IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: Hwëch'in v. Government of Yukon, 2005 YKSC 48

Date: 20050831
S.C. No: 04 A0131
Registry: Whitehorse

Between:

Tr'ondëk Hwëch'in

Plaintiff

- and -

Government of Yukon

Defendant

Before: Mr. Justice P.J. McIntyre

Appearances:

Stephen L. Walsh — for the Plaintiff

Penelope Gawn and Monica Leask — for the Defendant

REASONS FOR JUDGMENT

I. Introduction

[1] These are two interlocutory applications by the Plaintiff under Rule 18 and Rule 18A of the *Rules of Court*.

II. Nature of Action

[2] The Amended Statement of Claim concerns the establishment of the Tombstone Territorial Park in the northeast Yukon by four Yukon Orders-in-Council dated October 22, 2004: 2004/202, 2004/203, 2004/204 and 2004/11. The Plaintiff asks for 17 declarations, including that Order-in-Council 2004/202 and 2004/203 are void and inoperative, damages for breach of the Defendant's fiduciary duties to the Plaintiff, and special costs.

[3] The Statement of Defence describes previous litigation by the Plaintiff about the Tombstone Territorial Park: a previous Petition in the Yukon Supreme Court dated February 19, 2002 giving rise to a decision by Hudson J. [2003] Y.J. No. 3 that the Plaintiff and the Defendant appealed to the Yukon Court of Appeal 2004 YKCA 2, [2004] Y.J. No. 2, on which the Plaintiff unsuccessfully sought leave to the Supreme Court of Canada (September 30, 2004). The Plaintiff discontinued a second Petition filed September 20, 2004 about the Tombstone Territorial Park on November 5, 2004. This action was filed November 12, 2004.

[4] The Statement of Defence says that the impugned Orders-in-Council are not void and inoperative, that the 17 declarations sought are unnecessary and that the Court should exercise its discretion to refuse to make the declarations. The Defendant further pleads no breach of a fiduciary duty.

III. Applications

[5] By the Rule 18 motion the Plaintiff seeks:

a. a declaration that the provisions of Order-in-Council 2004/202 dated October 22, 2004, which purport to withdraw from disposal the mines and minerals located within Tombstone Territorial Park (other than oil and gas under the *Oil and Gas Act*, R.S.Y. 2002, c. 162) and the right to work those mines and minerals, exceed the authority granted to the Commissioner in Executive Council under the *Lands Act*, R.S.Y. 2002, c. 132, and are void and inoperative on the grounds that the *Lands Act* does not apply to mines and minerals, including the mines and minerals within Tombstone Territorial Park, which became "territorial lands" on or after April 1, 2003; and

b. an order for costs.

[6] This is the same as declaration (b) sought in the Amended Statement of Claim.

[7] The 18A motion seeks 8 declarations set out at letters (d), (c), (e), (g), (h), (f), (j) and (i) in the Amended Statement of Claim:

1. an order in the nature of a declaration that the "purpose" of Tombstone Territorial Park set out in section 3 of Order-in-Council 2004/203 is inconsistent and in conflict with the purpose of that Park as agreed to in the Tr'ondëk Hwëch'in Final Agreement, and is of no force and effect;

2. an order in the nature of a declaration that the correct construction of the Tr'ondëk Hwëch'in Final Agreement is that the purpose of Tombstone Territorial Park is to protect for all time a natural area of territorial significance which includes representative portions of the MacKenzie Mountains eco-region, including the Ogilvie Mountains and Blackstone Uplands areas, and which contains important physical and biological features as well as sites of archaeological, historical and cultural value, for the benefit of Yukon residents and all Canadians while respecting the rights of the Tr'ondëk Hwëch'in and its Citizens;

3. an order in the nature of a declaration that the reference to section 11 of the *Parks and Lands Certainty Act* in Order-in-Council 2004/203 is void and inoperative because it exceeds the statutory authority provided the Commissioner in Executive Council under the terms of sections 8 and 9 of that *Act*;

4. an order in the nature of a declaration that those provisions of Order-in-Council 2004/203 which exclude mines and minerals, including hydrocarbons, and the right to work them, from the land comprising the Park are inconsistent and in conflict with the terms of the Tr'ondëk Hwëch'in Final Agreement, and the rights of the plaintiff thereunder;

5. an order in the nature of a declaration that the correct construction of the Tr'ondëk Hwëch'in Final Agreement is that the parties thereto intended that mines and minerals and the right to work them are to be included in the land comprising the Park so as to better ensure the attainment of the parties' objective of protecting the land comprising the Park for all time;

