IN THE SUPREME COURT OF YUKON

Citation: *Kwanlin Dün First Nation* v. *Government of Yukon, et al.* 2008 YKSC 66

Date: 20080912
S.C. No. 08-A0069
Registry: Whitehorse

Between:

KWANLIN DÜN FIRST NATION

Petitioner

And

GOVERNMENT OF YUKON and ARCHIE LANG, MINISTER OF HIGHWAY AND PUBLIC WORKS

Respondents

Before: Mr. Justice L. F. Gower

Appearances:

Rhys Davies, Q.C. — Counsel for the Petitioner
Penelope Gawn and Monica Leask — Counsel for the Respondents

REASONS FOR JUDGMENT
(Interlocutory Injunction)

INTRODUCTION

[1] This is an application by the Kwanlin Dün First Nation ("KDFN") for an interlocutory injunction to restrain the respondents, Government of Yukon and the Minister of Highways and Public Works, (to whom I will refer jointly as "YTG") from proceeding further with any public tender process for the proposed expansion of the air terminal building for the Whitehorse International Airport (the "project").

[2] KDFN is a self-governing Yukon First Nation pursuant to a Final Agreement and a Self Government Agreement between it and YTG which came into effect in 2005. Chapter 22 of the Final Agreement deals with “Economic Development Measures” and states that the objectives of the chapter are to provide KDFN with opportunities to participate in the Yukon economy, to develop economic self-reliance, and to obtain economic benefits from the Final Agreement. Section 13 of Part 1 of Schedule A to Chapter 22 deals with “Yukon Asset Construction Agreements” (“YACA’s”), and obliges the parties to negotiate such agreements, subject to certain conditions, for asset construction projects costing $3 million or more within KDFN’s traditional territory.

[3] KDFN submits that YTG has failed to negotiate a YACA for the airport project in a manner consistent with the honour of the Crown. In particular, KDFN says this YACA, which was only recently provided by YTG, is not in compliance with s. 13 of the YACA provisions of the Final Agreement, in that it fails to provide “benefits commensurate with the nature, scale, duration and cost” of the project.

ISSUES

[4] The test for granting an interlocutory injunction is three-fold, and is set out in *RJR-MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311:

1. Is there a serious question to tried on the main (judicial review) application?

2. Will the applicant suffer irreparable harm if the injunction is not granted and it is ultimately successful on the main application?

3. Does the balance of convenience favour the applicant or the respondent?

ANALYSIS

1. Is there a serious question to be tried?

[5] The general principles applicable to my determination of whether there is a serious question to be tried are not seriously in dispute. Obviously, this case involves a Final Agreement, which is a treaty under s. 35 of the *Constitution Act, 1982*. In *R.* v. *Badger*, [1996] 1 S.C.R. 771, at para. 76, Cory J. stated that treaties are analogous to contracts "albeit of a very solemn and special, public nature" and that they create enforceable obligations based on the mutual consent of the parties. At para. 41, Cory J. stated:

> "… The honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown…" (my emphasis)

[6] In *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, 2004 SCC 74, McLachlin C.J., speaking for the Supreme Court of Canada, stated, at para. 24:

> "In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)." (my emphasis)

[7] In *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 16, McLachlin C.J., again speaking for the Supreme Court, said that this proposition regarding the honour of the Crown was "not a mere incantation, but rather a core precept

that finds its application in concrete practices." Later, at para. 19, she continued "the honour of the Crown also infuses the processes of treaty making and treaty interpretation."

[8] In *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, 2005 SCC 69, Binnie J., speaking for the Supreme Court said, in the opening paragraph of his judgment:

> "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case."

At para. 57, Binnie J. repeated that "the honour of the Crown infuses every treaty and the performance of every treaty obligation."

