S.C. No. 13-A0142

SUPREME COURT OF YUKON

Between:

THE FIRST NATION OF NACHO NYAK DUN, THE TR'ONDËK HWËCH'IN, YUKON CHAPTER-CANADIAN PARKS AND WILDERNESS SOCIETY, YUKON CONSERVATION SOCIETY, GILL CRACKNELL, KAREN BALTGAILIS

Plaintiffs

and

GOVERNMENT OF YUKON

Defendant

and

THE GWICH'IN TRIBAL COUNCIL

Intervener

DEFENDANT'S OUTLINE OF FURTHER ARGUMENT (REMEDIES)

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DEFENDANT'S OUTLINE OF FURTHER ARGUMENT (REMEDIES)

1. This Outline of Argument on Remedies is filed pursuant to the request by Judge Veale for additional submissions on the issue of remedy.

Primary Position of the Yukon Government

2. The primary position of Yukon Government continues to be that the appropriate remedy in this case is for the action to be dismissed.

3. What is at issue in this case is the construction of this section of the Final Agreement between the parties (emphasis added):

> 11.6.2 Government, after Consultation with any affected Yukon First Nation and any affected Yukon community, shall **approve, reject or propose modifications** to that part of the recommended regional land use plan applying on Non-Settlement Land.
>
> 11.6.3 If Government rejects or proposes modifications to the recommended plan, it shall forward either the proposed modifications with written reasons, or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon:
>
> 11.6.3.1 the Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to Government, with written reasons; and
>
> 11.6.3.2 **Government shall then approve, reject or modify that part of the plan** recommended under 11.6.3.1 applying on Non-Settlement Land, after Consultation with any affected Yukon First Nation and any affected Yukon community.

4. What has happened in this case is that the Government proposed modifications to the Recommended Plan pursuant to Article 11.6.2 to achieve greater balance between land preserved from any development and land available for development. When the Commission declined to introduce greater

balance in the Final Recommended Plan, the Government modified the Final Recommended Plan pursuant to Article 11.6.3.2.

5. The complexity with which the Plaintiffs have attempted to clothe these straightforward provisions masks a simple reality – on Non-Settlement Land the Government has the final word. The fact that on a plain reading of Article 11.6.3.2 the Government can modify the Final Recommended Plan, irrespective of what position the Government took on the Recommended Plan, demonstrates the simplicity of this case.

6. The balance of these submissions will present an alternative remedy, in the event that the hearing judge concludes that something went awry in the process of following Article 11.6 that requires correction by the Court. The Government does wish to emphasize that while an alternative remedy will be proposed, the Government is not submitting that this remedy be adopted. It is only if, contrary to the Government's position, the Court is satisfied that the Article 11.6 process has not been followed that the alternative remedy should be imposed.

Alternative Remedy – General Approach

7. It is clear that the Commission is not a decision-making body, but rather a recommending body. The process in the Final Agreement sets out how the Commission is to conduct its work and the options the parties have, but it is clear that the Commission does not decide what plan is to be adopted, the deciding government – here the Yukon Government – does.

8. The closest analogue to the current process that can be found in the leading authorities is the approach taken by the Supreme Court of Canada in the Provincial Court Judges' case[1]. There the Court was dealing with a commission process that required acceptance by the Government to be

[1] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286

effective, as in the case at bar. The Government was, however, required to follow a process in its consideration of the commission's recommendation and the Court concluded that the process had not been properly followed.

9. The remedy for failure in the commission process was determined to be "to return the matter to the government for reconsideration." In the central passage setting out this remedial approach, the Supreme Court said the following[2]:

> In light of these principles, if the commission process has not been effective, and the setting of judicial remuneration has not been "depoliticized", then the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Should the commission no longer be active, the government would be obliged to appoint a new one to resolve the problems. Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option. This reflects the conclusion in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13 (CanLII), that it is "not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers" (para. 77).

10. A number of the principles in this concise statement have application to the case at bar.

(i) "If the commission process has not been effective ... then the appropriate remedy will generally be to return the matter to the government for reconsideration."

11. This passage appears to have direct application to the case at bar. The Plaintiffs' best case (which the Government contests) is that the commission process did not work. The proper remedy is then to send the matter back to the government for reconsideration.

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[2] *ibid.*, para. 44

(ii) "If problems can be traced to the commission, the matter can be referred back to it. Should the commission no longer be active, the government would be obliged to appoint a new one to resolve the problems."

12. If there has been a problem in the commission process, it is because the Commission completely ignored the Government's request for greater balance in the Recommended Plan. One possibility would be to send the case back to the Commission to continue its work properly.

