COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Tr'ondëk Hwëch'in v. Canada***,
2004 YKCA 0002 err1

Date: 20040123
Docket: YU494

Between:

Tr'ondëk Hwëch'in

Appellant
(Petitioner)
(Respondent on Cross-Appeal)

And

Her Majesty the Queen in Right of Canada, Government of the Yukon and Canadian United Minerals Inc.

Respondents
(Respondents)
(Appellant on Cross-Appeal)

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hall

G.R. Thompson and S. Walsh	Counsel for the Appellant
F.L. Lamer and K.D. Parkkari	Counsel for the Respondent Canadian United Minerals Inc.
P. Gawn and M. Leask	Counsel for the Respondent Government of the Yukon
M. Radke	Counsel for the Respondent HMTQ in Right of Canada
Place and Date of Hearing:	Vancouver, British Columbia 28 November 2003
Place and Date of Judgment:	Vancouver, British Columbia 23 January 2004

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] This case concerns certain mineral claims known as the Horn Mineral Claims (the "Horn Claims") which are located in Tombstone Territorial Park some distance north-east of Dawson City in the Yukon. On 6 May 1997 Canadian United Minerals Inc. ("CUMI") acquired these claims, which had been staked on 8 March 1997 and registered on 10 March 1997. The park in question is part of territory covered by the Tr'ondëk Hwëch'in Final Agreement (the "THFA"), a Land Claims Settlement under the ***Yukon First Nations Land Claim Settlement Act***, R.S.C. 1994, c. 34. The THFA was signed on 16 July 1998, about a year after the acquisition by CUMI of the Horn Claims, and was made effective 15 September 1998.

[2] The claims were held initially under the provisions of the ***Yukon Quartz Mining Act***, R.S.C. 1985, c. Y-4, subsequently repealed and replaced by the ***Quartz Mining Act***, S.Y. 2003, c. 14. On 17 December 1999, the Mining Land Use and Reclamation branch received an application from CUMI. This was a proposal seeking a five-year exploration permit with respect to the Horn Claims. The Chief, Mining Land Use and Reclamation ("Chief, MLUR"), an appointee of the Minister under the statute, ordered a hearing to consider the issuance of an exploration permit. A public hearing was held in early May

2000 in Dawson City and submissions were received from several parties, including the appellant Tr'ondëk Hwëch'in ("Tr'ondëk"), departments of the Federal and Yukon government and environmental groups. On 31 May 2000, the Chief, MLUR issued a permit authorizing certain exploration activities on the claims.

[3] In late June 2000, Tr'ondëk filed a notice of application in the Federal Court Trial Division seeking judicial review of the decision of the Chief, MLUR. The hearing of this application was scheduled to commence on 29 May 2001, but on 20 April 2001 Tr'ondëk discontinued the judicial review application. Thereafter, on 19 February 2002, Tr'ondëk filed a petition in these proceedings in the Supreme Court of the Yukon Territory. It sought declarations in the following terms:

> A declaration that prior to the establishment of the Territorial Park referred to in section 3.1 of Schedule "A" to Chapter 10 of the Tr'ondëk Hwëch'in Final Agreement, the lands within the "Core Area" and "Study Area 1" referred to in section 2.1 of Schedule "A" are subject to, and shall be managed in accordance with, the objectives set out in section 1.0 of Schedule "A" to Chapter 10 of the Tr'ondëk Hwëch'in Final Agreement; and
>
> A declaration that the mining claims known as the "Horn Claims" located in "Study Area 1" and recorded in the name of the respondent Canadian United Minerals Inc. are subject to, and shall be managed in accordance with, the objectives set out in

> section 1.0 of Schedule "A" to Chapter 10 of the Tr'ondëk Hwëch'in Final Agreement;

[4] CUMI entered an appearance to this application. It also filed an application in the Supreme Court of the Yukon Territory seeking various declarations. It sought a declaration that the regulation of the Horn Claims and exploration mining rights appurtenant thereto were governed by the ***Yukon Quartz Mining Act*** and a declaration that the Horn Claims were not subject to the provisions of the THFA and were not required to be managed in accordance with the objectives set out in s. 1.0 of Schedule "A" to Chapter 10 of the THFA. Both petitions came on for hearing before Hudson J., who issued Reasons for Judgment on 17 January 2003: see 2003 YKSC 7. He essentially dismissed both applications; however, as described later in the reasons, he did grant two declaratory orders. Hudson J. set out his conclusions as follows:

