COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Heynen v. Yukon Territory (Government),*** 2008 YKCA 14

Date: 20081006
Docket: 07-YU588

Between:

Klaas Heynen and Kusawa Outfitters Ltd.

Appellants
(Plaintiffs)

And

Government of the Yukon Territory and The Honourable Dale Eftoda, (Former) Minister of Renewable Resources

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Chiasson

T.L. Robertson, Q.C. W. S. Taylor	Counsel for the Appellants
P. Gawn S. Schorr	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, B.C. June 19, 2008
Place and Date of Judgment:	Vancouver, British Columbia October 6, 2008

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] On March 27, 2002, Mr. Heynen's long-held outfitting concession proximate to Whitehorse was revoked by the Minister of Renewable Resources acting under the ***Wildlife Act***, R.S.Y. 1986, c. 178. By order dated October 1, 2007, the appellants' claim for an order quashing that revocation was dismissed, the judge finding that there was a serious breach of Mr. Heynen's right to procedural fairness but that the Minister's decision should be allowed to stand because there was, in his words, "undue and inexcusable delay" on the part of Mr. Heynen in bringing the matter to court. The neutral citation for his reasons for judgment is 2007 YKSC 49.

[2] Mr. Heynen and his outfitter corporation Kusawa Outfitters Ltd. appeal from that order. No challenge is made to the judge's conclusion that there was a breach of procedural fairness.

[3] We have before us as well the applications of the appellants to adduce fresh evidence, and if successful a further application of the respondents to adduce fresh evidence.

Background

[4] Under the regulatory scheme for hunting in the Yukon Territory, areas are designated as "outfitting concessions". In each outfitting concession, a guide outfitter has the exclusive right to supply guides to non-resident hunters in that concession. Non-resident hunters in the Yukon Territory are prohibited from hunting big game animals unless accompanied by a guide.

[5] The concessions are generally transferable and may be renewed indefinitely, subject to limitations found in the regulatory scheme, and thus are, in the judge's words, "valuable property".

[6] The outfitting concession in issue had been held by the appellants Mr. Heynen and Kusawa Outfitters Ltd. since 1967. It was revoked by the Minister on March 27, 2002. When the concession was revoked, Mr. Heynen was 72 years old. Although it is clear on the evidence that the concession had considerable value (perhaps $1 million or more) Mr. Heynen was not afforded the opportunity to sell it.

[7] In May 2002, a member of the Opposition asked a question concerning revocation of the concession in the Legislature and the Minister, in response, referred to violations by Mr. Heynen of provisions of the ***Wildlife Act***. Thus at least as of May 2002, the concession's revocation was a public matter.

[8] In October 2002, Mr. Heynen commenced an action by issuing a writ of summons. Although the judge was critical of the pleadings in that action, the writ gave notice, within seven months of revocation, that Mr. Heynen was seeking some form of redress.

[9] A short time later, in November 2002, a general election effected a change in the Yukon government. Mr. Heynen then sought to settle his complaint and had discussions with representatives of the government with that objective. His hopes for reconsideration of the decision to revoke the outfitting concession were not realized.

[10] In March 2003, Mr. Heynen started another proceeding, seeking an order of certiorari and damages. Like the first, this action was not commenced as a judicial review petition, but rather by writ of summons. In the statement of claim filed in December 2004, the appellants sought an order that "the revocation . . . be reviewed and set aside" and "the current Minister . . . be directed to issue an [o]utfitting [c]oncession", as well as an award of general, punitive and aggravated damages. In their statement of defence, also filed in December 2004, the defendants pleaded that the plaintiffs were "not entitled to judicial review of the Minister's decision because such review was not previously sought in a timely and proper manner".

[11] In April 2005, the two actions were consolidated by a consent order, but still the challenge to the Minister's decision was not the subject of a separate judicial review petition. The judge was rightly critical of the form of proceedings, observing that the claim for an order of certiorari should have been made in a petition for judicial review. It was not, however, and the parties proceeded on the writs. There was significant delay between the commencement of the second action and the hearing of the judicial review issues. In the judge's words "[t]he judicial review aspects of the case became obscured by a battle over compensation". Finally, in January 2007, the appellant agreed that the matter should proceed as judicial review and it was set for hearing in June 2007.

