SUPREME COURT OF YUKON
COUR SUPRÊME DU YUKON
APR 04 2011
FILED / DÉPOSÉ

# SUPREME COURT OF YUKON

Citation: *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd.*, 2011 YKSC 29

Date: 20110404
S.C. No. 10-A0118
Registry: Whitehorse

Between:

LIARD MCMILLAN, on his own behalf and on behalf of all the other members of LIARD FIRST NATION, and LIARD FIRST NATION

Petitioners

And

THE MINISTER OF ENERGY, MINES AND RESOURCES, and
THE YUKON GOVERNMENT, and
ROBERT HOLMES, in his capacity as Director of Mineral Resources, Ministry of Energy, Mines and Resources, and
SELWYN CHIHONG MINING LTD. and
YUKON ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT BOARD

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

| | |
|---|---|
| Drew Mildon | Counsel for the Petitioners |
| Laurie Henderson and Julie DesBrisay | Counsel for Yukon Government |
| Kevin O'Callaghan | Counsel for Selwyn Chihong Mining Ltd. |
| Joseph J. Arvay, Q.C. and James F. Bishop | Counsel for Yukon Environmental and Socio-economic Assessment Board |

## REASONS FOR JUDGMENT
## (Application for Party Status)

## INTRODUCTION

[1] The Yukon Environmental and Socio-economic Assessment Board ("YESAB") applies to be added as a party respondent in this proceeding brought by Liard First

Nation ("LFN") against the Yukon Government ("YG") and Selwyn Chihong Mining Ltd. ("Selwyn Chihong"). YESAB also applies for an order that the YESAB Online Registry for project numbers 2009-0207 and 2010-0072 be part of the record in these proceedings.

[2] YESAB relies on Rules 15(5) and 54. Pursuant to Rule 54(6), YESAB has been served with the Petition seeking a judicial review of the Decision Document dated July 23, 2010 approving the Selwyn Resources Underground Exploration Project (the "Project"). YESAB applies for party status as a "person directly affected by the order sought" under Rule 54(5).

[3] On February 23, 2011, I ordered that YESAB be added as a respondent with full party standing. I further ordered that the YESAB Online Registry is YESAB's record of decision. These are my reasons.

**BACKGROUND FACTS**

[4] The Umbrella Final Agreement ("UFA") and the eleven Yukon First Nation Final Agreements ("Final Agreements") set out the framework of an environmental and socio-economic assessment process for Yukon. This process is formalized in the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*"). Among other things, *YESAA* creates YESAB to administer the assessment process.

[5] YESAB is comprised of an Executive Committee of three members and four other Board members. Three Board members, including one Executive Committee member, are appointed on the nomination of the Council of Yukon First Nations and three, including one Executive Committee member, by the nomination and appointment of the federal and territorial governments. The Chairperson of the Board, who is also a

member of the Executive Committee, is appointed by the federal minister, after consultation with the other two Executive Committee members.

[6] While constituted under federal legislation, YESAB is an independent body responsible for administering a comprehensive, neutrally-conducted assessment process for projects proposed to be undertaken in Yukon, whether the project will be located on First Nation settlement land or on non-settlement land, and whether the decision body for the proposed project is a federal agency, the territorial minister or a First Nation.

[7] The UFA and the Final Agreements expressly provide that YESAB members are not delegates of the parties that nominate or appoint them.

[8] Under *YESAA*, the Yukon has been divided into six contiguous assessment districts. Each assessment district has a "designated office", which is an office maintained by the Board and staffed with Board employees. A Designated Office is located in each of the following communities: Dawson City, Mayo, Haines Junction, Teslin, Watson Lake and Whitehorse.

[9] Project proposals subject to assessment under *YESAA* are submitted to either the Designated Office for the assessment district in which the project would be located or to the Executive Committee, depending on the activities proposed. The *Assessable Activities, Exceptions and Executive Committee Projects Regulations* (SOR/2005-379) specify whether a Designated Office or the Executive Committee is responsible for conducting the assessment.

[10] Since November 2005, 1,170 projects have been assessed under *YESAA*. Of those, three were assessed by the Executive Committee and the remainder by the

Designated Offices. The Watson Lake Designated Office itself has completed 132 assessments.