6. an order in the nature of a declaration that the provisions of sections 4 and 5 of Order-in-Council 2004/203 are inconsistent and in conflict with the terms of the Final Agreement, and the rights of the plaintiff thereunder, in respect of the management of Tombstone Territorial Park, and are of no force and effect;

7. an order in the nature of a declaration that the correct construction of the Tr'ondëk Hwëch'in Final Agreement is that the parties thereto intended that the beds of water bodies within Tombstone Territorial Park and the water rights associated therewith are to be included in the land comprising the Park so as to better ensure the attainment of the parties objective of protecting the land comprising the Park for all time;

8. an order in the nature of a declaration that the provisions of Order-in-Council 2004/203 which exclude from the land comprising the Park the beds of all water bodies in the Park and the water rights associated therewith are inconsistent and in conflict with the terms of the Tr'ondëk Hwëch'in Final Agreement, and the rights of the plaintiff thereunder, and are of no force and effect;

[8] It is common ground that the burden on the Plaintiff for the Rule 18 application is to demonstrate beyond doubt the correctness of its position. On the 18A application the Plaintiff must demonstrate on a balance of probabilities that there is no genuine issue to be tried in law or fact.

[9] Declaratory relief is always discretionary. In other words, even if the Plaintiff meets the burdens under Rule 18 and 18A, this Court has a discretion whether to award the relief sought ***Canada v. Solosky***, [1980] 1 S.C.R. 821 at 832; ***Tr'ondëk Hwëch'in v. Canada***, 2004 YKCA 2, [2004] Y.J. No. 2 at para. 11.

[10] The latter case must be referred to in more detail. Hall J.A., writing for the Court of Appeal expressed his concern about the wide terms of the declatory relief sought:

> 10 A fundamental difficulty that I perceive with the instant case is that there was no actual decision that was being appealed against before Hudson J. In the present circumstances, the dimensions of any lis between the parties are not entirely clear. When the appellant Tr'ondëk launched the judicial review proceedings in the Federal Court, they were seeking to overturn the decision of the Chief, MLUR that granted a permit to CUMI to do exploration work on the Horn Claims. Therefore, in those circumstances, an actual decision made by a tribunal was in issue and could be passed by the court in the judicial review proceedings. By contrast, in the instant proceedings the heads of declaratory relief sought by Tr'ondëk and CUMI in the Supreme Court was framed in quite wide terms.

[11] He expressed caution about issuing an advisory opinion where the relief sought is not related to an existing and defined lis:

> 11 I appreciate the point, made by counsel for the appellant, that this was an application for the construction or interpretation of a document, namely the THFA [The Final Agreement]. However, when one considers the scope of the declarations sought by CUMI and Tr'ondëk herein, it appears to me that what was really being sought from the Supreme Court was something in the nature of an advisory opinion. I believe that the courts ought to be cautious in acceding to
>
> requests of this sort. A court may of course grant declaratory relief where no other relief is sought. But a court may properly exercise its discretion to refuse a declaration where the relief sought is not related to an existing and defined lis.

[12] He noted the need to construe an agreement in its entirety:

> 16 It is, of course, a sound canon of construction to construe an agreement in its entirety. That principle was referred to by McIntyre J., giving judgment of the majority of the court, in St. Peter's Evangelical Lutheran Church (Ottawa) v. The Council of the Corporation of the City of Ottawa, [1982] 2 S.C.R. 616 at 626, 140 D.L.R. (3d) 577, 45 N.R. 271. Section 12.2 is a general statement of the approach to the management of the area of Tombstone Park to be taken prior to the final establishment of the park. The provisions of 3.6, on the other hand, are of considerable specificity and contain this phraseology: “for greater certainty, the provisions of 3.3 and 3.5 shall not apply in respect of”, inter alia, “recorded mineral claims -- under the Yukon Quartz Mining Act --- existing on the Effective Date

[13] He held that the declarations made by the chambers justice were not necessary, and that broad prospective statements of principle by a Court are neither necessary nor helpful:

