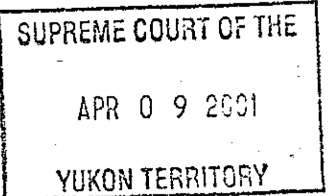
Peters et al. v. YTG and
YTG v. Peters et al., 2001 YKSC 13

Date: 20010215
Docket: S.C. 00-A0248, 00-A0167
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY



BETWEEN:

KERRY PETERS and
KERRY PETERS INDUSTRIES NORTHERN LTD.

PETITIONERS (00-A0248)
RESPONDENTS (00-A0167)

AND:

THE GOVERNMENT OF YUKON

RESPONDENT (00-A0248)
PETITIONER (00-A0167)

MICHAEL COZENS — Appearing for Kerry Peters and Kerry Peters Industries Northern Ltd.

GORDON COFFIN — Appearing for the Government of Yukon

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

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[1] CHRUMKA J. (Oral): There are two applications before me. The first application heard was an application by the respondents, Kerry Peters and Kerry Peters Industries Northern Limited, for an order to quash the order issued by Deputy Minister Oppen, the order being issued, as I understand it from the documents firstly referred to on the 20th of May, 2000, and then the

decision of the Minister to have the order issued, being made on the 5th of July, 2000. The order I speak of is an environment protection order.

[2] The second application is for an injunction that Mr. Peters and his company comply with the order and clean up a site where refuse was dumped.

[3] The submission is that the Deputy Minister of Renewable Resources exercised the discretion to issue this environment protection order to Mr. Peters and his company in a manner that constituted an abuse of discretion, as "abuse of discretion" is described by the Supreme Court of Canada in the cases referred to yesterday and also as is referred to in the judgment of *Aasland v. British Columbia (Ministry of Environment, Lands and Parks)* [1999] B.C.J. No. 1104 (B.C.S.C.), issued on the 11th of May, 1999.

[4] I have carefully reread all of the exhibits that were filed, and I have also made careful note of the interview that was had and recorded with Mr. Oppen, the Deputy Minister, and the other persons present with him, as well as the comments made by Mr. Kerry Peters at this particular interview, this meeting being held on the 9th of June, 2000.

[5] It is apparent from what was said and referred to by Mr. Peters at that time that he was prepared to respond to the allegations that were attached to the order that had been served on him. These are the allegations that are set out in the

statement of reasons supporting the issuance of the environmental protection order.

[6] It is also apparent to me that Mr. Peters expected that those who were involved with it on behalf of Renewable Resources would be there, in particular, Mr. Levia. Of course, Mr. Levia was not present. Mr. Peters did not request an adjournment, did not request to have a lawyer there, although there were a number of other parties there, and, in my view, it would have been unreasonable to expect that he would request an adjournment in the circumstances in which he found himself.

[7] Mr. Peters was given an opportunity to state his position and he did so. He replied to the questions and statements. His replies to the questions asked and the statements he made at the time were essentially the same as the evidence he gave yesterday in this hearing. After Mr. Peters had concluded his oral representations he was encouraged, as he himself had suggested, to write a letter referring to the discussion had and to refer to the points that he had been making. Mr. Oppen, additionally, at the termination of the discussion said that he wanted to look at some of the information presented and to again talk to the persons referred to in the information presented.

[8] Mr. Peters did write to Mr. Oppen on the 27th of June; that letter is Exhibit 8. There followed a letter from Deputy Minister Bill Oppen to Mr. Peters, Exhibit 13. In paragraph 2, he writes:

> My officials have reviewed the issues that you raised during our meeting and can find no evidence to corroborate the information that you provided. Therefore the Environment Protection Order issued to you and your company remains in effect. You must follow the directions as stated in the Order. Specifically, you must provide a Site Assessment and Plan of Restoration by **July 31** and have the site remediated by **September 30**.

[9] The next paragraph:

> My officials have been in contact with representatives of Cominco, who have indicated that they may consider allowing the disposal of the contaminated soil at the Sa Dena Hes mine. Understand that this is not a direction to you to take this action but simply an option for you to pursue with Cominco.

[10] The only party involved in this cleanup and disposal of the contaminated material was Kerry Peters Industries Limited and Mr. Peters. No one else received an environmental protection order to clean up the site where the material had been placed, that is, to clean up the site on the Desrosiers farm.

[11] From all of the evidence that I have heard, I am satisfied that Mr. Peters was retained by Image Transport Ltd. and Saskatchewan Government Insurance, that he was retained by them to do the work, but he was not only acting under their instructions but also under the instructions of personnel from Renewable Resources and, particularly, Mr. Levia.

