

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

Chief Leon Lafferty, Chief Henry Gon, and
Chief Charlie J. Nitsiza on their own behalf
and in their capacities as Tlicho Chiefs,
Members of the Chiefs Executive Council
and Members of the Tlicho Assembly, and
on behalf of the Community Governments of
Behchoko, Gameti, and Whati

Applicants

- and -

The Tlicho Government

Respondents

Application for declaration of invalidity of a Tlicho law; preliminary motion to strike action.

Heard at Behchoko NT: May 21 - 22, 2009

Reasons filed: May 27, 2009.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E.
RICHARD

Counsel for the Applicants:

Ron S. Maurice

Counsel for the Respondents:

Arthur Pape
Jean Teillet

Lafferty v. Tlicho Government, 2009 NWTSC 35

Date: 2009 05 27

Docket: S-0001-CV-2009000011

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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REASONS FOR JUDGMENT

In this lawsuit, commenced by Originating Notice of Motion, the Applicants seek declaratory relief regarding the validity of a law passed by the Tlicho Assembly in November 2007.

Two preliminary motions have been presented to the Court.

Firstly, the Respondent (the Tlicho Government) seeks:

- a) an order amending the style of cause by striking out the words Aand on behalf of the Community Governments of Behchoko, Gameti and Whati@, and
- b) an order striking the Applicants= Originating Notice of Motion as being an abuse of process.

Secondly, the Applicants seek an interlocutory injunction suspending the operation of the impugned law of November 2007 pending the Court=s adjudication of the Applicants= Originating Notice of Motion.

Background

This lawsuit concerns the *Tlicho Agreement*. It is a land claims and self-government agreement reached following many, many years of negotiations between the Tlicho, and the Government of Canada and the Government of the Northwest Territories. It was ratified by the Tlicho in 2003. It is given the force of law by federal statute and a territorial statute.

The *Tlicho Agreement* came into force and effect on its effective date, i.e., August 4, 2005, and it is constitutionally protected by s. 35 of the *Constitution Act, 1982*.

The *Tlicho Agreement, inter alia*, sets forth how the inherent right of the Tlicho to self-government is recognized in its modern form. In particular, chapter 7 of the *Tlicho Agreement* establishes the Tlicho Government. The *Tlicho Agreement* calls on the Tlicho to develop and approve a *Constitution* for the Tlicho Government, and to do so prior to the ratification of the *Tlicho Agreement* itself.

The *Tlicho Constitution* was indeed developed by the Tlicho during the same time that the negotiations were taking place on the *Tlicho Agreement*. Extensive consultations took place in the four Tlicho communities of Behchoko, Whati, Gameti and Wekweeti and was approved by consensus at a large annual gathering of Tlicho in August 2000. The *Tlicho Constitution* came into force and effect on the effective date of the *Tlicho Agreement*, i.e., August 4, 2005.

Tlicho Constitution

The *Tlicho Constitution* sets forth the purpose of the Tlicho Government and a statement of its governing principles. It declares that the Tlicho Government is composed of three institutions: (1) Annual Gathering, (2) Tlicho Assembly, and (3) Chiefs Executive Council, and details the role and responsibilities of each of those institutions.

The following excerpts from section 7.0 (The Annual Gathering), section 8.0 (The Tlicho Assembly) and section 9.0 (Chiefs Executive Council) assist in providing context to the within lawsuit:

7.0 The Annual Gathering

7.1 The Tlicho Assembly shall convene an Annual Gathering of the Tlicho, which shall be held on a rotation basis in each Tlicho community. The purpose of the Annual Gathering is to bring people together to share in the social, political and cultural activities of the Tlicho. Among other things, the following matters shall be attended to at the Annual Gathering:

- (a) an open forum shall be held where Tlicho Citizens may ask questions, make recommendations and provide broad policy directions to the Tlicho Assembly;
- (b) nominations for the Grand Chief shall be announced in the year of an election;
- (c) annual reports including financial reports on the activities of Tlicho Government and its institutions shall be presented;
- (d) debate, consideration and approval of proposed amendments to the Tlicho Agreement or to this Constitution; and
- (e) consider approval of motions from the Tlicho Assembly.