[12] In his reasons dismissing the appellants' claim, the judge referred both to the one-year delay in filing the second writ, and to the delay in setting the matter for hearing. He said:

> [101] The plaintiff says that there is a strong policy in the courts in the favour of settlements, and that the court ought, therefore, to accept settlement negotiations, even lengthy ones, as proper explanations for delay.
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> [102] I find the plaintiff's explanation difficult to accept. While courts should and do encourage settlements in many contexts, care must be taken in accepting private settlements as things to be fostered in the context of public law. Here, the Minister [of Renewable Resources] made a discretionary administrative decision. Though he was a politician, the decision was in no sense meant to be a political one. Once he made it, the decision was final. A new Minister had no discretion to reverse it, much less did members of the House, other than the Minister [of Renewable Resources], have any discretion to reverse it, other than, perhaps, through new legislation. Much less, again, did unelected supporters or members of the governing party have any right to interfere with the decision. Private agreements over public law disputes ought not, in my view, to be generally encouraged, at least where the issues are not of a policy or political nature.
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> [103] It may be argued, however, that all Mr. Heynen was doing was exhausting alternative remedies, something generally encouraged in public law. It must be recognized, however, that there are often numerous avenues of redress that an aggrieved party may pursue: the ombudsman's office, for example, or informal intervention from the person's member of the assembly. A person is welcome to choose those remedies as alternatives to the courts. A person cannot, however, expect to serially approach various agencies in the hope that eventually one will accede to his or her viewpoint.
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> [104] Judicial review is intended to be a speedy summary remedy. The period of one year prior to the filing of the writ seeking judicial review in this case was too long, and suggests political motivations behind the delay. The further delays in filing the statement of claim, and in settling upon judicial review as the nature of the litigation are also not inspiring.
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> [105] In my view, great damage would be occasioned to our system of administration of justice if delays of the sort that occurred here were countenanced in the name of amicable settlements of public law

> issues. Such issues generally should be dealt with in the open, rather than in private discussions with politicians or in confidential reports commissioned by a government.
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> [Emphasis added.]

[13] In the result, the judge exercised his discretion against granting the relief sought, on the basis of unreasonable delay.

Discussion

[14] The issue before this court is whether the judge erred in failing to quash the Minister's revocation of the outfitting concession on the basis that the appellants' delay in seeking judicial determination of the issue was unreasonable. In my view, and without considering the fresh evidence, the answer is yes.

[15] The granting of certiorari is discretionary: ***The Queen v. Sheward*** (1880), 9 Q.B.D. 741 (C.A.) *per* Bramwell L.J.; and it may be refused on the basis of unreasonable delay: ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1. ***Burchill v. Commissioner of the Yukon Territory***, 2002 YKCA 4, is an example of this court refusing discretionary relief on the basis there was unreasonable delay in bringing the action.

[16] Because the order appealed was made in the exercise of the judge's discretion, this court may interfere only if the judge considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion: ***Canadian Pacific Ltd. v. Matsqui Indian Band***, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129.

[17] Here the question for the judge was whether there was unreasonable delay such that he ought not to make the order sought. What is unreasonable delay depends upon the circumstances of the case. In deciding whether to make the order the judge should bear in mind the apparent merits of the case and the prejudice that may flow to either side on the exercise of the discretion: ***MacLean v. University of British Columbia Appeal Board*** (1993), 87 B.C.L.R. (2d) 238, 109 D.L.R. (4th) 569 (C.A.). The circumstances to be considered of course include the nature of the impugned decision and its place in the legislative scheme, the reason for the delay and the extent of the delay. That the latter factor, however, is not determinative is illustrated by ***Re McColl*** (1973), 42 D.L.R. (3d) 763, 14 C.C.C. (2d) 365 (B.C.S.C), a case in which certiorari was ordered 23 years after the impugned order was made and 15 years after the applicant became aware of the order.

