

# SUPREME COURT OF YUKON

Citation: *Taku River Tlingit First Nation v Yukon (Government of)*  
2016 YKSC 12

Date: 20160218  
S.C. No. 13-A0147  
Registry: Whitehorse

Between:

TAKU RIVER TLINGIT FIRST NATION

Plaintiff

And

GOVERNMENT OF YUKON

Defendant

Before Mr. Justice R.S. Veale

Appearances:

Stephen Walsh  
John J.L. Hunter, Q.C. and Mark Radke

Counsel for the Plaintiff  
Counsel for the Defendant

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] The Government of Yukon (“Yukon”) applies to adjourn the summary trial of this matter pending the outcome of the appeal in *Ross River Dena Council v Government of Yukon*, 2015 YKSC 45 (“*Ross River v Yukon*”) on the ground that the declaration sought in the case at bar is essentially the same as the case under appeal. In that case, Ross River Dena Council has appealed and Yukon has cross-appealed.

[2] The other similar declaration regarding mineral staking has been substantially resolved by Yukon’s admission that it has a duty to consult before granting mineral rights in the Taku River Tlingit First Nation traditional territory in Yukon.

[3] The matter of the campground is under negotiation and may be resolved but remains outstanding.

## **BACKGROUND**

[4] In each case, the First Nation seeks a declaration that Yukon has a duty to consult and, where indicated, accommodate prior to issuing hunting licences and seals under the *Wildlife Act*, R.S.Y. 2002, c. 229, in the traditional territory of the First Nation. In addition, the First Nation seek a declaration that the failure to consult is a breach and inconsistent with the honour of the Crown.

[5] In *Ross River v Yukon*, I found that there was a duty to consult but the consultation had been met. I also denied the declaration on the ground that they should be used sparingly.

[6] While the declarations sought are exactly the same, the First Nations are different with Taku River Tlingit First Nation being located in Northern British Columbia, while Ross River Dena Council is wholly within the Yukon. The traditional territories are quite different with Ross River Dena Council having a large traditional territory comprising 7% of Yukon and the Taku River Tlingit First Nation having a very small claim in Yukon on the northern end of Atlin Lake.

[7] In each case, Yukon has filed an extensive affidavit outlining all the interactions between the Wildlife Branch and the respective First Nations, studies conducted and actions taken. These affidavits differ in terms of species, studies and locations but both essentially claim extensive consultation between the Wildlife Branch and the First Nations. The number and location of Game Management Zones differ as well.

## THE LAW

[8] Yukon relies on a case granting a temporary stay. In *Apotex Inc. v. Sanofi-Aventis*, 2012 FC 553, the Federal Court trial division awarded damages to Apotex pursuant to s. 8 of the *Patented Medicines (Notice of Compliance) Regulations* due to delay in selling its generic version of a pharmaceutical drug.

[9] That decision is under appeal and has not been resolved. In the Superior Court action, *Apotex Inc. v. Schering Corp.*, 2013 ONSC 1411, Apotex makes a treble damages claim on the same facts as in the Federal Court case under the Ontario *Statute of Monopolies*, R.S.O. 1897, c. 323, and the Court opined on the circumstances where a court can issue a stay of proceedings, on its own initiative. Stinson J. stated at para. 9.

In *Hollinger International Inc. v. Hollinger Inc.*, [2004] O.J. No. 3464 at para. 5 (S.C.J.), Farley J. summarized the relevant factors a court will consider when deciding whether to issue a temporary stay pending the resolution of another proceeding:

- (a) whether there is substantial overlap of issues in the two proceedings;
- (b) whether the two cases share the same factual background;
- (c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and
- (d) whether the temporary stay will result in an injustice to the party resisting the stay.

## **ANALYSIS**

### **Is there substantial overlap of issues?**

[10] There is no doubt that the issues are precisely the same, i.e. whether there should be a declaration that Yukon has a duty to consult and accommodate before the annual issuance of licences and seals in the traditional territory of the respective First Nation under the *Wildlife Act*.

### **Is there the same Factual Background?**

[11] The factual background is of the same kind, i.e. the facts surrounding game management consultation, studies and planning. However, Game Management Zones are different as well as the wildlife populations, their distribution and the wildlife taken in the various wildlife management zones.

### **Will a temporary stay prevent unnecessary and costly duplication of judicial and legal resources?**

[12] It is quite possible that the appeal in *Ross River v. Yukon* will avoid further costs in this case if the trial judgment is confirmed. In the event that the trial decision is overturned, there may be agreement on the appropriate remedy in this action. Although it is entirely speculative as to the outcome in the Court of Appeal in *Ross River v Yukon*, there is no question that some certainty will result in terms of how to proceed in the case at bar. At best, it would appear that there would be less likelihood of an appeal in the case at bar.

### **Will the temporary stay result in an injustice?**

[13] Counsel for Taku River Tlingit First Nation submits that there will be an injustice if the summary trial does not proceed before this year's annual harvest.

[14] However, that assumes that the judgment will be rendered before the issuance of licences and seals and further that it will not simply be stayed and heard in appeal at the same time as *Ross River v. Yukon*.

## **DECISION**

[15] I find that the summary trial would be a duplication of judicial and legal resources if heard before the appeal in *Ross River v Yukon*. If this case does proceed to summary trial after the Court of Appeal decision, it would be more focussed and a better use of judicial and legal resources.

[16] Balancing the four factors above, it is appropriate to adjourn the summary trial pending the outcome of the Court of Appeal decision in question.

[17] Counsel for Taku River Tlingit First Nation has the conduct of the appeal and can ensure that the appeal moves forward with dispatch. In the event that the appeal is not heard in the Spring or Fall sitting in 2016, counsel may bring this matter to case management to set a new date for the summary trial.

[18] The summary trial set for February 22, 23 and 24, 2016, is adjourned generally.

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VEALE J.