SUPREME COURT OF YUKON

Citation: *Teslin Tlingit Council v. Canada (Attorney General)*, 2019 YKSC 3

Date: 20190115
S.C. No. 17-A0131
Registry: Whitehorse

BETWEEN

TESLIN TLINGIT COUNCIL

PETITIONER

AND

THE ATTORNEY GENERAL OF CANADA

RESPONDENT

Before Chief Justice R.S. Veale

Appearances:
Gregory J. McDade, Q.C. — Counsel for the Petitioner
Glen Jermyn and
Eden Alexander — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This case involves the interpretation of the Teslin Tlingit Council Final Agreement (the "Final Agreement") and the Teslin Tlingit Council Self-Government Agreement (the "Self-Government Agreement"), both signed May 29, 1993. Both Agreements follow the template in the Yukon-wide Umbrella Final Agreement dated May 29, 1993. Teslin Tlingit Council ("TTC") is a Yukon First Nation consisting of inland Tlingit people that occupy a traditional territory in central and southern Yukon and northern British Columbia, with its government offices in Teslin, Yukon.

[2] Teslin Tlingit Council brings an application for the following declarations:

1. A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward a Self-Government Financial Transfer Agreement ("FTA") that has "comparability" as its objective, and has refused or failed to do so;

2. A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate bilaterally with TTC toward an FTA that takes into account TTC's capital and operation needs, and has refused or failed to do so;

3. A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward an FTA that provides funding based on TTC Citizenship, not on Citizens who are "Status Indians" under the Indian Act, and has refused or failed to do so;

4. A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward an FTA that considers TTC's jurisdiction and responsibilities as a Self-Governing Yukon First Nation, and has refused or failed to do so;

5. A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward an FTA that is structured to ensure equal treatment of TTC citizens and essential public services of reasonable quality and has refused or failed to do so;

> *6. A declaration that in accordance with the TTC Final and Self-Government Agreements, Canada has a legal obligation to negotiate with TTC toward a progressive FTA that takes into account appropriate adjustment and has refused or failed to do so;*

[3] TTC submits that Canada has failed to negotiate the aforementioned principles as required in its Self-Government Agreement, since 2010. TTC submits that Canada does not treat the principles set out in ss. 16.1 and 16.3 of the Self-Government Agreement as legally binding and presently has no mandate to negotiate the principles with TTC.

[4] Canada submits that it is negotiating and that it would be inappropriate to make a declaration to do what it is already doing. Canada submits that it has entered into a national Collaborative Process with representatives of self-governing Indigenous governments, initially including TTC. Canada submits that the Collaborative Process has resulted in the jointly drafted 2017 Draft Policy, addressing the principles set out in s. 16.3 of the Self-Government Agreement. In fact, Canada submits that granting the six declarations would hinder or potentially disrupt the FTA renewal negotiations with TTC and other Yukon First Nations.

[5] It is Canada's submission that s. 16 of the Self-Government Agreement is an agreement to negotiate, not an agreement to conclude a FTA.

[6] TTC submits that the Collaborative Process and the 2017 Draft Policy do not replace Canada's legal obligation to negotiate a self-government FTA in accordance with ss. 16.1 and 16.3 of the Self-Government Agreement.

[7] For the reasons set out below, I declare that Canada has a legal obligation to negotiate a self-government FTA with the Teslin Tlingit Council pursuant to the Final Agreement and ss. 16.1 and16.3 of the Self-Government Agreement, that takes into account funding based on TTC Citizenship and has failed to do so. I also declare that in the negotiations with TTC, all factors in s. 16.3 may be taken into account. Accordingly, these Reasons for Judgment will address the status / non-status issue referred to in the declaration.

[8] The balance of declarations applied for by TTC are not granted.