[9] In *Little Salmon/Carmacks First Nation* v. *Yukon (Minister of Energy, Mines and Resources)*, 2008 YKCA 13, Kirkpatrick J.A., at para. 90, referred to the honour of the Crown and the correlative duty to consult as "constitutional duties" which "exist outside and infuse the treaty [the Final Agreement between the Little Salmon/Carmacks First Nation, Canada and Yukon] and govern Yukon's dealings with First Nations." She went on to say that the "degree of consultation" will be a function of the potential adverse impacts on First Nations' treaty rights.

[10] Section 13.3 of the YACA provisions oblige YTG and KDFN to enter into negotiations with a view to concluding a YACA for any project which has a capital cost of

$3 million or more within KDFN's traditional territory, unless that requirement is waived by YTG, which is not the case here.

[11] Pursuant to s. 13.4 of the YACA provisions, if the negotiations are unsuccessful after 30 days, or such other period of time that YTG deems reasonable, then YTG may ask KDFN to provide a proposal in writing respecting the provisions to be included in a YACA. Under s. 13.5, that responsive proposal is to be within 15 days of YTG's request.

[12] Pursuant to s. 13.7.2, following the receipt of the responsive proposal by KDFN, YTG may, at its discretion, either refer the matter to mediation, or "make the final determination respecting the provisions to be included" in the YACA.

[13] Finally, s. 13.11 states:

> "Yukon Asset Construction Agreements shall:
>
> 13.11.1 provide benefits commensurate with the nature, scale, duration and cost of the construction of the Asset; and,
>
> 13.11.2 not place an excessive burden on the Yukon or the agent of the Yukon constructing the Asset or adversely affect the viability of the construction of the Asset."

[14] In *RJR-MacDonald*, the Supreme Court of Canada said that determining whether there is a serious question to be tried should be determined "on the basis of common sense and an extremely limited review of the case on the merits" (para. 78). Further, unless the case on the merits is frivolous or vexatious, the court should, as a general rule, go on to consider the second and third parts of the test (para. 78). Finally, the Supreme Court held that the threshold is a low one and that a prolonged examination of the merits is generally neither necessary nor desirable (para. 50).

[15] Although there are facts which are in dispute between the parties, they agree that YTG gave KDFN notice of the proposed project and ultimately commenced negotiations

towards the completion of a YACA in relation to the project. YTG provided a draft YACA to KDFN and asked KDFN to provide its response in writing pursuant to s. 13.5 of the YACA provisions. KDFN did so and YTG made its final determination respecting the provisions to be included in the YACA, pursuant to s. 13.7.2 of the YACA provisions. However, KDFN says that the negotiations did not take place in a manner consistent with the principle of the honour of the Crown, which is a constitutional imperative, and that the final YACA provided by YTG does not provide benefits commensurate with the nature, scale, duration and cost of the construction of the project.

[16] Keeping in mind that I am not to embark on a prolonged examination of the merits in determining whether there is a serious question to be tried, the history of the dealings between the parties is relevant to the issue of the honour of the Crown. Therefore, I feel it is necessary to set that out as briefly as possible.

[17] In March 2007, YTG provided KDFN with formal notice of its intention to proceed with the project and invited KDFN to begin negotiations on a YACA for the project.

[18] In June 2007, YTG met with KDFN to discuss a number of issues, including the potential YACA for the project. Michael Cowper, YTG's senior project manager for the project, indicated at that meeting that there would be minimal opportunity for benefits for KDFN on the project, as it was understood to be a fairly sophisticated undertaking involving specialized construction techniques. KDFN was further informed that the project was still waiting for internal financial approval from within YTG.

[19] On August 29, 2007, YTG and KDFN approved and adopted a "Protocol to Guide the Negotiation of Yukon Asset Construction Agreements" (the "YACA Protocol").

[20] It appears that there were no substantive negotiations on a YACA for the project in 2007, as both parties were waiting for YTG to obtain the related internal financial approval. That approval was not obtained until January 16, 2008. The total project was then estimated to cost $15.7 million. However, two additional phases were also contemplated, adding to that cost.

