

IN THE SUPREME COURT OF YUKON

Citation: *Le Diuzet v Government of Yukon*,
2016 YKSC 02

Date: 20160121
S.C. No.: 15-A0069
Registry: Whitehorse

Between:

OLIVIER ET MYLENE LE DIUZET
PINE VALLEY CAFÉ

PETITIONERS

and

GOVERNMENT OF YUKON
(DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

RESPONDENT

Before the Honourable Mr. Justice P.S. Rouleau

Appearances:

Olivier and Mylène Le Diuzet
Philippa Lawson and Lee
Kirkpatrick

Appearing on their own behalf
Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Petitioners Olivier and Mylène Le Diuzet are the owners of the Pine Valley Café. Environmental Health Services (“EHS”) refused to issue a Permit to Operate for their business because EHS considered the drinking water supply system to be inadequate.

[2] Pursuant to s. 3 of the *Regulations Governing the Sanitation of Eating or Drinking Places Regulations* in the Yukon Territory (CO 1961/001, made under the *Public Health*

and Safety Act, RSY 2002, c. 176) (the "Regulations"), the Le Diuzets appealed the refusal to the Chief Medical Officer of Health and eventually to the Minister of Health and Social Services of Yukon.

[3] The Minister confirmed the refusal to issue the permit. This final decision of the Government is the subject of this petition for judicial review. For the following reasons, I would dismiss the petition.

BACKGROUND

[4] Olivier Le Diuzet and his wife Mylène Le Diuzet bought the Pine Valley Café in 2009. They applied for a permit to operate their business. Following an inspection by EHS, a permit to operate was issued in 2010. When he inspected the site, EHS representative Todd Pinkess informed Mr. Le Diuzet of the need to improve the sewage disposal system, which was obsolete. The system was built in 1966, was homemade using timber, and the absorption system includes a bed and leaching pit.

[5] In June 2012, Mr. Le Diuzet informed EHS of his intention to install a new sewage disposal system with a disposal field. This was followed by correspondence between Mr. Le Diuzet and EHS concerning the need to replace the system, regulations related to sewage disposal systems and acceptable designs for such systems.

[6] No modifications were done to the café's sewage disposal system when the Le Diuzets asked EHS, in June 2013, to reassess the existing system in the hope that it would be approved despite its age and deficiencies. Mr. Pinkess informed Mr. Le Diuzet that he would visit the site but that Mr. Le Diuzet had to make the septic tank and other system components visible to permit the inspection.

[7] On June 12, 2013, when Mr. Pinkess arrived on site, he noticed that nothing had been done to make the underground tank or sewage disposal system components visible. Consequently, he was unable to assess the system's condition.

[8] During his inspection visit, Mr. Pinkess also assessed the drinking water supply system. Based on the information in his possession, the well from which water was drawn was only 30 feet deep. According to the guidelines used to determine if an underground water source is under the direct influence of surface waters (GUDI), a well less than 15 meters (approximately 49 feet) deep is considered under the direct influence of surface water, unless hydrologic investigative work establishes otherwise.

[9] When considering the well's depth as well as three further observations made during his inspection, Mr. Pinkess determined that the groundwater source was likely GUDI and, therefore, water drawn from it needed to be treated.

[10] The other three observations made by Mr. Pinkess are:

1. the column of water in the well pipe of the well was only 5 feet below ground level;
2. Mr. Le Diuzet told him that the shallow basement in his adjoining house often flooded in the spring; and
3. a hole dug in the ground behind the house revealed the presence of standing water in it at between 3 to 5 feet below ground level.

Those three elements suggest that the water table under the area surrounding the café was very close to the ground surface.

[11] Mr. Pinkess was also concerned that the obsolete sewage disposal system, given its age, might contaminate the area's groundwater source. He therefore

concluded that in order to protect the environment as well as the café's drinking water source, a new sewage disposal system was needed.

[12] No permit to operate was issued for the 2013 season.

[13] On February 28, 2014, Mr. Le Diuzet sought permission to operate the café during the summer of 2014. Following discussions and meetings between the Le Diuzets and EHS, EHS refused to issue the permit to operate.

[14] At Mr. Le Diuzet's request, EHS confirmed its decision in writing on June 24, 2014, indicating that no permit would be issued without a guarantee as to the quality of the drinking water supply source. EHS offered three options to the Le Diuzets:

1. install a drinking water treatment system;
2. obtain a report from a qualified third party indicating that the well is not GUDI;
3. install and use a water tank filled with drinking water obtained from an approved water supply.

EHS eventually added a fourth option: dig a new well that is not GUDI.

[15] In its June 24 letter, EHS also asked the Le Diuzets to provide in writing a schedule and plan for the installation of an approved sewage disposal system.

[16] The Le Diuzets did not perform the work or obtain the reports required by EHS. On June 25, 2014, they appealed EHS's decision to the Medical Officer of Health as allowed by the Regulations.

[17] On July 10, 2014, the Chief Medical Officer of Health confirmed in writing EHS's decision to deny the permit until all necessary improvements were completed.

