Federal Court  Cour fédérale

Date: 20120830

Docket: T-1995-10

Citation: 2012 FC 1043

Ottawa, Ontario, August 30, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

REPRESENTATIVE PROCEEDING

BETWEEN:

GRAND CHIEF SAMUEL GARGAN on his own behalf and on behalf of all members of the DEHCHO FIRST NATIONS

Applicants

and

THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and TLICHO GOVERNMENT

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion by the respondents, The Attorney General of Canada and The Minister of Indian Affairs and Northern Development, for an order dismissing the applicants' judicial review application of Order-in-Council (OIC) SI/2010-84 on the grounds that it has been rendered moot. The respondents also request costs.

Background

[2] This case arises from the implementation of the Northwest Territories Protected Areas Strategy (the NWT PAS). The NWT PAS was developed through multi-stakeholder participation from government, Aboriginal organizations, industry groups and non-industry organizations. It was intended to address concerns about the effects of mining on unique and important ecological regions in the Northwest Territories.

[3] The NWT PAS outlined the following eight-step process for accomplishing its goals:

1. Identify priority areas of interest;
2. Prepare and review protected area proposal at regional level;
3. Review and submit proposal for candidate protected area status;
4. Consider and where necessary, apply interim protection for candidate area;
5. Evaluate candidate area;
6. Seek formal establishment of protected area;
7. Approve and designate protected area; and
8. Implement, monitor and review protected area.

[4] The NWT PAS was officially signed in 1999 and shortly thereafter, the Horn Plateau in the Edéhzhíe was announced as one of the first candidate sites under the NWT PAS Implementation Phase.

[5] The Edéhzhíe area is situated in the Mackenzie Valley in the Dehcho Region, within Treaty 11 in the Northwest Territories. The headwaters of three major drainage basins are located in the Edéhzhíe area: the Horn, Willowlake and Rabbitskin Rivers. The Edéhzhíe area is valued for its natural, cultural and spiritual importance by several First Nation communities. These communities are represented by the applicant, the Dehcho First Nations.

[6] Pursuant to the first four steps of the NWT PAS process, the Edéhzhíe Candidate Protected Area (the Candidate Area) has been protected since June 2002 through successive OICs that have provided interim withdrawals of surface and subsurface right dispositions in the area.

[7] To implement the fifth step of the NWT PAS process, an Edéhzhíe Working Group comprising, amongst others, representatives of the applicants, Indian and Northern Affairs and the Government of Northwest Territories was established to assess the ecological, cultural and economic values of the area. After completing several ecological and non-renewable resource assessments, the Edéhzhíe Working Group made a joint recommendation that an area covering 57% of the original Candidate Area, referred to as the Edéhzhíe Recommended Boundary Area (the Recommended Area), be established as the permanent protected area. However, agreement was not reached on how subsurface protection would be achieved.

[8] Based on the Edéhzhíe Working Group's joint recommendation and pursuant to the sixth step of the NWT PAS, the applicant Dehcho Grand Chief Sam Gargan and the Tlicho Government Grand Chief Joe Rabesca submitted a formal request to the respondent, the Minister of Indian and

Northern Affairs, for a designation of the Edéhzhíe National Wildlife Area with a permanent subsurface land withdrawal in the Recommended Area.

[9] Following receipt of this request, the respondents adopted OIC SI/2010-84, which came into force on October 31, 2010 for a two year period. Under this OIC, the surface rights for the Candidate Area as a whole were withdrawn from disposition. However, the underlying subsurface rights were not withdrawn and were therefore available for disposition. This differed from previous interim OICs over the Candidate Area, all of which had withdrawn both surface and subsurface rights from disposition. As a result of this decreased level of protection and the respondents' diversion from the agreed upon NWT PAS eight-step process, the applicants brought a judicial review application of OIC SI/2010-84.

[10] In their judicial review application, the applicants applied for various declarations and orders. They first applied to the Court for declarations that the respondents were in breach of:

1. Their agreement with the applicants, pursuant to the NWT PAS, to protect the Recommended Area;

2. Their agreement to negotiate in good faith with the applicants on the protection of the Candidate Area;

3. Their agreement to provide interim protection of the Candidate Area pending the completion of the NWT PAS Process; and

4. Their constitutional obligation to consult and, if appropriate, accommodate the applicants with respect to the decision to only extend partial protection to the Candidate Area and make the subject lands available for disposition of subsurface rights.

