# IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Minister of Energy Mines and Resources Re: Bonnet Plume Outfitters (1989) Ltd. and Chris McKinnon*, 2007 YKSC 17

Date: 20070329
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 respondents, Bonnet Plume Outfitters (1989) Ltd. and Chris McKinnon, under Rule 2(2)(b) of the *Rules of Court*, to "suspend" a summons issued against them by a judge of this Court under s. 18(1) of the *Territorial Lands (Yukon) Act*, S.Y. 2003, c. 17 (the "*Act*"). In brief, that section provides, where the Minister of Energy, Mines and Resources is of the opinion that a person is unlawfully occupying territorial lands, he or she may authorize an application to a judge of this

Court for a summons directing the occupier to promptly vacate the lands or to show cause within thirty days why a further order for their removal should not be made.

[2] The issue before me is whether the application for the summons should be with or without notice to the respondents.

**POSITIONS OF THE PARTIES**

[3] Counsel for the respondents argued that the *Act* is silent as to the manner in which an application for a summons under s. 18 of the *Act* is to be made. Consequently, he says that Rule 10 of the *Rules of Court* should apply. That Rule deals with originating applications and states as follows:

> "10(1)(a) An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where
>
> > (a) an application is authorized to be made to the court . . .
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> (4) Unless these rules provide otherwise, a copy of the petition and of each affidavit in support must be served on all persons whose interests may be affected by the order sought." (my emphasis)

[4] Pursuant to Rule 11(2)(a), "service" of a document on an individual is effected "by leaving a copy of the document with him or her".

[5] The respondents' counsel noted that, once a summons has been obtained from this Court, s. 18(5) of the *Act* allows for "service" of that summons to be made:

> ". . . by personal delivery to the person named in it or by leaving a copy with an adult person found on the lands and by posting up another copy in a conspicuous place on the lands or, where no adult person is found on the lands, by posting up copies in two conspicuous places on the lands." (my emphasis)

Counsel pointed out that the term “personal delivery” is confusing, since the notion of “delivery” under the *Rules of Court* is premised on a party having previously provided an address for delivery, following which documents may be delivered to that address either physically, by mail or by fax transmittal. That is to be contrasted with the concept of “service” in the *Rules*, where a document is left directly (or personally) with the individual being served. (Indeed, with respect to *delivery* of a document, there is no requirement in the *Rules* to prove that a document was actually received by the person, only that the document was delivered by one of the means set out in Rule 11(6.1): *Kapelus* v. *University of British Columbia*, 2000 BCCA 564.)

[6] Thus, the respondents’ counsel argued that the form of “service” contemplated in s. 18(5) of the *Act* is of a lesser standard than that required by the *Rules* and that this creates the potential for significant mischief and unfairness. For example, if the occupier of the territorial lands is a big game outfitter, as is allegedly the case in the within matter, such an outfitter will not generally be present on their outfitting concession over the winter months. Therefore, if a summons is obtained under s. 18(1) of the *Act*, and no one is present on that portion of the outfitting concession being occupied, presumably by the existence of some buildings or other structures, then s. 18(5) of the *Act* can be satisfied by simply posting up copies of the summons in two conspicuous places on the lands. That would then trigger the running of the thirty day time period under s. 18(1)(b) of the *Act*, within which the named occupier is required to show cause why he or she should not be removed. In the absence of showing cause, the government can return to this Court for a final order for that person’s summary removal from the lands, which presumably may authorize the removal or razing of any

unauthorized structures on the lands. Furthermore, counsel says that in many instances these are structures of significant value (e.g., lodges, cabins, sheds and the like), which given the remote locations involved, may have taken years to complete.

[7] The argument of the respondents' counsel is that, if the initial summons is obtained without notice to the outfitter, then the entire process could theoretically violate the outfitter's right to be heard under the rules of natural justice. Further, given the potentially significant consequences which might flow after the posting of such a summons on the property, it is reasonable to interpret s. 18(1) of the *Act* as anticipating that Rule 10 of the *Rules of Court* will be complied with, such that a copy of the petition and each affidavit in support must be served on each of the respondents prior to the hearing to obtain the summons.

[8] Counsel for the Minister pointed to Rule 1(4) of the *Rules of Court* which states:

> "These rules govern every proceeding in the Supreme Court except where an enactment otherwise provides."

[9] Further, since s. 18(1) of the *Act* specifically authorizes an application for a summons, it is the summons which must have been intended to be the instrument by which the respondent(s) would receive notice and that therefore the application for the summons need not be on notice. Consequently, the Minister's counsel argued that Rule 41(16.3) applies. That reads:

> "(16.3) An application of which notice need not be given may be made by filing
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> (a) a requisition in Form 56,
>
> (b) a draft of the order in Form 56A, and
>
> (c) evidence in support of the application."