[21] It was not until March 6, 2008, that negotiations really got underway. On that date YTG met with KDFN to discuss the project and again stated that the unique nature of the construction made it unlikely that KDFN would obtain any direct construction benefits from the project. YTG also then announced its intention to publicly tender the general contract for the project in July 2008. Ray Santa, the Director of Economic Development for KDFN, deposed that YTG representatives stated that they had looked at the project and determined that there was “nothing in there that KDFN would be capable of taking on” and that “only a few companies in western Canada, like Dominion Construction, would be capable of doing the work.” That allegation was not specifically denied by YTG. Further, it is undisputed that YTG made no inquiries of KDFN prior to the meeting about their capacity to participate in the project. Also, no specific details of the project were provided to KDFN prior to that meeting.

[22] On March 7, 2008, representatives of YTG and KDFN met at an Annual Information Exchange, pursuant to the YACA Protocol. The expansion of the air terminal building at the Whitehorse Airport was one of several projects discussed at that meeting. KDFN indicated then that it was unable to take full advantage of benefiting from asset construction agreements due to its extremely limited capacity and that it was specifically seeking training and employment opportunities for KDFN members and firms in order to

build its capacity. KDFN further indicated that it was receiving enquiries from contracting firms and was interested in developing partnerships with such firms to enhance its capacity.

[23] On March 18, 2008, KDFN representatives reiterated their request that YTG consider providing “non-traditional” benefits within the YACA for the project, such as those referred to in the “Other Measures” provision of the YACA template in the YACA Protocol. Those benefits are referred to there as ones “which may not be directly related to the specific Project but are likely to lead to increased opportunities on future Asset construction projects.” Among the potential benefits discussed were provisions for the secondment of YTG officials to KDFN, business opportunities associated with the Airport, a potential project manager position, some sort of service contract for the project, and the potential for using KDFN land near the Airport. At that time, KDFN had still not been provided with details or specifications for the project.

[24] On April 23, 2008, a representative of KDFN wrote to YTG requesting information about costs and timelines for the project and reiterated KDFN’s interest in the “non-traditional” benefits. On April 24th, a YTG Senior Negotiator, Michael Hale, wrote to KDFN indicating that he would be providing a response to their letter of the previous day “in short order” as well as a draft YACA. Unfortunately, Mr. Hale left his employment with YTG shortly afterwards on May 2nd and did not return to his position until August 11, 2008. In the meantime, Mr. Santa deposed that he did not contact YTG about negotiating a YACA for the project for several weeks, as KDFN was waiting to receive the promised draft YACA.

[25] On or about June 10, 2008, KDFN and Dominion Construction entered into a Memorandum of Understanding reflecting their intention to establish a joint venture to pursue and execute construction management and/or stipulated price contracts to provide construction services to YTG for the construction of a number of projects, including the air terminal building expansion for the Whitehorse Airport. (Counsel for YTG argued that the Memorandum in the materials is not signed by Dominion, but the "Counterparts" clause arguably makes that unnecessary.)

[26] On or about June 18, 2008, Mr. Santa wrote to YTG informing it about the joint venture with Dominion and requesting an opportunity for KDFN to submit a proposal, on a sole-sourced basis, as contemplated under the YACA Protocol, to provide Construction Management "At Risk" services for the project through the joint venture. KDFN had previous experience with the same model, as it was successful in submitting a joint venture proposal with Dominion Construction to YTG in May 2008 for the construction of the Yukon Healing (Correctional) Centre.

[27] On June 26, 2008, Mr. Cowper wrote to Mr. Santa rejecting the "Construction Management" proposal, stating that it was too late in the procurement process, that design for the project was already well underway and that the construction packages were being "fast tracked" in order to proceed with the project quickly. In that letter, Mr. Cowper indicated that he had "separated out a task" involving realignment and reconstruction of an access road to the air terminal building, which he envisioned as a possible sole-sourced contract for KDFN. Mr. Cowper acknowledged that the YACA relating to the project was "behind schedule". There was no discussion between YTG

and KDFN about either the Dominion joint venture proposal or the access road proposal prior to Mr. Cowper's letter being sent.