[18] In June 2015, following a meeting between Mr. Le Diuzet and the Chief Medical Officer of Health, the matter was reconsidered. The Chief Medical Officer of Health confirmed that the decision to deny the permit was the right decision.

[19] The Le Diuzets appealed the Medical Officer of Health's decision to the Minister of Health and Social Services. The decision was affirmed.

PETITION

[20] The Le Diuzets' petition for judicial review concerns the Government's decision to confirm the refusal. They ask the Court to order EHS to issue the permit to operate for the following four main reasons:

- 1) The Government did not comply with the principles of fundamental justice since it is only after receiving the letter dated June 24, 2014, that the Le Diuzets found out that there was an issue with their permit application;
- 2) They tested their drinking water source and the results revealed no harmful bacterial occurrence, proving that the water was potable;
- 3) EHS, and not themselves, should be responsible for obtaining an engineer or hydrologist report certifying the GUDI or non-GUDI nature of the well; and
- 4) Given that in 2010 EHS issued a permit to operate despite the age of the sewage disposal system and without any questions concerning the drinking water source, and given that these systems have not been altered since 2010, the new requirements imposed by EHS are not reasonable.

STANDARD OF REVIEW

[21] It is well established that the standard of judicial review with respect to government administrative decisions like the one in this case is the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 51).

[22] To be successful, the Le Diuzets must demonstrate that the Government's decision was unreasonable or that there was a breach of the principles of fundamental justice.

DISCUSSION

[23] I now turn to the four issues raised by the Le Diuzets in support of their application for judicial review and explain the reasons why I dismiss them.

1. Decision-making process

[24] The Le Diuzets argue that before receiving the letter dated June 24, 2014, they were not aware of any issues concerning their application and that the Government did not comply with the principles of fundamental justice.

[25] I do not give effect to that assertion. Affidavits filed by the Government, that I accept as being true, describe numerous exchanges between government agents and the Le Diuzets. These exchanges precede the June 24 letter and show that the Government shared its concerns with the Le Diuzets regarding the drinking water system and sewage disposal system.

[26] The evidence is to the effect that the Government thoroughly explained the statutory requirements to the Le Diuzets. Government agents kept in touch with the Le Diuzets throughout the decision-making process and clearly indicated the need to

modify the drinking water system and sewage disposal system. There is no basis for concluding that the Government acted arbitrarily.

2. Significance of the drinking water analyses

[27] In his affidavit, Mr. Pinkess explains that EHS must ensure that drinking water systems of businesses like the Pine Valley Café are safe and do not pose a risk to the public. The assessment is conducted using standards that comply with guidelines issued by Health Canada. These standards will vary depending on the GUDI or non-GUDI nature of the groundwater source.

[28] As explained earlier, standards established by Health Canada and used by EHS provide that a well less than 15 meters (49 feet) deep is considered GUDI. Information obtained by EHS shows that the Pine Valley Café's well is only 30 feet deep. Therefore Mr. Pinkess was justified to conclude that the well is GUDI. This concern is particularly justified in light of Mr. Pinkess' observations during his inspection regarding the height of the water table.

[29] GUDI water sources, although originating underground, have a hydrological connection to surface water and, consequently, pose a higher contamination risk than protected groundwater. Therefore, GUDI water sources require stricter treatment standards to ensure that the water is fit for human consumption.

[30] In the circumstances, Mr. Pinkess' conclusion as to the well's susceptibility to be influenced by surface water and the need to install a water treatment system is fully justified.

[31] I do not agree with the Le Diuzets' argument that their water analyses demonstrate that the well water is a safe drinking water source and meets the statutory

requirements. As indicated by the Medical Officer of Health to the Le Diuzets in his letter dated July 10, 2014, the mere fact that the water is potable at a given moment does not minimize EHS's concern. What concerns EHS is that the well is susceptible to being influenced by pathogens found at ground surface or originating in the café's sewage disposal system which dates back to the 1960s.

[32] The Le Diuzets argue further that the contamination risk is exaggerated since they reside in an area with very little human activity. Although it may seem logical that the absence of human activity reduces the risk of contamination from a human source, there is nothing in the record to support a finding that the potential source of harmful pathogens is exclusively or even primarily from a human source. In the absence of evidence to the contrary, I accept the assessment conducted by EHS, which has the expertise to assess such risks.

[33] Given that the conclusions that the well is GUDI and a water treatment system is needed were made in good faith and are fully supported by the evidence, the requirements imposed by EHS and the refusal to deliver the permit are, in my view, reasonable.

3. Must the Government obtain an expert report?

[34] The Le Diuzets argue that it is unfair to oblige them to hire an engineer or hydrologist if they want to challenge Mr. Pinkess' assessment concerning the GUDI nature of the well. The Le Diuzets allege that the onus of proof should be on EHS. They add that if not supported by an independent engineer or hydrologist, Mr. Pinkess' assessment that the well is GUDI is not sufficient to satisfy the onus of proof.

