YUKON COURT OF APPEAL

Citation: ***Tr'ondëk Hwëch'in v. Yukon,***
2007 YKCA 001

Date: 20070312
Docket: YU00545

Between:

Tr'ondëk Hwëch'in

Appellant
(Plaintiff)

And

Government of Yukon

Respondent
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Thackray

S.L. Walsh	Counsel for the Appellant
P. Gawn and M. Leask	Counsel for the Respondent
Place and Date of Hearing:	Whitehorse, Yukon 30 May 2006
Place and Date of Judgment:	Vancouver, British Columbia 12 March 2007

Written Reasons by:
The Honourable Mr. Justice Smith

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] The Tr'ondëk Hwëch'in First Nation appeals from two orders made by Mr. Justice McIntyre in an action in the Supreme Court of the Yukon Territory in which it sought several declaratory orders and, as well, damages from the Government of Yukon for alleged breaches of fiduciary duties. The learned judge dismissed its application for final judgment on one declaration pursuant to Rule 18 of the ***Rules of Court***, B.C. Reg. 221/90, which apply in that court by virtue of s. 38 of the ***Judicature Act***, R.S.Y. 2002, c. 128. At the same time, he refused to make eight other declarations following a summary trial conducted under Rule 18A. His reasons for judgment are indexed as 2005 YKSC 48.

[2] The declarations sought by the appellant relate to the implementation of an agreement to establish a park pursuant to a settlement of its claims to lands in the Yukon Territory.

[3] Declaratory orders are discretionary orders. The circumstances in which the court will consider granting declaratory relief were explained in ***Canada v. Solosky***, [1980] 1 S.C.R. 821 at 832, 105 D.L.R. (3d) 745:

> As Hudson suggests in his article "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dalhousie L.J. 706, p. 708:
>
> > The declaratory action is discretionary and two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

> The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as "future rights" (p. 710).

[4] The judge dismissed the appellant's application for summary judgment and refused to make the declarations sought on the summary trial because, in his view, there is no existing dispute between the parties, the questions raised are hypothetical, and the declarations would serve no useful purpose.

[5] The appellant contends that the judge erred in law by applying a wrong test to the application for summary judgment and, in the alternative, that he did not exercise his discretion judicially. Further, the appellant contends that he did not properly exercise his discretion on the summary trial. It asks us to set aside his orders in respect of five of the declarations sought and to grant those declarations. I will set the declarations out individually as I deal with them in these reasons.

[6] For the reasons that follow, I have concluded that the learned judge did not err in law as alleged by the appellant and that no basis has been shown on which we could properly interfere with his exercise of discretion. I would dismiss the appeal.

Background facts

[7] Yukon land-claims negotiations began in 1973 and resulted in what is described as the Umbrella Final Agreement, signed on May 29, 1993 by the Council

for Yukon Indians, Her Majesty the Queen in Right of Canada, and the respondent. In the Umbrella Final Agreement, the parties recorded their intention to negotiate Final Agreements, established a framework for those agreements, and set out provisions that were to be applicable generally to all such agreements.

[8] There followed further settlement negotiations that culminated in various Final Agreements, including the Tr'ondëk Hwëch'in Final Agreement (the “Final Agreement”), which was executed by the appellant, the federal government, and the respondent on July 26, 1998 and came into force on September 15, 1998.

[9] In the Final Agreement, the respondent agreed to establish the Tombstone Territorial Park (the “Park”) in the Ogilvie Mountains of the Yukon Territory. The respondent subsequently purported to establish the Park by orders-in-council made on October 22, 2004. However, the appellant says that the order-in-council (OIC 2004/202) by which the respondent withdrew the lands set aside for the Park from disposal to third parties is *ultra vires*. Accordingly, the appellant asks us to set aside the dismissal of its application for summary judgment on Declaration #1 and to grant that declaration. As well, it submits that the order-in-council by which the respondent formally established the Park (OIC 2004/203) is inconsistent and in conflict in several respects with the Final Agreement. Accordingly, it contends that the order-in-council is invalid, relying on a provision of the Final Agreement which stipulates that the Final Agreement shall prevail to the extent of any inconsistency or conflict with any federal, territorial, or municipal law. It sought judgment below on a summary trial of these claims and asks us now to set aside the dismissal of these claims and to grant Declarations #2 through #5.