BACKGROUND

[9] The Umbrella Final Agreement is a monumental agreement whose purpose is to provide a renewed relationship between Canada, Yukon and Yukon First Nations. The Umbrella Final Agreement was signed by Canada, Yukon and Yukon First Nations as represented by the Chairperson of the Council for Yukon Indians. The Council for Yukon Indians was formed in 1973 as an amalgamation of the Yukon Native Brotherhood (Status Indians) formed in 1968 and the Yukon Association of Non-Status Indians formed in 1971. The Council for Yukon Indians changed its name to the Council of Yukon First Nations in 1995. The unity of status and non-status Yukon Indian people was a significant achievement of Yukon First Nations, Canada and Yukon.

[10] Teslin Tlingit Council, one of the first four Yukon First Nations to settle their land claims, signed both the Final Agreement and the Self-Government Agreement, on May 29, 1993, after some 20 years of negotiation.

[11] It should be noted that in 1993, there were four First Nation Self-Government Agreements. There are now 11 Yukon First Nation Self-Government Agreements and a total of 25 in Canada.

[12] The Teslin Tlingit Council, in their Final Agreement, modelled on the Umbrella Final Agreement, relinquished their claim to title to 90% of their Traditional Territory in exchange for a number of enumerated agreements, some of which have been interpreted by the Supreme Court of Canada in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 ("*Little Salmon/Carmacks*") and *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58 ("*Nacho Nyak Dun*").

[13] In the case at bar, I will focus on the following:

a) The fact that enrollment as a Citizen of Teslin Tlingit Council was not based on status or being registered under the *Indian Act* which discriminated against the so-called non-Status Indians. Rather, Chapter 3 of the Final Agreement required a person to establish that they were of 25% or more Indian ancestry, or a descendant of such person, who was ordinarily resident in the Yukon between January 1, 1800 and January 1, 1940. This definition of Citizenship was a monumental achievement because it terminated the colonial and divisive status versus non-status distinction that artificially divided Yukon First Nation members.

b) Chapter 24 of the Final Agreement created the principle of Yukon Indian Self-Government, which for the first time in Yukon history created a nation-to-nation relationship between Teslin Tlingit Council, Canada and

Yukon. Chapter 24.2.0 of the Final Agreement sets out an extensive list of subjects for negotiation.

c) Sections 16.1 and 16.2 of the Self-Government Agreement state the following:

> 16.1 Canada and the Teslin Tlingit Council shall negotiate a self-government financial transfer agreement in accordance with 16.3, with the objective of providing the Teslin Tlingit Council with resources to enable the Teslin Tlingit Council to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation.
>
> 16.2 Subject to such terms and conditions as may be agreed, the self-government financial transfer agreement shall set out:
>
> 16.2.1 the amounts of funding to be provided by Canada towards the cost of public services, where the Teslin Tlingit Council has assumed responsibility;
>
> 16.2.2 the amounts of funding to be provided by Canada towards the cost of operation of Teslin Tlingit Council government institutions; and
>
> 16.2.3 such other matters as Canada and the Teslin Tlingit Council may agree.

[14] Section 16.3 sets out 10 factors which are to be taken into account as follows:

> 16.3 In negotiating the self-government financial transfer agreement, Canada and the Teslin Tlingit Council shall take into account the following:
>
> 16.3.1 the ability and capacity of the Teslin Tlingit Council to generate revenues from its own sources;
>
> 16.3.2 diseconomies of scale which impose higher operating or administrative costs on the

Teslin Tlingit Council, in relation to costs prevailing prior to conclusion of this Agreement;

16.3.3 due regard to economy and efficiency, including the possibilities for co-operative or joint arrangements among Yukon First Nations for the management, administration and delivery of programs or services;

16.3.4 any funding provided to the Teslin Tlingit Council through other Government transfer programs;

16.3.5 demographic features of the Teslin Tlingit Council;

16.3.6 results of reviews pursuant to 6.6;

16.3.7 existing levels of Government expenditure for services to Yukon First Nations and Yukon Indian People;

16.3.8 the prevailing fiscal policies of Canada;

16.3.9 other federal Legislation respecting the financing of aboriginal governments; and

16.3.10 such other matter as Canada and the Teslin Tlingit Council may agree.

[15] The significance of these provisions, which are mirrored in the 10 other First Nation Self-Government Agreements, cannot be underestimated.

