SUPREME COURT OF YUKON

Citation: *Frost v Blake*, 2021 YKSC 32

Date: 20210611
S.C. No. 21-A0013
Registry: Whitehorse

BETWEEN

PAULINE FROST

PETITIONER

AND

ANNIE BLAKE and H. MAXWELL HARVEY, CHIEF ELECTORAL OFFICER OF THE YUKON TERRITORY

RESPONDENTS

AND

CHRISTOPHER RUSSELL SCHAFER

INTERVENOR

Before Chief Justice S.M. Duncan

Counsel for the petitioner	James R. Tucker and Luke S. Faught
Counsel for the respondent, Annie Blake	Shaunagh Stikeman
Counsel for the respondent, H. Maxwell Harvey, Chief Electoral Officer of the Yukon Territory	Mark E. Wallace
Counsel for the intervenor, Christopher Schafer	Vincent Larochelle

REASONS FOR DECISION
(preliminary application to introduce expert evidence)

Introduction

[1] DUNCAN C.J. (Oral): The respondent Annie Blake seeks to introduce into evidence in this petition two affidavits as expert evidence under Rule 34 of the *Rules of*

Court of the Supreme Court of Yukon, over the objections of the petitioner, Pauline Frost, and the respondent, Maxwell Harvey, the Chief Electoral Officer of the Yukon Territory. The intervenor takes no position.

[2] This petition is brought by Pauline Frost, one of the two candidates in the April 12, 2021 election in the electoral district of Vuntut Gwitchin ("the District"), under s. 356 of the *Elections Act*, RSY 2002, c.63, challenging the validity of the election in the District. The tie result on election night between the candidates Pauline Frost and Annie Blake was confirmed by judicial recount. As provided for in s. 300 of the *Elections Act*, a drawing of lots was done. Annie Blake became the Member of the Legislative Assembly for Vuntut Gwitchin electoral district after her name was drawn.

[3] Pauline Frost initiated this petition on the grounds that the election was not conducted in accordance with the *Elections Act.* Specifically, she says two of the voters in the District were not qualified to vote in the District on the basis of their residence. One of them, Christopher Schafer was born and raised in Old Crow but has been incarcerated or living in Whitehorse and subject to release conditions for approximately the last 22 years. There is affidavit evidence that some residents of Old Crow are unsupportive of the prospect of Christopher Schafer returning to Old Crow. The issue in this petition is whether he was qualified to vote in the District under s. 3 of the *Elections Act* because he was not resident in the District between March 12, 2021, the day the writ was issued, and April 12, 2021, the day of the election. The other voter, Serena Schafer-Scheper, was living in Alberta for part of 2020. The issue in her case is whether she met the requirement in s. 3 of the *Elections Act* of residency in the Yukon for the previous 12 months.

[4] The determination of these residency issues requires an interpretation of the *Elections Act* provisions on residency, including ss. 3 and 6 of the *Elections Act*.

[5] The two relatively short affidavits sought to be introduced as expert evidence are from Vuntut Gwitchin elders William Josie and Jane Montgomery. The respondent Annie Blake seeks to qualify the elders as experts in the Vuntut Gwitchin way of life and the meaning of "true home" (part of the definition of residence in s. 6(1)) for the Vuntut Gwitchin).

[6] The affidavit of William Josie references principally Christopher Schafer and only mentions Serena Schafer-Scheper to the extent of his view of the effect of the petition on her. This affidavit includes statements about the importance of forgiveness in the Vuntut Gwitchin way of life; that Christopher Schafer's family, blood and DNA have lived on the Vuntut Gwitchin land for the last 28,000 years, along with a long line of elders; that Old Crow is Christopher Schafer's home, and that he was brought up on it and knows how to live on it. William Josie also states that Vuntut Gwitchin First Nation has no banishment law.

[7] The affidavit of Jane Montgomery contains more detail about the Vuntut Gwitchin traditional lifestyle, including details about living off the land; the meaning of Vuntut Gwitchin and its connection with Crow Flats; going to Crow Flats in the past as a community and building boats; trapping muskrats; and hunting and using caribou, moose, rabbit, and ptarmigan. The affidavit states the importance of the connection with the land to the very definition of the Vuntut Gwitchin people. It also refers to the importance of forgiveness and acceptance into the community in the Vuntut Gwitchin way of life; the provision of care of parents by younger people; and again the absence

of any Vuntut Gwitchin banishment law. Jane Montgomery says that for Vuntut Gwitchin people, no matter where you are and no matter for how long you are away you still call Old Crow home. Examples of why people leave Old Crow are provided.