[10] The Minister’s counsel informed me that, in his experience, it is not unusual for government inspectors to come across various camps, including cabins and other structures, which are not readily identifiable. I am informed that simply having the GPS (global positioning system) coordinates of such structures may be insufficient information for the government to determine the name of the interested party from its databanks. For example, it might be a cabin on a trap line concession; alternatively, it might be a structure on a placer or quartz mining claim, authorized under the legislation governing such mining; further still, it might be a structure authorized by an historic Crown grant from the late 1800’s. (I gather from what the Minister’s counsel tells me, that government inspectors would be wise to exercise caution, combined with due diligence in seeking to identify the owner/occupier of such structures before taking steps to have them removed from the lands.)

[11] Accordingly, the Minister’s counsel further argued that it must have been the intention of the legislature that s. 18 of the *Act* would allow for a "balancing of interests" in situations where apparently unlawful structures may be located on territorial lands, but the owner or occupier of those structures is not readily identifiable. As I understand it, this argument presupposes that a summons has been obtained under s. 18(1) of the *Act* and that, if the owner/occupier of the structures in that location is otherwise incapable of being identified, s. 18(5) allows the government to simply post the summons in two conspicuous places on the lands. That then triggers the thirty day time period under s. 18(1)(b) for that person to show cause. Upon failing to do so, the final order for removal can then be obtained. In this way, the government is not "stymied”

from removing unlawful structures, simply because the owner of such structures is unknown.

**ANALYSIS**

[12] I have already quoted from s. 18(5) of the *Act*. For convenience, I will also set out ss. 18(1) and (2):

> "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.
>
> (2) Where a summons has been served under subsection (1) and within thirty days from the service of it the person named in the summons has not removed from, vacated, or ceased using, possessing, or occupying the lands, or has not shown cause why they should not do so, a judge of the Supreme Court may make an order or warrant for that person's summary removal from the lands."

[13] Counsel were unable to provide me with any authorities on the issue of notice. However, I have come across two cases which may be of assistance. *615231 Saskatchewan Ltd.* v. *Schulz*, 2002 SKQB 123, is a decision of Baynton J. There the applicant applied without notice for leave to serve the respondents with a notice of motion directing them to show cause why they should not be removed from certain land

which they were possessing and occupying. The matter involved *The Recovery of Possession of Land Act*, R.S.S. 1978 c. R-7, as amended. Section 3(1) of that *Act* bears some similarity to s. 18(5) of the *Territorial Lands (Yukon) Act* and therefore I will quote it fully here:

> "3(1) When a person refuses or fails to cease using or occupying land that he is wrongfully or without lawful authority using or occupying, the person entitled to possession may, upon affidavit of the facts, apply ex parte to a judge of Her Majesty's Court of Queen's Bench for Saskatchewan sitting at the judicial centre nearest to which the land is situated for an order granting him leave to serve a notice of motion directed to the person in possession and returnable before the judge at such time and place as may be fixed by the order, requiring the person to whom the notice is directed to show cause why an order should not be made for his removal from the land, and to compel him to vacate it, and to cease using or occupying it."

[14] Under the Saskatchewan *Act*, once the order to serve the notice of motion is obtained, s. 3(2) provides for the manner of such service. Once again, it bears some similarities to s. 18(5) of the *Territorial Lands (Yukon) Act*:

> "It shall be sufficient service of the notice if a copy thereof is left with a grown-up person found on the land, and another copy is put up in some conspicuous place thereon, or, where no grown-up person is found on the land, if a copy is put up in two conspicuous places thereon."

[15] The facts in *Schulz* are of little assistance and the case was decided largely on the ground that an application for leave to serve a notice of motion should not be brought on a without notice basis in cases where the applicant is aware that the respondent is represented by a lawyer. However, Baynton J. nevertheless remarked generally, at para. 9, that the *Act* under consideration there:

> ". . . grants an extraordinary remedy which ought to be strictly construed. It was designed to provide an expedient and summary procedure to obtain an order removing a

> person who is in possession of land or premises clearly without colour of right, such as a "squatter" or a "trespasser". *598225 Saskatchewan Ltd.* v. *Cunningham*, [1994] 4 W.W.R. 30 (Sask. Q.B.)."

And later:

> "It does not follow that just because the *Act* permits this [without notice] procedure, leave will be routinely granted by the court. The *Act* implies that the court has some discretion to refuse leave. To interpret it otherwise leads to the inevitable conclusion that the leave requirement is a needless step in the proceedings."

[16] I accept the reasoning and conclusion in *Schulz*. Even though the legislation there *expressly* authorized a without notice application, the court nevertheless held that it has discretion to refuse leave (for an order to serve the notice of motion to require the occupier to show cause). If the *Act* were interpreted in such a way as to remove the discretion of the court on such an application, then the leave requirement would be a needless step in the proceedings.