> 20 Indeed, it also appears to me that there was no proper basis for Hudson J. to grant the declarations contained in paras. 63 and 64 of his Reasons for Judgment. These are set forth in para. 4, supra. Obviously, those charged with the administration of the legislative regime in the Yukon will be required to have regard to both the existing statutory regime governing mining and exploration activity and the THFA. These are all existing circumstances that will govern future decision making by officials charged with such duties. The declaration made by Hudson J. at para. 63 of the Reasons appears to me to simply direct that the provisions of applicable legislation ought to be applied to these claims. In my view, that is a common place that requires no declaration by any court. With regard to the declaration made in para. 64 of the Reasons, that again seems to simply express the sentiment that those officials charged with making decisions concerning the exploration or development of the Horn Claims should have regard to the existence and terms of the THFA. Again, I do not consider that this requires any declaration from a court because the existence and terms of the THFA are circumstances that undoubtedly will be taken account of by those who are charged with making these types of decisions. It appears to me that the declarations made by Hudson J. and contained in these paragraphs deal with matters that can properly be left to be considered, at least in the first instance, by those officials
>
> charged with the administration of matters related to mining exploration and development in the Yukon. The courts may at some point in the future have a role to play if a decision should be questioned in proceedings taken by an interested party but I do not incline to the view that such broad prospective statements of principle by a court are either necessary or helpful.

IV. Background

A. The Agreements

[14] On May 29, 1993, the Council for Yukon Indians, the Federal Government and the Yukon Government signed the Umbrella Final Agreement that gave rise to the *Yukon First Nations Land Claim Settlement Act*, S.C. 1995, c. 34, the *Yukon First Nations Self-Government Act*, S.C. 1995, c. 35 and the *Act to Approve Yukon Land Claim Final Agreements*, R.S.Y. 2002, c. 240. The Plaintiff, formerly known as the Dawson Indian Band, and then the Dawson First Nation, is one of the Yukon First Nations mentioned in these Acts.

[15] The Acts led to settlement negotiations that culminated in Agreements dated July 16, 1998 entitled “Tr’ondëk Hwëch’in Final Agreement”, the “Tr’ondëk Hwëch’in Self-Government Agreement” and the “Tr’ondëk Hwëch’in Final Agreement Implementation Plan” between the Plaintiff, the Defendant and the Federal Government.

[16] The first of these Agreements, The Final Agreement, came into force on September 15, 1998. It is a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act*, 1982.

[17] Chapter 10 of The Final Agreement deals with special management areas. These are not settlement lands under The Final Agreement. By 10.3.2.1 Tombstone Territorial Park is established as a special management area with specific provisions set out in Schedule A to Chapter 10 (Schedule A). The objective of special management areas is set out in 10.1.1:

The objective of this chapter is to maintain important features of the Yukon's natural or cultural environment for the benefit of Yukon residents and all Canadians while respecting the rights of Yukon Indian People and Yukon First Nations.

[18] Clause 1.1.1 of Schedule A provides:

> 1.0 The objectives of this schedule are:
>
> 1.1.1 to protect for all time a natural area of territorial significance which includes representative portions of the Mackenzie Mountains ecoregion, including the Ogilvie Mountains and Blackstone Uplands areas, and contains important physical and biological features as well as sites of archaeological, historical and cultural value, by the establishment of a territorial park under the Parks Act, R.S.Y. 1986, c. 126, to be known as the Tombstone Territorial Park (the "Park");

[19] Clause 3.1 of Schedule A called for the park to be a natural environment park under the *Parks Act*, R.S.Y. 1986, c. 126.

[20] Clause 3.2 of Schedule A provides:

> Canada shall transfer to the Commissioner of the Yukon the administration and control of Crown Land within the Park, excluding the mines and minerals and the right to work the mines and minerals, as soon as practical following the determination of the boundaries of the Park pursuant to 5.0.
>
> [My emphasis. The boundaries were established December 1999].

B. Interpretation of The Final Agreement

(i) The Agreement Itself

[21] Clause 2.2.15 is an entire Agreement clause. It states:

> Settlement Agreements shall be the entire agreement between the parties thereto and there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them.

[22] Clause 2.6.6 says The Final Agreement shall be interpreted in accordance with the *Interpretation Act*, RS.C. 1985, c. I-21.

[23] Clause 2.6.7 of The Final Agreement describes the use of objectives. It states:

> Objectives in Settlement Agreements are statements of the intentions of the parties to a Settlement Agreement and shall be used to assist in the interpretation of doubtful or ambiguous expressions.

[24] Clause 2.11.1 refers to successor Legislation. It states:

> Except as expressly provided otherwise, any reference in a Settlement Agreement to Legislation, an Act or a provision of an Act includes:
>
> 2.11.1.1 that Legislation, Act or provision of an Act, and any Regulations made thereunder, as amended from time to time; and
>
> 2.11.1.2 any successor Legislation, Act or provision of an Act.

(ii) ***The Interpretation Act***, R.S.C. 1985, c. I-21.

[25] This Act states in section 12:

> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

(iii) ***The Yukon First Nations Land Claim Settlement Act***, S.C. 1994, c. 34.