[28] On or about July 25, 2008, YTG commenced a public tender process for general contracting services for the project by publication in a Whitehorse newspaper. It is uncontradicted that no prior notice was provided by YTG to KDFN about the specific date for the announcement of the public tender process. The initial date for the submission of bids was to have been on August 21, 2008, but that was subsequently extended, due to the within litigation, to August 28, 2008.

[29] On August 13, 2008, KDFN wrote to YTG to request that the tender process be revoked so that the parties could meet and discuss the situation with a view to concluding a YACA for the project.

[30] At noon on August 15, 2008, YTG delivered a draft YACA to KDFN, but did not agree to revoke the tender process. In the cover letter from Mr. Cowper to KDFN of August 15, 2008, he invited KDFN to meet with YTG as early as that afternoon to discuss the matter. On the same day, KDFN started this proceeding and brought this interlocutory injunction application, which was initially to be heard on August 22, 2008. On August 21, 2008, by consent, the interlocutory application was adjourned to September 8th and the tender closing was extended to September 11th. Subsequent to the hearing the closing was extended again, to September 16th.

[31] On August 20, 2008, YTG wrote to KDFN giving notice that, pursuant to ss. 13.4 and 13.5 of the YACA provisions in the Final Agreement, YTG was requesting a proposal from KDFN within 15 days, essentially in response to the draft YACA.

[32] On August 26, 2008, representatives of YTG and KDFN met to discuss the draft YACA. Saskia Bunicich, the Economic Development Officer for KDFN, has deposed that KDFN did not receive a detailed breakdown of the costs of the project until that date, despite previous requests for that information at earlier meetings. Michael Hale, for YTG, deposed that the information that YTG provided on August 26th "had already been provided to KDFN on previous occasions." Ms. Bunicich challenged that assertion stating that YTG had only provided "ball park figures" for the project and not the specific details KDFN had requested. Further, Mr. Hale provided no particulars of the information he said that he had previously provided to KDFN.

[33] On September 3, 2008, KDFN provided its written response to YTG on the draft YACA. In a seven page letter, KDFN accepted all of the benefits proposed by YTG in connection with the project, with certain suggestions and modifications. KDFN also proposed six additional provisions to be incorporated in the YACA. There is no evidence of any attempt by YTG to contact KDFN to discuss this response of September 3, 2008.

[34] On September 5, 2008, at or about 5 p.m., YTG notified KDFN that, pursuant to s. 13.7.2 of the YACA provisions of the Final Agreement, YTG had made a final determination respecting the provisions to be included in the YACA for the project.

[35] Mr. Santa deposed in his fourth affidavit that of the various benefits set out by YTG, the only one which is assured is the benefit regarding the management training opportunity for one KDFN citizen at a maximum value of $81,000. The others are all in the nature of potential benefits, which may or may not come to fruition, depending on the varying circumstances set out by Mr. Santa. According to the final YACA, the project is estimated to cost over $18 million in three phases over three years.

[36] With respect to the negotiations, and whether they were carried out in a manner consistent with the honour of the Crown, there are obviously some points of disagreement between the parties as to who did what and when. Further, there are substantive and subjective disagreements about the import and impact of some of the actions, or inaction, by the respective parties. Having said that, YTG has acknowledged that these YACA negotiations were behind schedule in relation to the timing of the project. It would also seem to be uncontradicted that YTG offered to provide a draft YACA in late April 2008, but failed to do so until August 15, 2008, *after* the public tender was announced and *after* KDFN had requested that the tender process be revoked in order to complete the YACA negotiations. It is apparent that YTG was extremely anxious to complete the YACA negotiations, as they invited KDFN to meet with their representatives the very afternoon of the day that they provided the initial draft YACA. However, despite that apparent urgency, it also seems to be largely uncontradicted that the specific detailed breakdown of the costs of the project requested by KDFN was not provided by YTG until August 26, 2008, again *after* YTG had provided its initial draft YACA, and *after* it had requested that KDFN provide its proposal in response, and *after* this litigation had been commenced. Finally, there is no evidence of any attempt by YTG to discuss KDFN's responsive proposal of September 3, 2008 before providing its final YACA late in the day on September 5th, effectively at the eleventh hour prior to the hearing of this interlocutory injunction application.

