File No. 36779

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL 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, THE VUNTUT GWITCHIN FIRST NATION

Applicants
(Respondents)

And

GOVERNMENT OF YUKON

Respondent
(Appellant)

APPLICANTS' REPLY

(Filed by the Applicants pursuant to Rule 28 of the *Rules of the Supreme Court of Canada)*

Counsel for the Applicants:

ALDRIDGE + ROSLING
11th Floor, 675 W. Hastings Street
Vancouver, BC V6B 1N2
Tel: (604) 605-5555
Fax: (604) 684-6402
Email: mrosling@arlaw.ca

Per: Thomas R. Berger, Q.C.
Margaret D. Rosling
C. Patricia S. Riley

Ottawa Agent for Counsel for the Applicants:

SUPREME LAW GROUP
900-275 Slater St.
Ottawa, ON K1P 5H9
Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Per: Moira S. Dillon

Counsel for the Respondent:

YUKON DEPARTMENT OF JUSTICE
Legal Services Branch
Government of Yukon
2130 – 2nd Avenue
Whitehorse, YT Y1A 5H6
Tel: (867) 667-3793
Fax: (867) 667-3599
Email: Mark.Radke@gov.yk.ca

Per: Mark Radke

TORYS LLP
79 Wellington St. W.
30th Floor Box 270, TD South Tower
Toronto, Ontario M5K 1N2
Tel (416) 865-0040
Fax (416) 865-7380
Email: jlaskin@torys.com
jterry@torys.com
rroth@torys.com

Per: John Laskin
John Terry
Jonathan Roth

Ottawa Agent for Counsel for the Respondent:

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P OR3
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Per: Eugene Meehan QC
Marie-France Major

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REPLY MEMORANDUM OF ARGUMENT OF THE APPLICANTS

A. Introduction

1. The Government of Yukon argues that the application for leave to appeal does not raise any issues of public or national importance. Moreover, they argue that the main conclusions in the Court of Appeal's reasons for judgment that are at issue in these proceedings are merely "interlocutory," "non-dispositive" and "hypothetical".[1] The following submissions are made in reply to these points.

B. The timing of the breach and the choice of remedy

2. The primary issue raised by the application for leave to appeal is the choice of remedy for the Government of Yukon's breach of the Final Agreements.[2] The resolution of this issue is dependent upon a determination as to when the Government of Yukon breached the Final Agreements. The Government of Yukon has argued that the issue of remedy is a fact-dependent question and a case-specific issue that is not one of general application or public importance.[3]

3. The applicants disagree. The issue of remedy is based on the underlying interpretation of all of the Final Agreements signed by Canada, the Government of Yukon and Yukon First Nations. The issue of remedy raises important legal principles which have a bearing not only on collaborative processes between First Nations and the Crown, but also on the principles of administrative law relating to judicial supervision of administrative tribunals.

4. The applicants have already set out the flawed reasoning of the Court of Appeal in holding that the Government of Yukon's failure to exercise a right to propose certain modifications under s. 11.6.2 of the Final Agreements was a breach of the Final Agreements.[4]

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[1] Response to Application for Leave to Appeal ("Response"), paras. 6-8 and 37, pp. 2 and 11.
[2] The Final Agreements which are at issue are the First Nation of Nacho Nyak Dun Final Agreement (1993), The Tr'ondëk Hwëch'in Final Agreement (1998) and the Vuntut Gwitchin First Nation Final Agreement (1993).
[3] Response, paras. 37 and 39, pp. 11 and 12.
[4] Applicants' Memorandum of Argument, paras. 37 to 41, Application for Leave to Appeal ("Application"), Tab 4, pp. 162-163.

5. Briefly, the Government of Yukon, in February 2011, proposed three modifications to the Recommended Peel Watershed Regional Land Use Plan (the "Recommended Plan"), supported by written reasons, pursuant to s. 11.6.2 of the Final Agreements. However, as Bauman C.J. held, modifications regarding development and access in the Recommended Plan were "effectively not formulated or disclosed."[5] Bauman C.J. found that it was "Yukon's failure to properly exercise its right to provide modifications that derailed the dialogue essential to reconciliation" and that "[t]his derailment of the dialogue is where Yukon's failure began, and marks the point to which the process must be returned."[6]

6. There is no precedent for treating the failure to properly exercise a right under an agreement as a breach of an agreement. The Court of Appeal's judgment confounds the jurisprudential distinction between what is a right and what is an obligation by interpreting the Government of Yukon's failure to exercise its right as a breach of the Final Agreements. The Court of Appeal's judgment sets an important precedent in the field of administrative law and will undoubtedly have an effect on future land use plan approval processes in Yukon.[7]

7. The law is clear that proceedings that have been lawfully conducted and completed should be upheld.[8]

8. The Government of Yukon has argued that the question of remedy is not relevant to other collaborative processes between First Nations and government. But here, the precedent set by the Court of Appeal would allow the Crown to choose not to diligently take a step in a process or exercise a right but, nevertheless, be entitled to go back, change its mind, and repeat those steps. This precedent runs counter to what Binnie J. in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103, held at para. 12: "It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests."

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[5] Appeal Reasons, para. 149, Application, Tab 3C, p. 141: "Yukon's modifications were put forward in such general terms as to lack such specificity that they were effectively not formulated or disclosed."
[6] Appeal Reasons, para. 114, Application, Tab 3C, p. 133.
[7] The framers of the Umbrella Final Agreement ("UFA") contemplated that there should be jointly established, over a period of years, a series of regional land use planning commissions across Yukon, with extensive provision for public participation. See UFA, ss. 11.1.1.1, 11.2.1.8, 11.4.1, and 11.6.0, Application, Tab 5A, pp. 180-185.
[8] Applicants' Memorandum of Argument, para. 73, Application, Tab 4, p. 171.

