SUPREME COURT OF YUKON

Citation: *Wright v Yukon (Director of Public Safety and Investigations)*, 2021 YKSC 54

Date: 20211022
S.C. No. 20-A0113
Registry: Whitehorse

BETWEEN:

CELIA ERIN BUNBURY BAINBRIDGE WRIGHT

PETITIONER

AND

GOVERNMENT OF YUKON
(DIRECTOR OF PUBLIC SAFETY AND INVESTIGATIONS)

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the petitioner — Vincent Larochelle

Counsel for the respondent — Kelly McGill and Amy Porteous

REASONS FOR DECISION
(Application to dismiss for lack of standing)

Introduction

[1] Based on her right to life, liberty and security of the person under s. 7 of the *Charter of Rights and Freedoms*, *Part 1 of the Constitution Act, 1982* (the "*Charter*"), the petitioner challenges a section of the *Safer Communities and Neighbourhood Act*, SY 2006, c.7 (the "*SCAN Act*"). Section 3 of the *SCAN Act* allows the Director of Public Safety and Investigations (the "Director") to be involved in the termination of a tenancy agreement or lease after receiving a complaint that a community or neighbourhood is being adversely affected by activities on or near a property in that community or

neighbourhood. The petitioner seeks a declaration of constitutional invalidity of this section.

[2] The respondent Yukon government brings an application to strike this petition because they say the petitioner lacks standing. The petitioner received a notice of termination of tenancy from her landlord as well as a notice to terminate tenancy from the Director on December 9, 2020, effective December 15, 2020. The deadline was extended to January 30, 2021, after the petitioner objected. At some point before January 30, 2021, the notice from the Director was withdrawn as arrangements were made between the petitioner and her landlord.

[3] The issue to be decided is whether the petitioner has public interest standing to pursue this litigation, according to the test set out by the Supreme Court of Canada in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 ("*Downtown Eastside*"). A preliminary determination is whether an application to dismiss brought under Rule 20(26)(a) of the *Rules of Court* of the Supreme Court of Yukon is the appropriate way to proceed.

Procedural issue – application to dismiss or determination of standing on a preliminary application

[4] The Yukon government initiated this application as a motion to strike for no reasonable cause of action under Rule 20(26)(a). At the outset of the hearing, I questioned this procedure because it was not clear that a lack of standing in a petition seeking constitutional invalidity of a section of legislation is sufficient to constitute an absence of a reasonable cause of action. An application for a determination of whether the petitioner had standing was a possible option. The relevance of the choice of procedure is that the use of Rule 20(26)(a) has implications for the admissibility of

evidence, whether or not the pleading is accepted as true, who has the onus, what is the applicable law, and whether the matter is final if the application is denied.

[5] The position of both parties was that an application to strike under Rule 20(26)(a) was an appropriate way to proceed. They argue that there is no cause of action if there are no proper persons before the Court.

[6] The Yukon government conceded however, that there are other ways to bring the matter before the court. For example, in *Zoocheck Canada Inc v Alberta (Minister of Agriculture and Forestry)*, 2019 ABCA 208 ("*Zoocheck*"), the applicant brought a preliminary application for a declaration they had standing to seek judicial review. In *Minister of Justice (Can.) v Borowski*, [1981] 2 SCR 575, the issue of legal standing of a taxpayer and citizen of Canada to challenge the validity of the law allowing for therapeutic abortions based on an infringement of the right to life enshrined in the *Canadian Bill of Rights*, RSC 1970, was argued fully at the Supreme Court of Canada by agreement of the parties. The main issue to be decided on appeal was the jurisdiction of the Saskatchewan Court of Queen's Bench to hear the matter, instead of the Federal Court.

[7] If this application were to proceed under Rule 20(26)(a), counsel for Yukon government conceded that the petitioner's evidence could be considered for the purposes of the application, except for the evidence about "backroom dealings" between the landlord and Yukon government, and evidence about Ms. Wright's plans to buy the house. In other words, the Yukon government would not insist on a strict application of Rule 20(29).

