IN THE SUPREME COURT OF YUKON

Citation: *Minister of Energy Mines and Resources Re: Bonnet Plume Outfitters (1989) Ltd. and Chris McKinnon*, 2008 YKSC 03

Date: 20080118
Docket No.: S.C. No. 06-A0123
Registry: Whitehorse

IN THE MATTER OF THE *TERRITORIAL LANDS (YUKON) ACT,* S.Y. 2003, c. 17

BETWEEN:

THE MINISTER OF ENERGY, MINES AND RESOURCES,
as represented by Margarete White, Manager of Land Use, Lands Branch

PETITIONER

AND

BONNET PLUME OUTFITTERS (1989) LTD. and
CHRIS MCKINNON

RESPONDENTS

Before: Mr. Justice L.F. Gower

Appearances:
Michael Winstanley — Appearing for the Petitioner
Nicholas Weigelt — Appearing for the Respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the petitioner, the Minister of Energy, Mines and Resources, for a summons under s. 18(1)(b) of the *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17. In particular, the Minister seeks a summons directing the respondents, Bonnet Plume Outfitters (1989) Ltd. and Chris McKinnon, to show cause why an order should not be made for their removal from certain territorial lands, on the basis that they are wrongfully or without lawful authority using, possessing or occupying those lands.

[2] To put the application in context, it may be helpful to note that this matter was before me on an earlier occasion after another judge of this Court issued such a summons, but without notice to the respondents. The respondents applied under Rule 2(2)(b) of the *Rules of Court* to suspend the summons on the basis that the application for same should have been made on notice to them. In my reasons for judgment in *Minister of Energy, Mines and Resources re: Bonnet Plume Outfitters (1989) Ltd. and Chris McKinnon*, 2007 YKSC 17 (my “2007 judgment”), I agreed that the application for the summons should have been made on notice, and more particularly that the application should have been brought by way of a petition pursuant to Rule 10 of the *Rules of Court* and served upon the respondents pursuant to Rule 11. Accordingly, I set aside the then existing summons, pursuant to Rule 2(2)(b), and directed the petitioner to start the process anew.

[3] Counsel have agreed that they would like to deal with the threshold issue first, being the question of whether or not a summons can or should be issued, before dealing with the next stage of the process, which requires the respondents to show cause why an order should not be made removing them from the lands.

ISSUE

[4] The specific issue at this stage is whether there is implied authority under s. 18(1) of the *Territorial Lands (Yukon) Act* for the Minister to delegate the power to decide whether an application for a summons should be made, or whether that decision has to be made by the Minister (in this case) himself.

ANALYSIS

[5] Section 18(1) of the *Act* states:

> "18(1) Where, under this Act, the right of any person to use, possess, or occupy territorial lands has been forfeited or where, in the opinion of the Minister, a person is wrongfully or without lawful authority using, possessing, or occupying territorial lands and that person continues to use, possess, or occupy, or fails to deliver up possession of, the lands, an officer of the Government of the Yukon authorized by the Minister for that purpose may apply to a judge of the Supreme Court for a summons directed to that person calling on that person
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> (a) to forthwith vacate or abandon and cease using, possessing, or occupying the lands; or
>
> (b) within thirty days after service of the summons on that person to show cause why an order or warrant should not be made for the removal of that person from the lands." (my emphasis)

[6] There is no dispute in this case that the Minister did not personally form the opinion referred to under s. 18(1) of the *Act*, which led to this application for a summons. Rather, Margarete White, Manager of Land Use, within the Department of Energy, Mines and Resources, clearly deposed in her affidavit that she "formed the opinion on behalf of the Minister that the Respondents are wrongfully or without lawful authority using, possessing or occupying the territorial land in question …". She also said that she formed this opinion based on relevant information supplied to her by three named employees of the Government of Yukon. One of those employees, Cory Chouinard, confirmed in an examination for discovery by the respondents' counsel, that it was Ms. White who made the official determination of unauthorized occupancy.

