SUPREME COURT OF YUKON

Citation: *Frost v Blake*,
2021 YKSC 33

Date: 20210614
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 (not appearing) — Vincent Larochelle

REASONS FOR DECISION
(application to amend petition)

[1] DUNCAN C.J. (Oral): This is an application to amend the petition. Leave of the Court is necessary under Rule 24(1) of the *Rules of Court* of the Supreme Court of Yukon because the responding parties have not consented and the hearing is

scheduled to proceed on June 23 and 24, less than two weeks from the date the petitioner provided notice of the amendments. The main issue is whether the amendments should be granted because they are outside of the 30-day limitation in s. 355 of the *Elections Act*, RSY 2002, c.63.

[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*, challenging the validity of the election in the District. 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 were not qualified to vote in the District on the basis of their residence.

[3] The amendments sought relate to one of those voters, Christopher Schafer. The petitioner seeks to add more facts about whether there was compliance with the requirements of s. 105.02 of the *Elections Act* in the issuance to him of an inter-district special ballot. These include the issues of authorized identification, the use and purpose of a letter of attestation, the failure of the returning officer to contact the local returning officer for the District. There is also an amendment about the failure of the Chief Electoral Officer to investigate concerns about residency brought to his attention three days before polling day.

[4] Section 355 of the *Elections Act* requires a challenge to the validity of the *Elections Act* to be brought within 30 days after the return to the writ of election, in this case, April 19.

[5] Counsel for the petitioner argues that the amendments are subsumed in para. 13 of the petition as well as the general grounds of the petition – that the election was not

conducted in accordance with the *Elections Act* (s. 357 (1)(b)). They do not constitute a new "cause of action." Alternatively, if they are considered to be a new "cause of action", counsel says the factual basis for these amendments was not known until he received the affidavit of David Milne, the Returning Officer, who conducted the special ballot process with Christopher Schafer at Whitehorse Correctional Centre ("WCC"). This affidavit was served and filed on May 18, 2021. As well, counsel learned about the response of Maxwell Harvey to the concerns about residency only after receiving his affidavit on June 3, 2021. Essentially counsel relies on the discoverability rule – he did not know or could not have known with reasonable diligence the information set out in David Milne's and Maxwell Harvey's affidavits about the process of allowing Christopher Schafer to vote by special ballot and the absence of any investigation by the Chief Electoral Officer. Applying the decision of *Basarsky v Quinlan*, [1972] SCR 380 ("*Basarsky*"), and cases following it, counsel for the petitioner says that this case presents special circumstances that should overcome the limitation period, including the need for an expedited hearing, and the public interest nature of the litigation. Counsel states he will not be filing further affidavit evidence and is seeking these amendments as a form of notice to the respondents and the Court to ensure no one is surprised.

[6] Counsel for the respondent Maxwell Harvey, the Chief Electoral Officer, objects to the amendments. He says the 30-day limitation period in s. 355 of the *Elections Act* prevails. The affidavit of David Milne was filed on May 18, giving the petitioner one day to proceed with amendments to address new issues raised by his affidavit. The statutory limitation period ousts the common law discoverability rule, as it does not require knowledge of the injured party in order to be applied. He relies on the decisions

in *Basarsky*, *Ryan v Moore*, 2005 SCC 38 ("*Ryan*"), *Gibbons v Doe*, 2019 YKSC 40 ("*Gibbons*"), and *Sidhu v Canada*, 2019 YKSC 36 ("*Sidhu*").

[7] Counsel for the respondent Harvey says in any event if the discoverability rule is found to apply, counsel for the petitioner did not exercise the requisite diligence to discover the information he says gives rise to these additions to the petition. The list of authorized identification documents is public. There is no property in a witness and counsel for the petitioner could have interviewed the returning officer or spoken with WCC, where Christopher Schafer voted by special ballot, before receiving any affidavits from the respondents. Counsel says that the amendments amount to a new "cause of action" because previously the only factual basis for the challenge was residency. Many of the proposed amendments are independent of any residency issue and they constitute a new breach under s. 105.02 of the *Elections Act*. Counsel says there are no special circumstances here that would justify allowing the amendments. He says there may be prejudice in the form of delay of the proceedings because of the need to respond with additional affidavit evidence.