[17] The provisions in *Schulz* are comparable with s. 18(1) of the *Territorial Lands (Yukon) Act*. Obviously, the latter does not expressly authorize a without notice application for the summons. However, it cannot have been the intention of the legislature that every such application would be routinely granted. Rather, the presiding judge of this Court retains discretion as to whether or not to issue a summons. Accordingly, there is good reason why the respondents should be entitled to be heard on such an application, in order that the presiding judge has the benefit of representations from both sides before deciding whether to issue the summons. That is particularly so, given that once the summons is issued and “served” under s. 18(5), in a manner which may never come to his or her actual attention, the respondent is

effectively in jeopardy of a considerable economic loss from the removal of the structures from the lands.

[18] *Boardwalk Reit Limited Partnership* v. *Busler*, 2006 ABQB 695, dealt with certain provisions in the Alberta *Residential Tenancies Act*, S.A. 2004, c. R-17 (the "*RTA*"), which are also similar, in some respects, to s. 18 of the *Territorial Lands (Yukon) Act*. Section 41 of the Alberta *RTA* provides that if a landlord applies to the court for termination of a tenancy, the landlord is to serve the notice of the application and any supporting affidavit upon the tenant. However, s. 57 of the *RTA* deals with the service of notices and, while s. 57(1) provides that notice must be served personally, by registered mail or certified mail, s. 57(3) allows the landlord to serve “by posting the notice, order or document in a conspicuous place on some part of the premises” if the tenant is absent from the premises or is evading service. Finally, s. 57(6) states “This section does not apply to service governed by the rules or practice of a court.”

[19] At paras. 7 to 9 of *Boardwalk*, Acton J. held as follows:

> “7 The *Rules of Court* relating to service have the force of legislation and the practice of the Court is governed by them. Whatever inherent jurisdiction the Court may have does not permit it to ignore the *Rules*.
>
> 8 Section 71 of the *RTA* requires that an application under the Act to the Court of Queen's Bench must be made by way of originating notice, which is defined in the *Rules* (Rule 5(1)(k)) as a pleading by which an applicant commences its action.
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> 9 Rule 14 of the *Rules of Court* specifically requires that a document by which an action or other proceeding is commenced is to be served personally. Rule 15(1) indicates that personal service is effected on an individual by leaving a true copy of the document to be served with the individual. . . . Rule 23(1) provides for substitutional service where it is impractical for any reason to effect prompt personal service, but only on order of the Court.”

[20] Acton J. then went on to quote from Veit J., in *Owczarczyk* v. *Livingston*, 2003 ABQB 158, who confirmed that personal service is a requirement under the Alberta *RTA* and that any other form of service is inadequate. At para. 10 of *Boardwalk*, Veit J. was quoted as follows:

> "The key provision here is s. 57(5) [now s. 57(6)]; our *Rules of Court* require that when a proceeding is commenced against a party, that party must be given personal notice of the proceedings. Therefore, although the applicants may have been able to rely on s. 57(3) of the *RTA* to post notices of termination on the premises' door by virtue of Ms. Livingston's being absent from the premises, they cannot do so for their originating notice. Therefore, Ms. Livingston did not have proper notice of the application and therefore the court cannot make any finds [as written] against her . . . " (my emphasis)

[21] In *Boardwalk*, Acton J. was sitting as an appeal court from a decision of Master Waller in chambers. She agreed with Master Waller's written decision below and quoted him, at para. 11, as stating

> "Personal service is preferable for a number of reasons. First it provides absolute certainty that the documents have been received by the respondent(s). Secondly it serves to emphasize the importance of the documents. . . ."

Acton J. then noted that Master Waller had referred to Justice Côté's decision in *Hansraj* v. *Ao*, 2004 ABCA 223, to support the proposition that proper service is important and that serious problems can arise in the absence of proper service. Not surprisingly, Acton J. concluded, at para. 13, "The important aspect of personal service is that it gives the Court comfort that the document in question has come to the personal attention of the defendant or respondent in the matter."

[22] Section 18 of the *Territorial Lands (Yukon) Act* does not contain a provision analogous to s. 57(6) of the *RTA*. On the other hand, Rule 1(4) of the *Rules of Court*

states that “These rules govern every proceeding in the Supreme Court except where an enactment otherwise provides.” Despite the initial attraction of the argument of the Minister's counsel on this point, I am not persuaded that s. 18(1) can be construed as an enactment which “otherwise provides”. As was the case in *Schulz*, s. 18 grants an extraordinary remedy which ought to be strictly construed. If the legislature truly intended that an application for a summons could be made without notice, I expect it would have expressly stated that in the *Act*, which it did not.