[37] KDFN submits that all of these circumstances support the conclusion that this was not a "meaningful" negotiation consistent with the honour of the Crown. It points here to *Haida Nation*, cited above, where McLachlin C.J., spoke about the scope and content of

the duty to consult and accommodate, and referred to the “concept of a spectrum” with respect to that duty, at paras. 43 and 44. At one end lie cases where there is a limited treaty right or a potential for only a minor infringement of that right, in which the Crown’s only duty may be to give notice, disclose information and discuss any issues raised in response to the notice. At the other end of the spectrum lie cases which are strong on their face, where the right and the potential for infringement is of high significance and the risk of non-compensable damage is high. In such cases, “deep consultation” may be required. Further, at paras. 45 and 46, McLachlin C.J. went on to note that between these two extremes will lie a variety of situations, which must be approached individually and that the controlling question in all situations is “what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.” Further, “meaningful consultation” may oblige the Crown to make changes to its proposed action based on information obtained through consultations.

[38] In *Mikisew*, cited above, at para. 64, Binnie J. approved of what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* v. *British Columbia (Minister of Forests)* 1999 BCCA 470, at para. 160:

> “The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.” (emphasis already added)

[39] Obviously, KDFN suggests that there is an analogy between the process of consultation referred to in the case law and the negotiation process referred to in the YACA provisions. That analogy was implicitly accepted by counsel for YTG on this

hearing, who acknowledged the need for “meaningful negotiation” under the YACA provisions. KDFN also submits that the YACA provisions require the equivalent of “deep consultation” in the negotiation process. I do not have to decide that here, but I would venture to say that even using the standard at the opposite end of the spectrum in *Haida Nation*, or that discussed in *Halfway River First Nation*, above, it is at least arguable that the negotiations between the parties were ultimately not very meaningful and therefore not carried out in a manner consistent with the honour of the Crown.

[40] Counsel for YTG also argued that there is no issue of “entitlement” here, as the objectives of Chapter 22 of the Final Agreement can not be elevated to the status of treaty rights. In support of that proposition she relies on *Ta’an Kwach’an Council* v. *Government of Yukon et al.*, 2008 YKSC 60, at para. 61. Thus, counsel argued, while the YACA provisions are in furtherance of those objectives, they also cannot be elevated to the status of treaty rights.

[41] For the purposes of this application, I am prepared to accept that proposition, although I note that the comments of Kirkpatrick J.A. in *Little Salmon/Carmacks*, cited above, at para. 13, would seem to open the door to a challenge to that argument. There she referred to Mr. Sam, the trapper whose trap line was at issue, as having expressed concerns related to “cultural transmission and his desire to pass on the traditional ways to the next generation”, which Kirkpatrick J.A., said “is consistent with one of the objectives of chapter 16 [of that Final Agreement] namely “to preserve and enhance the culture, identity and values of Yukon Indian People”. That signifies that a potential treaty right might be affected by the Paulsen application.” (Paulsen was the individual who applied for an agricultural land grant respecting a portion of Mr. Sam’s trap line.) Implicitly,

Kirkpatrick J.A. could be said to have viewed a “treaty right” as arising from an “objective” within the treaty.