[16] For the first time in Yukon history, Yukon First Nations could become self-governing and end the paternalistic colonial administration of Canada, as well as the discriminatory status / non-status division created by successive governments of Canada based on the *Indian Act*.

[17] Approximately 25% of TTC's 765 Citizens were non-status before the signing of the Final Agreement. However, Canada provides funding based upon those Citizens of

TTC who were Status Indians under the *Indian Act* at the time of legislating the *Yukon First Nations Land Claims Settlement Act,* S.C. 1994, c. 34.

[18] This discrepancy is no secret. Financial Transfer Agreements are negotiated for five-year terms subject to extensions. In the years following the 2000 Financial Transfer Agreement, Canada, Yukon and Yukon First Nations participated in several joint reviews; the 2006 Government Expenditures Needs Study; the 2007 Yukon First Nation Self-Government Financial Transfer Agreement Review (the "2007 Review"); the 2007 Implementation Reviews; and the 2008 Gross Expenditure Base Review. These reviews identified the problems which included:

a) Inadequate funding for programs and services and treaty implementation;

b) Insufficient funding for Yukon First Nation human resources;

c) Shortfalls in funding regarding capital, infrastructure and housing, particularly in light of significant expansion of capital needs, but funding support being tied to or dictated by the funding provided to the predecessor Indian Bands;

d) Fiscal support for governance also being derived from the predecessor "Band Support Funding", rather than consideration of expanded governance-responsibilities and authorities;

e) Funding being tied to Status Band members within a Nation, rather than all Citizens; and

f) Heavy reliance on proposal driven funding, which in principle is at odds with the SGAs [Self-Government Agreements], and practically diverts time, attention and resources away from governing.

[19] By way of example, the 2007 Review undertaken jointly by Canada and seven Yukon First Nations, including Teslin Tlingit Council, addressed the status / non-status funding discrepancy as follows:

> 2.6 Citizen-Based Funding
>
> SGYFN [Self-Governing Yukon First Nation] responsibility and authority under their SGAs now extends to all Citizens, both Status and Non-Status, resident throughout Yukon and beyond. Even without considering certain services also delivered to Citizens resident outside of the Yukon, SGYFNs must provide programs and services to, on average, more than double the number of Citizens. The funding flowing through the new SGFTAs did not account in any way for this significant increase in number of persons for whom SGYFNs are now responsible.
>
> <u>More than three quarters of the funding SGYFNs receive through their SGFTAs is provided through PSTAs [Program and Service Transfer Agreements]. This is the same funding provided to the predecessor *Indian Act* bands.</u> This disparity is most apparent in respect of programs transferred pursuant to PSTA 1 and PSTA 2, which provided resources for, among other things, the operation of SGYFN governing institutions, housing and capital infrastructure programs, and health programs. With the exception of an increase to account for indirect program costs provided by DIAND [Department of Indian Affairs and Northern Development], these resources were the same as or less than had been provided to the predecessor *Indian Act* bands for the benefit of status Indians resident on Reserve Land or Land Set Aside. Small subsequent adjustments have been made to include other DIAND governance programs for status Indians or to provide access to enhancements DIAND has made available to *Indian Act* bands. <u>However, there has been no adjustment for the fundamental differences in requirements for the predecessor *Indian Act* bands and what is required to address the responsibilities of SGYFNs which now include non-status Citizens.</u>
>
> The SGYFNs' governance institutions are operated for all Citizens equally, whether status or non-status. With respect to the programs and service delivery for which SGYFNs assume responsibility, SGYFNs read SGA 16.1 to mean that

> their SGFTAs are intended to put all their Citizens in Yukon in comparable circumstances with respect to the overall bundle of services they receive from governments (SGYFN, Canada, and Yukon).
>
> According to their Constitutions, SGYFNs are obliged to provide programs of equal quality to all Citizens, which include both status and non-status Indians. These same Constitutions were reviewed and approved by Canada prior to ratification. The funding SGYFNs received was not determined with this in mind. Accordingly, it is difficult to conclude that this funding is adequate to deliver reasonably comparable levels of services to all of their Citizens in Yukon. [footnote 19 omitted] (my emphasis)

[20] Unfortunately, the identification of these funding problems did not result in Canada addressing them in the 2010 Financial Transfer Agreement negotiations.