The summary judgment (Rule 18) application

> **Declaration #1 – A declaration that the provisions of Order-in-Council 2004/202 dated October 22, 2004, which were enacted pursuant to the provisions of s. 7 of the *Lands Act*, R.S.Y. 2002, c. 132 and which purport to withdraw from disposal the mines and minerals, other than oil and gas under the *Oil and Gas Act*, and the right to work those mines and minerals, located in the Tombstone Territorial Park exceed the authority granted to the Commissioner in Executive Council under the *Lands Act* and are void and inoperative on the grounds that the *Lands Act* does not apply to mines and minerals, including the mines and minerals within Tombstone Territorial Park, which became "territorial lands" on or after April 1, 2003.**

[10] The appellant sought summary judgment on Declaration #1 under Rule 18, which provides, so far as is relevant:

> **18** (1) In an action in which an appearance has been entered … the plaintiff, on the ground that there is no defence to the whole or part of a claim … may apply to the court for judgment on an affidavit setting out the facts verifying the claim or part of the claim and stating that the deponent knows of no fact which would constitute a defence to the claim or part of the claim ….
>
> (2) On the hearing of an application under subrule (1), the court may …
>
> (a) grant judgment for the plaintiff on the whole or part of the claim ….

[11] OIC 2004/202, entitled *Order Respecting the Withdrawal from Disposal of Certain Lands in Yukon (Tombstone Territorial Park, Yukon)*, was made "pursuant to section 7 of the *Lands Act*". It provided,

> 1. The purpose of this Order is to withdraw certain lands from disposal to facilitate the establishment of the Tombstone Territorial Park.

> 2. Subject to sections 3 and 4, the tracts of lands described in the schedule, including all mines and minerals, other than oil and gas under the *Oil and Gas Act*, and the right to work them are withdrawn from disposal.
>
> [My emphasis.]

Section 3 excluded existing mineral claims, oil and gas rights and interests, and other similar rights from the operation of s. 2. Curiously, OIC 2004/202 does not contain a s. 4. The lands described in the schedule are, save for certain exceptions I will mention presently, the lands that were later used to establish the Park.

[12] The appellant's position in respect of OIC 2004/202 is that it was *ultra vires* because the ***Lands Act***, R.S.Y. 2002, c. 132, as a result of an amendment effective on April 1, 2003, did not apply on and after April 1, 2003 to the mines and minerals ostensibly withdrawn from disposal. Rather, the appellant argues, the mines and minerals were "territorial lands" subject to the ***Territorial Lands (Yukon) Act***, S.Y. 2003, c. 17 as of April 1, 2003.

[13] This argument begins with the transfer of jurisdiction over the lands from the federal government to the respondent, which was necessary to enable the respondent to establish the Park. To that end, federal order-in-council P.C. 2003-224, made on February 20, 2003, provided,

> Her Excellency the Governor General in Council, on the recommendation of the Minister of Indian Affairs and Northern Development, pursuant to section 47.1 of the *Yukon Act*, hereby transfers the administration and control of the entire interest in the public lands described in the annexed schedule to the Commissioner of the Yukon Territory.

[14] The lands described in the annexed schedule are stated to be the lands "required for the Tombstone Territorial Park" and are described identically, save for the following exceptions, to the lands described in the schedule annexed to OIC 2004/202:

> Saving and excepting therefrom and reserving thereout all mines and minerals, including hydrocarbons, whether solid, liquid or gaseous and the right to work them;
>
> And saving and excepting therefrom and reserving thereout the beds of all bodies of water and the water rights connected therewith.

[15] It is agreed that the lands transferred by P.C. 2003-224 became "Yukon lands" and therefore fell under the jurisdiction of the ***Lands Act*** as of February 20, 2003, the date of transfer. However, the administration and control of the exceptions from P.C. 2003-224 did not devolve to the respondent until April 1, 2003. This occurred pursuant to an agreement between the respondent and the federal government entitled the "Yukon Northern Affairs Program Devolution Transfer Agreement", which became effective on that date. Also as of April 1, 2003, the ***Lands Act*** was amended such that the mines and minerals in the lands designated for the Park became "territorial lands" on that date and fell under the jurisdiction of the ***Territorial Lands (Yukon) Act***.

[16] To understand why this is so, it is necessary to trace the relevant legislative provisions.

[17] Section 3 of the ***Lands Act***, authorizes the Minister to sell or lease "Yukon lands" and to grant rights-of-way and easements over them to any corporation or

adult individual, subject to the proviso that the Minister may so dispose of Yukon lands only after receiving an application in respect of them or after public tenders have been called for them. Section 7, the authority invoked for OIC 2004/202, provides,

> **7** (1) The Commissioner in Executive Council, if it is considered advisable in the public interest may by order
>
> (a) withdraw any Yukon lands from disposition under this Act….

[18] "Yukon lands" are defined in s. 1 of the ***Lands Act*** as "properties to which this Act applies". These properties are set out in s. 2(1), which states,

> **2** (1) This Act applies with respect to all properties in the Yukon that are vested in Her Majesty in right of Canada but the right to the beneficial use or to the proceeds of which is appropriated to the Government of the Yukon and is subject to the control of the Legislature other than territorial lands under the *Territorial Lands (Yukon) Act*.
>
> [My emphasis.]