[18] Here the judge said the one-year delay in seeking an order quashing the revocation of the concession was “too long” and he described the delay in prosecuting the action as “not inspiring”. Reading his reasons for judgment as a whole, however, I consider that these are simply observations as to the arithmetic of the delay, and not the reason for declining to make the order sought. That decision rests upon his rejection of the reason proferred by the appellants for the delay and the view he took of Mr. Heynen’s efforts to settle the case outside the courtroom. The judge observed that although the prejudice resulting from the delay was “fairly minor”, the explanation for it was “very much wanting”. That is, he centered his exercise of discretion on the explanation for the delay and his view that the

settlement avenues attempted by the appellants detracted in some fashion from the system of administration of justice.

[19] With respect, I do not agree that the avenues of attempted resolution could occasion damage to the administration of justice as stated by the judge, or are otherwise improper or are to be discouraged.

[20] The comments of the judge deprecating the appellants' explanation for the delay are directed to the appellants' efforts to settle the dispute by approaching elected representatives and government officials, the propounding of the appellants' cause by a member of the Opposition in the Legislature, and the appellants' subsequent attempts to resolve this dispute after the general election. I do not consider these criticisms well-founded. A citizen should always be able to seek proper assistance from an elected member of the Legislature, and no detriment should flow to that citizen if an act of public administration is publicly questioned on the floor of the Legislature. This is the foundation of our parliamentary system. Nor could one criticize this as an attempt to reach "a private agreement" over a public law dispute. While settlements are not forged in public, any agreement here, had it been reached, would have become a matter of public record.

[21] Government actions to settle disputes and such agreements may be the product of discussions not open to the public. Yet the product can never be characterized as "private".

[22] Nor is it correct, in my view, to impugn the potential for settlement of a dispute outside the formal arena of the court process. It is, in my respectful view, mistaken to suggest that this delay for the reasons advanced by the appellants would occasion "great damage … to our system of administration of justice". The system of administration of justice is not fragile. It is robust and can well withstand some delay while a party seeks to sort a matter through with elected representatives, provided the nature of the issue does not require early finality, or there is not a degree of prejudice as to outweigh the benefit of settlement. Here, the judge found the prejudice was "fairly minor". Without commenting upon the appellants' contention that there was simply no evidence before the judge to support this conclusion, "fairly minor" prejudice is not sufficient for that purpose.

[23] With respect, I have concluded that the judge erred in basing his conclusion of unreasonable delay on the overtures of the appellants to elected representatives and government officials.

[24] In this case, full consideration of the discretion available to the judge was bound to include the seriousness of the breach of natural justice to the appellants, and the nature and importance to them of the decision. In other words, some consideration of the prejudice to the appellants is part of a balanced decision, just as is the degree of prejudice to the respondents: ***Turnagain Holdings Ltd. v. Environmental Appeal Brd. et al.***, 2002 BCCA 564, 6 B.C.L.R. (4th) 30; ***MacLean v. University of British Columbia Appeal Board***, *supra*.

[25] Here the judge concluded that the breach was “serious”. The reasons for judgment on the issue of remedy do not allude to this factor. Nor do they reflect the serious loss occasioned to the appellants by the impugned decision. I respectfully conclude that the judge erred in failing to consider these relevant factors. Further, when these factors are considered, and recognizing the minimal prejudice to the respondents found by the judge, I conclude that the appellants should obtain the relief sought.

[26] For these reasons, I would set aside the order and grant an order quashing the Minister’s decision of March 27, 2002, revoking the concession in issue.

[27] Given the conclusion I have reached, I would dismiss the appellants’ fresh evidence application on the basis it would have no effect upon the outcome of the appeal. As a consequence, the respondents’ fresh evidence application should also be dismissed.

“The Honourable Madam Justice Saunders”

I Agree:

“The Honourable Madam Justice Newbury”

I Agree:

“The Honourable Mr. Justice Chiasson”