[8] Counsel for the respondent Harvey states he will likely be required to file two additional affidavits to respond to the proposed amendments. Although he says it will be difficult, he would likely be able to complete the affidavits by the end of the day on Friday, June 18, five days before the hearing.

[9] Counsel for the respondent Annie Blake adopts the submissions of the respondent Harvey. She also says she will be required to file a new affidavit from Christopher Schafer to address the new allegations. She says that although it would be

difficult, she would likely be able to submit this affidavit by the end of the day on June 18.

[10] Rule 24(1) applies to amendments of originating processes, defined to include a petition. Broad discretion is provided to the Court and no restrictions, narrowing, or limits are set out in the Rule.

[11] Similarly, s. 17 of the *Judicature Act*, RSY 2002, c.128, although it is not clear whether it applies to petitions, allows for amendments to be made if they are 'just", even if the right of action would have been barred by the limitations provisions in any statute.

[12] Much of the case law submitted by counsel was distinguishable from this case. All the cases submitted were about civil actions, as opposed to applications or petitions, which are without a cause of action. The wording of the rule or statutes being addressed in the other cases (such as *Ryan*, *Sidhu*, *Gibbons*) was not the same as those in this case, especially where the issue was the adding of new parties, where different rules and considerations at common law, in statutes and in rules apply.

[13] A review of the British Columbia Supreme Court decision in *Coburn and Watson's Metropolitan Home v Bank of America* Corp, 2016 BCSC 2021, and one of the cases submitted by the petitioner, and referred to by counsel for the respondent, Ms. Blake, took me to *Chouinard v O'Connor*, 2011 BCCA 161 ("*Chouinard*"). Although this is also a decision in the context of a civil action, it provides helpful guidance on the applicable legal principles to this case. The rule in that case allows a party to amend an originating process at any time with leave of the court, the same language as the Supreme Court of Yukon Rule 24(1), and the facts in *Chouinard* do not deal with the addition of parties.

[14] The British Columbia Court of Appeal reviewed the applicable principles on amendments in *Chouinard* by referring to an earlier British Columbia Court of Appeal decision: *Teal Cedar Products (1977) Ltd v Dale Intermediaries Ltd* (1996), 71 BCAC 161 (BCCA) ("*Teal*"):

> [18] In *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), … this Court determined that the Supreme Court has broad discretion to allow or disallow an amendment, holding that the overriding test is whether it is "just and convenient" to allow the amendment. Finch J.A. (as he then was), with the concurrence of Ryan J.A., stated:
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>> [36] This application was brought … under Rule 24(1) which permits a party to amend pleadings at any time, with leave of the court. The rule is discretionary and contains no criteria for the exercise of that discretion.
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>> [37] The rule most often involved in questions arising under the *Limitation Act* is Rule 15(5)(a)(iii). It is invoked on applications to add parties. Rule 15(5)(a)(iii) says that the court may order a person to be added as a party where there exists a question which, in the opinion of the court, would be "just and convenient" to determine as between a party and the person sought to be added. The qualifying phrase "just and convenient" is not to be found in Rule 24(1).
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>> [38] Discretionary powers are, of course, always to be exercised judicially. It would clearly be unjudicial to permit an amendment to pleadings under Rule 24(1) if it appeared to be either unjust or inconvenient to do so. So, even though the words "just and convenient" are not found in Rule 24, justice and convenience would, in my view, be relevant criteria for the exercise of the discretion found in that rule.
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>> …
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>> [45] [T]he discretion to permit amendments afforded by ... Rule 24(1) … was intended to be completely unfettered and subject only to the general rule that all such discretion is to be exercised judicially, in accordance with the evidence adduced and such

> guidelines as may appear from the authorities. Delay, and the reasons for delay, are among the relevant considerations, and the judge should consider any explanation put forward to account for the delay. But no one factor should be accorded overriding importance, in the absence of a clear evidentiary basis for doing so.
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> …
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> [67] In the exercise of a judge's discretion, the length of delay, the reasons for delay and the expiry of the limitation period are all factors to be considered, but none of those factors should be considered in isolation. Regard must also be had for the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and the proposed new cause of action. Nor do I think that a plaintiff's explanation for delay must necessarily exculpate him from all "fault" or "culpability" before the court may exercise its discretion in his favour. ...