[19] The emphasized words were added to s. 2(1) of the ***Lands Act*** by an amendment made by virtue of s. 33 of the ***Territorial Lands (Yukon) Act***, which came into force on April 1, 2003. The scope of the latter ***Act***'s application is set out in s. 2(1):

> **2** (1) This Act applies only in respect of lands that become territorial lands on or after the date this Act comes into force.

"Land" and "territorial Lands" are defined in s. 1:

> **1** In this Act,

> "land" includes mines, minerals, easements, servitudes, and all other interests in real property;
>
> . . .
>
> "territorial lands" means lands under the administration and control of the Commissioner….

[20] Thus, the appellant's position is that, since administration and control of the mines and minerals in the lands designated for the Park devolved to the Commissioner on April 1, 2003, the mines and minerals became "territorial lands" under the ***Territorial Lands (Yukon) Act*** as of that date and, moreover, they were excluded from the ambit of the ***Lands Act*** by the amendment to s. 2(1) of that ***Act*** effective as of the same date. Accordingly, the appellant says, the Commissioner was not authorized by s. 7 of the ***Lands Act*** to withdraw the mines and minerals from the lands set aside for the Park, as he purported to do by OIC 2004/202, and the order-in-council was therefore *ultra vires* and invalid.

[21] The judge summarized the appellant's submission in Part V of his reasons for judgment under the title "Rule 18 Application" but he touched only briefly on the merits of the submission. Rather, he focussed on the respondent's submission that he should exercise his discretion against granting Declaration #1 whatever its merits. Thus, he said,

> [33] The Defendant says the Plaintiff has not demonstrated any need for the declaration nor identified any harm that would result to the Plaintiff if the declaration were not granted.
>
> . . .
>
> [35] The Defendant says that in any event mining is prohibited in the park, save for grandfather provisions, pursuant to 3.5 of [Schedule] A,

> which [Schedule] is binding on the Defendant pursuant to the Devolution Agreement.

[22] He continued,

> [36] During the course of argument I posed a question that had been troubling me to the Plaintiff. Why is the Plaintiff taking this position, what is its motivation? The answer: if the Plaintiff is right, mines and minerals cannot be disposed of without the consent of the Plaintiff. Its consent would be needed. The Plaintiff also said that these applications will save trial time and may encourage settlement.
>
> [37] I also asked why the Plaintiff does not wait until a problem arrives. The answer is that the Plaintiff has a right to the Park it negotiated, implemented and that it has a right to have a Court determine whether, as it believes, the Final Agreement has not been implemented. This is not a request for advisory opinion but a declaration that the Defendant has failed to implement that which it promised. The Plaintiff has a right to have the park it negotiated implemented.
>
> [38] In my view, in *Tr'ondëk Hwëch'in v. Canada* [2004 YKCA 2], the Yukon Court of Appeal has made it abundantly clear that courts must be cautious about making broad prospective statements of principle. In this case, the dispute exists in the briefs of counsel. The affidavits merely highlight the differences of opinion the Plaintiff and the Defendant have about the Final Agreement, the legislation, and the Orders-in-Council, but no one has made a decision that affects the Plaintiff, nor has anyone sought to take any steps to conduct or prohibit activities contrary to the Plaintiff's vision of the Park. In the end, I am not persuaded that any useful purpose can be served by granting the application. I do not see any need for the declaration sought. The Plaintiff has not identified any harm that might occur to it should the declaration not be granted nor any harm that might be avoided should the declaration be granted. There is no possibility based on the legislation in place, and the representations made to me in Court about the Defendant's position, that mining will occur in the Tombstone Territorial Park.
>
> [My emphasis.]

[23] Thus, the judge dismissed the application for summary judgment on Declaration #1 because, in his view, there is no actual dispute between the parties and the declaration would serve no useful purpose.

[24] However, the judge said, near the outset of his reasons, "It is common ground that the burden on the Plaintiff for the Rule 18 application is to demonstrate beyond doubt the correctness of its position." At the end of his reasons for judgment, he said,

> [50] With respect to the Rule 18 application, I am not satisfied beyond a doubt as to the merits of the Plaintiff's application and I dismiss it.

[25] The appellant submits first that the order should be set aside because the judge erred in applying a "beyond a doubt" standard and in failing to identify a triable issue.

