Tr'ondëk Hwëch'in v. HMTQ, et al, 2002 YKSC 37

Date: 20020708
Docket: S.C. No. 01-A0235
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

TR'ONDËK HWËCH'IN

PETITIONER

AND:

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

RESPONDENTS

**REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON**

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[1] There are two Notices of Motion before the court. One is brought by the respondent, Canadian United Minerals Inc., (hereinafter "CUM") and the other by Her Majesty the Queen in Right of Canada, (hereinafter "Canada"). The other respondent, Government of Yukon, takes no position on these matters.

[2] These motions ask for what amounts to the same relief, that is, a dismissal of the petition. The grounds are only slightly different.

[3] The historical background is that pursuant to s. 134 of the *Yukon Quartz Mining Act*, R.S.C. 1985, c. Y-4, as amended, and s. 136 thereof, a program was instituted for

permitting and regulating conduct undertaken in searching for minerals with environmental concerns paramount. The sections in question read as follows:

> Purpose of Part
>
> 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.
>
> Exploration Programs
>
> 136.(1) No person shall engage in a Class I exploration program except in accordance with the operating conditions prescribed under paragraph 153(b).

[4] The respondent CUM became the owners of the Horn Mining Claims, which were staked in 1957 by one Shawn Ryan and were conveyed to CUM in May 1997, being recorded on May 6, 1997 and transferred on May 8, 1997.

[5] The next step in the matter was the signing of the Tr'ondëk Hwëch'in Final Agreement (hereinafter "Agreement") on July 16, 1998. Included in this Agreement was the proposal for the creation of a Territorial Park called "Tombstone Territorial Park". This park was to be found within a special management area described in the Agreement within the traditional territory of the petitioner. The proposal is found in Chapter 10 of the Agreement. Particulars are contained in Schedule A thereto and contain a Statement of Objectives.[i]

[6] Also contained in the proposal is a provision reserving the rights of previously acquired mineral claim holders. This is to be found is section 3.6 of Schedule A.[ii] This states, "existing recorded mineral claims and leases under the *Yukon Quartz Mining*

Act, R.S.C. 1985, c. Y-4 …" are not effected by the bar to entry in 3.3 and 3.5 of Schedule A.

[7] The mineral claims pre-date the Agreement and are situate within the area covered by Schedule A's description of the proposed park. An exhibit to the affidavit of Mr. Kormendy is attached to these reasons. This is a map of the Tombstone Territorial Park, showing the Horn Mining Claims.

[8] CUM, the owners of the Horn Mining Claims, brought an application pursuant to s. 136 of the *Yukon Quartz Mining Act, supra,* for a permit to carry out certain works related to the Horn claims, partly, and if not on the claims themselves, but certainly within the study area referred to in the Agreement.

[9] The Chief of Mining Land Use and Reclamation, (hereinafter the "Chief"), to whom the application was by statute properly made, determined to hold a public hearing in the matter. This hearing took place in May 2000. The petitioner herein appeared and made extensive submissions *contra* the position of CUM.

[10] The principal issue was the relationship of the stated objectives in Schedule A to the provisions of section 3.6 (the "grandfather clause"), with particular regard to the Horn claims. The Chief gave a decision on or about May 31, 2000, and in due course issued permit number LQ00041 to CUM. In this decision the Chief stated:

> 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 Section 3.6 is not a complete answer to the First Nations 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.

These words, together with what follows, are the basis of the petition and applications before me.

[11] On June 29, 2000, the petitioner brought proceedings in the Federal Court for a judicial review of the Chief's findings. Extensive written submissions were prepared and filed and a hearing date was fixed for May 29, 2001. In March 2001, the petitioner indicated an intention to discontinue these proceedings to CUM and sought a waiver of costs. This waiver was not given and the Notice of Discontinuance in the Federal Court was filed April 20, 2001 and costs were paid in the amount of $6,000.00. It is not clear if this was a negotiated sum or the subject of an order of the court.

[12] In February 2002, these proceedings were commenced. The relief sought is:

> 1. A declaration that prior to the establishment of the Territorial Park referred to in section 3.1 of Schedule "A" to Chapter 10 of the Tr'ondëk Hwëch'in Final Agreement, the lands within the "Core Area" and "Study Area 1" referred to in section 2.1 of Schedule "A" are subject to, and shall be managed in accordance with, the objectives set out in section 1.0 of Schedule "A" to Chapter 10 of the Tr'ondëk Hwëch'in Final Agreement; 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 Canadian United Minerals Inc. are subject to, and shall be managed in accordance with, the objectives set out in section 1.0 of Schedule "A" to Chapter 10 of the Tr'ondëk Hwëch'in Final Agreement; and
>
> 3. An order for costs.

[13] The respondents CUM and Canada seek an order dismissing the petition. The respondent Government of Yukon takes no position.

[14] The grounds on this application, brought by way of Notice of Motion, are:

1. The appropriateness of declaratory relief
    (a) There is no lis.
    (b) There is no contradictor.
2. Issue estoppel or estoppel by conduct.
3. Abuse of process.
4. Unreasonable delay.

Canada adds an argument that the court should decline jurisdiction as well as an argument of mootness. I find this is included in the abuse of process argument.

