IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Tr'ondëk Hwëch'in v. Her Majesty*
The Queen in Right of Canada, et al., 2003 YKSC 7

Date: 20030117
Docket No.: S.C. No. 01-A0235
Registry: Whitehorse

Between:

TR'ONDËK HWËCH'IN

Petitioner

And:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, GOVERNMENT OF YUKON and CANADIAN UNITED MINERALS INC.

Respondents

And:

Docket No.: S.C. No. 02-A0075

Between:

CANADIAN UNITED MINERALS INC.

Petitioner

And:

TR'ONDËK HWËCH'IN, HER MAJESTY THE QUEEN IN RIGHT OF CANADA And GOVERNMENT OF CANADA

Respondents

Appearances:

Mr. Glen R. Thompson	Solicitor for Tr'ondëk Hwëch'in
Mr. Mark Radke	Solicitor for Her Majesty the Queen in Right of Canada
Ms. Penelope Gawn	Solicitor for Government of Yukon
Ms. Monica Leask	Solicitor for Government of Yukon
Mr. Keith D. Parkkari	Solicitor for Canadian United Minerals Inc.
Mr. Francis Lamer	Solicitor for Canadian United Minerals Inc.

Before: Mr. Justice R.E. Hudson

REASONS FOR JUDGMENT

FACTS

[1] In the early 1970s, early discussions were held by the Tr'ondëk Hwëch'in (Tr'ondëk) with the federal and territorial governments with relation to a land claim being made by the First Nation.

[2] Negotiations commenced in the mid-1970s and were originally conducted with a goal to achieving a Yukon-wide agreement (Umbrella Agreement), which would form the basis for further negotiations, First Nation by First Nation, on specific matters.

[3] During the course of negotiations with Tr'ondëk, and involving the federal and territorial governments, the concept of a territorial park encompassing parts of the Tombstone Mountain range area was raised. This area constitutes a significant geological and geographical formation to both the general population of the Yukon, and indeed Canada, and more specifically to the cultural heritage of the First Nation. It is also inclusive of some areas of geological commercial interest.

[4] After many years, on July 16, 1998, agreement was reached, in which the Government of Canada, the Government of Yukon and Tr'ondëk were parties. This document is referred to herein as the Tr'ondëk Hwëch'in Final Agreement (THFA) and pursuant to the *Yukon First Nations Land Claims Settlement Act*, R.S.C. 1994, c. 34, its validity was established and its effective date was proclaimed as September 15, 1998.

[5] Chapter 10 of the THFA provided for the establishment of the Tombstone Territorial Park as a Special Management Area, with boundaries to be later determined. Once boundaries were determined, then the steering committee, which had been directed to recommend the boundaries, was to make its best efforts to develop a management plan for the park. The park boundaries were finally concluded by way of recommendation on December 10, 1999 and were subsequently accepted by all parties.

[6] Schedule "A" to Chapter 10 of the THFA is the critical instrument with respect to these petitions. Section 1.1 contains a statement of objectives of the schedule, and they are replicated as endnote 1 to this judgment.[1] Section 3 of Schedule "A" deals with the establishment of the park. Section 3.2 states:

> Canada shall transfer to the Commissioner of the Yukon 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… [Underlining mine]

[7] Section 3 also includes a provision for the prohibition of entry into the general area, as defined, for the purpose of locating, prospecting or mining under the *Yukon Quartz Mining Act*, R.S.C. 1985, c. Y-4, and the withdrawal of the said area from any disposal pursuant to the territorial *Lands Act*, R.S.Y. 1986, c. 99, and prohibiting the issuance of interest out of the *Canadian Petroleum Resources Act*, R.S.C. 1985, c. 36.

[8] It further provides, by ss. 3.3 to 3.5, for the prohibition of entry to the park for the purpose of locating, prospecting or mining under the *Yukon Quartz Mining Act*, *supra*, and the *Yukon Placer Mining Act*, R.S.C. 1985, following determination of the park boundaries.