[26] Rule 18(1) provides that the judge may grant judgment "on the ground that there is no defence to the whole or part of a claim". There has been much judicial gloss put on this phrase. It has been said, for example, that leave to defend must be given unless there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment: ***Jones v. Stone***, [1894] A.C. 122; unless it is clear that there is no real and substantial question to be tried: ***Codd v. Delap*** (1905), 92 L.T. 510; and unless no *bona fide* triable issue is shown: ***Hughes v. Sharp*** (1969), 5 D.L.R. (3d) 760 at 763, 68 W.W.R. 706 (B.C.C.A.). In ***Progressive Construction Ltd. v. Newton*** (1980), 25 B.C.L.R. 330 at 334-35, 117 D.L.R. (3d) 591 (S.C.), Esson J. (as he then was) said, in a passage that was adopted in

Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd. (1984), 55 B.C.L.R. 137 at 139 (C.A.),

> On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

[27] Thus, the burden was on the appellant under Rule 18 to make it manifestly clear that there was no defence to its claim that OIC 2004/202 was *ultra vires*. Although he cited no case authorities, I am satisfied that the judge had that heavy burden in mind when he said he was not satisfied "beyond a doubt". That conclusion was sufficient to dispose of the application against the appellant and it was not necessary for the judge to go further. In particular, the judge was under no legal obligation to specify a triable issue or issues. Indeed, had he done so, he might have unduly fettered the court in the proper resolution of the action.

[28] In any event, whether a defence has been shown or not, the judge retains discretion under Rule 18(2) to grant or withhold summary judgment. In this case, that discretion is supplemented by the discretion described in ***Canada v. Solosky***, *supra*, to grant or withhold declaratory relief. In my view, the primary basis for the dismissal of the application for summary judgment was the judge's exercise of this discretion. This brings me to the appellant's alternative ground that the judge did not exercise his discretion judicially.

[29] We may not simply substitute our exercise of discretion for that of the judge below. Rather, we must review his exercise of discretion on the standard described in ***May v. Circumpacific Energy Corp.*** (2004), 191 B.C.A.C. 300, 2004 YKCA 1:

> [6] On an appeal from . . . a discretionary order, the applicable standard of review is that described by Cumming J.A. in *Ward v. Kostiew* (1989), 42 B.C.L.R. (2d) 121 (B.C.C.A.), at 127:
>
> > . . . an appellate court is justified in interfering with the exercise of discretion by a chambers judge only if he misdirects himself, acts on a wrong principle or on irrelevant considerations, or if his decision is so clearly wrong as to amount to an injustice.

[30] The appellant submits, first, that the judge considered matters that are not relevant to the *vires* of OIC 2004/202. It contends that it is irrelevant that no one has made a decision that affects the appellant, that it has not identified any manifest harm should the declaration not be granted, and that mining will not occur in the Park. Further, the appellant argues, the judge failed to recognize that the Crown's promises in the Final Agreement are fundamental to the achievement of the goal of reconciliation of pre-existing Aboriginal sovereignty with assumed Crown sovereignty and to the maintenance of the honour and integrity of the Crown (see, for example, ***Haida Nation v. British Columbia (Minister of Forests)***, [2004] 3 S.C.R. 511 at ¶¶ 19 and 20, 2004 SCC 73) and that the Crown's promises cannot be honoured through the enactment of *ultra vires* legislation.

[31] In my view, these submissions address only the surface of the dispute. It became clear during oral submissions that the core of the mines-and-minerals aspect of this litigation is the question whether the appellant may exert direct control over

mining exploration and development in the Park, as it might if mines and minerals are an integral part of the Park, or whether the respondent, albeit subject to the constraints imposed by the Final Agreement, can administer mining exploration and development on the basis that mines and minerals were excepted from the Park. Accordingly, I am not persuaded that whether mining will ever occur in the Park was irrelevant to the judge's exercise of discretion.

[32] Further, that there is no real dispute – no *lis inter partes* – and that no harm will be suffered by the applicant if a declaration should be refused are always relevant to the exercise of discretion to grant or to refuse declaratory orders. I would therefore not accede to the submission that the judge took irrelevant matters into account when he referred to these factors.

[33] As well, although whether OIC 2004/202 is *ultra vires* was a relevant consideration in the exercise of judicial discretion to grant or withhold summary judgment under Rule 18, it was not necessarily the overriding consideration. The defect alleged by the appellant was technical or procedural in nature – the appellant concedes that OIC 2004/202 would have been valid had it been enacted pursuant to the ***Territorial Lands (Yukon) Act*** rather than pursuant to the ***Lands Act***. I think this fact is relevant to the judge's exercise of his discretion to refuse to grant final judgment. A final judgment is normally granted on the merits of a case, that is, on the substantive considerations that bear on the decision. It is not clear whether the reason the judge was not satisfied on the merits of the appellant's application was that the challenge was founded on procedural deficiencies in the enactment of OIC 2004/202 rather than on the substance of the order-in-council itself. However, it was

open to him to view the application in that light since, in my opinion, the settlement of lands claims is an important matter and substance can properly transcend inadvertent technical and procedural deficiencies as a consideration in the exercise of judicial discretion.

[34] Moreover, the respondent did not promise in the Final Agreement to withdraw the mines and minerals from disposal to third parties, so whether it did so without proper authority does not involve a breach of any promise that would engage the Crown's honour and integrity.