> 61 Therefore, commencing with an examination of the indication of the intention of the parties in the letter from the government negotiators to the petitioner and flowing through the statutes referred to and the relevant provisions of the Agreement, my interpretation on a purposive basis is that the Horn claims are not "subject to" the objectives described in s. 1 of Schedule "A" and the declarations sought by Tr'ondëk are therefore denied.
>
> 62 With respect to the petition of CUMI, while it may be that the denial of the Tr'ondëk request satisfies their wishes, I nonetheless wish to proceed to make the following declarations, which

> relate to both petitions and are in keeping with the duty of the court to provide utility to the parties in their ongoing relationship.
>
> 63 This court declares that the duly recorded holders of the 22 Horn claims shall retain the right to operate and manage the said claims and exercise all their rights pursuant to the provisions of the *Yukon Quartz Mining Act, supra*.
>
> 64 This court further declares that those persons or entities with authority under the YQMA and regulations thereunder, particularly Part II thereof, and in carrying out their duty to uphold the essential socio-economic and environmental values of the territory shall make their decisions and exercise their discretion only after considering and observing the objectives set out in s. 1 of Schedule "A" to Chapter 10 of the THFA.

[5] Although he dismissed the application for relief sought by Tr'ondëk, he did give the appellant some partial relief by declaring, in para. 64, that the authorities ought to exercise their discretion relative to development of the claims "only after considering and observing the objectives set out in s. 1 of Schedule "A" to Chapter 10 of the THFA". Further, Hudson J. did not grant the relief sought by the holder of the claims, CUMI, although he did declare that they possessed the right to operate and manage the claims under the provisions of the then applicable statute, the ***Yukon Quartz Mining Act***.

[6] Tr'ondëk appeals to this Court and CUMI cross-appeals. Tr'ondëk argues that the judge erred in his interpretation of the provisions of the agreement, that he erred in having

regard to extraneous evidentiary material, namely a letter antecedent to the agreement concerning the intentions of the parties to the THFA. On its cross-appeal, CUMI argues that the judge should have granted declarations in wider terms, consistent with those it sought in its application in the Supreme Court. On the appeal, CUMI, supported by Canada, argues that the judge did not err in refusing the declaratory relief sought by Tr'ondëk in the court below. The Government of the Yukon submits that Hudson J. did not err in the decision he made and seeks to sustain his judgment.

[7] I agree with the appellant that the construction and interpretation of the THFA is the substantial issue in this appeal. By way of background, it should be noted that the claims here were staked at a time when the THFA was still being negotiated. The boundaries of the park were not fixed prior to the signing of the agreement and were not finally delineated until 1999, a time after the coming into force of the THFA.

[8] The Horn Claims are located in what is described as a study area adjacent to the core area of this park. Schedule "A" to Chapter 10 of the THFA deals with the establishment and the future management of Tombstone Park. The stated objectives of the establishment of the park included

protection of a natural area of territorial significance, the recognition and protection of traditional and current use by Tr'ondëk Hwëch'in people and the encouragement of public awareness and enjoyment of the natural, historical and cultural resources of the park as well as the provision of economic opportunities to the Tr'ondëk Hwëch'in in the development, operation and management of the park. The appellant Tr'ondëk placed considerable stress on s. 12.2 of Schedule "A". This section provides that "prior to establishment of the park under 3.1, the Core Area and Study Area 1 shall be managed in accordance with the objectives set out in 1.0". The respondent CUMI, however, lays considerable stress on a number of sections found in s. 3 of Appendix "A", which is headed "Establishment". This respondent relies particularly upon ss. 3.5 and 3.6, which read as follows:

> 3.5 Following determination of the boundaries of the Park pursuant to 5.0, and subject to 3.6, Canada shall prohibit entry on the Park for the purpose of locating, prospecting or mining under the Yukon Quartz Mining Act, R.S.C. 1985, c. Y-4 and the Yukon Placer Mining Act, R.S.C. 1985, c. Y-3, withdraw the Park from the disposal of any interest pursuant to the Territorial Lands Act, R.S.C. 1985, c. T-7 and prohibit the issuance of interests under the Canadian Petroleum Resources Act, R.S.C. 1985 (2d Supp.), c. 36 in the Park.
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> 3.5.1 Following determination of the boundaries of the Park pursuant to 5.0, and subject to 3.6, no one may carry out any

