

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

BHP DIAMONDS INC.

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Application for judicial stay of proceedings based on abuse of process. Application dismissed as premature.

Heard at Yellowknife, NT, February 27 and 28, 2002

Reasons Filed: March 7, 2002

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

Counsel for the Applicant: Ross Clark, Bruce Thompson  
Counsel for the Respondent: John Cliffe, Ari Slatkoff

Docket: S-1-CR 2001-000053

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BHP DIAMONDS INC.

REASONS FOR JUDGMENT

[1] BHP Diamonds Inc. (“BHP”) is charged with offences under the federal *Fisheries Act*. The trial of these charges in this Court is expected to take several weeks. BHP makes a preliminary motion seeking a judicial stay of proceedings on the basis that these proceedings are an abuse of process. The specific grounds stated in BHP’s filed Notice of Motion in support of the stay are “that the conduct of the Crown in respect of this matter has been and is vexatious, unfair or oppressive constituting a violation of the principles of fundamental justice and an abuse of process”.

[2] This Court does have a discretion to control its own process and to prevent any abuse of its process. A judicial stay of proceedings is the ultimate remedy to prevent an abuse of the Court’s process. It is a final remedy because it means that the charges are not prosecuted at trial, and that the charges are never resolved by a trial judge on the merits. For these reasons, a judicial stay of proceedings is reserved for only the clearest cases of abuse. All of this is confirmed in recent decisions of the Supreme Court of Canada, such as *U.S.A. v. Cobb*, 2001 SCC 19 and *R. v. Regan*, 2002 SCC 12.

[3] As I understand the submission of counsel in support of this preliminary motion, its essence is that BHP has a complete defence to these charges (i.e., the Authorization

issued by the Minister of Fisheries and Oceans pursuant to s.35(2) of the *Fisheries Act*) and that BHP should not be subjected to a lengthy and expensive trial.

[4] These charges relate to activities of BHP in 1994-1997 during the development stage of the Ekati diamond mine. Developing the mine towards the production stage was a complicated process and included the dewatering or draining of a number of lakes, and the diversion of water. The development of this huge mining project was, of course, subject to statutory regulation. There was an extensive public review of the project through the Environmental Assessment Review Process. BHP was required to obtain permits, licenses and authorizations from various regulatory agencies. For all water-related issues, BHP had to obtain a license or licenses from the N.W.T. Water Board pursuant to the *Northwest Territories Water Act*. As the development of the mine was obviously going to impact on any fish habitat in the area, BHP had to have regard to the provisions of the *Fisheries Act*; in particular, BHP sought an Authorization under s.35(2) of that Act. The federal Department of Fisheries and Oceans (DFO) is responsible for the administration of the latter Act.

[5] The provisions of that part of the *Fisheries Act* pertinent to these proceedings are entitled “Fish Habitat Protection and Pollution Prevention”. Section 35 and s.36(3) read as follows:

35(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.

(2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.

36(3) Subject to subsection (4) [deposits authorized by regulation], no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.

[6] BHP is charged in the indictment with four counts — one offence under s.35(1) and three offences under s.36(3) — as follows:

Count 1: On or between the 15th day of July 1994 and the 16th day of September 1997, at or near the Ekati mine site, in the Northwest

Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sediment, in water frequented by fish, to wit: the waters of Kodiak Lake, in violation of section 36(3) of the *Fisheries Act* and did thereby commit an offence contrary to section 40(2) (b) of the *Fisheries Act*.

Count 2: On or between the 15th day of July 1994 and the 16th day of September 1997, at or near the Ekati mine site, in the Northwest Territories, did unlawfully carry on work or undertaking, to wit: the construction and operation of a diversion ditch, that resulted in the harmful alteration, disruption or destruction of fish habitat, to wit: Kodiak Lake, in violation of section 35(1) of the *Fisheries Act* and did thereby commit an offence contrary to section 40(1)(b) of the *Fisheries Act*.

Count 3: On or between the 15th day of July 1994 and the 16th day of September 1997, at or near the Ekati mine site, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sediment, in a place, to wit: the waters of Kodiak Lake, under conditions where the said deleterious substance may enter water frequented by fish, to wit: the waters of Little Lake, in violation of section 36(3) of the *Fisheries Act* and did thereby commit an offence contrary to section 40(2)(b) of the *Fisheries Act*.

Count 4: On or between the 15th day of July 1994 and the 16th day of September 1997, at or near the Ekati mine site, in the Northwest Territories, did unlawfully deposit or permit the deposit of a deleterious substance, to wit: sediment, in a place, to wit: the waters of Kodiak Lake, under conditions where the said deleterious substance may enter water frequented by fish, to wit: the waters of Moose Lake, in violation of section 36(3) of the *Fisheries Act* and did thereby commit an offence contrary to section 40(2)(b) of the *Fisheries Act*.