[9] Significantly, the foregoing prohibitions are “subject to” s. 3.6, which provides:

> 3.6 For greater certainty, the provisions of 3.3 and 3.5 [prohibiting mining activity on the lands in question] shall not apply in respect of:
>
> 3.6.1 existing recorded mineral claims and leases, under the Yukon Quartz Mining Act, R.S.C. 1985, c. Y-4 and existing recorded placer mining claims and leases to prospect under the Yukon Placer Mining Act, R.S.C. 1985, c. Y-3;
>
> 3.6.2 existing oil and gas interests under the *Canadian Petroleum Resources Act,* R.S.C. 1985 (2d Supp.), c. 36;
>
> . . .
>
> 3.6.4 any successor or replacement rights and any new leases, licenses, permits or other rights which may be granted in respect of an interest described in 3.6.1, 3.6.2 or 3.6.3.

[10] On or about March 8, 1997, a Mr. Shaun Ryan had staked 22 mineral claims (the Horn claims), located within the general area later described as “Study Area 1”. The claims were registered on March 10, 1997, acquired by the petitioner, Canadian United Minerals Inc. (CUMI), on or about May 6, 1997. These interests were acquired, therefore, before the effective date of the THFA. There is no issue here with respect to any cloud on the claim of the petitioner CUMI to the rights to the mineral claims in question.

[11] Pursuant to the *Yukon Quartz Mining Act*, *supra*, CUMI prepared and presented an operating plan proposal for the exploration of the Horn claims. This application was made to the mining land use and reclamation division of the Department of Indian Affairs and Northern Development in December 1999.

[12] A hearing was held with respect to mining land use applications made in support of the operating plan applied for.

[13] The petitioner, Tr’ondëk, made representations to the chief mining land use inspector (“the chief”), who ultimately held hearings in Dawson City. In the result, after hearing the presentations of interested parties, the application was approved and the land use approval was duly issued.

[14] In his decision, the chief notes that there was:

> In addition the comprehensive land claim agreement with the Tr’ondëk Hwëch’in, which was given effect on September 15, 1998, and contained clauses in Chapter 10, Schedule A, which referred to the pre-existing rights acquired under the *Yukon Quartz Mining Act*. Those pre-existing rights include the Horn mineral claims. Since the claims appear to have been validly acquired pursuant to Part 1, and that is not being contested here, I am able to proceed in accordance with Part 2 of the *Act*.

[15] He further said:

> Given my conclusions with respect to environmental effect and assuming without deciding that a finding has to be made by me with respect to consistency with the THFA, and in particular Schedule A of Chapter 10, and assuming (without deciding) that s. 3.6 is not a complete answer to the First Nation's objections, I find that there is no inconsistency between the pursuit of this five-year, low-impact program, and in particular, Schedule A of the THFA. The permit conditions will maintain the natural or cultural environment and its physical and biological features, as well as sites of archeological, historical and cultural value within the meaning of Chapter 10 of the settlement agreement and Schedule A objectives.

Application was made to the Federal Court to quash this decision, but these proceedings were abandoned by the appellant, Tr'ondëk.

The Proceedings:

[16] The petition of Tr'ondëk was filed in the Supreme Court of the Yukon Territory on February 19, 2002 and seeks the following relief:

1. A declaration that prior to the establishment of the territorial park referred to in s. 3.1 of Schedule "A" to Chapter 10 of the THFA, the lands within the Core Area and Study Area 1, referred to in s. 2.1 of Schedule "A", are subject to, and shall be managed in accordance with, the objectives set out in s. 1 of Schedule "A" to Chapter 10 of the THFA; and
2. A declaration that the mining claims, known as the Horn claims, located in Study Area 1 and recorded in the name of the respondent CUMI, are subject to, and shall be managed in accordance with, the objectives set out in s. 1 of Schedule "A" to Chapter 10 of the THFA; and
3. Costs.

[17] Applications were made to dismiss this petition on various grounds, all of which were dismissed, and the matter proceeded to be set down for hearing.

[18] The CUMI petition was duly filed on September 4, 2002, and in it the petitioner seeks:

i. A declaration that the regulation of the Horn claims and the right to mine appurtenant thereto are governed by the *Yukon Quartz Mining Act*, *supra*;

ii. A declaration that the THFA is not found to transfer jurisdiction to regulate quartz minerals and mining rights in the Yukon Territory and the rights appurtenant thereto, and Her Majesty the Queen in right of Canada retains full jurisdiction to regulate and manage the rights associated with, or resulting from, the Horn claims, free and clear of any obligation or restriction imposed under the THFA;

iii. A declaration that pursuant to s. 3.2 to s. 3.6 of Schedule “A” to Chapter 10 of the THFA, Her Majesty the Queen in right of Canada has no obligation to prohibit entry or otherwise restrict the rights associated with, or resulting from, the Horn claims;

iv. A declaration that the mining claims known as the Horn claims, surrounded by Study Area 1 and recorded in the name of the petitioner CUMI are not subject to the THFA, and more specifically, are not required to be managed in accordance with the objectives set out in s. 1 of Schedule “A” to Chapter 10 of the THFA; and

v. Costs.