7.2 The Tlicho Assembly may convene other gatherings of the Tlicho as necessary.

8.0 The Tlicho Assembly

8.1 The Tlicho Assembly has the responsibility and authority to implement the Tlicho Agreement and to protect and ensure good government of the Tlicho Government and its rights, titles and interests. The Tlicho Assembly may enact Tlicho laws for these purposes and in relation to all matters for which the Tlicho Government has authority pursuant to the Tlicho inherent right of self-government and the Tlicho Agreement.

- 8.2 The Tlicho Assembly shall be formed on the principle of equal representation from each Tlicho community and shall include the following:
- (a) the Grand Chief;
 - (b) the Chief of each Tlicho community; and
 - (c) at least two (2) councilors from each Tlicho community.
- 8.3 Each member of the Tlicho Assembly is responsible to attend meetings of the Tlicho Assembly and Chiefs Executive Council as required, to act in the best interest of the Tlicho, to represent and inform his or her community about issues affecting the Tlicho and to relate various Tlicho community concerns to the Assembly.
- 8.4 The Speaker has the responsibility to chair all sessions of the Tlicho Assembly. The Speaker shall hold office at the pleasure of the Tlicho Assembly.
- 8.5 Subject to Tlicho laws and the Tlicho Agreement, the Tlicho Assembly may take actions required to carry out its responsibilities including the following:
- (a) authorize individuals, entities and institutions to perform particular functions;
 - (b) authorize the collection or expenditure of funds;
 - (c) review the performance of individuals, entities and institutions;
 - (d) enter into and ratify contracts or agreements;
 - (e) acquire and hold property, including real property, or any interest therein, sell or otherwise dispose of property or any interest therein;
 - (f) raise, invest, expend and borrow money;
 - (g) sue or be sued;
 - (h) form corporations or any other legal entities;
 - (I) enact or amend Tlicho laws;
 - (j) appoint persons to inquire into and report upon particular matters;
 - (k) create new offices, entities and institutions;
 - (l) make recommendations to Tlicho communities;
 - (m) provide for the appointment, duties, remuneration, tenure and termination of officers, employees, servants and agents;
 - (n) propose motions for consideration by the Annual Gathering;
 - (o) hold a referendum or plebiscite on an issue of importance to the Tlicho;

- (p) develop Tlicho Rules of Order and any ceremonial procedures which will become the procedural rules and ceremonies to guide proceedings for the Tlicho Government; and
 - (q) do such other things and take such other steps conducive to the exercise of its rights, powers and privileges and to give effect to Tlicho laws and Tlicho Agreement.
- 8.6 The Tlicho Assembly shall meet at least five (5) times per year and may convene other meetings as necessary. One meeting of the Tlicho Assembly shall be convened during the Annual Gathering. The Tlicho Assembly shall give ten (10) days notice for all meetings and such notice shall be made public.
- 8.7 Unless the Tlicho Assembly decides otherwise, Tlicho Citizens and the public may attend all meetings of the Tlicho Assembly.
- 8.8 The Tlicho Assembly shall make decisions by open votes. The Tlicho Assembly shall strive to make decisions by consensus. When consensus cannot be achieved, decisions may be made by majority vote of those present.
- 8.9 Subject to sub-section 12.1, a quorum for the Tlicho Assembly shall be nine (9) elected members, one of whom shall be the Grand Chief.
- 8.10 At least once per year the Tlicho Assembly shall publish the minutes of Tlicho Assembly meetings and reports on the activities, including financial matters, of the Tlicho Government and its institutions. These minutes and reports shall be made available to each Tlicho community, and on request to any Tlicho Citizen.

9.0 Chiefs Executive Council

- 9.1 The members of the Chiefs Executive Council shall be the Grand Chief and the Chief of each Tlicho community. The Chiefs Executive Council, among other things, shall:
- (a) take direction from and report regularly to the Tlicho Assembly;
 - (b) arrange for the implementation of Tlicho laws;
 - (c) oversee the management and administration of the affairs of the Tlicho Assembly; and
 - (d) take such actions as are necessary to ensure implementation of good government of the Tlicho.

