COURT OF APPEAL OF YUKON

Citation: *Ross River Dena Council v. Yukon (Government of)*, 2025 YKCA 4

Date: 20250328
Docket: 24-YU914

Between:

Ross River Dena Council, on its own behalf, and on behalf of all members of the Kaska Nation and the Kaska Nation

Appellant
(Petitioner)

And

Government of Yukon (Deputy Minister, Executive Council Office), the Attorney General of Canada and BMC Minerals Ltd.

Respondents
(Respondents)

Before: The Honourable Mr. Justice Groberman
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated January 2, 2024 (*Ross River Dena Council v. Yukon (Government of)*, 2024 YKSC 1, Whitehorse Docket 22-AP008).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference):	M.A. Youden E.C. Hobbs G.E.S. Matheson
Counsel for the Respondent, Government of Yukon (Deputy Minister and Executive Council Office) (via videoconference):	I.H. Fraser
Counsel for the Respondent, Attorney General of Canada (via videoconference in the afternoon):	M. Anderson-Lindsay W. Lu

Counsel for the Respondent, BMC Minerals Ltd. (via videoconference):	K.G. O'Callaghan P. Elahi-Khansarai
Counsel for the Liard First Nation, (via videoconference):	J.A. Proudfoot
Place and Date of Hearing:	Whitehorse, Yukon March 28, 2025
Place and Date of Judgment:	Whitehorse, Yukon March 28, 2025

Summary:

The Court, in reasons indexed as 2024 YKCA 18, set aside a decision approving development of a mining project, and remitted the matter to the decision-makers for reconsideration, including further consultations. The proponent of the project considered that the reconsideration was not proceeding expeditiously, and sought to have a deadline imposed on the consultation process. Held: application dismissed. As the applicant ultimately conceded, the remedy sought was not within the authority of a chambers judge. The alternative remedy sought — referral of the matter to the panel that decided the appeal — was not appropriate, as the matter does not fall within the limited scope of the Court's power to amend or vary its orders. As the order has not been entered, however, it remains open to the parties to make a request to the panel to re-open the appeal.

[1] **GROBERMAN J.A.**: On December 6, 2024, in reasons indexed as 2024 YKCA 18, this Court held that the Crown had not fulfilled its duties to consult and accommodate the Kaska Nation in certain respects in approving the development of an open pit and underground copper, lead and zinc mine in an area described as Kudz Ze Kayah.

[2] The Court set aside the decision approving the development and remitted the matter to the "Decision Bodies" for further consultation in accordance with the Court's reasons. The Decision Bodies are the Government of Yukon and two emanations of the Government of Canada (Natural Resources Canada and the Department of Fisheries and Oceans Canada).

[3] The further consultations have not proceeded as expeditiously as the proponent, BMC Minerals, would like, and it wishes the Court to impose a deadline on the consultations. It applies for orders that:

1. the consultation process ordered by this Court on December 6, 2024, including any further consultation meeting(s) among Kaska First Nations and the Government of Yukon, Natural Resources Canada, and the Department of Fisheries and Oceans Canada (the "Decision Bodies") regarding BMC Mineral's proposed Kudz Ze Kayah mining project (the "Project") shall be completed by April 30, 2025;

2. the Decision Bodies shall issue a new decision document regarding the Project by May 14, 2025; and

3. for such further and other orders as BMC Minerals seeks and the Court deems just.

[4] At the hearing, in recognition of Ross River Dena Council's argument that the relief sought is not within the jurisdiction of a judge in chambers, BMC Minerals sought, in the alternative, that I refer this matter to the panel of the Court that heard the appeal.

[5] In its reply submissions, the applicant now concedes that a single judge of this Court does not have jurisdiction to make the order originally sought, and seeks only to have me refer it to the division that heard the case.

[6] The Government of Yukon supports the application. It is opposed by the Ross River Dena Council, the Attorney General of Canada and the Liard First Nation, a Kaska Dena nation that advances its own claims affected by the development.