[11] At the conclusion of an assessment, a Designated Office makes a recommendation in writing with reasons to the responsible body that the project (a) be allowed to proceed; (b) be allowed to proceed subject to terms and conditions specified to mitigate significant adverse environmental or socio-economic effects; or (c) not be allowed to proceed because the project will have significant adverse environmental or socio-economic effects that cannot be mitigated (s.56 *YESAA*).

[12] A decision body must give full and fair consideration to scientific information, traditional knowledge and other information provided with the recommendation and must issue a decision document accepting, rejecting or varying the recommendation within the period specified in the *Decision Body Time Periods and Consultation Regulations* (ss. 74-75 *YESAA*). There is no provision in *YESAA* for a decision body to refer a recommendation or assessment back to a Designated Office. Section 74(2) of *YESAA* also requires a decision body to consult a First Nation for which no Final Agreement is in effect if the project might have significant adverse environmental or socio-economic effects in the First Nation's territory.

[13] Selwyn Chihong filed a proposal for the Project in March 2010. The Project is an underground exploration program which involves the moving of up to 200,000 tonnes of development rock to the surface. The Project is located approximately 160 km northeast of the community of Ross River, and may operate for a period of 10 years.

[14] After receiving input from YG, Liard First Nation and Ross River Dena Council, the Designated Office in Watson Lake issued a Designated Office Evaluation Report

dated June 16, 2010. The Designated Office recommended that the Project be allowed to proceed subject to specified terms and conditions, having determined that the Project will have significant adverse environmental or socio-economic effects that can be mitigated.

[15] The YG Director of Mineral Resources issued a Decision Document dated July 23, 2011 accepting the recommendation from the Watson Lake Designated Office that the Project be allowed to proceed subject to the terms and conditions as accepted or varied.

[16] LFN filed a Petition, dated December 6, 2010 and subsequently amended, alleging among other things, that both the Designated Office Evaluation Report and the Decision Document failed to comply with statutory requirements. LFN applies for an order quashing, or in the alternative, suspending or staying the Decision Document until the alleged deficiencies are remedied.

[17] LFN alleges extensive deficiencies in the Evaluation Report but does not seek any remedy against YESAB or the Designated Office.

[18] The issue to be determined is whether YESAB should be added as a party respondent with its Online Registry as part of the record. LFN has already conceded that YESAB should be included as an intervenor to explain the Evaluation Report and the jurisdiction of the Director of Mineral Resources in relation to the Evaluation Report.

[19] YESAB applies to be a full party which includes the right of appeal as well as the remedy of court costs.

**The Supreme Court of Yukon Rules**

[20] The LFN application for judicial review is provided for in *YESAA*:

Application for Judicial Review:

116. Notwithstanding the exclusive jurisdiction referred to in section 18 of the *Federal Courts Act*, the Attorney General of Canada, the territorial minister or anyone directly affected by the matter in respect of which relief is sought may make an application to the Supreme Court of Yukon for any relief against the Board, a designated office, the executive committee, a panel of the Board, a joint panel or a decision body, by way of an injunction or declaration or by way of an order in the nature of *certiorari*, *mandamus*, *quo warranto* or prohibition.

[21] The procedure to be followed in an application for judicial review is set out in Rule 54(5), (6)(b) and (6)(c) of the *Rules of Court*:

**Respondents**

(5) An applicant shall name as a respondent every person directly affected by the order sought in the application, including the decision-maker in respect of which the application is brought and every person required to be named as a party under the statute pursuant to which the application is brought.

**Service of notice of application**

(6) Unless the Court directs otherwise, within 10 days after the issuance of a petition, the applicant shall serve it upon

...

(b) the decision-maker in respect of which the application is brought,

(c) any other person who participated in the proceeding before the decision-maker in respect of which the application is made,

...

[22] Rules 54(8) and (9) anticipate that an application will be case managed and Rule 1(7) requires mandatory case management. The issue of party versus intervenor status can often be resolved at a case management conference.

[23] Rule 15(5)(a) sets out the test for removing, adding, or substituting a party as follows:

> (5) (a) At any stage of a proceeding, the court on application by any person may
>
> (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,
>
> (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
>
> (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
>
> (A) with any relief claimed in the proceeding, or
>
> (B) with the subject matter of the proceeding, which, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[24] In many cases, the appellant or applicant for judicial review neglects to "name as a respondent every person directly affected by the order." Sometimes the omission is based upon strategic reasons to discourage those who oppose the applicant, and at other times it is based on the view that a quasi-judicial body should not be permitted to defend or advance its own interests. In either case, the applicant is ignoring the clear

language of Rule 54(5). The purpose of this analysis is to encourage appellants and applicants to follow the clear direction of the Rules.