[8] Both affidavits contain hearsay evidence about the factual circumstances of Christopher Schafer and Serena Schafer–Scheper. Both contain a number of paragraphs about why Christopher Schafer should be welcomed back into the community of Old Crow.

[9] The respondent Annie Blake has filed a number of other affidavits. They include the affidavits of Christopher Schafer, of Serena Schafer-Scheper, of Marion Schafer and Esau Schafer, parents of Christopher Schafer, Rebecca Bradford-Andrew and Ellen Kyikavichik.

[10] The content of these other affidavits includes facts about Christopher Schafer's reasons for leaving Old Crow, a significant amount of information about his intentions and attempts to return to Old Crow, and his living arrangements in Whitehorse. The other affidavits also include significant information about Serena Schafer-Scheper's reasons for leaving the Yukon in 2020, the detailed circumstances of her time spent in Alberta, and her return to the Yukon and Old Crow.

Legal Principles

[11] The criteria for the admission of expert opinion evidence were established by the Supreme Court of Canada in *R v Mohan*, [1994] 2 SCR 9 ("*Mohan*") at para. 17. They are:

a. relevance;

b. necessity in assisting the trier of fact;

c. the absence of any exclusionary rule; and

d. a properly qualified expert

[12] A more recent helpful case from the Ontario Court of Appeal – *R v Abbey*, 2009 ONCA 624 - analysed in more detail the purpose of expert evidence and the *Mohan* criteria of admissibility.

[13] In that case, the Court of Appeal explained at para. 71: "

> … Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses and present an opinion as to a factual inference that should be drawn from that material. The trier of fact must then decide whether to accept or reject the expert's opinion as to the appropriate factual inference. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases. Consequently, expert opinion evidence is presumptively inadmissible. The party tendering the evidence must establish its admissibility on the balance of probabilities. … [citations omitted]

[14] The Court of Appeal suggested a two-step process for determining admissibility. The first step is to determine the expert is qualified to give the opinion. The second step is a "gatekeeper" function where the court has to decide whether the expert evidence that meets the preconditions of admissibility is sufficiently beneficial to the trial process to warrant its admission, despite the potential harm to the process that may flow from the admission of the expert evidence. This inquiry is only to decide if the evidence should be heard, not whether it should be accepted.

[15] Other courts have adopted the general proposition in applying the *Mohan* criteria that if evidence is logically probative, it should be admitted, subject to the recognized rules of exclusion and an assessment of weight (see *Sawridge Band v Canada*, 2005

FC 101, quoted in *Ross River Dena Council v The Attorney General of Canada*, 2011 YKSC 87 at para. 16).

[16] In this case, the two applicable criteria at the second stage of the process are necessity in assisting the trier of fact and relevance. I will first discuss necessity. The Supreme Court of Canada in *Mohan* at para. 22 explained the necessity of expert evidence as: "[w]hat is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of the judge or jury": as quoted by Dickson J. in *R v. Abbey*, [[1982] 2 SCR 24]". The Supreme Court in *Mohan* further relied on a statement in *Beven on Negligence in Law* (4th ed 1928), at p.141, which said: "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge." Additionally, as stated by the court in *Mohan*, quoting Lord Wilberforce in *Director of Public Prosecutions v Jordan*, [1977] AC 699 at p. 718: "If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

[17] Secondly, I will address the meaning of relevance in this context. Relevance is a threshold requirement for the admission of expert evidence. The court wrote in *Mohan* that it is not enough to conclude evidence is admissible if it is so related to a fact in issue that it tends to establish it. This is its logical relevance, but there must be a further inquiry, described as a cost-benefit analysis. If the probative value of the evidence is outweighed by its prejudicial effect, if it involves an inordinate amount of time not commensurate with its value, or if it is misleading to the extent that its effect on the trier of fact is out of proportion to its reliability, then it will not be admissible.

[18] When assessing the admissibility of expert evidence, the last factor is significant. There is always a danger that expert evidence can distort the fact-finding process and be given more weight than it deserves. This is of particular concern with a jury, but can still occur with a judge alone.

[19] Rule 34(5) sets out the requirements for filing an expert report. They include setting out the qualifications of the expert; the facts and assumptions on which the opinion is based; a description of the documents reviewed and relied upon by the expert, including any tests; and the name of the person primarily responsible for the content of the report and the names of all the other persons who contributed to the report. None of these requirements has been met here. Counsel for Annie Blake advised that she could provide this information in supplementary reports, and in fact Rule 34 allows for this. Although it is not ideal for these expert affidavits to be introduced without the fulfillment of the requirements in Rule 34(5), it is not fatal as it is a matter than can be rectified.