> activities related to the exploration or production of Oil and Gas in the Park.
>
> 3.5.2 Following determination of the boundaries of the Park pursuant to 5.0, and subject to 3.6, no one may explore for coal in the Park.
>
> 3.6 For greater certainty, the provisions of 3.3 and 3.5 shall not apply in respect of:
>
> 3.6.1 existing recorded mineral claims and leases under the Yukon Quartz Mining Act, R.S.C. 1985, c. Y-4 and existing recorded placer mining claims and leases to prospect under the Yukon Placer Mining Act, R.S.C. 1985, c. Y-3;

[9] The respondent CUMI argues that the effect of ss. 3.5 and 3.6 is to "grandfather" existing claims such as the Horn Claims. Hudson J. agreed with that submission and dismissed the application of Tr'ondëk seeking the relief noted in para. 3, *supra*.

[10] A fundamental difficulty that I perceive with the instant case is that there was no actual decision that was being appealed against before Hudson J. In the present circumstances, the dimensions of any *lis* between the parties are not entirely clear. When the appellant Tr'ondëk launched the judicial review proceedings in the Federal Court, they were seeking to overturn the decision of the Chief, MLUR that granted a permit to CUMI to do exploration work on the Horn Claims. Therefore, in those circumstances, an actual decision

made by a tribunal was in issue and could be passed by the court in the judicial review proceedings. By contrast, in the instant proceedings the heads of declaratory relief sought by Tr'ondëk and CUMI in the Supreme Court was framed in quite wide terms.

[11] I appreciate the point, made by counsel for the appellant, that this was an application for the construction or interpretation of a document, namely the THFA. However, when one considers the scope of the declarations sought by CUMI and Tr'ondëk herein, it appears to me that what was really being sought from the Supreme Court was something in the nature of an advisory opinion. I believe that the courts ought to be cautious in acceding to requests of this sort. A court may of course grant declaratory relief where no other relief is sought. But a court may properly exercise its discretion to refuse a declaration where the relief sought is not related to an existing and defined *lis*.

[12] As I noted, the appellant Tr'ondëk and the respondent CUMI refer to and rely upon those portions of the agreement said to advance their respective cases. The appellant argues that the learned judge erred in giving any weight to correspondence between the parties which antedated the staking of the claims and the conclusion of the THFA. It also submits

that the trial judge failed to give proper weight to ss. 2.6.7 and 10.1.1 of the agreement which, respectively, provide as follows:

> Objectives in Settlement Agreements are statements in the intentions of the parties to a Settlement Agreement and shall be used to assist in the interpretation of doubtful or ambiguous expressions.
>
> . . .
>
> 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.

[13] The appellants also complain that the trial judge failed to give proper weight to s. 2.6.6, which provides that settlement agreements are to be interpreted according to the canons of construction contained in the ***Interpretation Act***, R.S.C. 1985, c. I-21. Section 12 of the ***Interpretation Act*** provides "every enactment is deemed remedial and should be given such fair large and liberal construction and interpretation as best ensures the attainment of its objects". The appellant suggests that the judge also erred in referring to the case of ***Eastmain Indian Band v. Robinson*** (1992), [1993] 1 F.C. 501, 99 D.L.R. (4th) 16, [1993] 3 C.N.L.R. 55 (C.A.), leave to appeal refused, [1993] 3 S.C.R. vi, 104 D.L.R. (4th) vii, [1993] 4 C.N.L.R. vi, a case wherein the Federal Court of

Appeal noted that modern agreements or treaties may be susceptible of a different analytical approach than treaties entered into in an earlier era.

[14] Although Hudson J. did make reference to the previous correspondence that expressed a view of government that support for the withdrawal of mines and minerals in respect of the area proposed for the park was predicated upon an assumption that mineral holders would not be adversely affected, the judge did go on to note that, while s. 3.2 of Schedule "A" appeared to reflect the above view of government, he did not find that the wording of s. 3.2 gave rise to any uncertainties or doubts as to the meaning of the section. He considered that this portion of the agreement plainly spelled out such intention. In other words, he found no particular ambiguity in the provision which the respondent CUMI argues grandfathers its rights in the Horn Claims.