[12] He was instructed to remove contaminated material from the site of the spill. This included not only ammonium nitrate but refuse from the wreck, which was not only metal but also liquids such as antifreeze, battery fluid, diesel fuel, transmission fluid, and other contaminants that were described, such as road signs, a guardrail, truck parts, plastic, things of that nature.

[13] He testified that he was initially told that the contaminated material would not stay in the Yukon but that it would go back to Alberta from whence it came, and I am satisfied that he was told that. He was authorized to obtain the pots from Cominco and he did so. It was not a frolic of his own; this was an authorization he received. Whether it came from Renewable Resources or other parties, he received the authorization.

[14] His testimony was that he verified visually that the pots he looked into, approximately four, possibly six, were empty. He had his own belly dump trucks on site. They could not, of course, contain all of the contaminated material.

[15] Following the pots being brought on site, he was authorized to continue to use them. He was authorized to continue with the cleanup, and he was instructed to remove all of the contaminated material and to contain it, and to store it in a particular place. No greater responsibility was on Mr. Peters to look into and check the pots than it was on anyone else who was giving him instructions.

[16] Clearly, it would have to be common knowledge to the parties involved, including Renewable Resources and Mr. Peters, that these pots had been used in the mining business of Cominco.

[17] Following the cleanup the material was stored, as described in the evidence, and then Mr. Peters was instructed to take the material and dump it on the farm of Mr. and Mrs. Desrosiers. All arrangements for that were done by somebody other than himself. The arrangements were either through Mr. and Mrs. Schultz, Brian Levia, or the combination of them with the Desrosiers, but, clearly, Mr. Peters had no role in seeking out this particular dump site, or burial ground. I accept his testimony when he says that he always thought that the material was being taken out of the Yukon Territory to the province of Alberta.

[18] *Certiorari* is, in my view, an appropriate remedy to set aside an order of a deputy minister. It is clear from the case that I have referred to already that that is basically the only way that an order can be set aside unless the statute itself provides for a procedure, and I understand from counsel that this statute does not.

[19] In the decision, at paragraph 25, it is stated:

> At common law every public authority who makes a decision affecting the rights, privileges or interests of an individual must adhere to the requirements of natural justice or procedural fairness....

[20] Paragraph 26:

> Where a decision by a Minister is challenged by way of judicial review, the application of the rules of natural justice depend on the nature of the decision and the impact on the applicants....

[21] In this case, the impact on the applicant, Mr. Peters, is to clean up a site that would cost a considerable amount of money without any guarantee that the contaminated material could be disposed of within the Yukon Territory.

[22] Additionally, Chief Justice Dickson - he was not chief justice at the time - but in 1980, Chief Justice Dickson wrote in *Martineau v. Matsqui Institution Disciplinary Board* [1980] 1 S.C.R. 602:

> Certiorari is available as a general remedy for supervision of the machinery of government decision-making.

[23] And he continued:

> ...The basis for the broad reach of this remedy is the general duty of fairness resting on all public decision-makers.
>
> A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack on such a decision will have to be founded upon abuse of discretion....

[24] He continued:

> ...On the other hand, a function that approaches the judicial end of the spectrum will entail substantial procedural safeguards....

[25] His Lordship concluded the paragraph by saying:

> ...In these cases, an applicant may obtain certiorari to enforce a breach of the duty of procedural fairness.

[26] The decision is somewhat lengthy. On page 6 of the decision is this quote:

> The fact that a decision-maker does not have a duty to act judicially, with observance to formal procedure which that characterization entails, does not mean that there may not be a duty to act fairly, which involves importing something less than the full panoply of conventional natural justice rules.

[27] In making his decision the Deputy Minister must act fairly. He does not have to use rules that are applicable to trials or in court, but there must be a fair hearing. Again, at page 630 of the Supreme Court of Canada judgment, this is said:

> In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved?

[28] It seems to me that this is the underlying question that the Courts have sought to answer in all cases dealing with natural justice and fairness. I will not read the other paragraphs of the decision, but paragraphs 31 through to 39 are very relevant to my decision.

[29] The question of fairness must be considered in the light of everything that happened in this particular case dealing with the hearing before the Deputy Minister and the other persons, as recorded in Exhibit 9. Prior to that, Mr. Peters had been served with Exhibit 7, and this, as I understand, was the first notice he had that there was some difficulty with the site where the material had been dumped, or placed, or deposited. In paragraph 1, the Deputy Minister states:

> I have reasonable grounds to believe that Kerry Peters Industries Northern Ltd. (KPI) under your direction deposited soil contaminated with lead/zinc ore and litter on land owned by the Yukon Government, near Desrosiers' farm, in November 1998. The deposition of this material is related to an ammonium nitrate spill clean-up contract between KPI and Image Transport in October 1998.
>
> As Deputy Minister, and a person to whom authority has been delegated under the Environment Act, I am notifying you of my intent to issue an Environmental Protection Order for the restoration of this site, including the removal of the metals contaminated soil and litter released by your company. The Order will require you to restore the site to a condition whereby none of the contaminants outlined in the Order remains above the accepted standards.