[15] The petitioner, more tersely, refers in its written submissions herein that the issues are:

(a) declaratory relief;
(b) estoppel;
(c) abuse of process;
(d) unreasonable delay; and
(e) mootness.

I choose to deal with the issues on these Motions are they are described by the petitioner.

[16] Before proceeding, I state my view that the petitioner need only show that there remains an arguable position on each of the bases on which the dismissal order is

sought. This is not a mini-trial, but an application to show that further action on the matter, viewed reasonably, is fruitless.

[17] As to declaratory relief, I find that Rule 10(1)(b) and Rule 5(22) of the *Rules of Court* are highly persuasive in the matter. These Rules read as follows:

> *Originating application*
>
> 10(1) An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where …
>
> (b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document.
>
> *Declaratory order*
>
> 5(22) No proceeding shall be open to object on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[18] Declaratory relief is a discretionary remedy and has been so described in several cases.

[19] Arguable, there is an issue in the request to construct Schedule A to the Agreement or to interpret it. This is so as there is clearly a difference of opinion as between the petitioner and CUM and Canada with respect to the appropriate interpretation. (See *Canada v. Solosky,* [1980] 1 S.C.R. 821; *Montana Band of Indians v. Canada (C.A.),* [1991] 2 C.N.L.R. 88 (F.C.A.) (QL).

[20] I find that the courts discretion to grant declaratory relief, generally, as described in the Rules above-cited, is intact in these proceedings or is arguably so.

[21] With respect to issue estoppel or estoppel by conduct, the applicants assert that the filing of a Notice of Discontinuance in the Federal Court, in the face of an impending hearing date (albeit one month away) has the effect of validating the Chief's decision. They go on to say the petition constitutes an unauthorized appeal of the Chief's decision.

[22] The petitioner answers by saying that these proceedings do not affect the validity of the Chief's decision or the permit granted. The petitioner says that the petition is squarely within Rule 10(1)(b) and has not been brought as a means of obviating or avoiding the effect of the Chief's decision.

[23] My finding on this motion is that the discontinuance of the Federal Court proceedings and the steps taken here have all been done as of right. It remains arguable that no judicial determination has taken place with respect to the Chief's decision and therefore with respect to the matters raised in this petition.

[24] In addition, the words of the Chief recited above are conceivably and arguably to the effect that the work proposed by CUM does not fall afoul of any of the objectives contained in the Schedule A list, and therefore any conflict between the objectives and the grand father clause remains a live issue.

[25] I do not find on this interlocutory application on this ground that it would be appropriate to dismiss the petition. My views on the above grounds of estoppel are also applicable to the abuse of process argument.

[26] Rule 165 of the Federal Court Rules provides for filing of notices of discontinuance as of right and the payment of costs to follow. Whether or not it validates the Chief's ruling may be academic if one accepts that the Chief made no decision on the relationship of the objectives to the grand fathered clause and *vice versa*. An abuse of process cannot be said to exist here beyond argument.

[27] I cannot find that there is an attempt here to re-litigate or that re-litigation will or would constitute an abuse. (See *Drapeau v. Canada (Minister of National Defence)*, [1996] F.C.J. No. 1120 (QL).)

[28] As to unreasonable delay, no material evidence has been brought on this application to show that the passage of time from April 20, 2001 to February 29, 2002 was unreasonable in the circumstances. There is no evidence of discussions between the parties, if any, which would support or deny this claim. The respondent CUM has apparently proceeded with work on its permit. To suggest that this constitutes a prejudice is probably factually premature, but is arguably refutable by facts which may not be before me at this time. Therefore, I do not find that there is unreasonable delay existing as a proper ground to summarily dismiss the petition.

[29] The matter of jurisdiction is covered by Rule 5(22) and Rule 10(1)(b), which, of course, do not grant the jurisdiction, but do provide the mechanics for an exercise of discretion in the inherent jurisdiction of the court. Also relevant to jurisdiction are the terms of the Agreement which give to the Supreme Court of the Yukon Territory the jurisdiction to determine issues arising from the Agreement, and the inherent jurisdiction of the court. This is at least arguably so.

[30] It is therefore my decision that the summary remedy sought by way of Notice of Motion by CUM and Canada should be denied and the motions dismissed with costs to the petitioner.

[31] In closing, let me say that I do not find that the proceedings before the Chief resulted in an adjudication which bars the petitioners petition, nor do I find that the discontinuance of the Federal Court proceedings constitute, or is, the basis of a finding of abuse of process. These assertions have failed even if the applicants only have to establish their case on a balance of probabilities.

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Hudson J.

Glen R. Thompson	Solicitor for the Petitioner
Mark A. Radke	Solicitor for the Respondent, Her Majesty the Queen in Right of Canada
Penelope Gawn	Solicitor for the Respondent, Government of Yukon
Keith D. Parkkari	Solicitor for the Respondent, Canadian United Minerals Inc.

ENDNOTES

[i] **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 Tr'ondëk Hwëch'in in the development and management of the Park;

1.1.3 to recognize and honour Tr'ondëk Hwëch'in 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;

[ii] 3.6 For greater certainty, the provisions of 3.3 and 3.5 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;

3.6.3 existing rights granted under section 8 of the *Territorial Lands Act*, R.S.C. 1985, c. T-7;

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.