[11] The applicants then applied for, *inter alia*, orders:

1. Quashing OIC SI/2010-84;

2. Directing the respondents to protect the Recommended Area in accordance with the NWT PAS;

3. In the alternative, directing the respondents to negotiate in good faith with the applicants on the protection of the Recommended Area and to implement interim protection of the Candidate Area pending completion of the NWT PAS;

4. Directing the respondents to consult and, if appropriate, accommodate the applicants with respect to the decision to only extend partial protection to the Candidate Area and make the subject lands available for disposition of subsurface rights; and

5. Providing interim protection of the Candidate Area, or alternatively the Recommended Area, pending a final determination of this Court on that application, prohibiting any prospecting, staking, locating or recording of any claim within that area.

[12] Recently, on December 8, 2011 and pursuant to subsection 23(a) of the *Territorial Lands Act*, RSC 1985, c T-7, the Governor in Council passed OIC PC 2011-1537. On December 21, 2011, this OIC was registered as SI/2011-111.

[13] This new OIC repeals OIC SI/2010-84; the subject of the applicants' judicial review application. There are two main differences between the two OICs: OIC SI/2010-84 applied to the Candidate Area as a whole whereas the new OIC SI/2011-111 only applies to the Recommended Area; and OIC SI/2010-84 withdrew only surface rights from disposition, whereas OIC SI/2011-111 withdraws both surface and the subsurface rights from disposition in the subject area.

Issues

[14] The respondents submit the following points at issue:

1. Does the Court have the jurisdiction to strike an application?

2. Is the application for judicial review moot?

3. Is there any reason that the Court should exercise its discretion to hear and decide the application despite the matter being moot?

[15] I would rephrase the issues as follows:

1. Is the application for judicial review filed by the applicants moot?

2. In the alternative, if the application is moot, should this Court exercise its discretion and hear the application?

Respondents' Written Submissions

[16] The respondents submit that as OIC SI/2010-84 has been repealed by OIC SI/2011-111, a judicial review of OIC SI/2010-84 would now only be of hypothetical interest and is moot.

[17] The respondents submit that the Court does have the jurisdiction to strike out an application where it is so clearly improper as to be bereft of any possibility of success, or where it is clear that the relief sought has become moot.

[18] The respondents submit that as OIC SI/2010-84 is now repealed, there is no longer any live controversy with regards to the rights of any of the parties relating to it. Thus, the application for judicial review of OIC SI/2010-84 is moot.

[19] Despite a matter being moot, the respondents acknowledge that the Court has the discretion to determine a matter if the circumstances so warrant. However, such discretion should be exercised sparingly and with consideration of the appropriate factors. In referring to this Court's decision in *Democracy Watch v Canada (Attorney General)*, 2004 FC 969, [2004] FCJ No 1195, the respondents submit that the following three part framework should be applied in considering whether to hear an application despite it being moot:

1. Is there a continuing adversarial relationship?

2. Are there any special circumstances to warrant applying scarce judicial resources to resolving the legal issues posed in the application?

3. Would the Court be stepping beyond its adjudicative role if it were to continue to hear the application?

[20] First, the respondents submit that as OIC SI/2010-84 is no longer in force and as there is nothing deriving from its prior existence that could currently affect the parties, there are no collateral consequences that may arise if this Court does not hear the application. The respondents submit that an adversarial relationship between the parties, with regards to the subject matter of the applicants' judicial review application, no longer exists.

[21] Second, the respondents submit that there are no special circumstances to justify continuing this judicial review. The respondents note that as OIC SI/2010-84 no longer has any effect on the legal rights of the parties, the requests for relief are no longer relevant. The respondents also highlight that OIC SI/2011-111 provides part of the relief sought in the applicants' judicial review application; namely, interim protection of the Recommended Area.

[22] In addition, the respondents submit that there is no reason to expect that the legal issues raised in this application are likely to recur frequently or that cases raising the same points will always disappear before being resolved. The respondents note that one of the central issues raised in this application, whether the Crown's duty to consult applies to legislative acts such as OICs, is currently before the BC Court of Appeal in the appeal of the decision of *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266, [2011] BCJ No 363.

[23] The respondents also submit that there is nothing lost, either to the parties or to society in general, if the issues raised in the applicants' judicial review application are not decided at this time. The respondents note that OIC SI/2011-111 evidences that the goal of creating a National Wildlife Area in the Recommended Area continues. Thus, there are no social costs associated with leaving the application undecided.

[24] Third, the respondents submit that the Court must be careful not to depart too far from its traditional role of resolving disputes. As there is no longer a dispute affecting the rights of the parties or the public in general, the respondents submit that there is no compelling reason for the

Court to hear and rule on this application. Thus, convening a hearing and issuing a decision would serve no useful purpose.

[25] For these collective reasons, the respondents submit that the applicants' judicial review application should be struck, together with an award of costs for this motion.

Written Submissions of the Applicants (in the Judicial Review) Dehcho First Nations

[26] The applicants firstly submit that the application for judicial review is not moot and therefore the Attorney General's motion should be dismissed.

