S.C. No. 13-A0142

SUPREME COURT OF YUKON

SUPREME COURT OF YUKON
COUR SUPRÊME DU YUKON
FEB 1 8 2014
FILED / DÉPOSÉ

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

STATEMENT OF DEFENCE

This is the Statement of Defence of the Government of Yukon.

1. Unless expressly admitted herein, the Defendant Government of Yukon denies each and every allegation in the Statement of Claim and puts the Plaintiffs to the strict proof thereof.

2. The Defendant admits paragraphs 1, 2, 5, 6 and 7 of the Statement of Claim.

3. In specific reply to paragraph 3 of the Statement of Claim, the Defendant admits that the Yukon Chapter – Canadian Parks and Wilderness Society is a society registered in the Yukon under the *Societies Act*.

4. In specific reply to paragraph 4 of the Statement of Claim, the Defendant admits that the Yukon Conservation Society is a society registered in the Yukon under the *Societies Act*.

5. In answer to the Statement of Claim as a whole, the Defendant says that:

   (a) the Government followed the provisions of Chapter 11 and more particularly section 11.6.0 of the First Nation of Nacho Nyak Dun Final Agreement, the Tr'ondëk Hwëch'in Final Agreement and the Vuntut Gwitchin First Nation Final Agreement (hereinafter

collectively referred to as the 'Final Agreements') in their entirety;

(b) pursuant to section 11.6.3.2 of the Final Agreements, it was open to the Government to reject or modify that part of the revised plan recommended by the Regional Land Use Planning Commission after reconsideration; and

(c) the modified plan approved by the Government for Non-Settlement Land was approved in conformity with section 11.6.3.2 of the Final Agreements.

6. In reply to the Statement of Claim generally, the Defendant says that:

(a) the Umbrella Final Agreement (UFA) is an agreement that neither creates nor affects any legal rights between the parties;

(b) until such time as the UFA is incorporated into a Final Agreement, it is merely an agreement to negotiate; and

(c) all references that are made to the UFA in the Statement of Claim should properly be references to the provisions contained in the Final Agreements.

7. The Defendant admits paragraphs 11 to 14, inclusive, of the Statement of Claim.

8. The Defendant admits paragraphs 15 and 16 of the Statement of Claim but says that while section 11.4.1 of the Final Agreements enables Government and any affected Yukon First Nation to agree to establish a Regional Land Use Planning Commission, there is no requirement in that section, or elsewhere in the Final Agreements, that they must do so.

9. In specific reply to paragraph 17 of the Statement of Claim, the Defendant, while admitting the allegations contained therein, states that pursuant to section 2.12.2 of the Final Agreements nominees to Regional Land Use Planning Commissions are not delegates of the parties who nominate or appoint them.

10. The Defendant admits paragraphs 18 to 22, inclusive, of the Statement of Claim.

11. The Defendant admits paragraphs 23 and 24 of the Statement of Claim but says that both sections 11.7.1 and 11.7.2 are subject to section 12.17.0, which specifically allows for the approval by Government of non-conforming projects.

12. The Defendant admits paragraph 26 of the Statement of Claim.

13. In specific reply to paragraph 27, the Defendant admits that the Dempster Highway is the only year-round maintained road in the Peel Watershed Planning Region but says that there are also numerous 'cat' trails (including the 380-mile long Wind River Trail), winter roads and seismic lines in the Region and that these have been, and continue to be, used as transportation corridors.

14. The Defendant admits paragraph 28 of the Statement of Claim and further says that mineral exploration, as well as oil and gas exploration, has occurred in the Peel Watershed Planning Region for more than 60 years.

15. In specific reply to paragraph 31 of the Statement of Claim, the Defendant:

    (a) admits that the Peel Land Use Planning Commission (the 'Commission') was established in 2004; but

    (b) specifically denies that the Commission was established under the UFA and says that the Commission was established pursuant to Chapter 11 of the Final Agreements and in accordance with the provisions of the Gwich'in Comprehensive Land Claim Agreement.