- 9.2 The Chiefs Executive Council may convene meetings as necessary and shall strive to make decisions by consensus. The Chiefs Executive Council may, when consensus cannot be achieved, make decisions by majority vote of those present. A quorum for the Chiefs Executive Council is four (4) and subject to sub-section 12.1, includes the Grand Chief.

The Tlicho Assembly, therefore, in addition to other responsibilities, has the authority to enact Tlicho laws. It is presently comprised of 13 members, i.e.:

- a) the Grand Chief,
- b) the Chief of each of the four Tlicho communities,
- c) two councilors from each of the four Tlicho communities.

It is also to be noted from the foregoing excerpts that the Chiefs Executive Council (CEC) has cabinet-like functions, arranges for the implementation of Tlicho laws passed by the Assembly, and takes direction from the Assembly. The CEC is comprised of 5 members, and these 5 individuals are also members of the Assembly.

The *Tlicho Constitution* also contains provisions for the role of the Grand Chief, the election of a Grand Chief every 4 years, provision for challenging or appealing any decision of the Tlicho Government, provisions for challenging the validity of any Tlicho law, etc.

Tlicho laws and directives:

Although it is yet the early days of the existence of the contemporary form of the Tlicho inherent right of self-government B the Tlicho Government B the Assembly has enacted more than thirty Tlicho laws and issued numerous Directives on a wide range of issues within its mandate. Many of the Astarter laws@ were developed in advance of the effective date of August 4, 2005 and formally approved by the Assembly on August 4, 2005. In many aspects of those starter laws, the Assembly delegated specific administrative functions to the CEC. Many of the Directives issued by the Assembly in the first two years following August 4, 2005 were directed to the CEC for action.

Prelude to November 8, 2007 impugned law:

In the affidavit of Chief Leon Lafferty, one of the Applicants, he states that in the fall of 2007, he and the other two Applicants requested Grand Chief George MacKenzie

to resign as Grand Chief because we had several concerns related to his leadership and financial accountability. The Grand Chief did not resign. In his affidavit filed with the Assembly at a 2008 session, a copy of which was filed in the within proceedings, Grand Chief George MacKenzie states that he was shocked by the request of these 3 Chiefs that he resign, and was of the view that he was the target of a political power struggle. The dispute between the Grand Chief and the 3 Chiefs became public. The two sides could not even agree on the dates and venue of the CEC meetings.

For purposes of the within preliminary motions, it is of no import which side in the 2007 dispute was right or wrong, or whether either side was indeed right or wrong. This Court has no role in determining the merits of either side's position in the fall 2007 dispute.

The impugned Tlicho law of November 8, 2007:

It is termed the *Future Chiefs Executive Council Meetings Law 2007*. On its face it states that it was enacted by the Tlicho assembly by unanimous consent on November 8, 2007. In its preamble it states, *inter alia*, that the CEC exercises power delegated to it by the Tlicho Assembly, and that in light of recent events, the Tlicho Assembly has determined that the CEC is no longer functioning. Section 12 of the *Future CEC Meetings Law 2007* declares that, until further notice, there will be no more meetings of the CEC or its committees or working groups. Section 13 states that the Tlicho Assembly itself shall exercise all powers, authority and responsibility delegated to the CEC until the Assembly reinstates all delegated powers to the CEC. The affidavit material indicates that two of the Applicants, Chief Henry Gon and Chief Charlie J. Nitsiza, were present at the session of the Assembly when this *Future CEC Meetings Law 2007* was enacted by unanimous consent. Chief Leon Lafferty was not present.

I note that in the wording of the *Future CEC Meetings Law 2007*, there is no wrongdoing attributed to either side of the fall 2007 dispute, merely that the CEC is no longer functioning. I also note that section 14 calls for an Elders Advisory Council, and that sections 15 and 16 direct the Tlicho Executive Officer to, as soon as possible, organize a series of workshops for the Tlicho Assembly, the purpose of such workshops being to promote healing amongst its leaders and to gain a greater understanding of governance.