[35] Further, the appellant concedes that whether or not OIC 2004/202 is *ultra vires* is peripheral to its real claim – that OIC 2004/203 did not deliver the park that was promised by the respondent in Schedule A of the Final Agreement, which included the mines and minerals.

[36] Finally, if the appellant is correct and OIC 2004/202 did not validly remove the mines and minerals from disposal to third parties, the appellant has not identified how such a finding would advance the resolution of the underlying question. Whether they were withdrawn from disposal does not bear on whether they formed part of the Park or whether they were validly excepted when the Park was established. Thus, the judge's conclusion that Declaration #1 would serve no useful purpose seems justified.

[37] The judge's exercise of discretion finds support in these factors and I am not convinced that he misdirected himself, acted on any wrong principle or on irrelevant considerations, or that his decision is so clearly wrong as to amount to an injustice.

In my view, no basis has been shown upon which we could properly interfere with his exercise of discretion to refuse to grant summary judgment under Rule 18.

The summary trial (Rule 18A)

[38] The summary trial concerned OIC 2004/203, entitled "Parks and Land Certainty Act", which was made on October 22, 2004 pursuant to ss. 8 and 11 of the ***Parks and Land Certainty Act***, R.S.Y. 2002, c. 165 for the purpose of establishing the Park. The appellant sought judgment on the summary trial on Declarations #2 through #5, among others that are not before us on this appeal.

[39] The judge refused to grant judgment for the appellant on the discretionary grounds set out in ***Canada v. Solosky***, *supra*. Accordingly, the applicable standard of review is the standard described in ***May v. Circumpacific Engergy Corp.***, *supra*, for the review of discretionary orders.

> **Declaration #2 – A declaration that the "purpose" of Tombstone Territorial Park set out in section 3 of Order-in-Council 2004/203 is inconsistent and in conflict with the purpose of that Park as agreed to in the Tr'ondëk Hwëch'in Final Agreement, and is of no force and effect.**

[40] Section 3 of OIC 2004/203 names the Park and describes it as a "settlement agreement park and natural environment park". It sets out the purpose of the Park as,

> To protect a representative or unique landscape that displays ecological characteristics or features of one or more of the Yukon's ecoregions.

[41] The provisions of the ***Parks and Land Certainty Act*** invoked by OIC 2004/203 are:

> **8.** The Commissioner in Executive Council may, by order, establish a settlement agreement park in accordance with a settlement agreement.
>
> . . .
>
> **11** (2) A park may be
>
> . . .
>
> (b) a natural environment park. . . .

[42] The judge refused to grant Declaration #2 on the grounds that there is no existing dispute grounded in facts, the question is hypothetical, and "no one is worse off" without the declaration. He explained,

> [41] The purpose set out in Order-in-Council 2004/203 is "to protect a representative or unique landscape that displays ecological characteristics or features of one or more of the Yukon's ecoregions." This is said to be inconsistent with 10.1.1 cited above and in conflict with it.
>
> [42] Essentially, the Plaintiff says the Yukon legislation and Order-in-Council must mirror the language of The Final Agreement. I do not agree.
>
> [43] It may be, and it is evident that the purpose set out in 2004/203, is not as extensive as the objective set out in The Final Agreement. But what am I to take from that? Tombstone Territorial Park is identified as a settlement agreement park and natural environment park, and its boundaries have been established. No one has come forward to assert a right to do something inconsistent with the objectives in The Final Agreement, nor does the Yukon Government assert such a right. Any territorial legislation inconsistent with The Final Agreement cannot prevail. In my view it would be perilous to make declarations about the meaning of the legislation and the Yukon Government's implementation of the Tombstone Territorial Park in the absence of a dispute that engages both factual and legal issues. By this I mean that although the

> Plaintiff sought to persuade this Court about the interpretation of the various statutes and Orders-in-Council, there is no factual issue to ground this dispute - it is esoteric and hypothetical. No one has claimed a right to act in a way inconsistent with the statutory framework or The Final Agreement - no one says: I demand the right to mine in the Park, nor has the Yukon Government taken steps to stop individuals from carrying on activities nor purported to permit activities that the Plaintiff says cannot occur.
>
> [44] So the complaints are hypothetical. In my view, there are too many combinations and permutations of disputes actually grounded in facts that might arise to make a declaration absent those facts. It would be dangerous to make such a declaration - it is impossible to contemplate what activity might be sought to be permitted or prohibited by persons or groups presently unknown for purposes not yet contemplated. Until such an activity is proposed, no declaration should be granted. If no such activity arises, no one is worse off.

[43] The appellant submits that the judge erred in failing to give effect to the difference between the statement of the purpose of the Park set out in OIC 2004/203 and the agreed objectives set out in s. 10.1.1 of the Final Agreement and s. 1.1.1 of Schedule A.

