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

Intervenor

DEFENDANT'S REPLY TO THE WRITTEN SUBMISSION OF THE GWICH'IN TRIBAL COUNCIL

Plaintiffs' Counsel
Thomas R. Berger, Q.C.,
Margaret D. Rosling,
C. Patricia S. Riley
Aldridge + Rosling
#440 – 350 Burrard St.
Vancouver, B.C.
V6C 2G8
Tel: (604) 605 5555
Fax: (604) 684 6402
Email: tberger@arlaw.ca

Intervenor's Counsel
Jeff Langlois
JFK Law Corporation
340-1122 Mainland Street
Vancouver, BC, V6B 5L1
Tel: (604) 687 0549
Fax: (604) 687 2696
Email: jlanglois@jfklaw.ca

Defendant's Counsel
John J.L. Hunter, Q.C.
Hunter Litigation Chambers
2100-1040 West Georgia St.
Vancouver, British Columbia,
V6E 4H1
Tel: (604) 891 2400
Fax: (604) 647 4554
Email: jhunter@litigationchambers.com

Mark Radke
Aboriginal Law Group, Legal Services
Department of Justice
Yukon Government
2130 - 2nd Avenue
Whitehorse, Yukon
Y1A 5H6
Tel: (867) 667 3793
Email: mark.radke@gov.yk.ca

A. YUKON'S INTERPRETATION PROMOTES RECONCILIATION BETWEEN YUKON AND THE FIRST NATIONS

1. Throughout the Peel Watershed regional land use planning process, the Yukon Government has conducted itself in keeping with the honour of the Crown. This is true both with respect to Yukon's interpretation of the provisions of the Final Agreements, as well as how it has sought to implement those provisions.

2. The honour of the Crown, while infusing the process of treaty making and treaty interpretation[1], does not extend so far as to require that every provision contained within a treaty must be interpreted in favour of the First Nations.

3. Similarly, the honour of the Crown does not require seeking ambiguity in treaties where none exists.

4. Further, as Binnie J. noted in *Mikisew Cree First Nation* v. *Canada*[2] (where he favourably cites the *Sioui* decision), any interpretation 'must be realistic and reflect the intention[s] of both parties, not just that of the [First Nation].[3]

5. The Final Agreements are modern land claim agreements and must be interpreted as such. They differ markedly from the historic treaties and, as stated by Binnie, J., in *Beckman* v. *Little Salmon/Carmacks First Nation*[4]:

> The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties ... The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with James Bay and Northern Quebec Agreement (1975), while still to be interpreted applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations.

---

[1] *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73 at paragraph 17.; see also *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at paras. 78-80

[2] [2005] 3 S.C.R. 388 at 403, 2005 SCC at para. 28

[3] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1069

[4] 2010 SCC 53, at paras. 12 and 54

> Instead of ad hoc remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way. To the extent the Yukon territorial government argues that the Yukon treaties represent a new departure and not just an elaboration of the *status quo*, I think it is correct. However, as the trial judge Veale J. aptly remarked, the new departure represents but a step – albeit a very important step – in the long journey of reconciliation (para. 69).[5] (*Emphasis added*)

And further:

> The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a "modern comprehensive treaty" and the latter is more than a century old. Today's modern treaty will become tomorrow's historic treaty. The distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General)* v. *Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.[6] (*Emphasis added*)

6. Reconciliation is achieved, and the honour of the Crown fulfilled, when effect is given to the Final Agreements and respect paid to the over-all bargain reached between the parties, including the processes negotiated and provided for in chapters 11 and 12 of the Final Agreements.

B. THE LAND USE PLANNING PROCESS

7. At all times in the Peel Watershed land use planning process, the Yukon Government endeavoured to work with the Four First Nations to develop a plan that all of the Parties could support and approve[7].

8. To that end, the Yukon Government:

    a. Together with the Four First Nations and the Yukon Land Use

---

[5] *Ibid*, at paragraph 12.
[6] *Ibid*, at paragraph 54.
[7] Defendant's Outline of Argument filed June 9, 2014, at paragraph 74. [Document No. 29]

Planning Council, jointly developed General Terms of Reference with respect to the Peel Watershed Planning Commission[8];

b. Entered into two Joint Letters of Understanding with the Four First Nations[9];

c. Agreed to the establishment of a Senior Liaison Committee and a Technical Working Group[10];

d. Utilized the Senior Liaison Committee in its efforts to reach consensus on the terms of a final land use plan[11].

e. Worked with the Four First Nations in undertaking joint consultation with residents of both the affected Yukon communities as well as communities located in the Northwest Territories[12];

f. Consulted with the Four First Nations following delivery of the Recommended Plan[13]

g. Throughout the process, and as requested from time to time by the Four First Nations, agreed to continue the moratorium on staking in the planning region[14];

h. Made efforts to consult with the Four First Nations regarding the Final Recommended Plan and the Government's proposed modifications to it[15]; and

i. Extended the time for consultation with the First Nations regarding the Final Recommended Plan[16];