The result of the *Future CEC Meetings Law 2007* is that the powers and responsibilities previously exercised by the CEC (a group of five) is to be exercised on a temporary basis by the Assembly (a group of thirteen which includes the group of five). In passing this law the Assembly was essentially saying that as the group of 5 cannot work together at the present time, we will bring more people into the discussions (i.e., the other 8), to continue the work previously done by the 5 CEC members.

The three Applicant Chiefs felt aggrieved by the enactment of the *Future CEC Meetings Law 2007* and sought to challenge its validity under the *Tlicho Constitution*.

Challenging a Tlicho Law:

Four months after the enactment of the *Future CEC Meetings Law 2007*, the three Chiefs initiated their challenge by writing a letter to the Laws Guardian of the Tlicho Government.

The framers of the *Tlicho Constitution* had provided a mechanism for any person who is directly affected by a Tlicho law to challenge its validity. (Indeed, Chapter 7 of the *Tlicho Agreement* had not only required the Tlicho to approve a *Tlicho Constitution* before ratifying the *Tlicho Agreement*, it further stated that the *Tlicho Constitution* was to provide for, *inter alia*, the challenging of the validity of Tlicho laws by any person directly affected by such law and the quashing of invalid laws@.) This mechanism is contained in section 13.0 Challenging a Tlicho Law, and states as follows:

13.0 Challenging a Tlicho Law

- 13.1 Any person directly affected by a Tlicho law may challenge its validity. The body with jurisdiction to decide such a challenge has the jurisdiction to quash or limit the application of the Tlicho law that is subject to the challenge.
- 13.2 The Tlicho Assembly may enact one or more laws to provide for challenges to the validity of Tlicho laws.

- 13.3 In the absence of a Tlicho law providing for a challenge to the validity of a Tlicho law, such a challenge shall be by way of an appeal to the Tlicho Assembly.
- 13.4 A decision or order of a body dealing with a challenge to the validity of a Tlicho law, on a matter in respect of which that body has jurisdiction pursuant to Tlicho law, is final and conclusive and is not open to question or review in a court on any grounds.
- 13.5 A challenge to the validity of a Tlicho law shall not be considered by any court or tribunal until the exhaustion of all such challenges pursuant to Tlicho law.

In March 2008 when the three Chiefs initiated their challenge to the *Future CEC Meetings Law 2007*, the Assembly had not yet enacted any laws pursuant to section 13.2; thus the three Chiefs challenge proceeded by way of an appeal to the Tlicho Assembly itself. While it may appear an anomaly to have a legislative body (the Tlicho Assembly in enacting the *Future CEC Meetings Law 2007*) re-constitute itself into an adjudicative body (the Tlicho assembly under section 13.3) to hear a challenge to the validity of one of its own laws, that is the process that the Tlicho people decided upon in adopting the *Tlicho Constitution*. (That is, at least in these early days of the modern Tlicho self-government B as presumably the Tlicho Assembly will, in due course, exercise its authority to enact specific laws under section 13.2 of its *Constitution* to provide for challenges to the validity of Tlicho laws).

Between March 2008 and May 2008 the two parties B the three Chiefs on the one hand, and the Tlicho Government on the other hand B with the assistance of their respective legal counsel, participated in the development by the Assembly of a process for the hearing of the three Chiefs appeal under section 13.3 of the *Tlicho Constitution*. This was, obviously, the first occasion that section 13 of the *Constitution* had been invoked. The Tlicho Assembly (wisely) retained independent legal counsel to assist it in developing an appropriate and fair process. That process included, for example, provision for each of the parties to file affidavits and formal written submissions in advance of the appeal hearing.

The process developed by the independent legal counsel, with input from the two parties and their legal counsel, entitled AProposed Section 13.3 Decision-Making Process@ was unanimously approved by the Tlicho Assembly on May 23, 2008.