[44] Section 10.1.1 of the Final Agreement provides,

> The objective of this chapter is to maintain important features of the Yukon's natural or cultural environment for the benefit of Yukon residents and all Canadians while respecting the rights of Yukon Indian People and Yukon First Nations.

[45] Section 1.1 of Schedule A sets out the objectives of the Park, which include, in s. 1.1.1,

> To protect for all time a natural area of territorial significance which includes representative portions of the Mackenzie Mountains ecoregion, including the Ogilvie Mountains and Blackstone Uplands areas, and contains important physical and biological features as well as sites of archaeological, historical and cultural value, by the establishment of a

> territorial park under the *Parks Act*, R.S.Y. 1986, c. 126, to be known as Tombstone Territorial Park.

[46] The appellant submits that the judge erred in treating the dispute as hypothetical. It contends that there is a real *lis* between the parties – it says the respondent did not deliver the park it agreed to deliver and that this constitutes a breach of contract and, as well, a breach of the Crown's honour and integrity. It argues that, since the parties agreed that the Final Agreement would prevail over legislation to the extent of any conflicts or inconsistencies, and since the judge found that the purpose set out in OIC 2004/203 was evidently less extensive than the objectives set out in the Final Agreement, the judge erred in refusing to declare that OIC 2004/203 was "inconsistent and in conflict with" the Final Agreement.

[47] However, the alleged discrepancy is not as apparent as the appellant suggests. The parties agreed, in s. 3.1 of Schedule A, that the respondent would establish the Park as a "natural environment park" under the ***Parks Act***, R.S.Y. 1986, c. 126. A "natural environment park" was defined in s. 1 of that statute as,

> . . . an area of sufficient size that contains a variety of natural features such as lakes, streams, mountains and forests with the potential to provide a wide range of outdoor recreation opportunities.

[48] The ***Parks Act*** was repealed and replaced as of March 4, 2002 by the ***Parks and Land Certainty Act***, which defines "natural environment park" in s. 2 as,

> . . . a park established to protect a representative or unique landscape that displays ecological characteristics or features of one or more of the Yukon's ecoregions.

This definition was incorporated in OIC 2004/203 as the purpose of the Park.

[49] Thus, on its face, it seems that the respondent created a natural environment park as it agreed to do in s. 3.1 of Schedule A and, although there is no syntactical congruence and perhaps no substantive equivalence between the agreed objectives set out in s. 10.1.1 of the Final Agreement or in s. 1.1.1 of Schedule A, on the one hand, and OIC 2004/203, on the other, there is no inconsistency or conflict between the promise set out in s. 3.1 of Schedule A and the purpose set out in OIC 2004/203. There is therefore no clear basis on which to apply the contractual provision stipulating that conflicts between the Final Agreement and legislation shall be resolved in favour of the Final Agreement.

[50] It follows that the judge did not err in leaving this question to be resolved until it arises in a real *lis inter partes*. As a result, the question whether the respondent failed to deliver what it promised to deliver remains to be answered when it is ripe for decision. I am not convinced that there is any basis on which we could interfere with the judge's exercise of discretion against granting Declaration #2.

> **<u>Declaration #3</u> – A declaration that the provisions of sections 4 and 5 of Order-in-Council 2004/203 are inconsistent and in conflict with the terms of the Final Agreement, and the rights of the plaintiff thereunder, in respect of the management of Tombstone Territorial Park, and are of no force and effect.**

[51] The appellant submits that the judge failed to exercise his discretion judicially when he refused to declare ss. 4 and 5 of OIC 2004/203 invalid on the basis that they conflict with Schedule A.

[52] Sections 4 and 5 of OIC 2004/203 state,

> 4. Subject to section 5, the Minister may issue park permits authorizing visitor-related development in the park.
>
> 5. The Minister, after considering the *Tr'ondëk Hwëch'in Final Agreement*, may impose any terms and conditions on a park permit granted under section 4 as may reasonably be required to minimize any impact on the park.

[53] The judge dismissed this claim on the basis that it is "hypothetical, premature and not worthy of a declaration for the reasons articulated above in respect of the other complaints", which were that the complaint is not grounded in a real dispute and no useful purpose would be served by the declaration.

[54] The appellant contends that the judge was wrong to characterize the claim as hypothetical and premature. It says the claim involves a conflict between Schedule A and OIC 2004/203 and argues that it is entitled now to a declaration that resolves that conflict in favour of the terms of Schedule A. The conflict allegedly arises out of the provisions of Schedule A by which the parties agreed to establish a Park management plan, which included a plan for "permitting or other methods of regulating use of the Park". The management plan is the subject of the dispute resolution process set out in Schedule A and the appellant submits that the respondent has "jumped the gun" by enacting ss. 4 and 5 of OIC 2004/203 to deal with permitting before the process is concluded. The appellant contends that whether ss. 4 and 5 are in conflict with the process for developing a management plan is a justiciable dispute in its own right, and that the judge erred in holding that the absence of a factual dispute was a factor relevant to the exercise of his discretion. Moreover, the appellant argues, the establishment of a process for

developing a management plan is one of the objectives of Schedule A and, by enacting ss. 4 and 5 of OIC 2004/203, the respondent has not honoured the process agreed upon.