[27] In the alternative, the applicants submit that should the motion be granted, then they should be granted lump sum costs of the main proceeding.

[28] The applicants submit that the respondents do not meet the first part of the test in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, [1989] SCJ No 14, as there is still a live controversy between the parties.

[29] If the Court grants the Attorney General's motion to dismiss, the applicants should be awarded their costs of the main application for judicial review and of this motion.

Written Submissions of the Tlicho Government

[30] The Tlicho Government supports the submissions and arguments of Dehcho First Nations.

[31] The Tlicho Government also submits that interim protection should be provided for the subject area pending completion of the PAS process.

[32] The Tlicho Government submitted that the issues raised are not moot.

[33] The Tlicho Government submitted that the application for judicial review should be scheduled for hearing.

[34] As to costs, the Tlicho Government adopts the position of the applicants.

Analysis and Decision

[35] **Issue 1**

Is the application for judicial review filed by the applicants moot?

The doctrine of mootness permits a Court to refuse to decide a case if it only raises a hypothetical or abstract question (see *Borowski* above, at paragraph 15). The first step in determining mootness is to assess whether the Court's decision will resolve a controversy that affects, or may affect, the rights of the parties. The controversy must be live both when the proceedings are first brought, as well as when the Court is called on to decide the case (see

Newfoundland and Labrador v Canada (Minister of Transport), 2003 FC 1228, [2003] FCJ No 1571 at paragraph 19; and *Borowski* above, at paragraphs 15 and 17).

[36] In this case, there was clearly a controversy when the applicants first brought their judicial review application. This controversy arose from the respondents' early adoption of OIC SI/2010-84, which rendered subsurface rights available for disposition in the Candidate Area prior to the completion of the agreed upon NWT PAS eight step process. Nevertheless, the respondents argue that the repeal of OIC SI/2010-84 by OIC SI/2011-111 has eliminated this controversy and there is thus no live controversy currently before the Court.

[37] Although OIC SI/2011-111 removes both surface and subsurface rights from disposition, it does so only in a portion of the Candidate Area; namely, in the Recommended Area. Surface and subsurface rights are still available for disposition on the lands contained within the Candidate Area, but outside the Recommended Area boundaries. This is not insignificant, as the Recommended Area only comprises 57%, or just over half, of the territorial lands covered by the Candidate Area.

[38] Further, although the Edéhzhíe Working Group's recommendation only pertained to the Recommended Area, the last steps of the NWT PAS process remain incomplete. Until the entire eight step NWT PAS process is complete, interim protection to the entire Candidate Area should remain in place. The seventh step of the NWT PAS requires that "appropriate regional bodies co-sign and announce protected area establishment agreement". The eighth and final step in the NWT PAS process is to manage, monitor and review the protected area. If surface and subsurface rights on the lands outside the Recommended Area, but within the Candidate Area, are available for

disposition during this important review stage, it will be more difficult to incorporate all or portions of these lands at a later stage if the need is identified during the final stage. As noted in the initial NWT PAS Bi-Annual Report (1999-2001): "interim protection helps to ensure that the special values of the candidate site are not jeopardized during the next steps in the planning process".

[39] Interim protection was also included by the applicants in the relief they sought in their judicial review application. However, no such interim protection is provided under OIC SI/2011-111, whose scope is limited to the Recommended Area. Thus, contrary to the situation in *Borowski* above, some of the relief sought by the applicants in this case does still remain relevant (at paragraph 26).

[40] There also remains a live controversy with regards to the respondents' unilateral adoption of OIC SI/2010-84. As I found in *Newfoundland* above, a live controversy can exist where a question arises as to the Minister's lawful exercise of its power (at paragraph 20). In this case, the respondents' action in enacting OIC SI/2010-84 was clearly questionable, particularly in light of the applicants' asserted Aboriginal and treaty rights and title to the Edéhzhíe area, which attracts the honour of the Crown. The fact that the respondents have repealed and replaced OIC SI/2010-84 enforces this finding.

[41] In addition, this is an important issue to address at this point, as the Edéhzhíe Candidate Area is only one of the first few areas to be protected under the NWT PAS process. The treatment of this area will therefore serve as an important precedent for the future protection of other unique and important ecological areas across the Northwest Territories.

[42] For these collective reasons, I find that a live controversy does still exist. Therefore, the applicants' judicial review application is not moot and should be heard by this Court.

[43] **Issue 2**

In the alternative, if the application is moot, should this Court exercise its discretion and hear the application?