[23] Therefore, I find that Rule 10 applies to s. 18(1), such that the application for the summons must be brought by an originating application, more specifically a petition, and that a copy of the petition and each affidavit in support must be served on all of the named respondents. Rule 11, in turn, requires that service on an individual is effected by leaving a copy of the document with that person. In the alternative, the petitioner may seek an order for substituted service under Rule 12 “where, for any reason, it is impracticable to serve” the application under Rule 11.

[24] The flaw in the "balancing of interests" argument of the Minister’s counsel, as I understood it, is that s. 18(1) seems to presuppose that a person who is unlawfully occupying territorial lands is someone capable of being identified. There are basically two instances in which s. 18(1) is engaged. The first instance would be where “the right of any person to use, possess or occupy territorial lands has been forfeited.” It seems to me that any suggestion of forfeiture would necessarily require the government to have some information about the identity of the occupier who previously enjoyed the “right” to occupy the lands in question. The second instance in which s. 18(1) might be engaged is where a person unlawfully occupies territorial lands “and that person continues to

use, possess or occupy, or fails to deliver up possession of, the lands." Once again, this would seem to presuppose that the government has been able to identify the occupier and demand that they vacate and deliver up possession. Otherwise, it would seem to me to be difficult if not impossible for the Minister to be able to hold the opinion that a person is *continuing to occupy* (as opposed to having abandoned) or is *failing to deliver up possession of* the lands, if the identity of the person is unknown. In other words, insofar as the words of the statute suggest the occupier has made a choice, it would seem to be virtually impossible for the Minister to obtain an order for a summons under s. 18(1) of the *Act*, where the identity of the alleged unlawful occupier is unknown.

[25] As for the potential prejudice to the government, if my reasoning here is correct, perhaps an example will help to clarify my thinking. A government inspector may come across a cabin which appears, to have been unlawfully constructed on territorial lands. After a diligent search, the owner/occupier cannot be located. On my analysis of s. 18(1) above, the government would not be able to obtain a summons to vacate or show cause. In the absence of such a summons, nor would the government be able to obtain an order for summary removal of the cabin under s. 18(2) of the *Act*. In those circumstances, I expect the government would continue to monitor the cabin. If no activity or sign of occupation were observed for a lengthy period of time, the government could consider an action in common law based upon the notion of abandonment. Alternatively, if signs of occupation are detected, this should eventually lead the government to the identity of the occupier, in which case it could *then* take action under s. 18 of the *Act*. In the meantime, the government suffers virtually no prejudice, other than the continued existence of the cabin on the lands. But, absent any

environmental concerns or other competing interests, that prejudice is far less than the potential loss of a significant investment by an occupier who, after summary removal of the cabin, is able to establish their lawful authority to occupy.

**CONCLUSION**

[26] I conclude that s. 18(1) of the *Territorial Lands (Yukon) Act* requires that notice of the application for the summons be given to the person(s) being summoned.

[27] In this case, the petition was filed on December 19, 2006 and the order authorizing the summons was made on December 20, 2006. However, I am informed that the corporate respondent, Bonnet Plume Outfitters (1989) Ltd., did not receive delivery of the petition until the following day, December 21, 2006, and that the individual respondent, Chris McKinnon, did not receive his copy of the petition and supporting documents until January 4, 2007. Therefore, there is no question that the order of December 20, 2006 was made without notice to both respondents. As I have held that notice was required, then, pursuant to Rule 2(2)(b), there has been a failure to comply with the *Rules of Court* and accordingly I set aside the issuance of the summons.

[28] The respondents' counsel expressly asked that I merely "suspend" the operation of the summons, pending a new hearing on whether it should be issued. Perhaps I am being overly technical, but the notion of a "suspended" summons seems to invite a form of judicial review of the December 20th order and I don't understand that to be the respondents' intention. Rather, they wish an entirely fresh hearing, at which they expect to file their own responsive materials. In these circumstances, it makes more sense to

"set aside" the summons, as contemplated in Rule 2(2)(b), and start over (subject to any agreements on process as between counsel).

[29] The respondents' counsel acknowledged that there may be some overlap between the issues raised in response to the threshold question of whether the summons should issue and the ultimate question, assuming it comes to that, of whether the respondents can show cause why an order for removal should not be made. I appreciate that there may be certain advantages to the respondents to break these determinations up into two separate hearings. On the other hand, that will also add considerably to the parties' costs in this case (especially the respondents, as they have retained Vancouver counsel) and the overall delay. It seems to me that there may be some advantage to the parties agreeing to have all of the arguments heard at the same time and place, on the understanding that the presiding judge would make the threshold determination first, before moving on to the question of whether the respondents have shown cause. Counsel may wish to refer to the *Schulz* case in that regard. In any event, the Court will await further word from the parties as to how they wish to proceed.

[30] No costs were sought on this notice of motion and none are awarded.

GOWER J.