[8] Counsel for the petitioner, Ms. Wright, referenced the case of *District of Kitimat v Alcan Inc*, 2006 BCCA 75 ("*Kitimat*"), where the Court of Appeal for British Columbia upheld the order of the chambers judge that the applicant Kitimat had no standing to maintain the proceedings. Similar to the case at bar, this was an application to dismiss a petition for declaratory relief for lack of standing. The Court of Appeal confirmed the judge's decision to determine standing as a preliminary issue was appropriate. The respondent had accepted all the facts pleaded as true, and this was sufficient for the court to make the determination. The appellate decision addressed only private interest standing.

[9] Having reviewed the cases in more detail, including those filed by Yukon government at the hearing (*Zoocheck* and *Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1131 ("*Canadian Council for Refugees*")), and considering the arguments of both counsel, I agree that this matter can be considered under a Rule 20(26)(a) application.

[10] An application for a declaration of invalidity of a section of a statute based on a *Charter* right infringement, if grounded in a concrete factual dispute, can be considered a cause of action for the purpose of Rule 20(26)(a). Judicial definitions of causes of action are broad. For example, this Court in *Ross River Dena Council v Canada (Attorney General)*, 2007 YKSC 65 at para. 11 referenced *Dumoulin v Ontario* (2004), 71 OR (3d) 556 (SC) at paras. 23-25, where Cullity J. of the Ontario Superior Court of Justice noted that judicial explanations of "cause of action" have included:

- "the particular act of the defendant which gives the plaintiff his cause of complaint"

…

- "the material facts that must be proven if the plaintiff is to establish a particular claim"

  …

- "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person"

[11] In that same case at para. 14, this Court referenced *Markevich v Canada*, 2003 SCC 9, where Major J. at para. 27, simply stated "[a] cause of action is only a set of facts that provides the basis for an action in court ...".

[12] The petitioner is seeking a remedy of a declaration of invalidity of a statutory provision applied by government officials to require her and her family to leave their residence on short notice without procedural fairness, in her view. This government action, authorized by statute, constitutes an act giving rise to the complaint, and creates a factual situation entitling the petitioner to seek a remedy against the government.

[13] As a result, no evidence is admissible on an application such as this, based on Rule 20(29), meaning the petitioner's affidavits may not be considered. I do not accept the Yukon government's proposed compromise, as there is not a principled basis to accept the majority of the petitioner's evidence but not all of her evidence.

[14] The onus is on the Yukon government to demonstrate it is plain and obvious that there is no reasonable chance of success based on lack of standing of the petitioner. The petitioner's pleading must be construed generously and drafting defects overlooked. The pleading must not be struck because of complex issues, novelty of claims or apparent strength of the defences to the claim. All facts in the pleading must be accepted as true, except for those incapable of proof because they are speculative,

based on assumptions, bare allegations or bald assertions without factual foundation, or patently ridiculous (*Northern Cross (Yukon) Ltd v Yukon (Energy, Mines and Resources)*), 2021 YKSC 3 at para. 16, see cases cited).

[15] Submissions on whether this standing decision is preliminary or final were not made directly by the parties. If the petition is not dismissed at this preliminary stage for lack of standing, is it possible for the standing issue to be raised again at the full hearing on the merits, on the basis of a full record? (see *Apotex Inc v Canada (Governor in Council)*), 2007 FCA 374 paras. 14 and 24, and *Canadian Council for Refugees* at paras. 24-39).

[16] The Supreme Court of Canada in *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 ("*Finlay*"), summarized the considerations for determining a question of standing on a preliminary motion as follows:

> [16] … It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted.

[17] Here, there was no suggestion that if this Court were to decide the petitioner has standing, the Yukon government would argue the matter again at the hearing on the merits. Like the respondents in the cases of *Kitimat* and *Canadian Council for Refugees*, the Yukon government has accepted the material facts in the petition as true for the purpose of the application to strike. The petition is detailed and sets out significant factual background as well as specifics of the legal grounds. Accepting the facts and the documents incorporated by reference in the petition as true, as conceded by the Yukon government, I find it contains sufficient information for the Court to make a

final determination on standing on a preliminary application. The law and argument have been thoroughly set out so that the nature of the applicant's interest is clear.