Despite a matter being moot, this Court retains the discretion to determine a matter if the circumstances so warrant. In *Borowski* above, Mr. Justice Sopinka explained that the following criteria were relevant to exercising this discretion (at paragraphs 29 to 42):

1. Continued adversarial relationship;
2. Judicial economy; and
3. Court's role as the adjudicative branch.

[44] Although all three factors are relevant, Mr. Justice Sopinka acknowledged that "[t]he presence of one or two of the factors may be overborne by the absence of the third, and vice versa" (see *Borowski* above, at paragraph 42).

[45] With regards to the first criteria, Mr. Justice Sopinka explained that (see *Borowski* above, at paragraph 31):

> […] although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context […] [emphasis added]

[46] In this case, there are clearly possibilities of collateral consequences. As mentioned above, the new OIC SI/2011-111 does address the disposition of subsurface rights in the Recommended Area, but does not provide interim protection to the lands located outside the Recommended Area boundaries, but within the Candidate Area boundaries. It is thus likely that if this judicial review application is not heard, the applicants will bring a judicial review application of OIC SI/2011-111. In addition, the Edéhzhíe Candidate Area is only one of the first areas to be protected under the NWT PAS process. Thus, the manner in which the different parties treat the NWT PAS process for this area will likely have an important impact on the success or failure of future efforts made within this process. Finally, during the time that OIC SI/2010-84 was in effect, prior to its repeal by OIC SI/2011-111, it is possible that subsurface rights were claimed throughout the entire Candidate Area. These potential collateral consequences provide the necessary adversarial context favouring this Court's exercise of its discretion to hear the applicants' judicial review application.

[47] Turning to the second criteria, Mr. Justice Sopinka explained in *Borowski* above:

> 34. […] The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
>
> 35. The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. […]
>
> 36. Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration […] The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the

> circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.
>
> 37. There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. […] [emphasis added]

[48] In this case, there are several factors that justify the use of judicial resources to hear the applicants' judicial review application. Again, this is one of the first implementation efforts of the NWT PAS process; a process produced from collective multi-stakeholder efforts and intended for recurring and wide use to protect ecologically sensitive lands across the Territory. In *Newfoundland* above, I also considered that it was important that the applicable government policy had been extended to apply to several other sites (at paragraph 28).

[49] This case also raises questions of public importance regarding the relationship between the Crown and Aboriginal peoples. When such questions arise, it is important to recall that the honour of the Crown is always at stake in its dealings with Aboriginal peoples (see *R v Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49 at paragraph 75; *R v Marshall*, [1999] 3 SCR 456, [1999] SCJ No 55 at paragraphs 49 and 51; and *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 at paragraph 16). As Chief Justice McLachlin explained in *Haida Nation* above, at paragraph 17:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with

> the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31. [emphasis added]

[50] Thus, in summary, I find that this case raises sufficient special circumstances to justify the use of judicial resources.

[51] Third, Mr. Justice Sopinka explained that the Court must be cognizant of its proper law-making function. Else, "[p]ronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch" (see *Borowski* above, at paragraph 40). As mentioned above, although OIC SI/2011-111 provides a greater level of protection within the Recommended Area, it leaves a large portion of land outside these boundaries unprotected from surface and subsurface claims while the final steps of the NWT PAS process remain incomplete. I therefore do not find that this Court will be intruding into the role of the legislative branch by hearing the applicants' application.

[52] Further, this issue should be decided at this time, because until it does, the lands outside the Recommended Area, but within the Candidate Area, continue to be available for resource staking and claiming. Such staking or claiming raises the potential concerns from the effects of mining on ecologically sensitive lands that the NWT PAS was intended to address. Such effects, although local in the short-term, raise potential long-term environmental impacts with broad social costs affecting Canadians across the country.

[53] In summary, even if the applicants' judicial review application is considered moot, I find that this Court should exercise its discretion and hear the application due to the special circumstances that it presents.

[54] The motion of the respondents is dismissed with costs to the applicants and Tlicho Government.

ORDER

THIS COURT ORDERS that the motion of the respondents is dismissed with costs to the applicants and Tlicho Government.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Territorial Lands Act, RSC 1985, c T-7

23. The Governor in Council may	23. Le gouverneur en conseil peut :
(a) on setting out the reasons for withdrawal in the order, order the withdrawal of any tract or tracts of territorial lands from disposal under this Act;	a) par décret motivé, déclarer inaliénables des parcelles territoriales;

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1995-10
	REPRESENTATIVE PROCEEDING
STYLE OF CAUSE:	GRAND CHIEF SAMUEL GARGAN on his own behalf and on behalf of all members of the DEHCHO FIRST NATIONS
	- and -
	THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and TLICHO GOVERNMENT
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 5, 2012
REASONS FOR ORDER AND ORDER OF:	O'KEEFE J.
DATED:	August 30, 2012

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