SUPREME COURT OF YUKON

Citation: *White River First Nation v. Yukon (Energy, Mines and Resources)*, 2013 YKSC 10

Date: 20130204
S.C. No. 12-A0090
Registry: Whitehorse

Between:

CHIEF EIKLAND JR. on his own behalf and on behalf of all other members of WHITE RIVER FIRST NATION and WHITE RIVER FIRST NATION

Petitioners

And

THE MINISTER OF ENERGY, MINES AND RESOURCES, and THE YUKON GOVERNMENT, and ROBERT HOLMES, in his capacity as Director of Mineral Resources Branch, Ministry of Energy, Mines and Resources, and TARSIS RESOURCES LTD.

Respondents

Before: Mr. Justice R.S. Veale

Appearances:

Krista Robertson	Counsel for the petitioners
Laurie Henderson and Penelope Gawn	Counsel for the respondents Yukon Government and Holmes
Thomas Isaac	Counsel for the respondent Tarsis
Lino Bussoli	Counsel for Kluane First Nation

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Kluane First Nation to be a party respondent in this proceeding. White River First Nation and the Yukon Government oppose the application.

[2] The White River First Nation petitions the court for, among other things, a declaration that the Yukon Government has a duty to consult, and if appropriate, accommodate the White River First Nation about the Decision Document permitting Tarsis Resources Ltd. to proceed with a class 3 Mining Land Use permit. The Decision Body rejected the recommendations in the Evaluation Report that the Tarsis Project not proceed because of significant adverse effects on the Chisana Caribou Herd and First Nation traditional land use and culture that cannot be mitigated. White River First Nation seeks a declaration that the duty to consult has been breached and asks that the Decision Document be quashed or suspended on terms.

THE FACTS

[3] Kluane First Nation entered into a Final Agreement with Canada and Yukon in 2003. Prior to that, the Kluane First Nation and the White River First Nation had been amalgamated historically into one First Nation or Indian Band. White River has not signed a Final Agreement. The White River and Kluane First Nations have the same traditional territory that has not been divided.

[4] Kluane First Nation participated in the environmental and socio-economic evaluation of the Tarsis Project carried out by the Haines Junction Designated Office, which culminated in a Designated Office Evaluation Report dated July 30, 2012 (the “Evaluation Report”).

[5] The Kluane First Nation made submissions to the Designated Office that identified significant impacts to the environment and wildlife, with explicit identification of the Kluane Caribou Herd as being potentially affected.

[6] A cursory reading of the Evaluation Report indicates that the views of White River Nation and Kluane First Nation were both given consideration, although specific reference was made to the Chisana Caribou Herd on which White River Nation has had a voluntary ban on hunting since 1994. Both First Nations requested in 2003 that the herd be “Specially Protected.”

[7] The Designated Office recommended to Energy, Mines and Resources (the “Decision Body”) that the Tarsis Project not be allowed to proceed as it will result in “significant adverse effects to wildlife and wildlife habitat (specifically to the Chisana Caribou Herd) and First Nation traditional land use and culture that cannot be mitigated.”

[8] The Decision Body reviewed the submissions of the Kluane First Nation to the Designated Office and concluded that the concerns could be addressed by strict monitoring, and further: “Given that Kluane did not appear to have any outstanding concerns with the project, no consultation was directly undertaken with it by the Decision Body.”

[9] Pursuant to s. 74(2) of the *Yukon Environmental and Socio-Economic Assessment Act*, S.C. 2003, c. 7, (“*YESAA*”), the Decision Body did, however, consult with White River First Nation as it is a First Nation without a Final Agreement. It rejected the recommendations of the Haines Junction Designated Office and approved the Tarsis Project with variation.

[10] White River First Nation filed this petition for judicial review of that decision but did not name Kluane First Nation as a respondent. It did provide Kluane First Nation with a copy of the petition. The petition, while complex and lengthy, essentially relies on

the allegations that the Yukon Government has breached its duty to consult and, where appropriate, accommodate White River First Nation on what may be described as a *Haida Nation* analysis that applies to First Nations with aboriginal rights and claims but no settlement or Final Agreement (see *Haida Nation v. British Columbia (Ministry of Forests),* 2004 SCC 73). The claim is both statutory and constitutional and does not seek any declaration about aboriginal rights or traditional territory. However, the two First Nations have not resolved the division of their traditional territory and overlap areas.