[19] It was agreed, and an order was entered, providing for the hearing of both petitions being combined into one hearing.

Declaratory Relief:

[20] Section 12 of the *Judicature Act*, R.S.Y. 1986, c. 96, provides for the Supreme Court of the Yukon Territory to be a court of equity and entitle any petitioner to relief upon any equitable or legal ground. Under s. 32, this is expanded as follows:

> No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or can be claimed or not.

[21] Sarna, *The Law of Declaratory Judgments,* 2nd ed. (1988) at page 20 says:

> It is safe to say that the exercise of discretion to grant declaratory relief is bounded by a principle which continually recurs in modified form: while the applicant does not have to demonstrate an interest or cause of action sufficient to support a claim for consequential relief, he must quell judicial fears that the demand for a declaration will not result in a judgment useless or detrimental in its scope and substance. Whether denial of relief is described in terms of lack of *locus standi* or inappropriateness, the use of discretion in the name of either principle is fully sanctioned by the declaratory power as provided by statute.

[22] Wilson J., speaking in *Operation Dismantle Inc.* v. *R.* (1985), 1 S.C.R. 441 at page 467, says:

> I cannot accept the proposition that difficulties of evidence or proof absolve the court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts should or must, rather than on whether they can deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us.

Of course, she is there speaking of the duty of the court as the court of last resort on such questions as constitutional issues, but it is useful to consider what she says in appreciating the breadth of the discussion that can be applied to the question of whether to grant declaratory relief.

[23] In the case of *Canada* v. *Solosky*, [1980] 1 S.C.R. 821, the law with respect to declaratory relief is dealt with. The court states at page 830:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.
>
> …
>
> The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438, in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):
>
> > The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

[24] In the case at bar, the question arose as to whether the mineral claims lie under ground which, except for the provisions of s. 3 in Schedule "A", constitutes the park proposed, or whether the park, as proposed, is constituted of land surrounding the areas which are covered by the claims in question, i.e. the Horn claims, so that it cannot be said the claims are part of the park.

[25] The court, in the *Solosky*, *supra*, case quotes at page 832 from Hudson, *Declaratory Judgments in Theoretical Cases: The Reality of the Dispute* (1977), 3 Dal. L.J. 706, as follows:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

[26] The court, in *Solosky*, *supra*, goes on to say at page 833:

> Once one accepts that the dispute is real and the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

[27] Based on the aforesaid statements of law, any concerns I may have had as to whether the petitions filed raise appropriate issues for declaratory relief to be granted are swept away. I am satisfied that the issue as to the appropriate regulatory regime intended to be applied to the carrying out of mining operations on or appurtenant to the Horn claims is appropriate to be decided on an application for declaratory relief. Further, I am of the view that it is possible that a ruling on the issues presented can be one of utility and would be able to resolve some, most certainly not all, of the issues which are presented by the various interpretations of the THFA.

Statutory Provisions:

[28] Section 134 of the *Yukon Quartz Mining Act*, *supra*, which forms a part of Part 2 of that Act, states:

> 134. The purpose of this Part is to ensure the development and viability of a sustainable, competitive and healthy quartz mining industry that

> operates in a manner that upholds the essential socio-economic and environmental values of the Territory.

[29] As we will be seeing, it is the position of CUMI that this provision contains substantial cultural and environmental protections, in combination with the regulations passed, pursuant to said Part 2 of that Act.

[30] Section 76(1) of the said Act states:

> (1) The holder of a mineral claim, by entry or by lease, located on vacant territorial lands is entitled to
>
> a) all minerals found in veins or lodes, whether the minerals are found separate or in combination with each other in, on or under the lands included in the entry or lease, together with the right to enter on and use and occupy the surface of the claim or such portion thereof and to such extent as the Minister may consider necessary, for the efficient and miner-like operation of the mines and minerals contained in the claim, but for no other purpose; and
>
> b) the right to cut, free of due, such of the timber on the claim or such portion thereof as may be necessary for the working of the claim …
>
> …
>
> (2) A timber agent may permit any person to cut and remove from a mineral claim timber for his own use …

CUMI argues that a declaration as sought by Tr'ondëk would render their rights nugatory.