[42] Further, Veale J. in *Ta’an Kwach’an Council* v. *Government of Yukon*, 2008 YKSC 60, was careful to clarify at para. 70, that the honour of the Crown may still apply in circumstances where a treaty right is not directly in question:

> “I do not subscribe to the view that the honour of the Crown disappears simply because the post-event analysis determines that a treaty right is not at issue. Rather, in my view, the honour of the Crown is a principle that could in some circumstances apply to the determination of whether a treaty right is at stake…”

[43] In any event, I disagree that, for the purposes of this interlocutory application, there is no question of entitlement. While YTG is free to ultimately dictate the terms and provisions of a YACA under s. 13.7.2, the final product must still be one which provides “benefits commensurate” with the project, while not excessively burdening the Yukon or affecting the viability of the project. In other words, YTG is not free to impose *any* conditions it sees fit, without regard to the criteria in s. 13.11. In my view, that gives rise to a serious question as to whether the final YACA provided by YTG on September 5, 2008 provides “benefits commensurate” with the project. According to the *Concise Oxford Dictionary*, one of the definitions of “commensurate” is “proportionate.” The project is estimated to cost about $18 million in three phases over three years, yet KDFN has provided evidence that the only assured benefit to it is the proposed training position, which has a maximum value of $81,000, or less than 1% of the global value of the project. If the allegation of KDFN on this point is accepted at the main (judicial review) hearing, KDFN’s worst case scenario would result in YACA benefits which are far less than the cost of the project.

[44] I acknowledge that YTG takes a different view on this point, as Mr. Cowper clearly stated in his covering letter of September 5, 2008, that the final YACA "is not only fair and reasonable, but provides benefits and opportunities commensurate with the scale, nature, duration and cost of the construction of the asset." The difficulty for YTG here is that this is ultimately a question of fact, or perhaps mixed fact and law, depending upon the interpretation of "commensurate". Further, my role on this application is not to decide that question, but merely to determine whether such a question is raised, and that the question is not frivolous or vexatious.

[45] I find that KDFN has satisfied its onus on the first part of the three-fold test for an interlocutory injunction by establishing that there is a serious question to be tried.

2. Irreparable Harm?

[46] YTG initially argued here, that if I were to find that KDFN's dissatisfaction with the final YACA constitutes irreparable harm, the effect would be to provide KDFN with a veto of YTG's authority to impose a YACA in accordance with the provisions of the Final Agreement. In support of this proposition, counsel relies on the recent decision in *Musqueam Indian Band* v. *Canada*, 2008 FCA 214. There, a motions judge granted an interlocutory injunction in favour of the Musqueam to restrain Canada from selling two downtown office buildings in Vancouver. The Musqueam were in the process of negotiating a treaty with Canada and claimed all of downtown Vancouver as within its traditional territory. Canada had provided the Musqueam, among others, with notice of its intention to market the property and the latter responded by raising the Crown's obligation to accommodate their Aboriginal interests. The motions judge concluded that the issue of the duty to consult in good faith constituted a serious question to be tried with

respect to the first branch of the *RJR-MacDonald* test. Sexton J.A., speaking for the Federal Court of Appeal, stated, at para. 4, that the effect of the motions judge's approach was to provide Aboriginal groups who claim that the federal government has failed to consult them "with what amounts to a veto" over the federal government transferring title to property located in any area claimed as the traditional territory of that group.

[47] Veale J., addressed *Musqueam* in *Ta'an Kwach'an Council* v. *Government of Yukon et al.*, 2008 YKSC 54, at paras. 33 – 39. In particular, at para. 36 he said:

> "It is important to clarify that the Supreme Court of Canada has already stated that the duty to consult, grounded in the honour of the Crown, does not give a first nation any *veto* right. The Federal Court of Appeal, in my view, has used the word "*veto*" only as to "the effect of the motion judge's approach" based upon the particular facts of the *Musqueam* case. In the case before me no *veto* is sought, nor would it be granted."