[15] I agree with Hudson J. that there is no ambiguity in that particular section. It seems plain to me that s. 3.2 provides for recognition of the prior existing rights. Accordingly, I do not perceive any need to rely upon earlier correspondence or to consider provisions of the ***Interpretation Act***. Although the judge did make reference in his judgment to the earlier correspondence, I am not persuaded that he utilized this

correspondence in construing the agreement. I consider that he correctly construed these provisions of the THFA, having regard to the plain words of the agreement.

[16] It is, of course, a sound canon of construction to construe an agreement in its entirety. That principle was referred to by McIntyre J., giving judgment of the majority of the court, in ***St. Peter's Evangelical Lutheran Church (Ottawa) v. The Council of the Corporation of the City of Ottawa***, [1982] 2 S.C.R. 616 at 626, 140 D.L.R. (3d) 577, 45 N.R. 271. Section 12.2 is a general statement of the approach to the management of the area of Tombstone Park to be taken prior to the final establishment of the park. The provisions of 3.6, on the other hand, are of considerable specificity and contain this phraseology: "for greater certainty, the provisions of 3.3 and 3.5 shall not apply in respect of", *inter alia*, "recorded mineral claims -- under the *Yukon Quartz Mining Act* --- existing on the Effective Date".

[17] I am in agreement with Hudson J. that the language employed in this portion of the agreement very clearly points to the conclusion that the parties were agreed that the establishment of this park area would not nullify the existing rights of the owners of mineral claims that had previously been validly located in the park area. What is clearly

envisaged in the THFA is a moratorium on future staking activity, but equally clearly, there was to be no interference with the rights of those who held previously staked claims.

[18] Hudson J. made specific reference to s. 134 of the ***Yukon Quartz Mining Act***, now s. 130 of the ***Quartz Mining Act***, which provides that the operation of the claims is to be done in a manner that upholds the essential socioeconomic and environmental values of the territory. That concept was specifically referred to by the Chief, MLUR, the official who in May 2000 granted CUMI a permit to carry on exploration work on the Horn Claims. I am in respectful agreement with the conclusion of Hudson J. that the terms of the THFA clearly manifest an intention of the parties to grandfather the mineral rights of the respondent CUMI. Therefore, I would dismiss Tr'ondëk's appeal.

[19] Turning to the cross-appeal taken by CUMI, it seems to me that there was no basis to grant the declarations sought by CUMI. I am in respectful agreement with Hudson J.'s decision not to grant this relief.

[20] Indeed, it also appears to me that there was no proper basis for Hudson J. to grant the declarations contained in paras. 63 and 64 of his Reasons for Judgment. These are set forth in para. 4, *supra*. Obviously, those charged with the

administration of the legislative regime in the Yukon will be required to have regard to both the existing statutory regime governing mining and exploration activity and the THFA. These are all existing circumstances that will govern future decision making by officials charged with such duties. The declaration made by Hudson J. at para. 63 of the Reasons appears to me to simply direct that the provisions of applicable legislation ought to be applied to these claims. In my view, that is a common place that requires no declaration by any court. With regard to the declaration made in para. 64 of the Reasons, that again seems to simply express the sentiment that those officials charged with making decisions concerning the exploration or development of the Horn Claims should have regard to the existence and terms of the THFA. Again, I do not consider that this requires any declaration from a court because the existence and terms of the THFA are circumstances that undoubtedly will be taken account of by those who are charged with making these types of decisions. It appears to me that the declarations made by Hudson J. and contained in these paragraphs deal with matters that can properly be left to be considered, at least in the first instance, by those officials charged with the administration of matters related to mining exploration and development in the Yukon. The courts may at some point in the

future have a role to play if a decision should be questioned in proceedings taken by an interested party but I do not incline to the view that such broad prospective statements of principle by a court are either necessary or helpful.

[21] In conclusion, both the appeal and the cross-appeal should be dismissed and I would direct that the declarations contained at paras. 63 and 64 of the Reasons should be set aside. Costs should follow the event, but, as at present advised, I would not be inclined to make any order for costs in this Court for or against the Government of Canada or the Government of the Yukon.

"The Honourable Mr. Justice Hall"

I Agree:

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Madam Justice Newbury"

Corrigendum: Hall JA Date: January 27, 2004

In the third line of para 16 the reference was changed from "MacIntyre J." to "McIntyre J."