

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

In the matter of an application by  
WAYNE VIEIRA for Writ/Order of  
Certiorari

Ms. J. Ali for the Applicant

Ms. K. Kyte-John for the respondent

Decision

THE ISSUES

The main issues that arise for consideration are:

1. firstly, Whether the Cease Work Order (CWO) issued on the 26<sup>th</sup> November 2010 by the Commissioner, Guyana Geology and Mines Commission or GGMC was lawfully issued?
2. and secondly What is the effect of sections 2 to 5 of the Amerindian Act 2006 (Validation of Commencement) Act 2010 and the general retroactive or retrospective clauses.

The Applicant Wayne Vieira received a letter dated 26<sup>th</sup> November 2010, from the Commissioner (ag) of GGMC which stated that “This CWO has been issued because of the current absence of an agreement (as our records reflect) between yourself and the Village Council of Chinese Landing/Tassawini as is required by section 48 of the Amerindian Act.”

Under the Mining Act 1989 and the regulations, The Commissioner of GGMC or other authorized person has the power under Regulation 98 of the Mining Act to issue a CWO “for the maintenance of public peace or for protection of the interests of the State ”

Since The Commissioner derives his powers from a statute, his powers are defined by that Statute and he cannot exceed those powers. Particularly in relation to the issuance of CWO, the CWO can only be issued under Regulation 98 of the Mining Act and on the grounds stated therein ie. to maintain public peace or to protect the interests of the State...

I ought to mention that, in the present case, there was no allegation or answer from the respondent that there was a breach of the public peace. Nor can the Commissioner use Regulation 98 to say that the failure of the applicant to enter into an agreement under section 48 of the Amerindian Act 2006 falls within the ambit of “protection of the interests of the State...”

I therefore find that the Commissioner of GGMC and GGMC did not have the authority to issue the CWO of the 26<sup>th</sup> November 2010 outside Regulation 98 of the Mining Act under which it derives its authority to issue CWOs, since there was no ground upon which it could do so, and in particular, the Commissioner of GGMC and GGMC did not have the authority to issue a CWO under section 48 of the Amerindian Act 2006.

I will now deal with the next issue ie the effect of the  
Retroactive/retrospective clauses

Section 48(1)(f) of Amerindian Act 2006 states that a miner shall ... reach agreement with the Village Council on the amount of tribute to be paid ... “

It is evident that GGMC or its Commissioner does not have the authority to enforce section 48 of the Amerindian Act 2006. The subject Minister for the Amerindian Act 2006 is the Minister responsible for Amerindian affairs, and section 48 does not give the GGMC any powers to issue a CWO under this section.

Infact the deponent states in his affidavit in answer that he has no knowledge of paragraphs 20 to 33 of the affidavit in support by the applicant which sets out the efforts made by the applicant to reach an agreement.

Furthermore, Subsection (3) provides for penalties for non compliance of subsection 1 which do not include the issuance of a CWO by the Commissioner of GGMC.

On the 26<sup>th</sup> November 2010 when the CWO was issued, the Amerindian Act 2006 was not in effect. The Amerindian Act 2006 came into operation on the 1<sup>st</sup> December 2010 and The Amerindian Act 2006 (Validation of Commencement) Act 2010 came into operation on the 1<sup>st</sup> December 2010.

Section 2 of the validation Act contains a general retroactive clause that the Amerindian Act 2006 shall be deemed to have come into

operation on 14<sup>th</sup> March, 2006. However, if one examines the Validation Act, it will readily be seen that this clause is subject to sections 4 and 5.

Section 4 states “All acts and things done between 14<sup>th</sup> March, 2006 and the date of the enactment of this Act which would have been lawful if the Amerindian Act 2006 had been brought into force by Order published in the Gazette shall for all purposes be deemed to be and always to have been lawfully and validly done and all persons are freed, acquitted, discharged and indemnified from all liability and legal proceedings of any kind in respect of those acts and things.”

This section is clear that all acts and things done which would have been lawful if the Amerindian Act 2006 were in operation at the time, would be deemed lawfully done.

Therefore having already found that section 48 did not give the Commissioner or anyone else the power to issue a CWO; thus that act cannot be deemed lawful and therefore it cannot operate retrospectively.

It is important also to look at Section 5 which also limits the retrospective effect. Section 5 states that -

**“no person shall be made or shall become liable to any penalty whatsoever in respect of any act or commission or omission under the Amerindian Act 2006 between 14<sup>th</sup> March, 2006 and the enactment of this Act.”**

This section goes further and relieves any person who has committed an act or omitted to act between the 14<sup>th</sup> March and the date of enactment from being punished, even if that act or omission could be deemed to be retrospective.

With reference to Counsel for the respondent's submission that "a reading of this section shows clearly that this is in relation to criminal matters and could have no bearing whatsoever on the instant matter and is wholly irrelevant, I find such a submission wholly without merit since it would be a serious blunder if the drafters of the legislature intended criminal actions to go unpunished. This is beyond comprehension.

I will also address the issue of the removal of vested rights. It is established law that a clause or statute that inflicts a detriment or purports to "take away or impair a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past" or to modify accrued rights, cannot be said to have retrospective effect unless it is expressly stated and "the language and other components of the statutory context of the statutory provision clearly signify a legislative intention that the statutory provision should have retrospective effect." (see Sir Vincent Floissac CJ in *Richardson v Richardson* (1995) 50 WIR 178.)

Bearing this in mind, nowhere in the Act is there any express provision stating that section 48 of the Amerindian Act is to have retrospective effect.

In the present matter, by virtue of the 4 Mining Permits Medium Scale issued by GGMC, the applicant was given "the exclusive right to occupy and mine" and there was no mention of reaching any agreement between the applicant miner and anyone else as contemplated by the Amerindian Act

In the circumstances, I find that the CWO of the 26<sup>th</sup> November 2010 was not lawfully issued.

I also find that by virtue of section 5 of the 2010 Amerindian Commencement act, section 48 did not have retrospective or retroactive effect, nor did section 48 give the power for GGMC to issue a CWO.

This Court must express its surprise that Counsel for the Respondent made no mention of section 5 of the Act and also referred to repealed sections of the Mining Act.

In the circumstances, the respondent has not shown cause why the order nisi should not be made absolute.

Therefore the order nisi is hereby made absolute.

Costs \$75,000

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Diana F. Insanally

Date: 24/05/2011