I assume Veale J. was referring here to the statement of McLachlin C.J. in *Haida Nation*, at para. 48, that the consultation process arising from the duty to consult and accommodate "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim." At para. 49, Veale J. distinguished *Musqueam* from the case before him, which involved a First Nation claiming a right to an opportunity to have a good faith discussion with YTG prior to the disposition of certain commercial lands. The claim was based on both the duty to consult and the honour of the Crown. That is very similar to the claim of KDFN in the case at bar.

[48] I agree with the approach of Veale J. and distinguish the *Musqueam* case for the same reasons. (Incidentally, counsel for KDFN is also counsel for the Musqueam in that

case, and he informs me his client is currently seeking leave to appeal to the Supreme Court of Canada.)

[49] The second argument made by YTG under this branch of the *RJR-MacDonald* test, and I am referring here and below to counsel's Outline of Argument, is that the need for a YACA does not, in and of itself, constitute a basis for a finding of irreparable harm. I do not understand this submission. I have already expressed my opinion that, whenever Yukon intends to construct an asset in KDFN's traditional territory costing $3 million or more, the s. 13 YACA provisions arguably give rise a claim of entitlement by KDFN to a YACA with "benefits commensurate" to that project. Each YACA is specific to the construction of a particular asset. Therefore, it seems to me that the failure to complete a YACA for a particular qualifying project, in the absence of waiver by YTG, *could* give rise to an argument of irreparable harm by KDFN. Perhaps the explanation for this curious submission, is that YTG had not yet provided its final YACA to KDFN at the time the Outline was prepared.

[50] YTG argued, thirdly, that KDFN has provided no evidence to suggest that the general contract for the construction of the project has a unique character or is of special interest to it. With respect, I disagree. The rather voluminous affidavit evidence on this application suggests precisely the opposite. YTG itself has given evidence that this is an unusually sophisticated project involving special construction materials and techniques. KDFN, in turn, has expressed a particular interest in developing its capacity to participate in this contract and other similar contracts in the future. Indeed, it ultimately solicited and obtained a joint venture agreement with Dominion Construction, reportedly one of the

largest construction companies in the country, precisely for the purpose of pursuing its special interest in the project.

[51] YTG's fourth argument is that there is no evidence that the types of benefits sought by KDFN cannot be secured by measures unrelated to the construction of the asset in this case, or indeed, unrelated to the construction of another project. Once again, I do not follow YTG's submission in this regard. I acknowledge that some of the benefits KDFN sought in the course of the negotiations fell within the scope of "other measures" not directly related to the specific project, as referred to in the YACA template attached to the YACA Protocol. However, as KDFN submitted, this is not a case about money, but about opportunities to develop economically, to foster self reliance and to gain invaluable experience through participation in a significant construction project. Further, if KDFN is successful in the main (judicial review) application, but the project has gone ahead without its participation through a properly negotiated YACA, there is no substitute for the benefits it seeks. As counsel put it, KDFN cannot go out and "buy them" somewhere else. I agree. It is also arguable that when a party is focussed on building capacity, a shortfall on one project which interferes with that goal may well have a cumulative adverse impact on the party's capacity to participate in the next project, and so on.

[52] YTG lastly argued that, even if KDFN is able to establish an entitlement to particular YACA provisions, it could be compensated in damages or in other project opportunities available to KDFN, such as those referred to in Mr. Santa's first affidavit, at para. 16.

[53] I have already expressed my view that the types of benefits sought by KDFN are not compensable in damages. Finally, the argument that KDFN could be compensated by "other project opportunities" is once again difficult to understand. KDFN submits that it didn't get a YACA with "benefits commensurate" to this particular project. It seems to me to be no answer to that complaint to suggest that next time out, on some other project, KDFN *may* get a better deal.

[54] In *RJR-MacDonald,* the Supreme Court said, at para. 59, that:

> " "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured…"

One of the examples provided by the Court of such harm is where a party will suffer permanent market loss or irrevocable damage to its business reputation. In my view, that is analogous to the position of KDFN here.