16. In specific reply to paragraph 32 of the Statement of Claim, the Defendant denies that the nomination process occurred pursuant to section 11.4.2 of the UFA and says that it occurred pursuant to section 11.4.2 of the Final Agreements.

17. The Defendant admits paragraphs 33 to 35, inclusive, of the Statement of Claim.

18. The Defendant admits paragraph 36 of the Statement of Claim and further says that the establishment of a Senior Liaison Committee was not required under the terms of the Final Agreements but that the Defendant agreed to its being established as it provided an additional opportunity for the parties to share their views with one another.

19. In specific reply to paragraph 37 of the Statement of Claim, the Defendant admits the allegations contained therein but says that:

    (a) prior to the Commission submitting its Recommended Peel Watershed Regional Land Use Plan (the 'Recommended Plan') the Commission produced a draft plan (the 'Draft Plan') in April, 2009, which was released by the Commission for public and stakeholder

review;

(b) the Draft Plan was, as stated by the Commission in the Foreword to the Final Recommended Plan, an attempt to achieve a compromise between development and conservation; and

(c) in the face of opposition to the Draft Plan, the Commission abandoned its attempt to find balance between competing land-use interests and instead adopted an approach that favoured conservation over all other uses, including resource development.

20. The Defendant admits paragraphs 38 to 41, inclusive, of the Statement of Claim.

21. In specific reply to paragraph 42 of the Statement of Claim, the Defendant admits that under the Recommended Plan approximately 19.4 per cent of the Peel Watershed Planning Region was to be made available to mineral and oil and gas development but states that the area that was to be made available was, in contrast to certain other identified areas in the Peel Watershed Planning Region, low in mineral resource development potential.

22. The Defendant admits paragraphs 43 to 50, inclusive, of the Statement of Claim.

23. In specific reply to paragraph 51 of the Statement of Claim, the Defendant says that in his February 21, 2011 letter to the Commission, Minister Rouble:

(a) advised the Commission that the Defendant was seeking modifications to the Recommended Plan and that the Commission re-evaluate some of the Plan's recommendations based on 4 themes, which were identified in his letter as (1) Balance Conservation and Development Interests, (2) Plan Complexity of the Land Management Regime, (3) Implementation, and (4) General; and

(b) concluded his letter by asking the Commission to consider the following modifications when developing the Final Recommended Plan:

i. Re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan;

ii. Develop options for access that reflect the varying

conservation, tourism and resource values throughout the region;

iii. Simplify the proposed land management regime by re-evaluating the number of zones, consolidating some of the land management units and removing the need for future additional sub-regional planning exercises;

iv. Revise the plan to reflect that the Parties are responsible for implementing the plan on their land and will determine the need for plan review and amendment; and

v. Generally, develop a clear, high level and streamlined document that focuses on providing long term guidance for land and resource management.

24. In further reply to paragraph 51 of the Statement of Claim, the Defendant says that Minister Rouble, in his letter of February 21st invited the Commission to contact the Defendant's Technical Working Group member if it wished to receive further elaboration on any part of the Defendant's response.

25. The Defendant admits paragraphs 52 to 60, inclusive, of the Statement of Claim.

26. In specific reply to paragraph 61 of the Statement of Claim, the Defendant says that the Commission refused, or otherwise failed to address, two of the Defendant's five proposed modifications as identified in Minister Rouble's letter to the Commission dated February 21, 2011. Specifically the Commission did not address the Defendant's request that the Commission:

(a) Re-examine conservation values, non-consumptive resource use and resource development to achieve a more balanced plan; and

(b) Develop options for access that reflect the varying conservation, tourism and resource values throughout the region.

27. The Defendant admits paragraphs 62 to 67, inclusive, of the Statement of Claim.

28. In specific reply to paragraph 68 of the Statement of Claim, the Defendant says that consultation took place pursuant to the requirements of the Final Agreements and further says that pursuant to the Letter of Understanding it presented its proposal for community consultation to the Senior Liaison Committee on September 14th, 2012.