**ANALYSIS**

[25] In *Western Copper Corporation v Yukon Water Board*, 2010 YKSC 61, Western Copper appealed a decision of the Water Board denying a water licence.

[26] Western Copper named only the Yukon Water Board and Yukon Government as respondents. However, Western Copper also served Little Salmon/Carmacks First Nation and the Yukon Conservation Society with the notice of appeal as they were active participants at the Water Board hearing. Western Copper conceded that the First Nation and Society should be intervenors but opposed the granting of party-respondent status.

[27] While *Western Copper* was an appeal and this case is an application for judicial review, I ruled at para. 36 that the test for who is served and who becomes a respondent is functionally equivalent in either case, despite some variation in the wording:

> 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.

[28] At paras. 49, 50 and 51, in an attempt to give effect to the purpose of the *Rules* and provide for access to justice without the necessity of a costly court application, I ruled that in this jurisdiction the appropriate way to proceed where a person is served but is not a named party is to permit that person to indicate the involvement they prefer as follows:

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

[29] In this way, access to justice is enhanced from a cost perspective of avoiding a costly court application. The party appealing or applying for judicial review can take an initial assessment of whether they object to a particular person as a party or intevenor and raise those issues in case management before resorting to filing a court application opposing or limiting the standing of a particular person.

[30] In the case at bar, YESAB has chosen to make an application under Rule 15(5)(a) and Rule 54(5) stating that LFN should have named them as a respondent at the outset, as they are a person directly affected.

[31] LFN opposes party status for YESAB on the following grounds:

1. it submits that no relief or remedy is claimed against YESAB.
2. It says that the YG can represent the interests at stake under *YESAA*.
3. As a matter of access to justice, LFN wishes to limit the number of parties to keep costs down.

4. YESAB may lose its impartiality towards LFN.

[32] It is correct to say that LFN claims no relief or remedy against YESAB. However, that is of little consolation to YESAB, when the Petition contains a litany of allegations that YESAB failed to perform its statutory obligations. The failures of the Designated Office would be the basis for a quashing of the Decision Document. In my view, although the Petition only refers to quashing the decision body's Decision Document, it is a direct attack on YESAB's practices and recommendations.

[33] The submission that YG can represent YESAB's interests or the appropriate interpretation to be placed upon *YESAA*, fails to recognize that YESAB is a completely independent body from YG. That is one of the unique features of the Yukon environmental assessment process. YESAB is an independent environmental assessment body which has its own mandate and should appropriately represent itself at the hearing. YESAB also has relevant expertise and can offer a useful perspective to the court.

[34] While I have some sympathy for LFN's desire to keep costs and the number of parties to a minimum, it cannot impugn the Evaluation Report without anticipating a response from YESAB. I am also confident that YESAB can make its submissions in a moderate and respectful way and maintain its impartiality in the process. I agree that it is particularly important for YESAB to maintain its impartiality in the event that the alleged deficiencies are required to be addressed by the Designated Office.

[35] It is certainly arguable that intervenor status would be sufficient to allow YESAB to have its say in the hearing. However, an intervenor is often limited in its role and submissions to the court. As I indicated in my brief oral reasons, I see no reason to limit

YESAB's submissions at this stage nor deny it a right to appeal this Court's decision. However, the scope of its submissions may be revisited in the hearing. There is a lot at stake for the First Nation and the mining company, and the broader the representation at the hearing, the better equipped the Court will be to make an appropriate and just decision.

[36] While the issue of the tribunal impartiality has been a major concern of a reviewing Court historically (see *Northwestern Utilities*, [1979] 1 SCR 684) I am of the view that the interpretation of *YESAA* and the role of YESAB is a matter of public interest rather than a dispute between parties. Impartiality is certainly an important consideration, but the public interest requires a full exploration of *YESAA* and the role of YESAB.

[37] I order that YESAB be added as a respondent pursuant to Rules 54(5) and 15(5)(a)(ii) and that its Online Registry form part of the Court record.

VEALE J.