[55] I am satisfied that KDFN has discharged its onus by establishing that, if this interlocutory injunction application is not granted, then it will suffer irreparable harm if the project goes ahead without its participation through a properly negotiated YACA.

3. Balance of Convenience?

[56] The question here is which party will suffer the greater harm from the granting or the refusal of an interlocutory injunction, pending a decision on the merits on the main application. YTG relies heavily on the "public interest" aspect of the third part of the *RJR* test. Firstly, it argued that granting the injunction will cause the project to be significantly delayed. Indeed, it has provided the evidence of Mr. Cowper that if the general construction tender is cancelled, any construction would have to begin next spring, rather than this fall, or approximately six months from now. Therefore, assuming a two percent

per month inflation allowance, Mr. Cowper estimates an increase of $1.7 million in the cost of the project. Whether or not that is an accurate figure and whether or not the project would necessarily be delayed by as much as six months, on YTG's own evidence its losses from any delay are quantifiable in damages. Further, Mr. Santa has provided, on behalf of KDFN, an unlimited undertaking to abide by any order that this Court may make as to damages resulting from the interlocutory injunction sought in this application. Thus, I agree with submission of KDFN's counsel that, having determined that damages are *not* an adequate remedy for KDFN, if damages *are* quantifiable for any delay suffered by YTG, then the balance of convenience favours KDFN.

[57] Secondly, YTG points to the potential loss of the international designation of the Airport and the consequent adverse impact on tourism in the Yukon. Mr. Cowper deposed in his first affidavit that the Canada Border Services Agency ("CBSA") initially indicated in August 2004 that it would withdraw its services from the Whitehorse Airport if YTG did not make certain changes to the air terminal building to accommodate the arrival of international flights. Apparently, this was precipitated by a change of policy within the U.S. Department of Homeland Security relating to Air Condor flights arriving in Whitehorse direct from Germany and continuing on to the State of Alaska. While some of the passengers from such flights disembark in Whitehorse, others continue on to Alaska. Previously, the continuing passengers were allowed to remain on the aircraft while the Whitehorse-bound passengers departed. The policy then changed requiring the continuing passengers to disembark while officials performed a "clean plane" sweep of the aircraft before allowing it to continue on to Alaska. This in turn necessitated the creation of a secure holding area for the continuing passengers, which has ultimately

become part of the overall design concept for the expansion of the air terminal building. The letter from CBSA to YTG, dated August 5, 2004, required the alterations to be made prior to March 31, 2005. Obviously, that deadline has long since passed. However, no evidence has been led by YTG as to any new deadlines imposed either by CBSA or U.S. Homeland Security. Therefore, it is speculative at this stage that granting an interlocutory injunction pending the hearing of the main (judicial review) application will result in the loss of the Airport's international designation and a decrease in tourism detrimental to the Yukon economy.

[58] Further, as Sopinka and Cory JJ. pointed out in *RJR-MacDonald*, at paras. 65 and 66:

> "…the government does not have a monopoly on the public interest.
>
> …
>
> …Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups." (my emphasis)

[59] For all the above reasons, I am satisfied that the balance of convenience favours KDFN.

CONCLUSION

[60] I grant the interlocutory injunction to restrain the respondents from proceeding further with any public tender process for the proposed expansion of the air terminal building for the Whitehorse International Airport, pending the hearing of KDFN's petition and the issuance of reasons for judgment following that hearing. I further order that

KDFN shall abide by any order that this Court may make as to damages as a result of obtaining this injunctive relief.

[61] I suggest that counsel jointly approach the trial coordinator as soon as possible to discuss the first available date for the scheduling of the judicial review hearing.

[62] Although KDFN sought costs on this interim interlocutory application, I heard no submissions from the parties on the point. However, as I expect to remain seized of this matter, counsel may address me further on costs at or following the hearing of the petition.

Gower J.