[21] Although Canada provided a limited increase in funding in 2010, it was not based upon s. 16.3 or the previously identified funding deficiencies. Even more aggravating, at the last minute, Canada unilaterally imposed additional changes to the definition of "own source revenues" which are deducted from the FTA funding.

[22] In 2015, the negotiations leading up to the expiry of the 2010 Financial Transfer Agreement did not address the funding gaps. The 2015 Financial Transfer Agreement was extended two more years to March 2017 and ultimately one more year to March 31, 2018. Teslin Tlingit Council filed this Petition on December 18, 2017. In March 2018, Teslin Tlingit Council entered into a third one-year interim agreement to March 31, 2019, as it had no option but to continue funding for its First Nation government even though Canada continued to fund TTC based on the number of Status Indians under the *Indian Act*. Extension Agreements commit Canada to continue negotiations to consider the factors in s. 16.3 which it has failed to do.

The 2015 Fiscal Approach to Self-Government Arrangements

[23] Canada released a new federal policy in July 2015 entitled "Canada's Fiscal Approach to Self-Government Arrangements" (the "2015 Fiscal Approach"). The parties are in agreement that the 2015 Fiscal Approach was the first time that Canada's methods and approaches to FTAs were made transparent to the public and the parties.

[24] However, the 2015 Fiscal Approach made no change to the calculation of an aboriginal population:

> 462. **Population/volume** – Population or volume adjusters are used to modify funding amounts to reflect changes in the population of an Aboriginal community or the recipients of a program. For general population data, Canada will use Indian Registry data for members/citizens of the Aboriginal Government who are registered Indians living on Aboriginal Government Lands. ...

[25] In other words, the default position of Canada using the demographic of registered Status Indians under the *Indian Act* would continue.

The Collaborative Process

[26] The Government of Canada changed in October 2015 and the new Minister of Indigenous and Northern Affairs Canada ("the Minister") received a mandate to establish a new fiscal relationship with all 25 self-governing First Nations.

[27] In March 2016, the Land Claims Agreement Coalition, a First Nation coalition, which initially included the TTC, made a recommendation to work collaboratively with Canada and other partners to fully implement modern treaties. In response, Canada has embarked on the Collaborative Process with representatives of Self-Governing Indigenous governments. In February 27, 2018, the federal budget committed $189 million for 2018 – 2019 to begin implementation of the Collaborative Process. In part,

the Collaborative Process is Canada's attempt to create a policy that can be applied to each of the 25 self-government agreements to ensure a national policy fair to all.

[28] The TTC withdrew from the Collaborative Process in the fall of 2016 to focus on the meaningful implementation of the Teslin Tlingit Council Final Agreement and Self-Government Agreement. Since then, Canada has failed to negotiate and address the major problems with the Teslin Tlingit Council Fiscal Transfer Agreement but has continued to pursue a draft policy in the Collaborative Process.

[29] The relationship between Teslin Tlingit Council and Canada with respect to the Collaborative Process is best expressed by the parties.

[30] In January 9, 2017, Teslin Tlingit Council lead negotiator wrote to the Minister as follows:

> TTC has since withdrawn from this national fiscal initiative as its imperatives prejudice the foundation of Canada's constitutional and contractual commitment to provide adequate "resources" to TTC under the terms of the TTC treaty, SGA, and the common law.

[31] The Minister responded on June 21, 2017, as follows:

> With respect to your concerns regarding the negotiations toward a renewed Financial Transfer Agreement, I can assure you that Canada's negotiating team aims to work with your team to respond comprehensively to your renewal proposal and to proceed in a timely and positive manner.
>
> We are interested in working with Teslin Tlingit Council on examining such matters as fiscal strategies to close socioeconomic gaps, existing funding transfer levels, service population, and infrastructure as part of the Financial Transfer Agreement renewal process, <u>while remaining consistent with developments on the collaborative fiscal policy process. These are substantive issues, but I remain optimistic that the collaborative process provides a venue for collective and constructive dialogue that will inform the</u>

> federal mandate to address fiscal matters or specific concern to Teslin Tlingit Council. (my emphasis)

[32] In other words, the substantive negotiation with TTC must await the completion of the collaborative fiscal policy process.