Background

[18] The following background is taken from the amended petition, as the allegations therein are assumed to be true for the purpose of this application.

[19] Ms. Wright and her common-law spouse rented a home (the "residence") in a country residential subdivision in Whitehorse beginning in 2016. They have eight children who lived with them in the main residence on the property. A garage suite and a separate suite on the property were rented separately and occupied by extended family members.

[20] On November 5, 2020, Ms. Wright and her spouse were charged with drug-related offences in the Territorial Court of Yukon. Ms. Wright was released that same day by a Territorial Court judge on condition that she reside at the residence.

[21] On December 9, 2020, Yukon government officials visited Ms. Wright at her residence and served her with a letter signed by the Director giving notice of termination of tenancy, dated December 7, 2020 (letter incorporated by reference in the petition). She was advised orally and by this letter that she and her family were required to vacate the residence, with all their belongings, by December 15, 2020. Ms. Wright at the same time received a similar letter dated December 8, 2020, signed by her landlord. The letters stated that because of a complaint made to the SCAN Unit about the petitioner's property, the Director conducted an investigation. From evidence obtained during the investigation, the Director concluded there was a reasonable inference that the property was being habitually used for illegal activity which was adversely affecting the

neighbourhood and the safety and security of one or more persons. The specified use of the property was described as:

> For the possession, production, use, consumption, sale, transfer, or exchange of, or traffic in, a controlled substance, as defined in the *Controlled Drugs and Substance Act* (Canada), in contravention of that Act.

[22] No section number of the *SCAN Act* was referred to in the notices, although the Director's letter included copies of ss. 1-7 of the *SCAN Act* for reference.

[23] On December 9, 2020, Ms. Wright emailed the SCAN Unit, requesting an extension of approximately six months to remain in the residence on the property, so her children could finish their school year at the same school.

[24] On December 10, 2020, Ms. Wright was granted an extension by the SCAN Unit until January 30, 2021.

[25] Also on December 10, 2020, counsel for Ms. Wright requested dates from this Court to argue an injunction against the Yukon government. This injunction was never pursued.

[26] The original petition was filed on January 7, 2021, seeking judicial review of the decision of the Yukon government through the Director to terminate the petitioner's tenancy at the residence, as well as a declaration of invalidity of s. 3(2) of the *SCAN Act* based on a breach of s. 7 of the *Charter*.

[27] The petition was amended on January 21, 2021, to remove the application for judicial review of the Director's decision, and the facts on which that was based, leaving only the remedy of an invalidity declaration.

[28] Both counsel submitted orally that Ms. Wright and her family had moved and this matter had been addressed between her and her landlord. The notice to terminate from the Director under the *SCAN Act* was rescinded before the end of January 2021.

Law of Standing

[29] The law has identified two types of standing – private interest and public interest standing. Private interest standing requires a person to show they are directly affected by the litigation. As noted by the court in *Finlay* at p. 623, (the first case to review standing in the post-*Charter* era) quoting from *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980), 28 ALR 257 at p. 270:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle, or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.

[30] In this case, counsel agreed that when the petition was originally filed on January 7, 2021, Ms. Wright had private interest standing. At that time, she was subject to an eviction notice issued by the landlord after an investigation conducted by the Director, to take effect on January 30, 2021. However, upon rescission of the notice, before it was enforced, Ms. Wright's private interest standing became moot. Counsel for Ms. Wright does not argue she has private interest standing any longer. As a result, whether or not she has public interest standing is to be determined in this case.

[31] The factors to be considered in determining public interest standing have been best described by the Supreme Court of Canada in *Downtown Eastside* at para. 37:

> … (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in [the matter]; and (3) whether, in all the circumstances, the

> proposed suit is a reasonable and effective way to bring the issue before the courts: …

[32] These factors are to be applied purposively and flexibly. The determination of public interest standing is not to be done rigidly or in a formulaic way, but courts should take a generous and liberal approach in exercising their discretion.

