Land without the consent of the affected Yukon First Nation, "where provided by the Laws of General Application" (my emphasis).

[33] Section 5.4.1.2 of the Final Agreement reserves the right to work the Mines and Minerals on Category B Settlement Land. Section 5.4.2.2 states the rights and title of Tr'ondëk Hwëch'in are subject to any licences, permits or rights granted for the use of land prior to the effective Settlement date.

[34] On a preliminary analysis, the decision made by the Mining Recorder to refuse to accept the assessment work because the plaintiffs did not comply with the Class I Notification requirement is consistent with the Final Agreement provisions. The Mining Recorder's decision does not create a conflict with the rights of access set out in s. 6.3.5 because that section is restricted by s. 5.6.2, which obligates the Government to administer those rights in accordance with the laws of general application (i.e. the *Act* and *Regulations*). The decision also does not conflict with s. 18.3.2, because the *Act* and *Regulations*, laws of general application, do not state that Existing Mineral Rights can be exercised on Settlement Land without the consent of the First Nation, but instead they require a notification system to enable consultation with the First Nation.

These Final Agreement provisions confirm that activity on the plaintiffs' claims on Category B Settlement Land is regulated by the *Act* and *Regulations*.

[35] A final consideration is the plaintiffs' argument that their mining claims should be considered as though they are on Crown Land and consequently exempted from the Class I Notification requirement because they were issued before the Category B Settlement Land selection was made, as set out in s. 5.4.2.2 of the Final Agreement. This argument overlooks the fact that the *Act* and *Regulations* apply to Crown land, as well as to Settlement Land. The Class 1 Notification requirement is applicable to Class 1 activities on mining claims in identified areas that include both Crown land and Settlement land.

[36] The plaintiffs' argument that their claims are exempt from the Class 1 Notification requirement also fails to consider the duty to consult obligation on the Crown. The duty to consult is based on the honour of the Crown and exists at common law independent of what is set out in the modern land claim agreements. The duty to consult applies in circumstances where the asserted or actual rights of a First Nation are potentially detrimentally affected by conduct of the Crown. To fulfill the duty, notice of the proposed activity, consultation about its potential detrimental effects, and accommodation if necessary, is required. The Class 1 Notification process was created to satisfy this duty to consult.

[37] In this case, the Class 1 activities on claims that overlap with Category B Settlement land have the potential to affect detrimentally the rights of Tr'ondëk Hwëch'in, and the duty to consult is triggered. This process of consultation is not the same as the requirement to not seek consent from the First Nation.

[38] There is a strong likelihood, in my view at this preliminary stage, that the plaintiffs will not succeed at trial.

(2) Irreparable Harm Will Result if Relief is not Granted

[39] Irreparable harm is defined by the Supreme Court of Canada as harm that cannot be quantified in monetary terms or cannot otherwise be cured. (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at para. 64). The British Columbia Court of Appeal has stated that a finding of irreparable harm must not be based on mere speculation but "on a sound evidentiary foundation" (*Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, at para. 60).

[40] The plaintiffs have provided no evidence in their application of irreparable harm. They are miners and have conceded that they "are in this for the money they can derive from the Claims. They can derive that money by selling, leasing or working the Claims themselves" (Outline of Plaintiffs, para. 9).

[41] Counsel for the Government of Yukon confirmed that the expired claims are within the City of Dawson boundaries and are located in an area where there is a residential subdivision. The *Act* prevents anyone from entering lands for the purpose of mining within the boundaries of a city or that are occupied by a building or within the curtilage of a dwelling-house (ss. 17(2)(e)). These claims will not be re-staked or over-staked by anyone if the Mining Recorder's decision stands and they are permitted to lapse.

[42] If the plaintiffs are successful at trial, they could be compensated monetarily, through damages. Alternatively, because no one else will be able to acquire the claims,

their claims could be reinstated. The second part of the test, irreparable harm, is not satisfied.

(3) Balance of Convenience

[43] The plaintiffs must show that the balance of convenience favours the granting of the injunction in the third part of the test. In a context such as this where the interests of individuals are being balanced against the public interest that is carried out through the application of laws, a Court "must give due weight to the public interest." (*Canadian Free Speech League v. Canada*, [1992] A.C.F. no. 966 (F.C.T.), at para. 7.)

[44] An accepted principle in considering the balance of convenience factor for an injunction is the preservation of the *status quo*. Here, the *status quo* is the application to the plaintiffs of the applicable law, presumed to be in the public interest. The plaintiffs instead are requesting relief from the operation of the Class 1 *Notification Regulation*, which is an alteration of the *status quo*. The balance of convenience does not favour them in this respect.

[45] Further, the plaintiffs' delay of approximately 10 months in commencing this litigation has contributed to the balance of convenience weighing against them. The Mining Recorder's decisions were issued in December 2017 and January 2018. The litigation was not commenced until November 22, 2018. If the litigation had been started earlier, a decision may have been reached before the claims expired on November 30, 2018.

[46] I agree with the defendants that the plaintiffs have not met the third part of the test for mandatory interlocutory injunction.

2. Judicial Review of Mining Recorder's decision

[47] The alternative approach to the plaintiffs' application is to consider it as an application for judicial review of the Mining Recorder's decision under ss. 42(3) of the *Act* to refuse the relief from forfeiture of the claims. I recognize that the plaintiffs did not formulate their application in this way, but given the order they seek, the fact that they are self-represented, and the fact that the defendant Tr'ondëk Hwëch'in indicated that the plaintiffs may amend their pleadings to include this request, I will consider it.

[48] I dismiss the application on this basis, without prejudice to the reinstatement of the claims after trial. The wording is ss. 42(3) is clear. The Mining Recorder is given discretion to consider the written application for relief from forfeiture filed by an owner and must be satisfied that it meets the requirements in the section. Those requirements in particular are "that the owner will be or has been unable to do the work referred to in section 41 … owing to a restriction or requirement imposed by Part 2 [of the *Act*] or by any other Act of Parliament or of the Legislature" (my emphasis).

[49] In this case, the plaintiffs state that they could not comply with the Class 1 Notification requirement imposed by Part 2 of the *Act*, because the Final Agreement provisions prevail over this legislation. However, the plaintiffs did perform the assessment work as required; they just did not comply with a regulatory pre-condition before doing the work. This non-compliance was because they were deliberately seeking a refusal from the Mining Recorder for failure to comply with the Class 1 Notification requirement, so they could litigate the requirement. The plaintiffs are now seeking relief from forfeiture of their claims, for the sole reason that the litigation they started is ongoing, and they wish to maintain their claims until the outcome. The Mining

Recorder rightly found that the plaintiffs did not meet the criterion of being unable to do the work because of a requirement in Part 2 or in any other *Act*.

[50] The standard of review of a decision made by an administrative officer interpreting their own statute is one of reasonableness, not correctness (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, paras. 22 and 36). This means that there could be more than one outcome, but as long as each outcome is within the range of reasonableness, it is acceptable.

[51] In this case, on a preliminary analysis, the Mining Recorder's interpretation and application of ss. 42(3) was reasonable. There is no legal basis to revise her decision.

3. Abridgement of Time

[52] The plaintiffs also request an abridgement of time to bring this application. The defendants did not object or say they were prejudiced at the hearing of this application. They did raise the issue of delay in the context of the mandatory injunction test and I have addressed that issue above. As a result, I grant the abridgement of time to the plaintiffs to bring this application.

SUMMARY

[53] The plaintiffs' application for a mandatory injunction is dismissed. The judicial review of the Mining Recorder's decision is dismissed.

[54] Counsel may speak to costs in Case Management, if necessary.

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VEALE C.J.