[33] In August 2017, Teslin Tlingit Council formally presented Canada with its proposal (the "August 2017 Proposal") for the 2018 Financial Transfer Agreement. Canada's negotiator did not respond to the August 2017 proposal until March 14, 2018. This was a matter of weeks before the expiry of the 2018 Financial Transfer Agreement, which asked questions about the August 2017 Proposal. The Senior Negotiator for Canada acknowledged that the March 2018 extension was not responsive to the August 2017 Proposal of Teslin Tlingit Council.

[34] In the Meantime, Canada pursued its Collaborative Process. Meetings continued throughout the fall of 2016, winter and spring of 2017 culminating in the June 17, 2017 Report co-authored by representatives from Indigenous governments and Canada, that noted:

> Service population is a prime factor in the expenditure need of all governments. In the Indian Act context, the service population is defined as status Indians on reserve. In the Self Governing Indigenous Government ("SGIG") context, Indian Band funding has often remained the default basis for funding programs and services. However, SGIG responsibilities often extend to broader populations which may be defined in the respective treaty or self-government agreement (eg. members, citizens, residents), and these definitions do not necessarily correspond to status Indians and/or on land base. The appropriate calculation for expenditure needs must address the differences.

[35] This is a repetition of the failure identified in the 2007 Review cited above.

[36] The Collaborative Process continued and on December 13, 2017, Canada and representatives from Indigenous governments produced a comprehensive policy framework proposal (the "2017 Draft Policy"). The 2017 Draft Policy has been approved by Cabinet but the Revenue Capacity annexes "as a guide for further fiscal policy development" have not been approved by Cabinet. Counsel for Canada advises that the annexes on Revenue Capacity, Governance, Culture Language and Heritage and Social well-being gaps-closing are currently in the process of seeking Cabinet approval.

[37] To be fair, the Senior Negotiator for Canada maintains that he is ready to negotiate and is optimistic that negotiations will take place. However, he acknowledges that he has no mandate and I find that he has not negotiated as of the date of this hearing. The Senior Negotiator put it this way in cross-examination at p. 81:

> Q And not be speculative. As of today you do you have a mandate to make an offer for a new FTA to TTC?
>
> A From my perspective the question of a mandate is an interesting one because I certainly have a mandate to engage in negotiations with TTC. And do I have - - if the question is, you know, for - - again, we're bleeding into an area that I'm not sure is an area that I'm comfortable with, <u>but I say that it is not yet in my instructions to be able to, on behalf of the Government of Canada, provide a financial offer to the Teslin Tlingit Council for inclusion in a new financial transfer agreement.</u> (my emphasis)

[38] So Canada's position is that it is ready to negotiate and indeed is negotiating but, in the words of the Senior Negotiator, at p. 38:

> ...
>
> And so notwithstanding the fact that the self-government agreements confer the ability – the jurisdiction, the ability to make laws over all citizens of these communities themselves, they have the power to determine their own citizenship, they have long

> argued that that is the same population that should be reflected in the fiscal arrangements. Canada to date has not shared that perspective. (my emphasis)

FACTS

[39] I make the following findings of fact:

1. The Teslin Tlingit Council Final Agreement is premised on a blood quantum definition Citizenship which may include Status Indians under the *Indian Act* and non-Status Indians who were not registered under the *Indian Act*.
2. The FTAs with Teslin Tlingit Council since 2010 have been based only on those Citizens who were registered as Status Indians under the *Indian Act*.
3. Approximately 25% of TTC's 765 Citizens are non-Status and the First Nation is obligated to provide them with the same services provided to all its Citizens.
4. Various government reviews and particularly the joint 2007 Review have confirmed the failure to fund non-status Citizens.
5. Canada's 2015 Fiscal Approach was the first time that Canada's methods and approaches to First Nation Fiscal Transfer Agreements were transparent to the First Nations and the Canadian public. It remained committed to the default position that the First Nation population was calculated on the number of Status Indians registered under the *Indian Act*.
6. The Collaborative Process is a joint process by self-governing First Nations and Canada, resulting in the 2017 Draft Policy, which has been

approved by the federal Cabinet but without Revenue Capacity annexes which have not been approved at the date of this hearing.