Purpose of and principles underlying the law of standing

[33] At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources" (*Canadian Council of Churches v Canada (Minister of Employment and Immigration)*), [1992] 1 SCR 236 at p. 252 ("*Canadian Council of Churches*") quoted in *Downtown Eastside*, para. 23). Courts have recognized that limitations on standing are necessary because not everyone who would like to litigate an issue, whether or not it affects them, should be entitled to do so (*Downtown Eastside*, para. 22).

[34] The court in *Downtown Eastside* described three purposes of public interest standing (paras. 26-30). First, restrictions on standing are part of the gatekeeping function of the courts, to ensure they do not become overburdened with marginal or redundant cases, and to screen out "busybody" litigants, in other words, litigants who do not have a direct or special interest in the proceeding. Priority of scarce judicial resource allocation should be given to those with a personal stake in the outcome of a case.

[35] The second purpose of limiting standing was described as the courts needing the "benefit of contending points of view" of those most directly affected by the litigation to have the evidence and arguments presented thoroughly and carefully.

[36] Thirdly, limitations on standing are to ensure the courts play their proper role within our democratic system of government. The question to be litigated must be a justiciable one, that is, one that is appropriate for judicial determination.

[37] The principle of legality underlies the development of standing in public interest cases. Legality means ensuring that the state acts in conformity with the Constitution and the law and no law can be immunized from challenge.

[38] Decisions about public interest standing are an exercise in judicial discretion.

Application of law to facts of this case

[39] The application to dismiss was brought by the Yukon government, and they have the burden to demonstrate no reasonable chance of success based on a lack of standing. A determination of standing requires the Court to be persuaded that the three factors set out above, applied purposively and flexibly, are sufficient to grant the petitioner public interest standing.

[40] The three factors must be weighed cumulatively, not individually. I will consider each separately below to demonstrate the analysis. However, they are not a checklist or technical requirements. Applying a purposive, flexible and generous approach, I will weigh the three factors cumulatively.

(1) Serious justiciable issue

[41] A serious justiciable issue has been described in *Downtown Eastside* at para. 42 as:

> … a “substantial constitutional issue” (*McNeil*, at p. 268) or an “important one” (*Borowski*, at p. 589). The claim must be “far from frivolous” (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. … Once it becomes clear that the statement of claim reveals at least one serious issue, it will

> usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

[42] This factor addresses the proper role of the courts as well as ensuring scarce resources are allocated to issues that are not marginal or frivolous.

[43] The petitioner says there are significant constitutional issues raised in this application: the infringement of s. 7 *Charter* rights of individuals subjected to the termination of their tenancy under s. 3(2) of the *SCAN Act*. This includes the issue of the failure of the procedure under s. 3(2) to be conducted in accordance with the principles of fundamental justice.

[44] The Yukon government concedes that the issues raised by the merits of this case by the applicant are serious justiciable issues.

[45] This is an uncontested factor and the threshold of seriousness is clearly met on the facts and grounds set out in the petition.

(2) Nature of the petitioner's interest

[46] This factor is designed to eliminate the "busybody" litigant by ensuring the litigant has a stake in the proceeding or is engaged with the issues raised (*Downtown Eastside*, para. 43).

[47] The interest of Ms. Wright in this case is unique. She had private interest standing when the petition was initiated, but that situation is now moot. The question is whether the fact that she was at one point about to be evicted under the *SCAN Act* but never was, gives her a sufficient interest to be granted public interest standing.