[55] There is nothing in ss. 4 and 5 of OIC 2004/203 that would thwart the development of a management plan. The impugned provisions do not preclude the management plan from addressing the issue of visitor-related permits and until the terms of the management plan relating to such permits are settled, there could be no conflict.

[56] Moreover, the respondent has not issued any permits that conflict with the principles and objectives set out in the Final Agreement. Therefore, it cannot be said to have "jumped the gun" or to have failed to honour the process agreed upon. Unless and until such a conflict arises, the dispute alleged by the appellant remains in the realm of the hypothetical. For this reason, I would not interfere with the judge's exercise of discretion in refusing to grant this declaratory order.

> **<u>Declaration #4</u> – A declaration that those provisions of Order-in-Council 2004/203 which exclude mines and minerals, including hydrocarbons, and the right to work them, from the land comprising the Park are inconsistent and in conflict with the terms of the Tr'ondëk Hwëch'in Final Agreement, and the rights of the plaintiff thereunder, and are of no force and effect.**

[57] The Schedule attached to OIC 2004/203 describes the lands comprising the Park and sets out two exceptions. The first exception states,

> Saving and excepting therefrom and reserving thereout all mines and minerals, including hydrocarbons, whether solid, liquid, or gaseous and the right to work them,

[58] The appellant's position on Declaration #4 is that, on a correct construction of the Final Agreement, the parties agreed that mines and minerals would form part of the Park. Since the Final Agreement does not say expressly whether or not mines and minerals were to be included or excluded, the appellant contends that it is "unclear and ambiguous" on this point. In particular, the appellant contends that the meaning of the word "minerals" in the Final Agreement is not clear. It notes that the Final Agreement provides that the objectives shall be taken as statements of intentions of the parties and "shall be used to assist in the interpretation of doubtful or ambiguous expressions". On that foundation, it constructs an argument out of relationships between federal P.C. 2003-224, certain terms of the Final Agreement and the Yukon Northern Affairs Program Devolution Transfer Agreement, and provisions of the ***Parks Act***, which was in effect during negotiations, that it says leads to the conclusion that the parties intended the term "minerals" to have "the broadest possible meaning and not be restricted merely to the subsurface". Giving the term that broad meaning, as I understand the appellant's argument, all land is comprised primarily of minerals and to exclude minerals from the Park would be to exclude virtually all of the Park lands and to defeat the whole purpose of Schedule A.

[59] The judge did not accede to that submission. He set out the appellant's argument and said that it

> [47] . . . demonstrates that the Plaintiff has a basic misunderstanding of the difference between mines and minerals, which are subsurface, and surface title. Further, I do not see how that which has been specifically excluded by 3.2 of Schedule A of the Final Agreement, mines and minerals, can be said to be clearly intended to be included in the Park. Nowhere does it say that they were to be included, and if they were to be included, after, for example, April 1, 2003 it would have

> been easy to have said so. As noted above, the Yukon Government's position in Court is that mining is not to occur in the Tombstone Territorial Park. If that position changes, and there is a real factual basis for a dispute, the Plaintiff may then seek to demonstrate that this would be contrary to the Final Agreement."

[60] In ordinary discourse, "minerals" are naturally-occurring substances such as coal and precious and other useful metals found on or under ground, and "mines", in the context of the phrase "mines and minerals", are sources of such substances in valuable quantities. In my view the judge correctly gave the phrase "mines and minerals" in the Final Agreement its natural and ordinary meaning. The appellant's suggested interpretation is strained and artificial and is wholly inconsistent with the context in which the phrase was used by the parties.

[61] Section 3.2 of Schedule A, to which the judge referred in this passage, provided expressly that the federal government would except and reserve mines and minerals from the lands to be transferred to the respondent for the purpose of establishing the Park. The Final Agreement does not deal expressly with mines and minerals. Nevertheless, the appellant asks us to conclude that the Final Agreement is "vague and ambiguous" and that the mines and minerals were intended to inhere in the lands used to establish the Park because "parallel negotiations" taking place between the two levels of government at the time of the conclusion of the Final Agreement contemplated that they would remain part of the Park lands after they devolved to the respondent. However, the Yukon Northern Affairs Program Devolution Transfer Agreement, which was the product of those negotiations, makes

no such provision. Moreover, and in any event, the Final Agreement contains an entire agreement clause that prevents recourse to such extrinsic evidence.