[26] Subsection 13(2) provides:

> In the event of a conflict or inconsistency between a final agreement or transboundary agreement that is in effect and any federal or territorial law, including this Act, the agreement prevails to the extent of the conflict or inconsistency.

V. Rule 18 Application

[27] According to the Plaintiff, the Defendant has not acted in accordance with The Final Agreement. The Plaintiff says that when the Defendant purported to withdraw from disposal the mines and minerals in the Tombstone Territorial Park by Order-in-Council 2004/202 under the provisions of the *Lands Act* it failed to do so because it could not in law do so under that statute.

[28] The argument goes like this. The land comprising the Tombstone Territorial Park had been under the administration of the Federal Government. Section 3.2 of Schedule A called for the transfer of Crown land in the park, excluding the mines and minerals, to the Defendant after the determination of the boundaries of the park. The boundaries were determined in December 1999.

[29] By Federal Order-in-Council dated February 20, 2003, PC 2003-224 the Federal Government transferred the land in the park to the Defendant. Mines and minerals were excepted from the transfer by reservation.

[30] By Agreement dated October 29, 2001 the Federal Government had previously agreed to transfer administration and control over mineral resources to the Defendant on April 1, 2003 (the Yukon Northern Affairs Program Devolution Transfer Agreement).

[31] When, according to the Plaintiff, the Defendant purported to withdraw from disposal the mines and minerals pursuant to the *Lands Act*, it could not do so, for subsection 2(1) of the *Lands Act* states it does not apply to Territorial Lands under the *Territorial Lands (Yukon) Act*, S.C. 2003, c. 17.

[32] The Plaintiff says the mines and minerals became Territorial Lands on April 1, 2003, as part of the devolution of administration and control of lands to the Yukon as agreed to October 29, 2001.

[33] The Defendant says the Plaintiff has not demonstrated any need for the declaration nor identified any harm that would result to the Plaintiff if the declaration were not granted.

[34] The Defendant points out that an Order-in-Council made under the *Placer* and *Quartz Mining Acts* (OIC 2004/204) also withdraws from disposal mines and minerals within the park (this is refuted by the Plaintiff).

[35] The Defendant says that in any event mining is prohibited in the park, save for grandfather provisions, pursuant to 3.5 of Article A, which Article is binding on the Defendant pursuant to the Devolution Agreement.

[36] During the course of argument I posed a question that had been troubling me to the Plaintiff. Why is the Plaintiff taking this position, what is its motivation? The answer: if the Plaintiff is right, mines and minerals cannot be disposed of without the consent of the Plaintiff. Its consent would be needed. The Plaintiff also said that these applications will save trial time and may encourage settlement.

[37] I also asked why the Plaintiff does not wait until a problem arises. The answer is that the Plaintiff has a right to the park it negotiated, implemented and that it has a right to have a Court determine whether, as it believes, The Final Agreement has not been implemented. This is not a request for advisory opinion but a declaration that the Defendant has failed to implement that which it promised. The Plaintiff has a right to have the park it negotiated implemented.

[38] In my view, in ***Tr'ondëk Hwëch'in v. Canada*** the Yukon Court of Appeal has made it abundantly clear that courts must be cautious about making broad prospective statements of principle. In this case, the dispute exists in the briefs of counsel. The affidavits merely highlight the differences of opinion the Plaintiff and the Defendant have about The Final Agreement, the legislation, and the Orders-in-Council, but no one has made a decision that affects the Plaintiff, nor has anyone sought to take any steps to conduct or prohibit activities contrary to the Plaintiff's

vision of the Park. In the end, I am not persuaded that any useful purpose can be served by granting the application. I do not see any need for the declaration sought. The Plaintiff has not identified any harm that might occur to it should the declaration not be granted nor any harm that might be avoided should the declaration be granted. There is no possibility based on the legislation in place, and the representations made to me in Court about the Defendant's position, that mining will occur in the Tombstone Territorial Park.

VI. Rule 18A Application

[39] The declarations sought in this application are essentially attacks against Order-in-Council 2004/203, made under the *Parks and Lands Certainty Act* , R.S.Y. 2002, c. 165. The Plaintiff complains about the Order-in-Council: that the purpose set out is inconsistent with The Final Agreement; that the reference to section 11 of that Act is improper; that mines and minerals should not have been excluded; that sections 4 and 5 allow permitting of activities in the Park; and the exclusion of water bodies and beds from the Park.

[40] As with the Rule 18 application, the Plaintiff says no need has been demonstrated nor harm identified that would lead to the declarations sought.

A. Purpose

[41] The purpose set out in Order-in-Council 2004/203 is "to protect a representative or unique landscape that displays ecological characteristics or features of one or more of the

Yukon's ecoregions." This is said to be inconsistent with 10.1.1 cited above and in conflict with it.