[48] The Yukon government argues Ms. Wright is a "busybody" litigant. It relies on para. 43 of *Downtown Eastside*, in which the Court adopted the statement made by the Court in *Canadian Council of Churches*, where it was clear the applicant had a genuine

interest because it had "the highest possible reputation and has demonstrated a real and continuing interest in the problems of refugees and immigrants (p. 254)". The Yukon government argues that Ms. Wright's relatively short engagement with the SCAN Unit in December 2020 and January 2021 does not constitute the necessary connection with this litigation. Unlike the organizations granted standing in other cases such as the *Canadian Council of Churches*, the Yukon government says Ms. Wright has not included in her petition any material indicating past experience with or advocacy for people who are homeless or who have been directly affected by the SCAN Unit or the *SCAN Act*.

[49] Counsel for Ms. Wright referred to the comment made in *Downtown Eastside* at para. 28: the concerns about busybodies may be overstated. The court quoted Professor K.E. Scott who wrote "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom" ("Standing in the Supreme Court – A Functional Analysis" (1973), 86 *Harv. L. Rev.* 645 at p. 674). The court also noted the many other tools available to manage litigation to ensure unmeritorious cases do not consume scarce judicial resources. These include but are not limited to summary judgment applications on the merits; ensuring pleadings rules are followed; and costs awards.

[50] Counsel for Ms. Wright notes that she has lived through the initial SCAN process, and as a member of a First Nation shares a cultural identity with a group that is marginalized and over-represented in the criminal justice system.

[51] I find the unusual circumstances of this case, where Ms. Wright had private interest standing initially, even though it was lost due to circumstances not yet fully

explained on the record, gives her an interest beyond that of many other public interest litigants. For example, she has a greater interest than the plaintiff in the original challenge by Borowski, who was a concerned taxpayer found to have a genuine interest in the case. She has a greater interest than Professor Alford in *Alford v Canada*, 2019 ONCA 657, a law professor with expertise in constitutional law and national security who successfully obtained standing to challenge a section of the *National Security and Intelligence Committee of Parliamentarians Act*, SC 2017, c 15, s 12, based on its contravention of Parliamentary privilege. Ms. Wright has been personally and directly affected by the implementation of the *SCAN Act*, having lived through receiving a notice to leave her residence with her spouse and eight children within five days in December, later extended for another six weeks. The fact that the eviction notice from the Director was rescinded does not mean she does not have a "continuing interest" in the issue. This is an unreasonably narrow interpretation of continuing interest. An individual who has experienced what they perceive to be an injustice, and who identifies with others who may be subject to similar perceived injustices caused by the same process or law, can have a continuing interest in the issue even if they are no longer directly affected. The petitioner has sufficient interest in the case to support public interest standing.

(3) Reasonable and effective means of bringing the issue before the court

[52] The interpretation of this third factor was clarified in *Downtown Eastside*. The court confirmed it is not a strict requirement. An applicant does not need to show there is no other or even any other reasonable and effective means of bringing the matter before the court. Instead, the question to be asked is whether the proposed lawsuit is, in all of the circumstances, a reasonable and effective means of bringing the matter before

the court. This must also be assessed in a flexible and purposive manner (*Downtown Eastside* at para. 52).

[53] Examples of considerations for assessing this factor set out in *Downtown Eastside* include:

(a) the applicant's resources, expertise, and ability to situate the issues in a concrete factual setting in bringing forth the claim;

(b) whether the issues are of public interest and go beyond the interests of those most directly affected;

(c) whether on a pragmatic approach there are realistic alternative means that provide a better context and more efficient use of judicial resources, such as parallel proceedings; and

(d) whether the granting of public interest standing could prejudice challenges by others with more direct interest, or could affect those with direct interest who have deliberately refrained from suing.

[54] The purposive approach to assessing this factor requires the Court to consider the need to have a full adversarial hearing and whether the proposed proceeding is the best use of scarce judicial resources. This factor is also connected closely to the principle of legality; that is, the role of courts to ensure government acts lawfully.

[55] In this case, the Yukon government argues there is no need for Ms. Wright to be granted public interest standing as there are others who have been evicted or experienced significant impacts under the *SCAN Act*. Individuals with a private interest and a concrete factual dispute provide a more appropriate adversarial context for the dispute.