[7] As has now been conceded, a judge in chambers does not have jurisdiction to make the orders sought. I am also of the view that, once an order has been entered, a division of this Court is generally unable to make the kind of supplementary order that is sought in this case.

[8] The applicant characterizes the current application as simply a request for a clarification of the order. It originally contended that such a request is within the powers of a judge in chambers and it now contends that it is within the power of the division that heard the matter.

[9] I am not convinced that the application is simply for a "clarification" of the order. It is, rather, an attempt to obtain additional relief (that is, a precise timeline) that was specifically considered and rejected by the division hearing the matter.

[10] The Court, in its decision in December, specifically considered imposition of a specific time limit on consultations, saying:

> [203] I am … of the view that not enough is known by this Court to give precise directions regarding the timing of additional consultation on the economic feasibility of the Project. It is clear that given the length of time

> consultation has already taken, all the parties should avoid delay in any further consultation.

[11] As I see it, this is a case in which the Court fully dealt with the appeal from a judicial review decision and made a final order setting aside the administrative decision and remitting the matter to the decision-makers. That fully disposed of the appeal and, subject to what I will say in a moment, the matter is no longer before this Court.

[12] I acknowledge that there is jurisdiction in the Court to make certain incidental and ancillary orders even after a final order on the appeal. In *Holland v. Marshall*, 2010 BCCA 243 (Chambers), for example, I held that a vexatious litigant order could be considered even after the appeal had been disposed of.

[13] There is also some authority for the Court to vary an order where events that were unforeseen when the order was made have rendered it impossible to fulfill. In *Toor v. Dillon*, 2020 BCCA 309, the Court had ordered specific performance of a contract for the sale of land, leaving the closing date to be set by the parties. The parties did not agree to a closing date within the time set by the Court, and the respondent applied to the Court to set a closing date. The Court varied the order by specifying a closing date.

[14] I do not see the application before me as dealing with an unforeseen issue or a "housekeeping matter." The question is whether the Court can be asked to modify its order to deal with events that have occurred subsequent to the hearing. Unlike the situation in *Toor*, the issues that are raised do not concern the continued viability of the remedy that was granted.

[15] Further, unlike the situation in *Toor*, there are well-defined paths for the applicant to deal with the difficulties that it perceives. In its 2024 decision, this Court remitted the administrative decision to the decision-makers, and they now have carriage of it. If BMC Minerals believes that the decision-makers are failing to adhere to legal requirements, their remedies lie in judicial review before the Yukon Supreme Court — by seeking orders in the nature of *mandamus* or *certiorari*, depending on

the stage of the administrative proceedings. They do not lie in resurrecting the appeal in this Court, which has been disposed of.

[16] Courts do not automatically have the ability to manage the implementation of their orders after they are made. A court can assume a continuing management role, through what is often referred to as a "structural injunction" (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62), but such a remedy is uncommon, and it is entirely unlikely to be granted at the appellate level for practical reasons.

[17] There is a wrinkle, however, in this case. In response to questions from the bench, the parties have stated that they have not yet agreed to the form of the order arising from this Court's 2024 judgment, and it has, therefore, not yet been submitted for entry. It is clear that a division can re-open a matter and amend an order until such time as an order has been entered, though it exercises restraint in doing so (see, for example *Menzies v. Harlos* (1989), 37 B.C.L.R.(2d) 249).

[18] I am not prepared to refer this matter to the division for further consideration as I am not satisfied that it falls within the established jurisdiction of the Court to supplement or vary its orders. I am also doubtful that the matter raises issues that could result in a re-opening of the appeal, notwithstanding that the order is unentered. However, because the order is not yet entered, any party is free to request further consideration by the division by addressing a letter to the Court's Registrar to be brought to the attention of the division.

[19] I am dismissing the application without prejudice to the parties' abilities to make a request to the division to re-open the appeal.

"The Honourable Mr. Justice Groberman"