[31] Section 13 of the *Yukon First Nations Land Claims Settlement Act*, *supra*, is as follows:

> 13.(1) Subject to subsections (2) and (3), federal and territorial laws, including the *Yukon First Nations Self-Government Act*, apply to a first nation for which a final agreement is in effect, to persons enrolled under such an agreement and in respect of settlement land of the first nation.
>
> (2) 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.

[32] Section 35 of the *Constitution Act*, *1982* states:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> . . .
>
> (3) For greater certainty, in subsection (1) "treaty rights" include rights that now exist by way of land claims agreements or may be so acquired.

[33] The Yukon Legislature has passed *An Act Approving Yukon Land Claim Final Agreements*, S.Y. 1993, c. 19, which provides:

> 3(1) The Commissioner in Executive Council may by order approve a Subsequent Agreement as a land claims agreement referred to in s. 35 of the *Constitution Act*, *1982*, and the Subsequent Agreement as the force of law.
>
> . . .
>
> 4. For greater certainty, where the Agreement or Subsequent Agreement confers on any person or body a right, privilege, benefit or power, requires any person or body to perform a duty or subjects any person or body to a liability, that person or body may exercise the right, privilege, benefits of power, shall perform the duty or is subject to the liability to the extent provided for by the Agreement or a Subsequent Agreement.

[34] The foregoing are some of the statutory provisions applicable, some of which are of assistance in answering the questions posed, some of which are not. Counsel have cited to me several sections of the THFA, some of which are as follows:

> 2.6.2.2 where there is any inconsistency or conflict between any federal, territorial or municipal Law and a Settlement Agreement, the Settlement Agreement shall prevail to the extent of the inconsistency or conflict;
>
> . . .

> 2.6.3 There shall not be any presumption that doubtful expressions the settlement agreement be resolved in favour of any party to a settlement agreement or any beneficiary of a settlement agreement.
>
> . . .
>
> 2.6.6 Settlement Agreements shall be interpreted according to the *Interpretation Act*, R.S.C. 1985, c. I-21 with such modifications as the circumstances require.
>
> . . .
>
> 2.6.7 Objectives in settlement agreements are statements of the intention of the parties to resolve an agreement and shall be used to assist in the interpretation of doubtful or ambiguous expression.
>
> . . .
>
> 2.11.9 The Supreme Court of the Yukon shall have jurisdiction in respect of any action or proceeding arising out of the Settlement, Legislation or Settlement Agreement.

[35] There are many other relevant provisions of the final agreement, and in deliberating on this matter, I attempted to give consideration to all of them. Later in these reasons, I will specify those which have impelled me to a conclusion.

[36] Of course, the *Interpretation Act*, *supra*, previously referred to states:

> 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.

[37] Guidelines have been established for the interpretation of agreements such as the one in question. Of significance is *Eastmain Band* v. *Robinson* (1992), 99 D.L.R. (4th) 16 (F.C.A.). In that judgment, Decary J. states at page 25:

> We must be careful in construing a document as modern as the 1975 agreement that we do not blindly follow the principles laid down by the Supreme Court in analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of aboriginals rests in the case of historic treaties on the unique vulnerability of their aboriginal parties who were not educated and who were compelled to negotiate with parties who had a superior bargaining position, in language and with legal concepts which were foreign to them, and without adequate representation.

[38] At page 26, Decary J. also quotes *R.* v. *Sioui* (1990), 70 D.L.R. (4th) 427 at 461:

> Even a generous interpretation of the document must be realistic and reflect the intention of both parties, not just that of the Hurons. The court must choose from among the various possible interpretations of the common intention of the one which best reconciles the Hurons' interests and those of the conqueror.

[39] Also of significance is *Nunavut Tunngavik Inc* v. *Canada*, [1998] 4 F.C. 405 (F.C.A.). At page 431 of the judgment, the court said:

> Here, the Agreement is the result of a negotiated land claims settlement whereby the Nunavut Inuit receive defined rights and benefits in exchange for surrender of any claims, rights, titles and interests based on their assertion of an Aboriginal title (see the preamble of the Agreement). Therefore, we have to look at the terms of the Agreement to determine the rights and benefits obtained in exchange for the surrender.