13. The Plaintiffs have suggested that remitting the matter back to the Commission, whether the old Commission or a new Commission if the old Commission has been disbanded, would create practical difficulties[3]. That is undoubtedly true, but all these remedial options – none of which is contemplated by the Final Agreement – create practical difficulties. The Supreme Court has however anticipated that a new commission might have to be appointed and indicated that this is an acceptable option.

(iii) "Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option."

14. It appears that the Plaintiffs have abandoned the initial proposal of seeking an order that the Final Recommended Plan is the approved plan[4], so this direction may no longer apply to the case at bar. Nevertheless it does constitute a useful reminder that the Court has not been given the authority to re-write the agreement between the parties, either through the agreement itself or any "governing statutory scheme".

(iv) "It is not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers".

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[3] Plaintiffs' Outline of Further Argument, paras. 43-44

[4] Plaintiffs' Outline of Further Argument, para. 17

15. The new remedial order sought by the Plaintiffs appears to accept the general approach of referring the matter back to the Yukon Government for reconsideration, but seeks to tie the hands of Yukon Government as to the result of that reconsideration[5].

16. This is precisely what the Supreme Court has said must not be done. In the case at bar, if the Court is of the view that the commission process has not been effective, the Reasons for Judgment will presumably indicate the nature of the deficiency. At that point the matter should be remitted for reconsideration according to the deficiency that has been identified.

17. If the deficiency lies in how the Commission has dealt with the proposed modifications of the Recommended Plan, the matter could be referred to the Commission for further consideration.

18. If the deficiency arises because the Government was not sufficiently concrete in its proposed modifications to the Recommended Plan – which seemed to be the primary complaint at the hearing – then the matter could be remitted to the Government with the direction that if modifications are to be proposed, they must be more specific. That type of direction would recognize that in a multifaceted planning process it is ultimately for the Government to decide "which approach it prefers".

19. The Provincial Court Judges case is not a direct analogue to the case at bar because the commission process there was considered vital to judicial independence and indeed has been characterized as the "lynchpin" for judicial independence. By contrast, the commission process at bar is not a required process but one that can be voluntarily adopted by the parties. Thus one might expect judicial intervention to be more strongly supported in a judicial compensation case than a land use planning process.

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[5] Plaintiffs' Outline of Further Argument, para. 89

20. Nevertheless, the remedial principles set out in the Provincial Court Judges case may be useful for this Court if it is determined that the commission process has not been effective. The main theme is that the proper remedy is reconsideration without tying the hands of the decision-maker.

Fallacies in the Plaintiffs' Analysis

21. The central position of the Yukon Government is that if the Court is of the view that the commission process has not been effective, the deficiency should be identified and the matter remitted for reconsideration, either by the Yukon Government or the Commission depending on the nature of the deficiency, without direction as to the result of the reconsideration.

22. The Plaintiffs seek an order restricting such reconsideration to some but not all of the proposed modifications to the Recommended Plan – essentially preventing the Government from insisting on greater balance in the land use plan. This would constitute a direction to decide in a specific way contrary to the principles of the Provincial Court Judges' case.

23. The Plaintiffs have argued that they are not proposing to require the Government to exercise its discretion in a particular way, but rather seeking to place limits on the exercise of that discretion[6]. This is not consistent with the order they are seeking.

24. What they seek is an order that the Yukon Government cannot modify the Final Recommended Plan in the manner they wish in order to provide greater balance in the land use plan, and cannot reject the Final Recommended Plan[7]. This would give them the option of approving the Final Recommended Plan, or modifying it in respect of three matters the Commission has already accepted, which is exactly the same thing!

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[6] Plaintiffs' Outline of Further Argument, para. 79

[7] Plaintiffs' Outline of Further Argument, para. 89

25. On the Plaintiffs' theory, the Yukon Government can approve the Plan or they can modify the Plan only in ways that are already in the Plan. To say the Government has a "measure of discretion"[8] under this formulation of options is mere sophistry.

26. There are two analytical fallacies in the Plaintiffs' analysis that pervade their submissions. The first is the dogged insistence that the Government cannot modify the Final Recommended Plan in any way not proposed in the modifications to the Recommended Plan.

27. There is nothing in the Final Agreement or the Umbrella Final Agreement that could support this theory. It is manifestly wrong. The most obvious weakness in the theory is that it offers no sensible explanation of what the Government's options are if the Final Recommended Plan introduces some new factor that was absent from the Recommended Plan and which the Government does not wish to accept. Under this rigid theory the Government cannot modify the Final Recommended Plan beyond its proposals respecting the Recommended Plan, even if the Commission introduces changes in the Final Recommended Plan that could not have been anticipated.