[7] The respondents' counsel raised further questions about whether the information supplied to Ms. White by the government employees was timely or sufficient for her to

form the opinion leading to the application for the summons. However, as I intend to decide this application on the basis of whether s. 18(1) of the *Act* gives implied authority to the Minister to delegate someone other than himself to form the initial opinion required in that subsection, there is no need to pursue questions arising as to the timing or sufficiency of the information provided to Ms. White.

[8] There are three particularly instructive cases relating to this issue: *R.* v. *Harrison*, [1977] 1 S.C.R. 238; *Edgar* v. *Canada (Attorney General)*, [1999] O.J. No. 4561 (Ont. C.A.); and *Ramawad* v. *Minister of Manpower and Immigration*, [1978] 2 S.C.R. 375. In *Harrison*, a full panel of the Supreme Court of Canada concluded that there is implied authority under s. 605(1) of the *Criminal Code* for the Attorney General of Canada to delegate the power to instruct counsel to initiate an appeal and that the Attorney General was not required to personally instruct counsel to appeal in every case. According to an amendment to s. 2 of the *Criminal Code* made in 1968-69, the definition of "Attorney General", included "the lawful deputy" of the said Attorney General. The Court interpreted that as not being confined to the "Deputy Attorney General", but rather to all persons appointed to act on behalf of the Attorney General when acting within the scope of their authority: see p. 246.

[9] Perhaps more importantly, *Harrison* explicitly recognized the application of what has since been referred to as the "Carltona principle", which takes its name from the decision of the English Court Appeal in *Carltona, Ltd.* v. *Commissioner of Works,* [1943] 2 All E.R. 560 (C.A.), a wartime case dealing with the requisition by the government of a factory that manufactured food products. *Harrison* held at p. 245, that, although there is a general rule of construction in law that a person endowed with a discretionary power

should exercise it personally, that rule can be displaced by the language, scope or object of a particular administrative scheme. Where such a scheme empowers a Minister to act, a power to delegate is often implicit. Speaking for the Court, Dickson J., as he then was, said at p. 245:

> "Thus, where the exercise of a discretionary power is entrusted to a Minister of the Crown, it may be presumed that the acts will be performed, not by the Minister in person, but by responsible officials in his department: Carltona [citation omitted] … The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the Minister will select deputies and departmental officials of experience and competence, and that such appointees, for whose conduct the Minister is accountable to the Legislature, will act on behalf of the Minister, within the bounds of their respective grants of authority, in the discharge of ministerial responsibilities. Any other approach would but lead to administrative chaos and inefficiency …" (my emphasis)

[10] In Canada, the Carltona principle has been affirmed not only by the case law, but also by statute, commonly in the federal, provincial and territorial Interpretation Acts. In the Yukon *Interpretation Act*, R.S.Y. 2002, c. 125, ss. 2(1) and 17(2)(c) and (d) are critical to the determination of the issue in this case.

[11] Paragraphs 17(2)(c) and (d) of the Yukon *Interpretation Act* state:

> "17 (2) Words directing or empowering a Minister to do an act or thing, regardless of whether the act or thing is administrative, legislative, or judicial, or otherwise applying to that Minister as the holder of the office, include
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> …
>
> (c) a deputy of a Minister …; and
>
> (d) despite paragraph (c), a person appointed to serve, in the department over which the Minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying."

These provisions allow for decisions entrusted by statute to a Minister of the Government of Yukon to be made either by a deputy of the Minister or another person appointed to serve in the Minister's department, if so authorized. As noted in *Edgar*, the reason for this is that in modern government there are simply so many decisions to be made that the wheels of government would grind to a halt if they all had to be made by the Minister personally.

[12] However, neither s. 17(2) of the Yukon *Interpretation Act* (or its statutory equivalents across Canada) nor the case law establishes the Carltona principle as an absolute rule. This is because s. 2(1) (which is also found in similar wording in other jurisdictions) potentially qualifies s. 17 (2) by providing:

> "2(1) Every provision of this Act extends and applies to every enactment, <u>unless a contrary intention appears,</u> enacted or made before or after the commencement of this Act." (my emphasis)