9. The Government of Yukon did not finally formulate and disclose its modifications as to development and access until January 20, 2014 – three years after it provided its proposed modifications and written reasons to the Peel Watershed Planning Commission (the "Commission"). Yet the Court of Appeal, on the basis that it "bests serves the goals of achieving reconciliation", ordered that the process be remitted to the earlier stage.[9]

10. The Government of Yukon argues that the Court of Appeal's decision as to remedy "is in the nature of an interlocutory order," since "it does not establish any particular outcome for the Peel Watershed."[10] Such an interpretation ignores the fact that the decision lays down an interpretation of the law of remedies applicable in future land use plan approval processes across Yukon, similar processes under modern treaties in other jurisdictions of Canada, as well as in the field of administrative law.

C. The Commission's obligations under the Final Agreements

11. The Government of Yukon argues that the second issue raised by the applicants, that is, the Court of Appeal's observations on the conduct of the Commission, is not relevant beyond the particular circumstances in this case.[11] In fact, the Court of Appeal's findings here involve an interpretation of the obligations of regional land use planning commissions under the Final Agreements and have broader implications in respect of administrative law principles regarding written reasons and the exchange of written reasons.

12. Bauman C.J. held that he would have "expected the Commission to have gone back to Yukon to voice its concern about the lack of detail to Yukon's proposed modifications."[12] Bauman C.J. accordingly required the Commission not only to reconsider the three modifications actually advanced by the Government of Yukon, which the Commission did, but also to elicit a further set of modifications even though as yet "not formulated or disclosed."[13] In other words, according to Bauman C.J., the Commission should have directed the Government of Yukon to develop a new set of proposed modifications together with a new set of written

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[9] Appeal Reasons, para. 169, Application, Tab 3C, p. 146.
[10] Response, paras. 6 and 37, pp. 2 and 11.
[11] Response, para. 43, pp. 13-14.
[12] Appeal Reasons, para. 153, Application, Tab 3C, p. 142.
[13] Appeal Reasons, para. 149, Application, Tab 3C, p. 141.

reasons. In so doing, the Court of Appeal added an obligation, which is not included in the text of s. 11.6.3.1 of the Final Agreements, but will apply to all future regional land use planning commissions in Yukon.[14]

13. The Government of Yukon says, however, that the Court of Appeal's comments on the conduct of the Commission are "non-dispositive", having "no relevance beyond the circumstances of this case."[15]

14. The judgment of the Court of Appeal not only imposes an added obligation on future regional land use planning commissions in Yukon, it creates an obligation for commissions generally (or other bodies), to seek clarification where written reasons might not address all of the matters that a party might conceivably have addressed (if it had turned its mind to them all).[16] No authority was advanced to justify this construction of s. 11.6.3.1. This is a precedent that is applicable not only to collaborative processes under modern treaties but also generally to the principles of administrative law relating to the judicial supervision of administrative tribunals.

D. <u>Authority to reject a final recommendation for a regional land use plan</u>

15. The Government of Yukon argues that the question of whether it has the authority to reject a final recommendation under s. 11.6.3.2, after having proposed modifications to a recommended plan, is a hypothetical question that does not justify leave to appeal.[17]

16. The proper interpretation of s. 11.6.0 and, in particular, the meaning of the words "approve, reject or modify" in s. 11.6.3.2, is at the root of the conflict which arose in the land use plan approval process for the Peel Watershed Planning Region. Veale J. held that the word "reject" in s. 11.6.3.2 does not permit the Government of Yukon to reject a final recommendation in its entirety when it earlier chose to merely propose modifications to a recommended plan.[18]

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[14] Section 11.6.3.1 of the Final Agreements provides as follows: "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 ...." See UFA, s. 11.6.3.1, Application, Tab 5A, p. 184.
[15] Response, para. 8, p. 2.
[16] As Bauman C.J. wrote at para. 149: "One cannot offer intelligible reasons for modifications which are not even formulated or disclosed." Appeal Reasons, para. 149, Application, p. 141.
[17] Respondent's Memorandum of Argument, para. 45, p. 14.
[18] Trial Reasons, para. 164, Application, Tab 3A, p. 73.

The Court of Appeal disagreed and held that, regardless of the Government of Yukon's election under s. 11.6.2, it could reject the Commission's final recommendations.[19]

17. So notwithstanding the agreement of the parties to enter into the land use plan approval process, and representations made by the Government of Yukon in its written reasons delivered to the Commission and in consultation with affected communities and First Nations, the Government of Yukon retains absolute discretion at the end of the process and is under no obligation to explain its decision.[20]

18. The ruling by the Court of Appeal on the interpretation of the Final Agreements is not hypothetical. The Court of Appeal's interpretation of s. 11.6.0 will apply to all future land use plan approval processes under the Final Agreements in Yukon unless the Supreme Court of Canada grants leave to appeal in this case. The judgment of the Court of Appeal is, so to speak, now grafted onto Chapter 11 of the Final Agreements and the First Nations are left with an empty shell of a treaty promise. [21]

ALL OF WHICH IS SUBMITTED THIS 18th DAY OF February, 2016.

agent for

Per: Thomas R. Berger, Q.C.
Margaret D. Rosling
C. Patricia S. Riley

[19] Appeal Reasons, para. 159, Application, Tab 3C, p. 144.
[20] Unlike s. 11.6.3, no written reasons are required under s. 11.6.3.2 of the Final Agreements.
[21] In *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 2 SCR 103, Binnie J. pointed out, at para. 9, that the Yukon First Nations surrendered their Aboriginal rights in almost 484,000 square kilometers of land in exchange for defined treaty rights.