[15] This case has been followed in other British Columbia cases, with the factors set out in *Teal* becoming a list. The British Columbia Court of Appeal has cautioned that is it not intended to be an exhaustive list, and the overriding consideration is whether it would be just and convenient to grant leave. In *Letvad v Fenwick*, 2000 BCCA 630, Esson J.A. for the Court cited from *Teal* and then said:

> [29] My understanding of the phrase "completely unfettered" in this context is that the discretion is not fettered by the relevant legislation, i.e., the Rule and the *Limitation Act*. It is, however, fettered to the extent that, as was held in *Teal*, it must be exercised judicially, in accordance with the evidence adduced and such guidelines as may appear from the authorities. It was held in *Teal* that the guidelines to which the chambers judge is required to have regard include these:
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> - the extent of the delay;
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> - the reasons for the delay;
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> - any explanation put forward to account for the delay;

> - the degree of prejudice caused by delay; and
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> - the extent of the connection, if any, between the existing claims and the proposed new cause of action.

[16] The British Columbia Court of Appeal in *Chouinard* said:

> [21] As can be seen from the chambers judgment in the case before us, this list of factors has come to be seen as a checklist in applications to add a cause of action or a party after the expiry of the limitation period. It is sometimes forgotten that the list of factors is not an exhaustive one, and that the overriding concern is whether the proposed amendment will be "just and convenient". The factors listed in *Teal Cedar* and in *Letvad* will typically be important factors to be considered by a chambers judge, but the decision is ultimately a discretionary one. …

[17] Thus, given the broad discretion available to the Court in Rule 24(1) and the way in which this has been interpreted by the British Columbia Court of Appeal, I am of the view that s. 355 of the *Elections Act* must be interpreted in that context. In other words, the common law criteria of justness and convenience govern the decision of whether the amendments are allowed.

[18] Here, the context is different from a civil action. A petition is meant to be a more expeditious, efficient way of dispute resolution than a civil action, which often takes many years to resolve. In this case, a number of *Elections Act* provisions (set out in my earlier decision: *Frost v Blake*, 2021 YKSC 29) demonstrate that the intention of the legislature is to have any application challenging the validity of the election decided without undue delay. Petitions are often simpler than a civil action; for example the grounds and remedy sought are more circumscribed than in a civil action; there is no detailed response required to the statement of facts provided by the petitioner, unlike a statement of defence in a civil claim; evidence is generally by affidavit; and there is no

discovery and generally fewer pre-trial proceedings. Applications by petition are intended to be a more flexible, expedient tool to resolve a dispute.

[19] Here, the proposed amendments provide further details of the same basic ground that the election was not conducted in accordance with the *Elections Act*. The amendments are in the nature of additional particulars of the ground already specified. They are based on the affidavit evidence provided by the respondent Harvey. They do not require new evidence from the petitioner, who is relying on the evidence provided by the respondent in the affidavits of Milne and Harvey. The amendments are not a completely new cause of action; however, they allege a different failure to comply than the earlier failure articulated, which was limited to residency. They are somewhere in between the equivalent of a brand new cause of action and an immaterial amendment.

[20] Because of the broad discretion afforded to the Court in Rule 24(1), (and bearing in mind s. 17 of the *Judicature Act*) I must exercise it judicially, meaning the criteria of justness and convenience apply. I adopt the test set out in *Teal* and followed in later decisions of the British Columbia Court of Appeal recognizing that the factors are non-exhaustive.

[21] Extent of the delay: The expedited nature of these proceedings means that the delay was not extensive in real terms (from May 19 to June 10); however, it must be examined in the context of these proceedings. I agree with counsel for the respondents that given the dates of the responding affidavits – May 18 and June 3, the amendments, especially related to identification, attestation letter and notification of the District returning officer (all from David Milne’s affidavit dated May 18) could likely have been

thought of sooner. However, even in the context of these proceedings, the extent of the delay is not unjust, though it may be inconvenient.