[13] The Minister's counsel stressed that, in a case cited in *Harrison*, *Metropolitan Borough and Town Clerk of Lewishan* v. *Roberts*, [1949] 2 K.B. 608 (C.A.), Lord Denning made a distinction between a minister entrusted with *administrative* versus *legislative* functions, implying only the former could be delegated. Thus, argued the Minister's counsel, as the formulation of the Minister's opinion in s. 18(1) of the *Territorial Lands (Yukon) Act* is purely administrative, it is a function which should be capable of delegation pursuant to the Carltona principle. With respect, this argument is somewhat specious. First, there was never any question that the power entrusted to the Minister in s. 18(1) is an administrative one, so nothing really turns on that fact. Second, the Carltona principle has been codified in s. 17 of the Yukon *Interpretation Act*, and s. 17(2) appears to have largely done away with the distinction, because it applies to acts or things done by a

Minister “regardless of whether the act or thing is administrative, legislative, or judicial.” (I say “largely” because s. 17(3) prohibits the delegation of the legislative power of a Minister to enact regulations.) Third, the argument ignores the need to also address s. 2(1) of the *Interpretation Act*, to see whether a “contrary intention” appears in the *Territorial Lands (Yukon) Act.*

[14] The leading Canadian authorities establish that several factors must be considered before deciding whether the general rule, that a person endowed with a discretionary power should exercise it personally, or the Carltona exception to that rule, applies in a particular situation: see *Edgar*, at para. 28. In *Harrison*, Dickson J., as he then was, identified those factors as “the language, scope or object of a particular administrative scheme”. Further, in the subsequent decision of the Supreme Court of Canada in *Ramawad*, Pratte J. said, at p. 381:

> “In R. v. Harrison [[1977] 1 S.C.R. 238] my brother Dickson, speaking for the Court said, at p. 245, that "a power to delegate is often implicit in a scheme empowering a Minister to act". Whether such power exists however or, in other words, whether it may be presumed that the act will be performed not by the Minister but by responsible officers in his Department will depend on the intent of Parliament as it may be derived from, amongst other things, the language used in the statute as well as the subject matter of the discretion entrusted to the Minister.” (my emphasis)

[15] The approach taken in the case law, then, is similar to the determination of whether s. 17(2) of the Yukon *Interpretation Act* applies to a particular ministerial decision, or whether s. 2(1) of that *Act* indicates that “a contrary intention appears”. The latter part of the analysis thus requires an examination of the language, scope or object of the particular administrative scheme, as well as the subject matter of the discretion entrusted to the Minister.

[16] In *Ramawad*, the Supreme Court of Canada interpreted the words “in the opinion of the Minister” in the Immigration Regulations as dictating that only the Minister (or someone *specifically* authorized elsewhere in the statute) could refuse to waive the ordinary statutory requirements for an employment visa and make a deportation order. There, Pratte J., speaking for another full panel of the Supreme Court of Canada, noted, at p. 381, that the *Immigration Act* recognized the existence of different levels of authority, namely: the Governor in Council; the Minister; the Director; the Immigration Officer in Charge; the Special Inquiry Officer; and the Immigration Officer. The authority granted by Parliament to each of such levels was clearly specified in the *Act*, and in some cases, it allowed for a sharing of authority as between those levels. The section at issue was para. 3G(d) of the Immigration Regulations, which permitted the Minister to waive the prohibition against issuing an employment visa to an applicant who has violated the conditions of any employment visa issued to him within the preceding two years, if “in the opinion of the Minister”, such a prohibition should not be applied “because of the existence of special circumstances”. In that case, the decision under para. 3G(d) of the Regulations, and the accompanying deportation order, were made by a Special Inquiry Officer and not by the Minister personally. The issue was whether the Minister could, under that paragraph, delegate his authority to the Special Inquiry Officer. Pratte J. noted again at p.381, that the Regulations issued under the *Immigration Act* made a clear distinction between the authority conferred on the Minister, on the one hand, and on his officials on the other. He also noted that in both the *Act* and Regulations, the most important functions had been reserved for the Minister’s discretion, while authority in other areas had been delegated directly to other specified officials. Pratte J. concluded,

at p. 382, that the general framework of the *Act* and the Regulations was clear evidence of the intention of Parliament that the discretionary power entrusted to the Minister be exercised by the Minister personally, rather than by officials acting under the authority of an implied delegation:

> "… To put it differently, the legislation here in question, because of the way it is framed and also possibly because of its subject matter, makes it impossible to say, as was the situation in Harrison, that the power of the Minister to delegate is implicit; quite the contrary.
>
> I am reinforced in my opinion on this point by s. 67 of the Act which reads as follows:
>
> > "The Minister may authorize the Deputy Minister or the Director to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this Act or the regulations and any such duty, power or function performed or exercised by the Deputy Minister or the Director under the authority of the Minister shall be deemed to have been performed or exercised by the Minister."
>
> The effect of this section is, by necessary implication, to deny the Minister the right to delegate powers vested in him to persons not mentioned therein.
>
> I therefore come to the conclusion that the discretion entrusted to the Minister under para. 3G(d) of the Regulations must be exercised by him …"

[17] Similarly, in *Edgar*, the statutory provision in question was s. 3(1)(b) of the Customs and Excise Award Payment Regulations, which authorized the payment of an award to an individual who has contributed substantially to the detection of a violation of the customs laws or the *Excise Act*. Specifically, s. 3(1)(b) stated:

> "Subject to these Regulations, where
>
> …
>
> (b) <u>in the opinion of the Minister</u> an award is merited<u>, the Minister may, in his sole discretion</u>, authorize payment of an

> award in an amount that he considers appropriate." (my emphasis)

[18] MacPherson J.A., speaking for the Ontario Court of Appeal, stated, at para. 29, that the pivotal words in s. 3(1) of the Regulations are "the Minister may, in his sole discretion". Having previously recognized that s. 24(2) of the federal *Interpretation Act* provided that words directing or empowering a Minister to do an act or thing "include … (c) his or their deputy", MacPherson J.A. stated at para. 29:

> "There is no doubt that if s. 3(1) said simply "the Minister may", a decision could be made by the Minister and by the Deputy Minister. Both s. 24(2) of the Interpretation Act and the case law would support this result. However, s. 3(1) of the regulation employs the additional words "in his sole discretion"."

MacPherson J.A. continued to note, at para. 31, that s. 3(1)(b) of the Regulations also includes the words "in the opinion of the Minister", which are identical to the words interpreted by the Supreme Court of Canada in *Ramawad.*

[19] The Court in *Edgar* was determining whether the Carltona principle, as codified by s. 24(2) of the federal *Interpretation Act,* should apply to the interpretation of s. 3(1)(b) of the Regulations at issue, or whether, pursuant to s. 3(1) of the *Interpretation Act* (virtually identical in its wording to s. 2(1) of the Yukon *Interpretation Act*), "a contrary intention appears" elsewhere in the Regulations or the statutory regime. Following *Harrison* and *Ramawad*, the initial focus of the Court was on the language used in the statute and subsequently on the subject matter of the discretion entrusted to the Minister. Ultimately, at para. 38, MacPherson J.A. concluded that this second factor was a "neutral" one in the context of that particular appeal. That was because the subject matter of the discretion entrusted to the Minister (to reward individuals who helped the government recover

unpaid custom and excise duties) could be of significantly varying amounts and thus give rise to significantly different awards. For example, at para. 17, the Court noted that, in the recovery of small amounts of unpaid duties, common sense would suggest that the Minister would not be involved. On the other hand, if the awards were significant, such as in the case of that particular appellant, who was theoretically eligible for a maximum potential award of more than $1.6 million in public funds, common sense might suggest that the Minister should make the decision personally.

[20] Nevertheless, at paras. 42 and 43, MacPherson J.A. concluded that the language of the Regulation at issue suggested "exclusivity" with respect to the authority of the Minister to act. In particular, he noted that while the federal *Interpretation Act* provides that "Minister" includes "his or their deputy", this is subject to the limitation of whether "a contrary intention appears" in s. 3(1) of that *Act*:

> "The leading cases establish that a contrary intention does appear when Parliament uses language that modifies the basic words "the Minister may". In Ramawad v. Minister of Manpower [and] Immigration, supra, the Supreme Court of Canada held that the words "in the opinion of the Minister" require the Minister personally (or someone else specifically authorized by the statute) to make the decision. Those precise words are also present in s.3(1) of the Regulation in issue in the present appeal. …" (my emphasis)