The independent legal counsel continued in his role during the appeal process itself, including the 3-day appeal hearing which took place at a Special Assembly Session on September 23-25, 2008.

Legal counsel for each of the three Chiefs and the Tlicho government filed affidavits and written submissions and also made oral submissions to the members of the Tlicho assembly during the appeal hearing. The three Chiefs & the Applicants in the within proceedings & participated as Assembly members, including asking questions of legal counsel on their submissions. The Special Assembly Session was a public process, was well-attended by the Tlicho people, and was broadcast on radio.

On the third day of the Special Assembly Session the Assembly considered the challenge to the Tlicho law and then made its decision. That decision was to reject the appeal, and to uphold the validity of the *Future CEC Meetings Law 2007*. The decision passed by a vote of 10-3. The three Chiefs participated in the consideration of the appeal, in the vote, and in the drafting of the Directive which reflected the Assembly's decision under section 13.3.

Pursuant to section 13.4 of the *Tlicho Constitution* the Assembly's decision of September 25, 2008 is final and conclusive.

In their Originating Notice of Motion commencing the within lawsuit and seeking a declaration of invalidity of the *Future CEC Meetings Law 2007*, the Applicants make no reference to the September 23-25, 2008 appeal hearing and decision, or to the appeal process which preceded it.

Preliminary Motion re style of cause

As indicated earlier in these Reasons, the preliminary motion of the Tlicho Government is twofold: a) to strike out reference to the Community Governments of Behchoko, Gameti and Whati in the style of cause, and b) to strike the Applicants Originating Notice of Motion as an abuse of process.

The style of cause used by the Applicants in commencing this lawsuit indicates, that their application is brought on their own behalf *and on behalf of* the three Community Governments.

The four Tlicho Community Governments are established pursuant to the *Tlicho Community Government Act*, S.N.W.T. 2004, ch. 7. That statute provides that a community government=s powers and duties are to be exercised by its council, and that council is to perform its function by resolution or by-law. There is no evidence that any of the three Community Governments named in the style of cause herein has enacted a resolution or by-law authorizing it to be involved in this lawsuit. The Applicants concede that there are no such resolutions or by-laws and also state that it was not their intention to make the three Community Governments formal parties to this proceeding.

In these circumstances, I find there is merit in the request that the style of cause be corrected. An order will issue amending the style of cause by deleting the words Aand on behalf of the Community Governments of Behchoko, Gameti and Whati@.

Preliminary motion to strike the Originating Notice of Motion

This motion made by the Respondent Tlicho Government is founded in the common law principle which prohibits relitigation of an issue which has already been determined in a final and determinative way. The Tlicho Government points to section 13.4 of its *Constitution* in asserting that the Assembly=s decision of September 25, 2008 on the validity issue is final and conclusive. Also, the Tlicho Government points out that although the supervisory role of this Court is not ousted by this privative clause (section 13.4), no application for judicial review of the September 25, 2008 decision has been made by these Applicants, pursuant to Part 44 of the *Rules of Court* or otherwise.

On its face, the Originating Notice of Motion simply seeks declaratory relief in this Court with respect to the validity of the November 2007 impugned Tlicho law. The Originating Notice of Motion makes no reference to the previous proceedings in which the validity of that law was challenged and in which a final decision was rendered, confirming the law=s validity.

The Applicants confirm that in the within lawsuit the Applicants are not seeking judicial review of the September 25, 2008 decision of the Tlicho Assembly. Rather, they assert a right to bring a fresh, stand alone, application in this Court in which they seek declaratory relief. They submit that section 13 of the *Tlicho Constitution* does not give the Tlicho Assembly the *exclusive* jurisdiction to hear and determine a challenge to the validity of a Tlicho law. They submit that this Court

also has jurisdiction to hear and determine a challenge to the validity of a Tlicho law, and in this regard they rely on article 2.14.5 of the *Tlicho Agreement*.

In effect, the Applicants ask that this Court be oblivious to the existence of the September 25, 2008 decision and the process that led to it.