[56] The Yukon government further argues this is not a situation as described in *Downtown Eastside*, where potential applicants who are directly affected do not have the resources or capacity to bring the *Charter* challenge. Instead, the Yukon government says that often the individuals who are the subject of complaints are engaging in lucrative endeavours such as bootlegging, drug trafficking and prostitution, so they do not lack resources or sophistication. Ms. Wright herself is an example as she initiated this petition immediately after she had received notice of eviction.

[57] Counsel for Ms. Wright agrees that she has the capacity to bring forward the claim, unlike however, many others who are subject to the *SCAN Act*. This case is rare because most of the individuals receiving SCAN notices do not have the capacity or willingness to pursue this kind of litigation. Counsel says this is evidenced by the fact that in the 15 years since the introduction of the SCAN legislation, only one other termination of tenancy under s. 3(2) was challenged in court, and that challenge did not include a constitutional argument. Counsel for Ms. Wright also notes that if a directly affected litigant did bring the challenge under s. 3(2) to court, (absent a successful injunction application) it is unlikely that the matter would be resolved before an eviction was enforced or the litigant had otherwise left the property. He argues that even though the Director's notice was rescinded, there is a sufficiently developed factual context to allow for concrete arguments in an adversarial context.

[58] Counsel for Ms. Wright also argues that this is an issue of public interest and if standing is not granted, there is a risk that the legality of the Yukon government's continuing actions under the *SCAN Act* will not be assessed.

[59] I agree with the petitioner that this lawsuit is a reasonable and effective means of challenging the legislation. The petitioner has demonstrated the capacity to initiate this litigation. She has a direct interest because of her receipt of a notice to terminate her tenancy from the Director under the *SCAN Act* and her landlord. Assessing the legality of s. 3(2) of the *SCAN Act* is in the public interest because of its potential significant impact on individuals. It has not been addressed in the 15 years since the introduction of the legislation. I do not accept the assertion of the Yukon government that all individuals who may be affected by the *SCAN Act* are resourced and sophisticated because of their alleged “lucrative endeavours” of bootlegging, drug consumption or selling, or prostitution. People involved in these activities (assuming the allegations are proved) are just as likely to be marginalized or disaffected individuals. If they are engaged in illegal activities, they may not wish to initiate a public court proceeding, no matter how much they may feel it is justified. This was the case in *Downtown Eastside*, where many of the sex-workers most affected by the impugned prostitution laws were reluctant or refusing to identify themselves for fear of reprisal. Ms. Wright’s bringing of this application allows for other disaffected individuals to have some access to justice. There are no parallel proceedings elsewhere that this Court has been made aware of, and no other clear realistic alternative means of considering the matter. Finally, there is no evidence that hearing this case may prejudice other individuals with a more direct interest or who chose not to pursue such an application.

Conclusion

[60] Weighing the three factors cumulatively, and applying a flexibly and purposive approach, I will grant public interest standing to Ms. Wright to pursue this legal action.

She raises a serious justiciable issue. The nature of her interest is sufficient to ensure a concrete factual record and an adversarial dispute so that the Court will have the benefit of a factual understanding of and legal argument on the process and application of the impugned section of the *SCAN Act*. If this application were not permitted to be brought, there is a risk that this law would be immunized from challenge, given the 15-year history with only one challenge, the short time period in which to initiate a challenge, and the vulnerability of the individuals who are affected. Ms. Wright's application is a reasonable and effective way to have the matter considered by the Court, in a manner that preserves access to justice.

[61] Public interest standing is appropriate because Ms. Wright, although at one point was directly affected and had private interest standing, no longer does. There may be lingering effects of her involvement with the SCAN Unit which could form part of the factual matrix to be considered. Her continuing interest in the issue arises from her own past experience, her concern that it could happen again, as well as her membership in a First Nation, acknowledged to be over-represented in the justice system.

[62] The Yukon government has not shown it is plain and obvious that this claim has no reasonable chance of success for lack of standing. The matter may proceed, with Ms. Wright as the petitioner.

[63] Costs may be spoken to in case management if counsel are unable to agree.

DUNCAN C.J.