9. Further, and contrary to the intervenor, Gwich'in Tribal Council's (GTC)

---

[8] *Ibid,* at paragraph 48. [Document No. 6]
[9] *Ibid*, at paragraphs 53, 54 and 64. [Documents No. 12 and 19]
[10] *Ibid*, at paragraphs 48-50. [Document No. 6]
[11] Ibid, at paragraphs 67
[12] *Ibid*, at paragraphs 56 & 57.
[13] *Ibid*, at paragraph 59.
[14] *Ibid*, at paragraphs 60 – 62 and 74. [Documents No. 16, 17, 18 and 29]
[15] *Ibid*, at paragraphs 74-76, 78-82, 84-99. [Document Numbers 29 - 31, 33, 35, 37 - 39, 41, 58, 60 - 67, 78 - 80, 82 and 84 – 86]
[16] *Ibid*, at paragraph 86. [Document No. 60]

assertions[17], Yukon did not view First Nation participation in the regional land use planning process as merely procedural. All parties, including the Peel Watershed Planning Commission (the 'Commission') had a substantive role to play in developing a regional land use plan for the Peel Watershed.

10. The Commission's role included an obligation to consider the written reasons it received from the Yukon Government and the affected Yukon First Nations in response to the Recommended Plan (sections. 11.6.3.1 and 11.6.5.1) and to make a final recommendation for a regional land use plan, with reasons, to the Yukon Government and the affected Yukon First Nations (sections. 11.6.3.1 and 11.6.5.1).

11. For their part, the First Nations' role included the obligation to consult with the Yukon Government with respect to how their treaty rights would be affected by the Final Recommended Plan, and Yukon's proposed modifications to it.

12. Only after the Commission failed to address the Yukon Government's concerns did the Yukon make the decision to incorporate modifications into the Final Recommended Plan.

13. Yukon then sought to consult with the affected First Nations with respect to the Final Recommended Plan and its proposal to make modifications to it. To the extent that the First Nations' – including GTC's – concerns were not addressed, this was the result of the First Nations' unwillingness to engage with the Yukon Government other than on a very narrow basis.

14. The First Nations' position with respect to consultation was first outlined in their response to a letter sent to them by Minister Cathers, which proposed a face-to face meeting to discuss the Final Recommended Plan[18]. In response, Chiefs Taylor and Mervyn said: :

> As you know, under the Umbrella Final Agreement the Yukon Government's response to the Commission's Final Recommended Peel Watershed Regional Land Use Plan (the "Final Plan") will be limited to addressing the modifications that it proposed to the Recommended Plan, and the Commission's response to those modifications' in the Final Plan. We look forward to addressing the Yukon Government's proposed modifications to the Recommended

[17] Gwich'in Tribal Council Written Submissions at paragraphs 35 and 36
[18] *Supra*, note 7. [Document No. 29]

Plan during our intergovernmental consultations.[19]

15. Subsequent correspondence from the Four First Nations confirmed that, based on legal advice they had received[20], the Four First Nations continued to take the position that consultation could only occur on this narrow basis and that they were not prepared to discuss the modifications that the Yukon Government was proposing[21].

16. The Yukon Government, for its part, advised the Four First Nations that it did not share their view with respect to the scope of the consultation that needed to occur, and continued with its efforts to consult with them regarding the Final Recommended Plan and its proposed modifications to it[22].

17. It is not now open to the First Nations, including GTC, to suggest that the process failed due to the Yukon Government's failure to consult. Yukon sought to do so and the First Nations, other than the Vuntut Gwichin First Nation[23], remained unwilling to engage. As stated by Finch, J., in the oft-cited case of *Halfway River* v. *B.C.*:

> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions...[24]

18. *Halfway River* was cited with approval by Chief Justice McLachlin in *Haida*[25], where she says 'As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached'[26].

---

[19] Chief Mervyn and Chief Taylor letter to Ministers Cathers and Dixon, dated December 14, 2011. [Document No. 30]
[20] Defendant's Outline of Argument filed June 9, 2014, at paragraph 78. [Document No. 33]
[21] *Ibid*, at paragraphs 78, 81, 87, 93 and 94. [Document Numbers 33, 38, 61, 63 and 64].
[22] *Ibid*, at paragraphs 74, 76, 79, 80, 82, 84, 85, 86, 88 and 90. [Document Numbers 29, 31, 35, 37, 39, 41, 58, 60 and 62],
[23] *Ibid*, at paragraphs 97-98. [Document Numbers 82 and 86]
[24] 1999 BCCA 470 at page 79.
[25] *Supra*, note 1, at para. 42
[26] *Ibid*, at paragraph 42.

19. Yukon, for its part sought to work collaboratively with the Four First Nations in the Peel Watershed planning process and, at all times, it endeavoured to meet its obligations under the Final Agreements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2014.

John J.L. Hunter, Q.C.
Counsel for the defendant

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

Intervenor

DEFENDANT'S REPLY TO THE WRITTEN SUBMISSION OF THE GWICH'IN TRIBAL COUNCIL

John J.L. Hunter, Q.C,
Hunter Litigation Chambers
2100 – 1040 West Georgia Street
Vancouver, BC
V6E 4H1
Tel: 604-891-2401

Counsel for the Defendant