[21] In my 2007 judgment, after examining a similar case from Saskatchewan, *615231 Saskatchewan Ltd*. v. *Schulz*, 2002 S.K.Q.B. 123, I concluded at para. 22 that s. 18 of the *Territorial Lands (Yukon) Act* grants an extraordinary remedy which ought to be strictly construed. Although the issue at that point was limited to one of notice, I continue to be of the view that the legislative scheme under s. 18 of the *Act* does indeed provide for an extraordinary remedy and therefore should be construed narrowly. The section provides

an expedient and very summary procedure to obtain an order removing a person in possession of lands who is allegedly without colour of right, such as an alleged squatter or trespasser: see *Schulz*, at para. 9.

[22] In the Yukon context, it was brought to my attention in the previous application by counsel for the Minister that it is not unusual for government inspectors to discover camps, cabins or other structures on territorial lands. Such structures may be legitimately located on trapline concessions, on placer or quartz mining claims, or authorized by historic Crown grants from the late 1800s.

[23] Alternatively, such structures may have been erected by big game outfitters prior to the devolution of administration and control of lands and resources from Canada to the Government of Yukon on April 1, 2003. In relation to those cases, the Government of Yukon approved a policy in the fall of 2005 which is designed to facilitate applications for leases or licences by outfitters for lands which they have occupied on a long-standing basis, such as hunting camps or airstrips, prior to devolution.

[24] However, if the Government of Yukon determines that someone is “using, possessing or occupying territorial lands” either “wrongfully or without lawful authority”, then it can seek a remedy under s. 18 of the *Territorial Lands (Yukon) Act.* One option is for the Government to seek a summons under s. 18(1)(b) of the *Act*, which will require the occupier to show cause within 30 days of service of the summons why they, and presumably their structures, should not be removed from the lands. As I recognized in my 2007 judgment, given the relatively remote locations involved, these structures (eg. lodges, cabins, sheds and the like) may have taken years to complete and at considerable economic cost. Further, an occupier who is served with such a summons

would have a relatively short period of only 30 days within which to prepare their case to show cause. As argued by the respondents' counsel, in some instances these structures may well be occupied either as permanent or temporary dwellings or residences. The respondents' counsel stresses that the law has traditionally paid great heed to the sanctity of a person's home and protects lawful occupiers from such things as trespass, unlawfully entries and unreasonable searches and seizures.

[25] It is also important to note that, at the time the Government applies for the summons, it remains factually undetermined whether the respondent-occupier is or is not in lawful possession or use of the territorial lands. That determination, as pointed out by the Minister's counsel, must be made by a judge of this Court. However, the respondent-occupier, who may very well end up proving his or her lawful right to use and enjoy the lands, has only a mere 30 days within which to present his or her case and show cause why they should not be removed.

[26] Taking it one step further, the Government also has the option of seeking a summons under s. 18(1)(a) of the *Act*, which requires the occupier "to forthwith vacate or abandon, and cease using, possessing, or occupying the lands" (my emphasis). In that event, a respondent-occupier might conceivably be required to prepare a case justifying their use, possession or occupation of the lands within the minimum notice period for the hearing of petitions under the *Rules of Court* (see my 2007 judgment, at para. 23).

[27] In both cases, if the respondent-occupier is unable to prepare a case to justify their use, possession or occupancy of the lands, then, in theory, they could be immediately evicted and their structures razed, potentially causing considerable economic loss. This is

why I emphasize that the process is expedient and very summary in nature and conclude that the legislative scheme should be strictly construed.

[28] According to *Driedger on the Construction of Statutes,* 3d ed. (1994), Ruth Sullivan, ED, at p.355:

> "… Legislation that is strictly construed is applied with reluctance, as sparingly as possible. The scope of general terms is narrowed for any plausible reason and conditions of application are fully and carefully enforced. Where reasonable doubts or ambiguities arise, they are resolved in favour of non-application. …"

[29] On the facts of this case, the officer authorized by the Minister to make applications to this Court under s. 18(1) is the Manager of Land Use, Margarete White. In her affidavit, she has provided a copy of a document signed by the Minister which authorizes a number of particular officers within the Government of Yukon to apply for a summons under s. 18(1) of the *Territorial Lands (Yukon) Act*, including the "Manager of Land Use". To be clear, the authorization is generic and not specific to the facts of this particular, or any other, case.