These are the early days of the modern form of Tlicho self-government. It is an order of government in Canada. In the context of a) the requirement in the *Tlicho Agreement* of 2003 that the Tlicho people develop and approve a *Constitution* for their Government and to include therein provisions for the challenging of the validity of Tlicho laws, b) that the Tlicho have indeed done so in section 13 of their *Constitution*, and c) the first occasion on which the validity of a Tlicho law was challenged involved a very detailed comprehensive process mutually agreed to by the parties including these Applicants B it is of concern that this Court is being asked to simply disregard the fact that the Tlicho have not only devised a constitutional mechanism for resolving a *Avalidity@* dispute but have indeed utilized it.

As stated, the Applicants rely on article 2.14.5(d) of the *Tlicho Agreement* to allow them to bring this application for declaratory relief in the Supreme Court of the Northwest Territories. The *Tlicho Agreement*, an agreement between the Tlicho and the federal and territorial governments, includes Chapter 2 entitled General Provisions. Within that chapter is article 2.14 entitled Jurisdiction of Courts. In that article, the Supreme Court of the Northwest Territories is granted exclusive jurisdiction in any action respecting the interpretation or application of the *Tlicho Agreement*. In sub-articles 2.14.1 through 2.14.3 that exclusive jurisdiction is specifically confirmed with respect to various subject matters. Sub-article 2.14.5, cited by the applicants, states:

2.14.5 Unless otherwise agreed by government and the Tlicho government,

(a) the Territorial Court or a justice of the peace with authority in the Northwest Territories shall have jurisdiction to hear and determine proceedings for violations of Tlicho laws and impose sanctions for such violations;

(b) in relation to a civil matter arising under Tlicho laws, the Supreme Court or Territorial Court of the Northwest Territories, if it has jurisdiction to hear and determine a similar civil matter arising under the laws of the Government of Canada or the Government of the Northwest territories, shall have jurisdiction to hear and

determine that matter arising under Tlicho laws, except where the Tlicho laws provide for it to be heard and determined other than by a court;

(c) the Supreme Court of the Northwest Territories shall have jurisdiction to review on a question of law or jurisdiction a final decision of a trustee or an administrative board, commission or tribunal or other body established by the Tlicho Government or, where Tlicho laws so provide, to hear and determine an appeal of such a decision;

(d) the Supreme Court of the Northwest Territories shall have jurisdiction to hear and determine a challenge to the validity of a Tlicho law or provision thereof; and

(e) in relation to a matter arising under Tlicho laws other than one described in any of (a) to (d), the Supreme Court or Territorial court of the Northwest Territories or a justice of the peace with authority in the Northwest Territories, if that Court or justice has jurisdiction to hear and determine a similar matter arising under the laws of Canada or the Government of the Northwest Territories, shall have the jurisdiction to hear and determine that matter arising under Tlicho laws, except where the Tlicho laws provide for it to be heard and determined other than by a court.

It is firstly to be noted that, as opposed to the earlier sub-articles within article 2.14 where *exclusive* jurisdiction is granted to this Court, there is no exclusive jurisdiction granted to this Court in sub-article 2.14.5, including paragraph (d) relied upon by the Applicants. Secondly, I view sub-article 2.14.5 as a series of Assignposts@, rather than creating new jurisdictions, or establishing causes of action in a particular court or courts. Sub-article 2.14.5 provides information about *which* court would have jurisdiction for particular types of matters that should be adjudicated by a court. For example, in paragraph (d) the litigant bringing the challenge is directed to the Supreme Court of the Northwest Territories *as opposed to* the Territorial Court of the Northwest Territories or the Federal Court of Canada. Paragraph 2.14.5 (d) may *permit* a challenge to be brought in this Court but in my respectful view it cannot *oust* the jurisdiction specifically contemplated in Chapter 7 Tlicho Government, of the same *Agreement*, wherein the Tlicho are to include in their *Constitution* provisions for the challenging of the validity of Tlicho laws. In article 7.1.2(d) of the *Tlicho Agreement*, the Tlicho secured for themselves the

authority to decide how constitutional challenges to their own laws are to be dealt with.