29. In further reply to paragraph 68 of the Statement of Claim, the Defendant says that the other parties' representatives to the Senior Liaison Committee failed to respond to the Defendant's proposal in a timely manner and, as a result, the Defendant proceeded with consultation pursuant to its obligations under Chapter 11 of the Final Agreements.

30. The Defendant admits paragraph 69 of the Statement of Claim.

31. In specific reply to paragraph 70 of the Statement of Claim, the Defendant states that at all times during its consultation it clearly stated that it was consulting on both the Final Recommended Plan as well as proposed modifications to that Plan, which would address the two modifications previously identified in Minister Rouble's letter of February 21, 2011 that had not been addressed by the Commission.

32. In specific reply to paragraph 71 of the Statement of Claim, the Defendant says that following consultation on the Recommended Plan, it received verbal feedback from Yukon citizens with respect to the town-hall format that had been employed. In particular, individuals expressed the concern that it was very intimidating to express a view contrary to that held by others in the room.

33. The Defendant says that in response to those concerns, the decision was made to employ an open-house format for consultation on the Final Recommended Plan. This would allow participants to ask questions and to provide comments in a non-threatening atmosphere and to give staff sufficient time to explain and answer questions on a one-on-one basis.

34. In further reply to paragraph 71 of the Statement of Claim, the Defendant says that:

(a) when requested its representatives facilitated presentations in a town-hall format and also undertook presentations with respect to the Defendant's proposed modifications to the Final Recommended Plan; and

(b) its representatives also offered to engage in technical briefings with stakeholders and as a result met with, among others, the Wilderness Tourism Association of the Yukon, Environment Canada, Mayo Renewable Resource Council, Dawson Renewable Resource Council, the Yukon Fish and Wildlife Management Board as well as representatives of two of the plaintiffs, Yukon Chapter-Canadian Parks and Wilderness Society and the Yukon Conservation Society.

35. In specific reply to paragraph 72 of the Statement of Claim, the Defendant says that 5 maps were displayed at each of the open-houses with the first of those maps depicting the Final Recommended Plan.

36. In specific reply to paragraph 73 of the Statement of Claim, the Defendant admits that in the proposed modification with respect to Protected Areas, roads would be allowed to existing land tenures but says that any access roads would be:

    (a) allowed only if required;
    (b) private in nature (that is, they would not provide for public access); and
    (c) temporary.

37. In specific reply to paragraph 74 of the Statement of Claim, the Defendant admits the proposed modifications with respect to RUWAs were presented as described but says that following consultation, and in response to concerns that were expressed, changes were made to the Restricted Use Wilderness Areas ('RUWA') designation prior to the Plan being approved.

38. In specific reply to paragraph 75 of the Statement of Claim, the Defendant admits the proposed modifications with respect to RUWA River Corridors were presented as described in that paragraph but says that following consultation, and in response to concerns that were expressed, the RUWA River Corridor designation was changed to a new designation – Wild River Park - prior to the Plan being approved.

39. In specific reply to paragraph 76 of the Statement of Claim, the Defendant says that, while Integrated Management Areas (IMAs) are open to mineral and oil and gas development, any activity in the IMAs would be closely managed and the amount of disturbance allowed would be limited.

40. In specific reply to paragraph 77 of the Statement of Claim, the Defendant says that its website also contained a section regarding the Final Recommended Plan, which was described in detail.

41. The Defendant admits paragraph 78 of the Statement of Claim.

42. In specific reply to paragraph 79 of the Statement of Claim, the Defendant says that it provided to the four affected First Nations detailed information with respect to the modifications it was proposing as early as September 14th, 2012.

43. The Defendant admits paragraphs 80 to 86, inclusive, of the Statement of Claim.

44. In specific reply to paragraph 87 of the Statement of Claim, the Defendant admits the contents of the letter in question but says that says that its efforts to consult with the four affected First Nations were largely rebuffed.

45. In further reply to paragraph 87 of the Statement of Claim, the Defendant says that during its consultation with the two plaintiff First Nations it sought to obtain information from them as to how the modifications the Defendant was proposing to make would impact on their treaty rights. The Defendant further says that the two plaintiff First Nations did not provide the Defendant with that information.