28. The inadequacy of this theory is reinforced by the second logical fallacy of the Plaintiffs' theory – that if the Government proposes modifications to the Recommended Plan it is thereby foreclosed from rejecting the Final Recommended Plan. The Final Agreement clearly states that the Government has three options in relation to the Final Recommended Plan, it can "approve, reject or modify that part of the plan recommended under 11.6.3.1 applying on Non-Settlement Land". Yet the Plaintiffs baldly state that "The Government of Yukon could not reject the Final Recommended Plan."[9] To give effect to that unsupported allegation would require reading out the word "reject" in Article 11.6.3.2. There is no principle of interpretation that could justify such an approach.

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[8] Plaintiffs' Outline of Further Argument, para. 34, 79

29. The only explanation for this analytical approach is that the Plaintiffs started with the conclusion that the Government had to accept the Final Recommended Plan and then backed out a theory that might support the conclusion. While disclaiming their original request for an order that the Final Recommended Plan *was* the approved plan, they have attempted to erect a structure that purports to leave the Government some discretion, but can in fact lead to only one conclusion – that the Government must approve the Final Recommended Plan. This analysis cannot be sustained.

30. There is only one significant difference in wording between the options the Government has in responding to the Recommended Plan and the options it has in relation to the Final Recommended Plan. The Government cannot modify the Recommended Plan – it can only "propose modifications" to the Plan. However, once the Commission has completed its work and produced a Final recommended Plan the time for proposals is over. The Government is given by the parties the explicit power "to modify" the Plan. That is what has been done in the case at bar.

Minister Rouble's Proposed Modifications

31. The Plaintiffs' case has been largely built around the proposition that the modifications proposed by Minister Rouble on February 21, 2011 were not sufficiently concrete to constitute "proposed modifications" within the meaning of Article 11.6.2 of the Final Agreement and hence were not "qualified" modifications.[10] The theory then is that since the proposed modifications were not "qualified" modifications they could not be modifications imposed by the Government at the final stage of the process.

32. The concept of "qualified" modifications is not contained in the text of the Final Agreement and has no logical role in the interpretation of the agreement. If there is a problem with the proposed modifications to the

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[9] Plaintiffs' Outline of Further Argument, para. 34
[10] Plaintiffs' Outline of Further Argument, para. 25

Recommended Plan it is that they were not as precise as the modifications ultimately made to the Final Recommended Plan by the Yukon Government. What are the consequences of this lack of detail at the Recommended Plan stage? That is really the only issue in this case.

33. The position of the Yukon Government is that the lack of detail does not give rise to legal consequences. It is highly unlikely given the emotionally charged environment in which these proposals were being made that anyone had much doubt about what the Government was proposing. But if the Commission was in doubt – a proposition not supported by their own report – they could easily have asked for clarification.

34. Furthermore it seems inappropriate to require the Government in proposing modifications to be as prescriptive as the Plaintiff's theory would seem to require. Just as the Supreme Court pointed out that "(s)ince there is more than one way to do so, it is the government's task to determine which approach it prefers", it seems more in keeping with the Commission's role for the Government to point out a broad policy objective and leave it to the Commission to fashion the particular solution, which can then be approved, rejected or further modified by the decision-maker, here the Yukon Government.

35. It is indisputable that the Government's proposal was far less detailed than the modification it ultimately made to the Final Recommended Plan. If this was a deficiency, the appropriate course of action would be to remit the matter to the Government with a direction to be more concrete in its proposed modifications to the Commission. This would give the Commission the opportunity to consider the proposals in a more specific manner.

36. Whether there is any point in this exercise is open to question but this is the only area that has been identified that might form the basis of a remittal to the Government for consideration.

Consultation

37. The role of consultation, barely mentioned at the original hearing, assumes a larger place in the Plaintiffs' current remedial argument. Presumably this is to try to bring this case into the consultation jurisprudence.

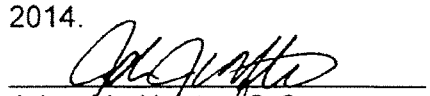
38. Consultation is not the issue in this case. The simple answer is found in the Plaintiffs' own submissions. The Government tried to consult the First Nations over the modified plan but the First Nations refused to engage on the subject, instead adhering to the strategy of refusing to acknowledge the ability of the Government to modify the Final Recommended Plan in a way that was not explicitly proposed in relation to the Recommended Plan.[11]

Conclusion

39. The remedy that should be granted in this case is a dismissal of the action.

40. If the Court is of the opinion that the commission process has been ineffective, the appropriate remedy would be to indicate the deficiency in the reasons for judgment and to issue an order remitting the case back for reconsideration, either to the Commission if appropriate, or to the Government. The Court should not dictate the result of the reconsideration, either directly (as the Plaintiffs initially proposed) or indirectly (as the Plaintiffs now propose).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2014.



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[11] Plaintiffs' Outline of Further Argument, paras. 69-76

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