[20] Turning to the application of the test to the facts of this case, the first stage of the process is the qualifications of these individuals as experts in Vuntut Gwitchin way of life, including how “true home” is interpreted. Expert qualification is not an issue of concern. Although the details of the elders’ expert qualifications have not been proffered by counsel, the affidavits describe their backgrounds, cultural knowledge, and experience sufficiently so that I do not doubt their expert qualifications in these areas, and the respect that they engender in their community and beyond.

[21] Moving to the second stage of the process of determining admissibility, I find, first, that the necessity criterion is not met here. The petition as it relates to Christopher

Schafer's qualification to vote requires a factual determination of his residency. This is to be determined by applying the *Elections Act* provision and any relevant policy to the facts of his situation. The facts that he was born and raised in Old Crow, is a Vuntut Gwitchin citizen, has participated successfully in many traditional Vuntut Gwitchin activities over the years, has many family members, including his parents, daughter and elders, currently living or having lived in Old Crow for many thousands of years, has very strong ties with the land in the Vuntut Gwitchin traditional territory, including its contribution to his identity and well-being, and his repeated statements borne out by some actions that he wants and intends to return to live on that land in Old Crow, are all relevant to the question I have to determine. These facts and more are set out clearly in Christopher Schafer's affidavit and those of his parents and daughter, all of whom are Vuntut Gwitchin citizens. It is possible for me to draw necessary inferences to make a decision in this matter from the facts (and any cross-examinations that may occur) in the non-expert affidavits that are already before the Court.

[22] The facts in this petition as they relate to Serena Schafer-Scheper are different. The legal issue is whether she met the test of Yukon residency for the previous 12 months. Although her presence in Old Crow as opposed to Whitehorse is relevant to this inquiry, her residence in the District is not as directly in issue as it is in the determination of Christopher Schafer's residency. As a result, expert evidence about the Vuntut Gwitchin way of life and the concept of home is not as necessary in determining the issue related to Serena Schafer-Scheper. In fact, one proposed expert affidavit does not mention her at all, except as I outlined at the beginning with respect to the effect of the petition on her. The other one refers to her in four short paragraphs, containing

hearsay evidence about the residency issue. What is relevant to the inquiry about Serena Schafer-Scheper's situation are the facts that she was born and raised for most of her youth in the Yukon and has family and ties to the land in Old Crow and currently lives there. In addition, the circumstances surrounding her leaving the Yukon, and her intention to return to the Yukon or establish a residence elsewhere outside of the Yukon during the twelve months before the election are relevant. Again, that evidence is set out clearly and directly in a number of affidavits: her own, her mother's, and Rebecca Bradford-Andrew's. The affidavits of William Josie and Jane Montgomery are not necessary for this inquiry.

[23] The second criterion I wish to address is relevance. Much of the content in the proposed expert affidavits does not meet the test of relevance. As noted by counsel for Pauline Frost in the brief argument on this issue, there are a number of paragraphs in both affidavits that can be described as exhortations to the community to forgive Christopher Schafer and welcome him back to Old Crow. Those parts of the affidavits are irrelevant and do not meet the test of admissible expert evidence in this petition. The ability of the community to accept Christopher Schafer's intention to return to Old Crow and why they should do so is not what this petition is about. It is about (in part) whether the *Elections Act* was properly complied with when Christopher Schafer was listed as an elector and voted by special ballot that was counted in the District.

[24] As noted earlier, much of the proposed expert evidence repeats facts set out in the affidavits of others. To have it repeated in the form of expert testimony, even by affidavit, risks giving these facts undue weight. It is also not an efficient use of resources, especially in an expedited hearing situation such as this. There is also a risk

that repetition by the proposed experts of some of the facts through hearsay evidence, facts that are attested to directly by Christopher Schafer, Serena Schafer-Scheper and others, constitutes oath-helping, an impermissible use of expert evidence.

[25] The only parts of the affidavits that do qualify, in my view, as expert opinion that is necessary and relevant to this petition are the statements about the absence of any ability of the Vuntut Gwitchin First Nation to banish people from the community. If this is disputed by the petitioner, then it would be helpful to me to have expert evidence on this point. I will leave it to counsel to discuss but if there is a dispute on this point, then I will allow one expert affidavit by the respondent and a responding affidavit by the petitioner to address this point.

[26] As a result, with this one above-noted possible exception, the application to admit these two affidavits as expert evidence is denied. I repeat that this is not in any way intended to diminish the respect for these elders' cultural knowledge, wisdom and views. The denial is the result of the application of the necessity and relevance analysis set out by the Supreme Court of Canada and followed in numerous cases on expert evidence, to the grounds and the facts of this petition.

_____

DUNCAN C.J.