The most that could be said for the Applicants' position on this point is that there is concurrent jurisdiction. Indeed, these Applicants have already gone to the one forum, and now they seek to go to the other forum. This Court is that second forum and in my view this Court has a discretion whether or not to hear a challenge that has already been decided in the first forum.

The very issue raised in the Originating Notice of Motion has already been adjudicated upon by the process chosen by the Tlicho in developing their *Constitution*. This Court cannot simply ignore the fact that the Tlicho Assembly has, under the *Constitution*, already ruled on the validity of the impugned law.

On this preliminary motion, the Respondent Tlicho Government relies on both the common law doctrine of abuse of process, and the doctrine of *issue estoppel*. These are closely related doctrines.

The Supreme Court of Canada discussed the basic principles underlying the public policy doctrine of *issue estoppel* in *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44. It was stated that *issue estoppel* is generally applied to preclude an unsuccessful party from relitigating in the Courts an issue that has already been litigated before another court or tribunal. There is a public interest in the finality of litigation.

The Court confirmed that there are three preconditions to the operation of *issue estoppel*, and I find that these preconditions are present in the within lawsuit:

- (1) that the same question has been decided in the earlier proceeding,
- (2) that the earlier adjudicative decision was final, and
- (3) that the parties to that decision are the same in both the proceedings (this is true here, now that the style of cause has been corrected, as indicated earlier in these reasons).

The Court in *Danyluk* stated that, even if the three pre-conditions are present, a court must still determine whether, as a matter of discretion, *issue estoppel* ought to be

applied. On the facts in *Danyluk*, the Court found that the earlier adjudicative decision had been made in a manifestly improper and unfair manner, and refused to apply *estoppel* as a matter of discretion. No such impropriety or unfairness is alleged in the present case.

The doctrine of abuse of process by relitigation was comprehensively reviewed by the Supreme Court of Canada in *Toronto v. C.U.P.E.* 2003 SCC 63. It was held that this doctrine engages the inherent power of the Court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it, or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as *issue estoppel*.⁶ In the circumstances of the present unique case, I would add that the court's procedures ought not be misused in a manner which displays a blind ignorance of, or disrespect for, internal constitutional processes expressly adopted by, and accessed by, members of a self-governing people such as the Tlicho.

In *Toronto v. C.U.P.E.*, it was held that, in the adjudicative process, relitigation carries serious detrimental effects and should be avoided. Arbour J. stated, at para. 51:

Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

Upon careful consideration, I find that both of these common law doctrines B *issue estoppel* and abuse of process B apply to the relief sought by the Applicants in the Originating Notice of Motion. Accordingly, in the exercise of the Court's discretion, the Applicants ought to be barred from relitigating this issue. An order will issue striking the Originating Notice of Motion.

The Respondent=s application, set forth in its Notice of Motion filed March 13, 2009, is granted, with costs.

Applicants= motion for an interlocutory injunction:

In view of the Court=s disposition of the Respondent=s motion, the Applicants= request for an interlocutory injunction is moot.

Conclusion:

This Court was requested by the parties to hear and determine these two preliminary motions prior to the upcoming elections scheduled for June 8, 2009 in the Tlicho communities, and the Court has now done so. I reiterate, however, that this Court=s decision is not concerned with who was right or wrong in the fall 2007 dispute, or indeed whether anyone was right or wrong. This Court=s decision is concerned with the *process* to be followed for adjudicating on a challenge to the validity of a Tlicho law.

An order will issue as follows:

- a) amending the style of cause by deleting the words Aand on behalf of the Community Governments of Behchoko, Gameti and Whati@,
- b) striking the Originating Notice of Motion,
- c) granting the Respondent its costs of its application,
- d) declaring the Applicants= interim application in their Notice of Motion filed April 21, 2009 to be moot.

J.E. Richard,
J.S.C.

Dated this 27th day of May 2009.

Counsel for the Applicants: Ron S. Maurice

Counsel for the Respondent: Arthur Pape
Jean Teillet

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