46. The Defendant admits paragraph 88 of the Statement of Claim.

47. The Defendant specifically denies paragraph 89 of the statement of Claim and says that of the affected First Nations, only Tr'ondëk Hwëch'in provided notice of consultation pursuant to section 11.6.5.2 of its Final Agreement.

48. The Defendant admits paragraphs 90 and 91of the Statement of Claim.

49. In specific reply to paragraphs 92 and 93 the Defendant says that it disagrees with the conclusions of law set out therein and further says that in certain circumstance section 12.17.0 of the Final Agreements specifically allows Government to approve Projects that do not conform with the applicable approved regional land use plan (if one is in effect).

50. The Defendant admits paragraphs 94 and 95 of the Statement of Claim.

51. In specific reply to paragraph 96 of the Statement of Claim, the Defendants say that to state that 71% of the Peel Watershed is "unprotected" is both incorrect and misleading and that it has adopted an approach that will employ new management tools to protect the important values identified by the Commission, while at the same time achieving the Commission's stated objective of sustainable development.

52. In further response to paragraph 96 of the Statement of Claim, the Defendant says that:

(a) the principal tool for achieving these objectives is through limiting the surface and linear (road and cutline) disturbance in the IMA and RUWA zones to a very conservative level based on the sensitivity of the landscape;

(b) this same approach was proposed by the Commission for Land Management Units (LMUs) that are designated IMA;

(c) allowable surface disturbance for LMUs designated as IMAs ranges from 0.2% to 1%;

(d) for the LMUs designated as RUWAs only 0.2% of the area can be disturbed at any one time or, put another way, 99.8% of that area will be protected at any one time;

(e) the RUWA zone, in addition to a very low level of allowable disturbance (0.2%) provides land use direction of allowable and prohibited land uses as well as additional management restrictions to minimize existing and potential conflict between user groups as well as to protect key values; and

(f) 29% (19,800 sq. Km) of the land in the Peel Watershed Planning Region has now been designated as a protected area and, with the approval of the modified Plan, 16.8% of the land in the Yukon is now protected, which is the highest percentage of any jurisdiction in Canada.

53. The Defendant specifically denies the allegations contained in paragraphs 97 to 100 of the Statement of Claim and puts the plaintiffs to the strict proof thereof.

54. In further response to paragraphs 97 to 100 of the Statement of Claim the Defendant says that:

(a) It does not accept the conclusions of law set out therein;

(b) Section 11.6.3.2 of the Final Agreements allows Government to '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';

(c) In making modifications to the Final Recommended Plan the Defendant was not limited to requiring the implementation of the modifications previously proposed in Minister Rouble's letter of February 21, 2011 and the accompanying 'Detailed Government Response on the Recommended Peel Watershed Plan'; and

(d) In the alternative, if the Defendant was limited in making modifications to requiring the implementation of the modifications previously proposed in Minister Rouble's letter of February 21, 2011 and the accompanying 'Detailed Government Response on the Recommended Peel Watershed Plan', which is not admitted

but expressly denied, the Defendant says that the modifications that it made to the Final Recommend Plan were consistent with, and flowed naturally from, the modifications previously proposed by the Minister.

55. In further reply to the whole of the Statement of Claim, and in particular to paragraphs 96 to 100 thereof, the Defendant says that at all times it has acted in accordance with the provisions of the Final Agreements.

Wherefore the Defendant submits that the Plaintiffs' action be dismissed with costs.

DATED at the City of Whitehorse, in the Yukon Territory, on the 18th day of February, 2014.

Mark Radke
Counsel for the Defendant
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THIS STATEMENT OF DEFENCE is prepared by Mark Radke, Barrister and Solicitor, Counsel for the Defendant, Government of Yukon, whose address for delivery is c/o 2134-2nd Avenue, 2nd Floor, Whitehorse, Yukon Territory, Y1A 5H6 and whose facsimile address for delivery is 867-667-3599.

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GOVERNMENT OF YUKON

Defendant

STATEMENT OF DEFENCE

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