[62] For those reasons, I am not convinced that the judge erred in construing the Final Agreement or that any basis has been shown for us to interfere with his exercise of discretion to refuse Declaration #4.

> **<u>Declaration #5</u> – A declaration that the provisions of Order-in-Council 2004/203 which exclude from the land comprising the Park the beds of all water bodies in the Park and the water rights associated therewith are inconsistent and in conflict with the terms of the Tr'ondëk Hwëch'in Final Agreement, and the rights of the plaintiff thereunder, and are of no force and effect.**

[63] The second exception set out in the Schedule attached to OIC 2004/203 is stated in these terms:

> And saving and excepting therefrom and reserving thereout the beds of all bodies of water and the water rights connected therewith . . .

[64] The judge refused to make Declaration #5 on the basis that it was "another hypothetical question not grounded in a factual dispute and appropriate for declaratory relief."

[65] The appellant submits that the exception in OIC 2004/203 of water beds and related water rights from the Park is in conflict with the terms of Schedule A. It submits that the parties agreed, in ss. 1.1.1 and 3.1 of Schedule A, to create a "natural environment park" under the ***Parks Act*** which, as I have set out earlier, defined that term in s. 1 as,

> . . . an area of sufficient size that contains a variety of natural features such as lakes, streams, mountains and forests with the potential to provide a wide range of outdoor recreation opportunities.

The appellant notes that s. 21(1)(i) of the ***Parks Act*** provided for the control and regulation of "fishing" and "impoundment of water". Thus, it submits, the use of water was to be regulated as part of the Park. Further, it points out that the parties agreed under s. 6.0 of Schedule A to establish a management plan that would address, among other things, "management and protection of Fish . . . and their habitat in the Park" and "management and protection of other renewable resources in the Park". Thus, the appellant submits, the exception of water beds and related water rights in OIC 2004/203 conflicts with these provisions of Schedule A and since, by agreement, the terms of Schedule A prevail over legislation to the extent of any conflict, the exception of water beds and related water rights is invalid. This, the appellant contends, is a real dispute that is justiciable as it stands and no other factual dispute is required.

[66] Section 21(1)(i) of the ***Parks Act*** states,

> **21.**(1) The Commissioner in Executive Council may make such regulations as he deems necessary to carry out the purposes of this Act, and may make regulations
>
> > (a) for the care, preservation, improvement, control and management of parks;
> >
> > (b) controlling any use, activity or development in any area of a park. . .;
> >
> > (c) governing and controlling the issuance of park use permits. . .;
> >
> > . . .

> (i) controlling and regulating hunting, fishing, trapping discharging firearms, cutting of timber, impoundment of water and mineral exploration and extraction;
>
> . . .

[67] Thus, under s. 21(1)(i), the Commissioner in Executive Council may make regulations controlling and regulating fishing if he deems them necessary to carry out the purposes of the ***Parks Act***. The general purpose of the ***Act*** is identified in s. 6(1), which authorizes the Commissioner to establish a system of parks "to protect unique natural and historic features and to provide for comprehensive outdoor recreational opportunities". Accordingly, the ***Act*** gives the Commissioner operational control of parks and directs him, in s. 8, to limit development in each park to ensure consistency with the purpose of the park and to limit it, as well, to such development as "is reasonably necessary to provide for public use and enjoyment of the park or the preservation of the park and its facilities". Section 17 prohibits any activity, use, occupancy, or development in a park without a park use permit.

[68] None of this is inconsistent with the provisions of s. 6.0 of the Final Agreement which provide for a management plan in relation to the protection of fish and their habitat and the protection of other renewable resources in the Park. Section 6.0 does not specify who is to manage the Park. Presumably, this question and related questions will be addressed in the negotiations leading to the management plan.

[69] Nor is it manifestly clear that the intent of the Final Agreement was that fish and their habitat could only be managed pursuant to a management plan if "the beds of all bodies of water and the water rights connected therewith" remain an integral

part of the Park. The question is whether the phrase “in the Park” in s. 6.0 of Schedule A should be read as meaning “forming part of the Park” or merely “within the spatial boundaries of the Park”. If the latter, the exclusion of the water beds and related rights would not conflict with the provisions of s. 6.0 of Schedule A. This is the type of question that should not ordinarily be answered by way of a declaratory order. It is better considered within an action grounded in facts between parties with opposing claims.

[70] Accordingly, I cannot conclude that the judge erred when he refused Declaration #5 on the ground that it was not appropriate for declaratory relief.

Conclusion

[71] As no basis has been shown to justify our interference with the orders made below, I would dismiss the appeal.

_____
The Honourable Mr. Justice Smith

I agree:

_____
The Honourable Madam Justice Saunders

I agree:

_____
The Honourable Mr. Justice Thackray