7. TTC presented its August 2017 Proposal to Canada for a FTA to be concluded by March 31, 2018.

8. Canada did not respond to the TTC August 2017 Proposal until its March 14, 2018 response and the March 2018 extension was not responsive to the TTC August 2017 Proposal.

9. Canada's Senior Negotiator does not have a mandate to negotiate a FTA for the 2019 year after the expiry of the 2018 FTA on March 31, 2019.

10. Canada, since the 2010 FTA, has continued to revert to its "default position" of providing funding for the Citizens of TTC based upon the Status Indians registered under the *Indian Act*.

11. There is a real disagreement between Canada and the Teslin Tlingit Council on the appropriate funding for its Citizens.

ISSUES

Issue 1: Does Canada have a legally binding obligation to negotiate a Self-Government Financial Transfer Agreement with TTC that takes into account funding based on the Citizens of TTC as defined by Chapter 3 – Eligibility and Enrollment of the TTC Final Agreement; and has it failed to do so?

[40] In my view, there is a misconception in Canada's interpretation of its legal obligation under the Final Agreement and the Self-Governing Agreement. Canada acknowledges its legal obligation to negotiate with TTC "with a view to concluding a self-government agreement appropriate to the circumstances" of TTC.

[41] Section 24.12.1 of the Final Agreement states:

> 24.12.1 Agreements entered into pursuant to this chapter and any Legislation enacted to implement such agreements shall not be construed to be treaty rights within the meaning of section 35 of the Constitution Act, 1982.

[42] With reference to s. 24.12.1, Canada submits that the Self-Governing Agreements and Financial Transfer Agreements are not constitutionally protected and shall not be construed to be treaty rights pursuant to s. 35 of the *Constitution Act, 1982*.

[43] Canada then submits that we are not addressing a treaty right under s. 35 of the *Constitution Act, 1982*, but rather a solemn obligation to negotiate pursuant to ss. 16.1 and 16.3 of the Self-Government Agreement.

[44] The implication for Canada's interpretation is that it effectively ignores or downplays the constitutional obligation that flows from Chapter 3 Eligibility and Enrollment. Canada, Yukon, and Yukon First Nations agreed to open up eligibility for First Nation citizenship based on a definition of blood quantum rather than being limited to Status Indians registered under the *Indian Act*. I have described this as a monumental achievement of the Umbrella Final Agreement because it embodied the principle that there would no longer be two classes of Indians; those with status and funding under the *Indian Act* and those without status and funding. That was the premise and the promise of the Umbrella Final Agreement. It is not honourable to agree to a blood quantum definition of TTC Citizenship and continue to apply funding based on under the *Indian Act*.

[45] In my view, Canada and TTC have a two-dimensional or hybrid agreement. On the one hand, Canada has explicitly agreed to open up citizenship to a blood quantum

definition open to all Yukon Indians. On the other hand, while Canada has not explicitly agreed to fund every Citizen of TTC, it has solemnly agreed in the Self-Government Agreement to negotiate the demographic features of TTC, among other factors "with the objective of providing the Teslin Tlingit Council with resources to enable the Teslin Tlingit Council to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation."

[46] The Supreme Court of Canada in *Nacho Nyak Dun,* in para. 1, expressed the unique significance and promise of modern treaties as follows:

> 1 As expressions of partnership between nations, modern treaties play a critical role in fostering reconciliation. Through s. 35 of the *Constitution Act, 1982*, they have assumed a vital place in our constitutional fabric. Negotiating modern treaties, and living by the mutual rights and responsibilities they set out, has the potential to forge a renewed relationship between the Crown and Indigenous peoples (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 10; *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, *Restructuring the Relationship* (1996), at pp. 3, 10, 40-41 and 56). This case highlights the role of the courts in resolving disputes that arise in the context of modern treaty implementation.