[22] Reasons for the delay: Counsel for the petitioner says they did not know of these additional facts until receiving the affidavits of Milne and Harvey. Counsel for the respondent Harvey says that there was nothing preventing counsel for the petitioner from contacting WCC or the returning officer David Milne before the deadline of May 19 to get the information contained in the Milne affidavit. The returning officer David Milne is independent from the Chief Electoral Officer. Counsel also noted that the list for proper authorized identification is a public list. With reasonable due diligence the petitioner could have discovered this information earlier.

[23] While technically counsel for the respondent is correct, the expedited nature of this proceeding, including the absence of a requirement of a detailed response and a discovery process, means that the first realistic opportunity the petitioner had to understand the nature and extent of the response was the affidavit evidence of the respondents. It is unreasonable to expect in the short time frame of this application that the petitioner could do its own searching and interviewing. These inquiries would of necessity be general, uninformed and speculative, a probing for information without knowing whether it would turn up more details that would fit the grounds for the petition. It would not be an efficient or perhaps even necessary use of resources. The reasons for the delay are justified.

[24] Explanation for the delay: This has been addressed in the extent and reasons for the delay. The petitioner did provide a valid explanation that the delay was created by not knowing about the issues raised in the amendments until receiving the affidavits.

[25] Prejudice: Both respondents say they are prejudiced because they will be forced to rush to file new affidavits to respond to the proposed amendments. However, both said that, with some inconvenience, they could file them before the hearing on June 23. In other words, they do not say that the hearing will have to be delayed because of these amendments. As stated by the British Columbia Court of Appeal in *Chouinard*, prejudice must be actual. "Mere inconvenience or annoyance will not necessarily amount to prejudice."(para. 23).

[26] I understand the annoyance of both counsel for the respondents, as it was counsel for the petitioner who has been most insistent from the beginning that this matter be heard quickly and as soon as possible, over the objection of counsel for the respondent Annie Blake. To be met with amendments this close to the hearing date is annoying and inconvenient. However, both respondents, to their credit, have said they can provide the parties and the Court with the necessary material before the hearing. The inconvenience is something that may be compensated for by costs.

[27] Extent of the connection between the existing claims and the new "cause of action": Although counsel for the respondents both say adamantly that these amendments raise a new "cause of action" under s. 105.02, and counsel for the petitioner refers to the identification issue as independent of residence, I see these amendments as interconnected with the facts already set out. They arise out of the presence of Christopher Schafer at WCC and the consequent requirement under s. 99.01(3) for him to vote by special ballot. They do not involve any other voter or a different set of factual circumstances. They arise from the conduct of the inter-district special ballot process by the returning officer at WCC, and the aftermath of that

process, which included correspondence from counsel for the Liberal Party to Maxwell Harvey. The petitioner's outline, filed at the same time as the petition was filed, contains a paragraph referring to s. 105.02 not being complied with. The issue of the use of a letter of attestation for identification is connected to the residency issue. As a result, although the amendments set out new arguments, they are connected to the earlier ground, as they arise from the same process and factual background of providing Christopher Schafer, an inmate at WCC at the relevant time, with an inter-district special ballot.

[28] A significant factor for the Court to consider is ensuring the real issues in this dispute between the parties are before the Court, especially in a case of public interest like this one. Here the issue is whether the *Elections Act* was complied with in allowing Christopher Schafer to vote by special ballot in the District and Serena Schafer-Scheper to vote in the District. All of the facts and arguments related to those issues should be before the Court. While it is inconvenient for the respondents to provide affidavit material on short notice and in an abbreviated time, this can be compensated for through costs.

[29] I therefore grant the petitioner's amendments, with costs to the respondents of the inconvenience created by these amendments by having to provide additional affidavits in a rushed time frame. These costs may be spoken to at the conclusion of this proceeding if necessary.

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DUNCAN C.J.