[35] In my opinion, the Le Diuzets' argument is ill founded. Where environmental conditions suggest that a particular water source is very likely GUDI, it is reasonable and consistent with the law and established standards to require owners seeking a permit to operate to show that the water source is safe.

4. The significance of the permit to operate issued in 2010

[36] The Le Diuzets also argue that the Government should be directed to issue them the permit without them having to improve their drinking water source or sewage disposal system because they were issued a permit in 2010. Since then, no modifications have been made to the café's drinking water system and sewage disposal system that would require the permit be denied at this point. Furthermore, according to the Le Diuzets, the Government has issued several permits to operate to other businesses without asking them to comply with the same standards imposed on their café.

[37] In legal terms, it appears to me that the Le Diuzets rely on the Doctrine of legitimate expectations (see *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504, at paras. 68-69, and *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, at para. 94).

[38] The difficulty I have with that suggestion is that the factual record does not support the conclusions sought by the Le Diuzets. When Mr. Pinkess granted the permit to operate in 2010, he made it clear to the Le Diuzets that there were issues with the septic system, and that it would need to be replaced in the near future. Mr. Pinkess did not, at that time, inspect or comment on the drinking water system.

[39] The Petitioners themselves contacted the Government in June 2012 to indicate their intention to install a new septic system in the fall of 2012. As such, the Petitioners are not in a position to say that in 2014, they had a legitimate expectation to receive a permit for the season.

[40] Furthermore, there is no evidence in the record showing that the Government has allegedly issued permits to operate to other persons or businesses with drinking water or septic system issues similar to the Le Diuzets'. In fact, the evidence is clearly to the contrary. Mr. Pinkess listed several businesses that were required to modify their systems to comply with government standards before receiving their permits.

[41] Finally, on this point, it seems to me that under the Regulations, EHS is required to assess the systems when an application is made, and as it sees fit at that moment. The fact that EHS may have made an exception in the past does not mean that it must continue to do so.

[42] In any case, circumstances have changed since 2010. The sewage disposal system is 4 years older and criteria used in assessing the contamination risk have changed in the light of scientific progress. The norms of what is acceptable for the public have evolved. EHS is not obliged to make in 2014 the same decision it would have made four years ago.

CONCLUSION

[43] For these reasons, I dismiss the petition.

COSTS

[44] The Government asks for costs, to be assessed as extraordinary costs. It puts forward a proposed amount of \$10,000. Using the usual party and party tariff, the

proposed amount is \$7,260. The Government considers that it acted in good faith throughout the process and made considerable efforts to explain to the Le Diuzets their rights and obligations as well as what they had to do to bring their business into conformity with the statutory requirements.

[45] The Government argues that this petition is without merit and frivolous and that the Court must penalize plaintiffs who, like the Le Diuzets, make such petitions.

Otherwise, according to the Government, courts will be inundated with frivolous claims of this sort.

[46] In my view, there is not a proper basis for an extraordinary costs award here. The Le Diuzets represented themselves throughout the procedures. Despite the fact that they were unsuccessful, I would not necessarily characterize the petition as frivolous. The Le Diuzets were denied a permit to operate a business in which they have invested time and money. They bought it in 2009 and made extensive renovations which were commended by Mr. Pinkess. They have some difficulty understanding why they were issued a permit to operate for the 2010 season, but not for the 2014 season.

[47] Despite the explanations given by the Government, the Le Diuzets argued that the refusal was not justified. Although I would describe their arguments as weak, the Le Diuzets had the right to challenge the decision before the courts. I find nothing in this case that would justify imposing such penalties as are extraordinary costs.

[48] Having been successful in its defence to the petition, the Government is normally entitled to costs. However, in determining the amount to be awarded, I must take into account the fact that the Government brought a motion for summary judgment or to set

aside the petition. That motion was dismissed and, in my view, should not have been brought. The Le Diuzets would normally be awarded costs for it.

[49] Evidently, the costs for preparing and bringing the government motion are substantially lower than the costs for defending the petition itself.

[50] It is preferable in this case to fix a lump sum for costs rather than ask for assessment. In my opinion, it should be a modest amount considering the circumstances surrounding the Le Diuzets' situation. They are unable to operate the business in which they have invested, unless they find the money needed to make the modifications required by the Government. Furthermore, they have acted reasonably in the conduct of the proceeding; for a self-represented party, such proceeding can sometimes be hard to understand.

[51] Regarding the amount of \$ 7,260 proposed by the Government, I have no doubt that the work indicated has been performed. However, it appears to me that the time spent on this file and the amount claimed are high considering the nature of the petition, that is, an application for judiciary review of a government decision that was not very complex. The facts and applicable law were relatively straightforward. There were very few cases cited, and the factual record consisted of EHS files and affidavits from EHS representatives explaining the reasons for the decision, and contents of the files.

[52] Therefore, in the circumstances, weighing all factors, including the costs relating to the unsuccessful motion by the Government, I find that the appropriate amount for costs to be paid by the Le Diuzets to the Government is \$1,000 \$, all inclusive.

ROULEAU J.