[30] The order of the site restoration was to have been completed by the 30th of September. It was signed by the Minister, although a hearing was to be held. No contact was made with Mr. Peters prior to that order being drafted.

[31] In my view, the Deputy Minister was required to fully and properly consider the roles played in this incident by members of his department and that there be an appearance of fairness.

[32] The Deputy Minister said he would check out what Mr. Peters submitted at the meeting. What appears from the final letter, Exhibit 13, what the Minister, in fact, did was confirm and refer to the materials supplied to him by persons other than he directly speaking to the parties involved, the persons to whom Mr. Peters had referred.

[33] I read the letter earlier today, and I have just mislaid it. I am sorry. It is Exhibit 13. I will find it in a moment. In any event, I have already read paragraph 2 thereof, indicating what the Minister had done and that there was no corroboration of the position taken by Mr. Peters. It is important that it would have been determined what efforts were made by anyone to contact Cominco about possible contamination, if there was a fear of contamination or there was a likelihood of it. Nothing was done by anyone, except that Mr. Peters, who understood that these pots had been sitting in the location where they were for approximately five years, were - at least those that he looked into - were empty. It would have been totally unreasonable to expect of Mr. Peters to have cleaned those pots out before he used them if he was satisfied from a visual inspection that they were, in fact, empty.

[34] What is also very material is who ordered that the material be deposited on the Desrosiers' farm in the location where it was. It clearly was a representative of the Renewable Resources that was involved in that decision, along with others, and that Mr. Peters was only obeying the instructions of those persons to deposit the material at the site.

[35] I am satisfied that Mr. Levia took charge concerning the cleanup and also the depositing of the material at the site, and because he was so involved in this he should have been present at the meeting. If the Minister did not have that information, that information should have been provided to him, of the role that was played by Mr. Levia in these proceedings.

[36] It also seemed that Deputy Minister Oppen was not concerned with how the cleanup was conducted, but only concerned with the fact that contaminating metals were found at the site where the contaminated soil from the spill site had been located. The conclusion that everybody came to is that it must have come from inside the pots. They were steamed out at the site; it must have come from them. That may well be a conclusion that people can come to, but I have not heard any evidence that anyone checked with Cominco to determine what condition their pots were in at the time, and the only evidence we have of what condition they were in is from Mr. Peters, who observed some of them and saw nothing, no debris, inside.

[37] In my view, it should have been made clear to the Deputy Minister that Renewable Resources department was involved and required to ensure that the cleanup and disposal of the contaminated material was done properly, and that function could not have been abdicated or given to anybody else. The fact that, when all was said and done, only the company and person who physically deposited the contaminated material that came from the spill site, only one party has been charged, that is, charged by way of an environmental protection order and made liable to fines if he refused to obey or if the company refused to obey that order.

[38] From all of the evidence which was placed before me, I am satisfied that Mr. Peters was acting on the instructions throughout, first of Image, then of Image and Renewable Resources.

[39] In view of all of the circumstances, including those that were discussed and raised during submissions of counsel, the Deputy Minister's exercise of a discretion to enforce the environment protection order was unfair and contrary to natural justice, and his exercise of that discretion was, as the law calls it, an exercise of abuse of discretion, and, therefore, the order that he made is quashed.

[40] Accordingly, also, the application for an injunction is dismissed.

[41] MR. COZENS: My Lord, will there be any order as to costs?

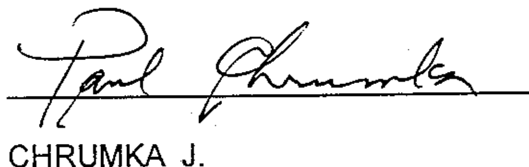
[42] THE COURT: What is your submission as to that aspect?

[43] MR. COZENS: The normal scale for costs here is three. I would certainly submit that Mr. Peters and KPI should be entitled to their costs, at least with respect to the normal, although, in the circumstances, it does seem that this was an unfair - and I use the word lightly - prosecution, singling him out. I would ask, at least, that a minimum is scale 3. I leave it in the discretion of the Court.

[44] THE COURT: Mr. Coffin, as to costs?

[45] MR. COFFIN: I really have very little comment on that, My Lord. I really have nothing to say.

[46] THE COURT: I agree with Mr. Cozens that Mr. Peters and his company are entitled to costs. They are the successful party. There is no question they were singled out as the only persons subject to an order, and I grant costs under column 3.



CHRUMKA J.