[40] The THFA was reached after years of negotiation by ably-trained negotiators and therefore the words of Decary J. in *Eastmain Band* v. *Robinson*, *supra*, should be followed.

[41] I am of the view that it is appropriate to take a purposive approach to the interpretation of this agreement. I am also of the view that in doing so it is appropriate to observe and consider any statements of intention by the parties, or any of them, which might bear on the proper interpretation to give to the final agreement.

[42] After considering the statutory and contractual provisions referred to here and in submissions, I therefore commence my conclusory remarks with a reference to a letter, which was Exhibit D to the affidavit of Mr. Kormendy filed in this matter on February 19, 2002.

[43] This is a letter from negotiators for Canada and Yukon directed to Tr'ondëk and refers to the negotiations leading to the THFA.

[44] On page 3 of the letter, the following is said in recapitulating previous discussions:

> The federal government agreed to support the withdrawal of mines and minerals in respect of the area proposed by the Yukon and to eventually transfer the surface to the Yukon for the creation of Tombstone Territorial Park.
>
> The federal government's support for withdrawal and transfer was predicated upon the assumption that no mineral holders would be adversely or unwillingly affected. The only existing claims within the area proposed by the Yukon were held by Archer Cathro & Associates (1981) Ltd., and that company generously allowed these claims to lapse on the understanding that the area would be protected for the public and that the key feature, Tombstone Mountain, would be preserved. [Underlining mine]

The fact that the company generously allowed these claims to lapse is not significant, except to the extent that under the circumstances they had rights. Of course, this statement does not express the thoughts of the other party to the negotiations, Tr'ondëk, and therefore standing alone would have little persuasive effect on an interpretation of the agreement. If, however, upon examination, the provisions of the agreement come into question and are relevant and connected, then the contents of the letter referred to above are a meaningful assist to the interpretation of the agreement and, in particular, Schedule "A".

[45] Pursuant to 3.2 of Schedule “A” to Chapter 10 of the THFA, the following was agreed to:

> 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 practicable, following the determination of the boundaries of the Park pursuant to 5.0. [Underlining mine]

There is a clear connection between the previously stated intention of Canada, Yukon and the underlined portion above.

[46] The wording of this section does not give rise to any uncertainties or doubts as to what it means.

[47] Pursuant to ss. 3.3 and 3.5, there is, subject to s. 3.6, a prohibition of entry into the Core Area and Study Area No. 1 for the purpose of locating, prospecting or mining under the *Yukon Quartz Mining Act*, *supra*. This is also clear, and considering the statement of intention previously referred to in the letter, tends to confirm that the stated intention was carried through into the Final Agreement agreed to by Tr’ondëk.

[48] Thereafter, s. 3.6 provides:

> For greater certainty, the provisions of s. 3.3 and s. 3.5 [the prohibition from entry] shall not apply in respect of:
>
> 3.6.1 existing recorded mineral claims and leases under the *Yukon Quartz Mining Act* and existing recorded placer mining claims and leases to prospect under the *Yukon Placer Mining Act*, R.S.C. 1985, c. Y-3;

And further, s. 3.6.4 states:

> any successor or replacement rights and any new leases, licences, permits or other rights which may be granted in respect of an interest described in s. 3.6.1, s. 3.6.2 or s. 3.6.3.

[49] Thus, I find there is a specific and logical separation of the proposed park from the pre-existing mineral claims obtained pursuant to the *Yukon Quartz Mining Act*, *supra*.

[50] The question, however, is to what extent the rights and obligations of CUMI with respect to the Horn claims are impacted by the statement of objectives in paragraph 1 of Schedule “A” to chapter 10 of the THFA.

[51] Counsel have argued that I should consider the constitutional rights of the parties and, as well, the devolution agreement entered into between Canada and Yukon. I do not find that these considerations are relevant to the questions before me, which center on the intention of the parties to an agreement and the interpretation of that agreement.

[52] I must give due weight to the clear intention to leave unfettered the rights that mining claim holders have under the *Yukon Quartz Mining Act*, *supra*. The declaration sought by Tr’ondëk could, I find, seriously impair the enjoyment of CUMI’s rights. It would obviously introduce a vague and uncertain area of supervision and oversight between the owner and its legitimate goals.