[47] In *Little Salmon/Carmacks*, at para. 10, the Supreme Court of Canada stated:

> 10 The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is

> as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

[48] The Nunavut Court of Appeal commented on the Crown's failure to fulfill its obligations under the Nunavut Land Claims Agreement as follows in *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2, at para. 67:

> … If the Land Claims Agreement contains a covenant to do something, the appellant is obliged by that covenant to do it. It has never been a defence to breach of contract that: "Sorry, we ran out of money", or "Sorry, we never included that in our budget". If the covenant in the Land Claims Agreement requires a fixed amount of funding, that amount must be provided. If the covenant creates an obligation to fund, but without a fixed amount, the amount must be determined in accordance with the proper interpretation of the covenant (possibly, a "reasonable" amount). If the covenant in the Land Claims Agreement requires the appellant to do something, the appellant must find the necessary funds to perform. Thus, having agreed to put in place a monitoring program, the appellant must provide the necessary funding. …

[49] Successive governments of Canada have failed to negotiate a FTA based on TTC Citizenship. To be clear, Canada does not have an express legal obligation to fund every TTC Citizen, but it must negotiate the demographic features of TTC as agreed upon in Chapter 3 of the Final Agreement.

[50] I therefore answer the issue posed above in the affirmative but I do so in the context that s. 16.3 of the Self-Government Agreement requires "polycentric" negotiations. In other words, s. 16.3 requires a consideration of competing factors or as the Crown puts it, a balancing of factors that includes benefits and costs. See *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, at paras. 28, 36 and 48.

[51] However, I have not granted the balance of the applied for declarations because they involve specific factors that cannot be taken into consideration individually or in isolation.

Issue 2: Should this Court grant declaratory relief?

[52] The focus of Canada's submission in this case has been the extent to which the Collaborative Process fulfills the legal obligation to negotiate a self-government financial transfer agreement in accordance with ss. 16.1 and 16.3 of the TTC Self-Government Agreement. In my view, it is not appropriate to conflate negotiations in the Collaborative Process with Canada's legal obligation in the Final Agreement and the Self-Government Agreements.

[53] There is general agreement between TTC and the Crown that granting a declaration pursuant to Rule 5(21) of the Supreme Court of Yukon's *Rules of Court* is a discretionary exercise and must be on a principled basis as follows:

1. There must be utility in granting the declaration based on a real dispute and not a hypothetical one (*Canada v. Solosky*, [1980] 1 S.C.R. 821; *Ross River Dena Council v. Yukon*, 2012 YKCA 14).
2. There must be a cognizable threat to a legal interest before the courts will entertain the use of a declaration as a preventive measure (*Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441; *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539; and *Kaska Dena v. British Columbia (Attorney General)*, 2008 BCCA 455, at para. 13).
3. Courts have a long-standing preference for negotiated settlements and avoiding court intervention. See *Haida Nation v. British Columbia (Minister*

of Forests), 2004 SCC 73, at para. 14. Recently, in *Nacho Nyak Dun,* the Supreme Court reiterated both the principle of judicial forbearance and appropriate court scrutiny of Crown conduct as follows:

> 33 … It is not the appropriate judicial role to closely supervise the conduct of the parties at every stage of [page593] the treaty relationship. This approach recognizes the *sui generis* nature of modern treaties, which, as in this case, may set out in precise terms a co-operative governance relationship.
>
> 34 That said, under s. 35 of the *Constitution Act, 1982*, modern treaties are constitutional documents, and courts play a critical role in safeguarding the rights they enshrine. Therefore, judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance.