[42] Essentially, the Plaintiff says the Yukon legislation and Order-in-Council must mirror the language of The Final Agreement. I do not agree.

[43] It may be, and it is evident that the purpose set out in 2004/203, is not as extensive as the objective set out in The Final Agreement. But what am I to take from that? Tombstone Territorial Park is identified as a settlement agreement park and natural environment park, and its boundaries have been established. No one has come forward to assert a right to do something inconsistent with the objectives in The Final Agreement, nor does the Yukon Government assert such a right. Any territorial legislation inconsistent with The Final Agreement cannot prevail. In my view it would be perilous to make declarations about the meaning of the legislation and the Yukon Government's implementation of the Tombstone Territorial Park in the absence of a dispute that engages both factual and legal issues. By this I mean that although the Plaintiff sought to persuade this Court about the interpretation of the various statutes and Orders-in-Council, there is no factual issue to ground this dispute – it is esoteric and hypothetical. No one has claimed a right to act in a way inconsistent with the statutory framework or The Final Agreement – no one says: I demand the right to mine in the Park, nor has the Yukon Government taken steps to stop individuals from carrying on activities nor purported to permit activities that the Plaintiff says cannot occur.

[44] So the complaints are hypothetical. In my view, there are too many combinations and permutations of disputes actually grounded in facts that might arise to make a declaration absent those facts. It would be dangerous to make such a declaration – it is impossible to contemplate what activity might be sought to be permitted or prohibited by persons or groups presently unknown for purposes not yet contemplated. Until such an activity is proposed, no declaration should be granted. If no such activity arises, no one is worse off.

B. The Reference to Section 11 of the Act

[45] I do not know why Order-in-Council 2004/203 made reference to both sections 8 and 11 of the Act. Section 8 deals with settlement agreement parks and section 9 states that parks other than the settlement parks shall be established in accordance with sections 10 through 17. The reference to section 11 is neither appropriate nor necessary but I fail to see what need there is to declare that to be so.

C. The Exclusion of Mines and Minerals

[46] The Plaintiff complains that in setting up the park, the Yukon Government excluded mines and minerals. It is argued that mines and minerals should have been included, that the parties intended they should be included. At paragraph 27, the Plaintiff states:

> The applicant submits that the Final Agreement makes it clear that the mountains within the Park were to be included as part of the Park. Indeed specific mountain areas are described in section 1.1.1. However, if “all mines and minerals” are excluded from the lands comprising the Park, then it is very difficult to say what, if anything, would remain of the mountains within the Park since, other than the flora and fauna on the mountains, the rest of the mountains are comprised primarily of minerals.

[47] This paragraph demonstrates that the Plaintiff has a basic misunderstanding of the difference between mines and minerals, which are subsurface, and surface title. Further, I do not see how that which has been specifically excluded by 3.2 of Schedule A of The Final Agreement, mines and minerals, can be said to be clearly intended to be included in the Park. Nowhere does it say that they were to be included, and if they were to be included, after, for example, April 1, 2003 it would have been easy to have said so. As noted above, the Yukon Government's position in Court is that mining is not to occur in the Tombstone Territorial Park. If that position changes, and there is a real factual basis for a dispute, the Plaintiff may then seek to demonstrate that this would be contrary to The Final Agreement.

D. Exclusion of Beds of Water Bodies and Water Rights

[48] The Plaintiff says the exclusion is inconsistent with the definition of a natural environmental park the parties had in mind at the time of The Final Agreement, being a park that contains a variety of natural features such as lakes and streams. It is argued that the mandatory management provisions would be rendered meaningless if these were excluded. First, I am not convinced that water rights are the same as fishing rights but even if they are, I consider this to be another hypothetical question not grounded in a factual dispute and appropriate for declaratory relief.

E. Sections 4 and 5 of the Order-in-Council

[49] The Plaintiff's complaint about the Minister's ability to issue permits is hypothetical, premature and not worthy of a declaration for the reasons articulated above in respect of the other complaints.

VII. Conclusion

[50] With respect to the Rule 18 application, I am not satisfied beyond a doubt as to the merits of the Plaintiff's application and I dismiss it.

[51] With respect to the Rule 18A application, I am satisfied that I have sufficient material before me to make a decision. On the material that has been provided, I am persuaded that no declaration should issue because the application is premature, hypothetical and not appropriate for declaratory relief.

[52] Costs may be dealt with by written submissions within 30 days.

Dated at Calgary, Alberta this 31st day of August, 2005.

P.J. McIntyre

Deputy Judge