[30] Counsel for the Minister submits that the Manager of Land Use should also be a person authorized to form the opinion necessary to trigger an application under s. 18(1), on behalf of the Minister. Following this argument, Ms. White would presumably form the opinion that an occupier is wrongfully or without lawful authority, using, possessing or occupying territorial lands and then *instruct herself* to apply for a summons. With respect, that seems a curious proposition. Further, if the submission of the Minister's counsel is correct, such that either a deputy of the Minister or an authorized person in the Minister's department could *both* form the requisite triggering opinion *and* make the application for a summons, then there would have been no need for the Legislature to make the

distinction between the Minister and the authorized officer in s. 18(1). Rather, the section presumably could simply have specified that, if the requisite preconditions are met, without any reference to the opinion of the Minister, then the “Minister may” apply for the summons. Alternatively, as in s. 67 of the *Immigration Act* in *Ramawad*, the Minister could have been provided with express authority to delegate to a deputy or a director (see para. 15, above).

[31] Counsel for the Minister also sought to make a distinction between the application for a summons and the determination by this Court as to whether a further order should be made to remove that person from the lands, following the show cause hearing. He argued that the initial decision to apply for the summons is of little legal consequence, since it does not directly confer any benefit or result in any penalty being imposed upon any party. Rather, it is only after a judicial determination has been made under s. 18 that a respondent-occupier is truly in jeopardy (However, at that stage, the Minister’s counsel conceded that the ultimate remedy of removal *could* be categorized as “extraordinary”.).

[32] I disagree with this distinction. In my view, as soon as the Minister has formed the opinion that a person is wrongfully or without lawful authority using, possessing or occupying territorial lands and that an application for a summons should be made, the respondent-occupier is in significant potential jeopardy, i.e. personal eviction and the destruction and removal of the occupier’s structures. This would be particularly true if the application was made under s. 18(1)(a) of the *Act*, for an immediate order to vacate. Further, under s. 19 of the *Act*, a person who remains on territorial lands, or returns to them after having been ordered to vacate, can be prosecuted for an offence and liable on

summary conviction to a fine of up to $300, or a term of imprisonment of up to six months, or to both.

[33] The situation is somewhat analogous to that of a police officer who forms an opinion, on reasonable and probable grounds, that an offence has been committed under the criminal law. That can then lead to the swearing of an information, the issuing of process to compel the attendance of the accused person before a court, and the eventual prosecution of the accused. In that case, as in the case of an alleged unlawful occupier under the *Territorial Lands (Yukon) Act*, the formulation of an opinion is the first step in a process which puts the person concerned in jeopardy.

[34] In summary, the language, scope and object of these provisions in the *Territorial Lands (Yukon) Act*, the subject matter of the discretion entrusted to the Minister, and in particular the significance and seriousness of the potential consequences facing a respondent-occupier after the formation of the Minister's opinion under s. 18(1) of the *Act*, all indicate to me that the opinion should be formed by the Minister personally.

CONCLUSION

[35] For these reasons, I conclude that the discretionary power entrusted to the Minister under s. 18(1) of the *Territorial Lands (Yukon) Act*, must be exercised by the Minister personally rather than by an official acting under the authority of an implied delegation. Specifically, it must be the Minister personally who forms "the opinion" that a person is wrongfully or without lawful authority using, possessing or occupying territorial lands. I am fortified in this conclusion by the distinction within s. 18(1) between the authority conferred on the Minister, on the one hand, and the officer authorized by the Minister to apply to this Court for a summons, on the other. In my view, the section clearly

anticipates that the initial step in the process is for the Minister to personally form the requisite opinion and then to authorize an officer to apply for a summons.

[36] In the result, I dismiss the application for a summons.

[37] As was the case in my previous reasons for judgment, I once again note that no costs were sought on this application. However, I will remain seized of the matter if counsel wish to address that issue further.

GOWER J.