[54] Canada makes four submissions on why court intervention is not appropriate:

a. Court intervention in the fiscal negotiations is inconsistent with reconciliation, the nation-to-nation relationship, and the intended FTA negotiation process;

b. Canada's negotiation position is for the Minister to decide;

c. The declarations are TTC's interpretation of the guiding provisions, which are a subject for FTA negotiation; the declarations would have no practical effect in resolving the negotiation dispute; and

d. There is no real dispute – Canada has negotiated and still negotiates with TTC towards a renewed FTA in good faith and in accordance with the Final and Self-Government Agreements.

[55] Canada also submits that the Collaborative Process should prevail as it:

a. Shows Canada's commitments to develop a new fiscal relationship that is based upon a renewed government-to-government relationship and respect for treaties;

b. Recognizes that Indigenous governments should have government-to-government access to Canada funding initiatives, such as infrastructure money; and

c. Contains important commitments from Canada to close the current well-being gaps that exist between Indigenous and non-Indigenous communities as a result of colonialism, residential school and chronic underfunding.

[56] I will address the collaborative fiscal policy process first. This Court does not wish to diminish the achievements emerging from the Collaborative Process. First Nations and Canada are clearly on the road to a renewed government-to-government relationship.

[57] Canada relies on this Court's decision in *Taku River Tlingit First Nation v. Canada (Attorney General)*, 2016 YKSC 7 ("*Taku River*"). In *Taku River*, Canada had agreed to negotiate a Land Claims Agreement but would not proceed to negotiate the Taku River transboundary claim in the Yukon until a settlement agreement was concluded in British Columbia. In other words, Canada was prepared to negotiate but took a "not now" position despite the urgency and high priority of the transboundary claim.

[58] This Court did not declare the specific terms of Canada's duty to negotiate the Taku River transboundary claims honourably. Nor should it do so now. However, the

Court stated, at para. 122, that policies and mandates cannot trump the duty to negotiate honourably.

[59] In my view, the same reasoning applies to the TTC Final Agreement and s. 16 of the Self-Government Agreement. The national Collaborative Process cannot trump the constitutional legal obligation of Canada to negotiate honourably pursuant to the Final Agreement and ss. 16.1 and 16.3 of the Self-Government Agreement. Teslin Tlingit Council left the Collaborative Process in 2016 and Canada has continuously failed to negotiate pursuant to its legal obligation since 2010.

[60] Canada submitted that this declaration is inconsistent with reconciliation and the nation-to-nation relationship. On the contrary, this declaration promotes reconciliation by ensuring that Canada negotiates the demographic features of TTC on a timely basis which successive governments of Canada have failed to do. The hopeful wishes of Canada's Senior Negotiator notwithstanding, Canada is legally obligated to negotiate and a declaration accordingly is appropriate given the years of failing to negotiate the demographic issue.

[61] This declaration does not interfere with the Minister's negotiating position.

[62] Canada submits that the declaration will have no practical effect. I do not agree with that submission as the declaration requires Canada to address the demographic issue before the expiry of the FTA on March 31, 2019.

[63] Canada submits there is no real dispute and that it has been negotiating honourably. Canada may be negotiating the policy in the Collaborative Process but it has not negotiated the status / non-status Citizenship issue with TTC.

[64] The fact that Canada has consistently reverted to its default position indicates that there is a real dispute impacting the ability of TTC to service its Citizens. The concept of self-government for First Nations holds great promise as it is embraced by Canada and First Nations. However, self-government financing must be negotiated in an honourable way to ensure First Nations survive and thrive. It also ensures that Canada and TTC continue their journey down the road to reconciliation.

[65] The government of Canada may be on the cusp of negotiating a Financial Transfer Agreement, but this Court has an obligation to ensure that Canada negotiates honourably and in a timely manner, to fulfill the premise and the promise of the Final Agreement and the Self-Government Agreement.

CONCLUSION

[66] I declare that Canada has a legal obligation to negotiate a self-government FTA with Teslin Tlingit Council pursuant to the Final Agreement and ss. 16.1 and 16.3 of the Self-Government Agreement, that takes into account funding based on TTC Citizenship and has failed to do so.

[67] I also declare that in negotiations with TTC, all factors in s. 16.3 may be taken into account.

[68] Counsel may speak to costs, if necessary, in case management.

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VEALE C.J.