[7] It is agreed by counsel on the hearing of this preliminary motion that the *actus reus* alleged against BHP is the same on each of the four counts.

[8] Development of this mine, as mentioned, included the dewatering or draining of a number of lakes so as to gain access to kimberlite pipes (containing diamonds) beneath those lakes. Two of the lakes to be dewatered were Panda and Koala. Prior to

development, water flowed from Panda Lake to Koala Lake and then to Kodiak Lake. Moose Lake and Little Lake are situated downstream from Kodiak Lake.

[9] BHP's development plan included diverting water from Panda Lake around Koala Lake to Kodiak Lake, and to construct a diversion channel for this purpose (Panda Diversion channel). The construction of and use of the Panda Diversion Channel to divert water from Panda was in due course approved by the N.W.T. Water Board in the license it issued to BHP in January 1997.

[10] BHP's request for a s.35(2) Authorization under the *Fisheries Act* was the subject of negotiations between BHP and DFO. The Authorization was issued by the Minister to BHP in January 1997. This document, the covering letter accompanying it, and the Fish Habitat Compensation Agreement (incorporated by reference in the Authorization) were presented as exhibits on the hearing of this preliminary motion. The interpretation of the Authorization is very much at the crux of this motion. Counsel for the Crown and the Defence urge upon the court quite divergent interpretations. Defence counsel submits the Authorization covers the entire mining project, including in particular the Panda Diversion Channel, as it may affect any fish habitat associated with the mining project. Crown counsel, on the other hand, submits that the authorization only relates to the fish habitat of the twelve named lakes in the Authorization document. Kodiak, Moose and Little lakes are not specifically mentioned in the Authorization document itself. There are references, though, to the Panda Diversion Channel in the related Fish Habitat Compensation Agreement.

[11] In my view, however, the Court's decision on the proper interpretation of the Authorization does not end the matter before the Court. Even if I were to assume, for the purposes of this motion, that the interpretation urged on behalf of BHP is the correct one, that does not resolve the issue whether there is an abuse of process justifying a judicial stay of proceedings.

[12] What is the *actus reus* alleged by the Crown in the charges before the Court? Presumably the Crown intends to present extensive evidence at trial of BHP's alleged acts and omissions from July 15, 1994 to September 16, 1997 in the design, construction and operation of the Panda Diversion Channel. At the hearing of this motion the parties agree on this fact — that in the Spring of 1997 there was an overflow of heavy sediment or silt from the Panda Diversion Channel into Kodiak Lake. What was the cause or causes of the overflow of sediment? Presumably the parties will lead evidence at trial on this question.

[13] Assuming again, for the purposes of this motion, BHP's interpretation of the Authorization, it is not a blanket or unconditional authorization. The covering letter accompanying the Authorization states, "This Authorization shall be conditional upon implementation of the mitigation and compensation measures specified in the Authorization and the Fish Habitat Compensation Agreement." The Authorization document itself contains a section entitled "Conditions of Authorization". One of those listed conditions is that BHP "shall implement the Fish Habitat Compensation Agreement negotiated between the Department of Fisheries and Oceans (DFO) and BHP." Another section of the Authorization document states, "Failure to comply with any condition of this authorization may result in charges being laid under the *Fisheries Act*".

[14] The Fish Habitat Compensation Agreement includes, *inter alia*, an obligation by BHP to construct the Panda Diversion Channel according to a named design document, Panda Lake Diversion and Fish Habitat Enhancement Channel Design (a technical document also an exhibit at the hearing of this motion). BHP is required to do so "with due diligence and in a good and workmanlike manner and at its own cost and expense and to the satisfaction of DFO." Did BHP comply with this condition of the Authorization? Presumably the parties will lead evidence at trial on this question.

[15] The s.35(2) Authorization is in effect a statutory exemption or statutory defence to what would otherwise be unlawful activity under s.35(1). At this stage how can I determine whether BHP's alleged unlawful activity is covered by the Minister's Authorization when I have no specific evidence (yet) of BHP's alleged unlawful activity between July 15, 1994 and September 16, 1997?

[16] Binding case law from the Supreme Court of Canada tells me that I ought to grant a judicial stay of proceedings only in the "clearest of cases" of abuse of process. Is it absolutely clear that DFO officials are proceeding with this prosecution in circumstances where BHP has a complete defence to the charges on account of the Authorization? I do not know. I need to see specific evidence of the allegations against BHP.

[17] The application for a judicial stay of proceedings because of abuse of process is premature. Accordingly the motion before the Court is denied.

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

Dated at Yellowknife, NT, this  
7th day of March 2002

Counsel for the Applicant: Ross Clark, Bruce Thompson  
Counsel for the Respondent: John Cliffe, Ari Slatkoff

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