[11] Kluane First Nation has filed a Response that does not oppose the declaration that there was a breach of the duty to consult White River First Nation but opposes the application to quash or suspend the Decision Document.

[12] The Kluane First Nation Response goes on to seek additional relief based on its Final Agreement. It alleges that the Yukon Government breached its duty to consult with it before the Decision Document was issued. The Response also alleges that the Decision Body failed to consult Kluane First Nation and that any declaration with respect to the White River First Nation must take into account treaty rights and traditional territory overlap rights. I will refer to these claims as Final Agreement Relief.

Party Respondent Status

[13] This application for respondent status in judicial review has been addressed in *Western Copper Corporation v. Yukon Water Board*, 2010 YKSC 61, and more recently in *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd.*, 2011 YKSC 29.

[14] In those decisions, I ruled that the Yukon *Rules of Court* create a simplified, cost-effective approach to party status for a person served with a petition under Rule 10(5).

[15] As set out in para. 49 of *Western Copper*, the person served has three choices:

1. they can do nothing and not participate in the proceeding;
2. they can file an appearance and a response, thereby becoming a party respondent with the right to appeal and court costs exposure; or
3. they can apply for intervenor status to avoid court costs exposure.

[16] The advantages to proceeding on this basis are at para. 51 of *Western Copper:*

1. the party status of all interested persons who file an appearance is established at the outset;
2. an interested party who files an appearance as a respondent has costs consequences and a right of appeal;
3. in circumstances where respondent status is not appropriate, the status of a party may be discussed in case management; and
4. the petition or an “interested person” may apply to obtain intervenor status for such person.

[17] This procedure is a simplified way to avoid the all-too-common initial application of all parties to determine status, which is both time-consuming and costly to litigants.

[18] In the case at bar, the Yukon Environmental and Socio-Economic Board filed an appearance but has declined further participation. Kluane First Nation has filed an appearance and a Response which has been challenged by other parties in case management; they call upon the inherent jurisdiction of this Court and Rule 15(5)(a) to deny respondent party status to Kluane First Nation.

Disposition

[19] There is no doubt that Kluane First Nation is “directly affected” by the order sought pursuant to Rule 54(5) and should have been named as a respondent at the outset. The Tarsis Project is in its traditional territory, it made submissions in the assessment by the Designated Office, and it will be affected whether the Tarsis Project proceeds or not.

[20] The parties opposing the application point out that Kluane First Nation did not participate in the procedure before the Decision Body that resulted in the Decision Document. However, the statutory duty to consult in s. 74 of *YESAA* explicitly does not apply to Kluane First Nation, and the common law constitutional duty to consult analysis set out in *Haida Nation* applies to First Nations without a Final Agreement or land claim settlement. However, Kluane First Nation clearly has an interest in this judicial review of the Tarsis Project.

[21] The real crux of the opposition to respondent status for Kluane First Nation is based on its claim for Final Agreement Relief in its Response, which claims a completely different duty to consult for a First Nation with a Final Agreement. It should be pointed out that the Form 11 Response does not provide for setting out a new claim for relief but confines the respondent to the outline of relief in the Petition.

1. that is not opposed;
2. that is opposed;
3. that is consented to.

[22] This format has the objective of confining the respondent to the relief claimed by the Petitioner and should not be used to raise new claims for relief.

[23] Kluane First Nation is free to commence its own Petition and claim its own relief, but it cannot expand upon the relief claimed in a Petition. This would result in the White River First Nation case for judicial review being hijacked and delayed to consider a completely different claim for relief.

[24] I am therefore granting the Kluane First Nation party respondent status, but its position on relief is limited as follows:

1. the Respondent does not oppose the granting of the relief set out in the following paragraphs of the (White River First Nation) Petition: Paragraphs 1, 2, 7, 8 and 9;
2. the Respondent opposes the granting of the relief set out in the following paragraphs of the (White River First Nation) Petition: Paragraphs 4 and 5.

[25] The remainder of the Response is struck and not part of this Petition. Kluane First Nation may request a case management meeting to determine whether any affidavit response is required.

VEALE J.