[53] On the other hand, the Tombstone Territorial Park would be seriously and detrimentally affected by decisions made in the carrying out of mining operations which do not have as a prime concern the viability of the park and the achievement of the objectives.

[54] These conflicts were obviously in the minds of the negotiators of all the parties to the agreement.

[55] When s. 2.6.7 of the agreement discusses objectives, it says they shall be used to assist in the interpretation of doubtful or ambiguous statements. Also, the treatment of encumbering rights as in ss. 5.6.1, 5.6.2 and 5.6.3, and then dealing with royalties

accruing from time to time, can be taken as indicators of the potential compatibility of mining activity and the legitimate goals of First Nations.

[56] Much was made of s. 12.2, which states:

> Prior to the establishment of the Park under s. 3.1, the Core Area and Study Area 1 shall be managed in accordance with the objectives set out in 1.0.

Is this an agreement that the mine will be managed, or that management decisions will be made, by someone a stranger to the owner of the property “in accordance with the objectives”?

[57] Assuming for the moment the continuing right of the mining operation to function, and taking notice of the expertise involved, I am hard-pressed to conclude that management of the mine was being considered by the negotiating parties in reaching that consensus, rather than managing the park exclusive of the mineral properties.

[58] Tr’ondëk state in their submission at page 16:

> The real question is whether Government’s administration and control of the mines and minerals which comprise the Horn Claims is subject to and must be exercised in accordance with the objectives set out in s. 1.0 of Schedule “A” regardless of whether it is Canada or Yukon that has jurisdiction.

That, I find, in a nutshell, is the case before me.

[59] Based on an application of the concept of plain meaning to the words in Schedule “A”, and considering those parts of the THFA which tend to recognize the continuing existence of the Horn claims, it is my view that they are not held “subject to” the said objectives.

[60] A significant factor in reaching this determination as to the intent of the parties is the fact that s. 134 of the *Yukon Quartz Mining Act*, *supra*, clearly provides for the

operation of the claims to be done in a manner “that upholds the essential socio-economic and environmental values of the territory.”

[61] Therefore, commencing with an examination of the indication of the intention of the parties in the letter from the government negotiators to the petitioner and flowing through the statutes referred to and the relevant provisions of the Agreement, my interpretation on a purposive basis is that the Horn claims are not “subject to” the objectives described in s. 1 of Schedule “A” and the declarations sought by Tr’ondëk are therefore denied.

[62] With respect to the petition of CUMI, while it may be that the denial of the Tr’ondëk request satisfies their wishes, I nonetheless wish to proceed to make the following declarations, which relate to both petitions and are in keeping with the duty of the court to provide utility to the parties in their ongoing relationship.

[63] This court declares that the duly recorded holders of the 22 Horn claims shall retain the right to operate and manage the said claims and exercise all their rights pursuant to the provisions of the *Yukon Quartz Mining Act*, *supra*.

[64] This court further declares that those persons or entities with authority under the YQMA and regulations thereunder, particularly Part II thereof, and in carrying out their duty to uphold the essential socio-economic and environmental values of the territory shall make their decisions and exercise their discretion only after considering and observing the objectives set out in s. 1 of Schedule “A” to Chapter 10 of the THFA.

[65] The relative success of each petition being virtually equal, I would be inclined to order that each party bear its own costs, but will give all parties an opportunity to show

cause why an order for costs should be made. Indication of an intent to show cause should be filed by February 1 and served by February 10, 2003, whereupon the court will sit to fix a time for a hearing.

_____

Mr. Justice R.E. Hudson

[1]SCHEDULE A

TOMBSTONE TERRITORIAL PARK

1.0 Objectives

1.1 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");

1.1.2 to recognize and protect the traditional and current use of the area by by Tr'ondëk Huch'in in the development and management of the Park;

1.1.3 to recognize and honour Tr'ondëk Hwëch'in history and culture in the area through the establishment and operation of the Park;

1.1.4 to encourage public awareness, appreciation and enjoyment of the natural, historical and cultural resources of the Park in a manner that will ensure it is protected for the benefit of future generations;

1.1.5 to provide a process to develop a management plan for the Park;

1.1.6 to provide economic opportunities to the Tr'ondëk Hwëch'in in the development, operation and management of the Park in the manner set out in this schedule;