# SUPREME COURT OF YUKON

Citation: *Wright v Yukon (Director of Public Safety and Investigations)*, 2022 YKSC 38

Date: 20220822
S.C. No. 20-A0113
Registry: Whitehorse

BETWEEN:

CELIA ERIN BUNBURY BAINBRIDGE WRIGHT

PETITIONER

AND

GOVERNMENT OF YUKON
(DIRECTOR OF PUBLIC SAFETY AND INVESTIGATIONS)

RESPONDENTS

AND

CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENOR

Before Chief Justice S.M. Duncan

| | |
|---|---|
| Counsel for the Petitioner | Vincent Larochelle |
| Counsel for the Respondents | Kelly McGill and Amy Porteous |
| Counsel for the Intervenor | Brent Olthuis and Fraser Harland |

**REASONS FOR DECISION**

**Introduction**

[1] This is a decision on the costs of the unsuccessful application to dismiss the petition for lack of standing of the petitioner, Celia Wright, brought by the respondent Government of Yukon (Director of Public Safety and Investigations).

[2] The three issues are:

a. Are costs payable in the cause or in any event of the cause?

b. Are costs payable forthwith or should they follow the event?

c. Should there be special costs or party and party costs?

[3] This petition is an application for a declaration of invalidity of s. 3(2) of the *Safer Communities and Neighbourhoods Act*, SY 2006, c. 7 (the "*SCAN Act*"), based on an infringement of s. 7 of the *Charter.* The petitioner was given notice of termination of tenancy at her Whitehorse residence on December 9, 2020. She, her common-law spouse, and their eight children were required to vacate the residence by December 15, 2020. This deadline was extended to January 30, 2021, after the petitioner objected. The termination of tenancy letter was issued after an investigation by the Director of Public Safety and Investigations (the "Director") occurred upon receipt of a complaint that the petitioner's neighbourhood was being adversely affected by activities on the petitioner's property. The Director concluded there was a reasonable inference that the property was being habitually used for illegal activity, and specifically "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."

[4] The notice to terminate was rescinded by the Director before the end of January 2021. The petitioner moved out of the residence and the matter was addressed between her and her landlord.

[5] The petitioner sought to carry on the petition nonetheless based on public interest standing. The respondent brought an application to dismiss/strike because they said the petitioner did not meet the test for public interest standing 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*").

[6] This Court found, after weighing the three applicable factors cumulatively, and applying a flexible and purposive approach, Ms. Wright met the test of public interest standing. Those three factors were: 1) a serious justiciable issue; 2) an interest sufficient to ensure a concrete factual record and an adversarial dispute; and 3) the petition is a reasonable and effective way to have the matter considered by the Court in a way that preserves access to justice.

[7] The Canadian Civil Liberties Association ("CCLA") was granted leave to intervene on condition that their submissions would not be repetitive of those of the petitioner or the Yukon government.

**Issue a) – Costs in any event of the cause**

[8] The general rule set out in Rule 60(12)(b) of the *Rules of Court* of the Supreme Court of Yukon is that Ms. Wright is entitled to costs of the application in the cause unless the Court orders otherwise. The Yukon government does not object to the Court exercising its discretion to order costs in any event of the cause, because the standing issue that was the subject of the application is a discrete one.

[9] Normally it is preferable to have one assessment of costs at the end of the litigation, so that all aspects of the litigation may be considered. However, the jurisprudence from jurisdictions with similar rules to the Yukon, such as British Columbia, makes it clear that the discrete nature of an application that is severable from the remaining claims justifies an order for costs in any event in the cause (*Martel v Wallace*, 2008 BCSC 436 at para. 28; *Great Canadian Gaming Corporation v British*

*Columbia Lottery Corporation*, 2018 BCSC 370 *("Great Canadian Gaming Corporation")* at para. 16; *Ewert v Nippon Yusen Kabushiki Kaisha*, 2020 BCSC 1903 ("*Ewert*") at paras. 5-6). Concerns militating against costs in any event of the cause such as hindering a meritorious claim from proceeding or unfairly affecting the balance between the litigants until final judgment is rendered do not exist in this case because the Yukon government is being ordered to pay costs to an individual petitioner. The application to dismiss on the basis of a lack of standing of the petitioner is severable from the main claim. Considering all the circumstances, I will exercise my discretion and order that costs be payable in any event of the cause.

**Issue b) – Costs payable forthwith or to follow the event**

[10] The general rule in Rule 60(13) is that costs follow the event and are not payable forthwith, unless the Court orders otherwise. The Yukon government objects to an order for payment forthwith as they say there is an insufficient basis. They note that costs have been ordered to be paid forthwith in cases where it is unlikely the matter will proceed to trial, or where the party paying costs has engaged in unnecessary or unreasonable conduct. They say such circumstances do not exist here – that is, it is highly likely the petition will proceed to hearing and the Yukon government has been cooperative and agreeable to date.

[11] The petitioner relies on a number of cases in which costs in any event of the cause were awarded and there were also orders they be payable forthwith. Costs were payable forthwith in cases where the subject matter of the costs award was a discrete severable issue, or the purpose was to deter unnecessary or unreasonable conduct of the paying party (*Fairhurst v Anglo American PLC*, 2012 BCSC 45; *Ewert*). In cases

where there was an order for costs to be paid in any event of the cause but no order they be paid forthwith it was generally due to the significant length of time between the costs application and the reasons (in one case ten months), as well as the imminent date of the trial (see *Great Canadian Gaming Corporation*).

[12] Here, the Yukon government correctly notes they have not engaged in any unreasonable or unnecessary conduct. They are also correct that it is likely this matter will proceed to a hearing. However, the hearing date has not yet been set, unlike the cases relied on by the petitioner where the trial date was imminent. A significant period has passed between the reasons issued October 22, 2021, and this costs application brought in June/July 2022. However, during at least part of that time the parties were attempting to negotiate a resolution of this issue short of an application, and it is not clear that one party was any more responsible for the delay than the other.

[13] The circumstances of this case are consistent with those in which costs in any event of the cause payable forthwith was ordered because of the discrete and severable nature of the interlocutory matter. There is no clear reason not to order costs payable forthwith. The costs will therefore be payable forthwith in any event of the cause.

**Issue c) – Special costs or party and party costs**

[14] Rule 60(1) of the *Rules of Court* provides that costs are assessed as party and party costs unless the Court orders they be assessed as special costs, also called costs awarded on a full-indemnity basis.

[15] The petitioner relies on the decision of the Supreme Court of Canada in *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 ("*CCD*"). In awarding special costs in that case, which decided the question of whether

organizations may pursue public interest litigation without an individual plaintiff, the Supreme Court of Canada reiterated its earlier decision in *Carter v Canada (Attorney General)*, 2015 SCC 5 ("*Carter*"), a case about the legality of physician-assisted dying:

> [140] … First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

[16] Addressing the first criterion, the petitioner argues that the affidavits filed for the application, the participation of the CCLA and local civil society groups providing services to marginalized Yukoners, and the petitioner's provision of a voice for those who rarely have one in court all demonstrate the truly exceptional nature of the case and its significant and widespread societal impact. The petitioner adds that it appears this is the first case in the Yukon in which public interest standing has been granted to a party litigant. Finally, the petitioner says the effect of this case could be nation-wide because of the number of statutes similar to the *SCAN Act* in other jurisdictions, none of which has been constitutionally challenged.

[17] The respondent argues this case does not meet the high bar set by the first criterion in *Carter*, providing examples from the following recent cases where special costs were denied:

- the first-time consideration of Henson trusts in the context of the issue of whether an interest in a trust was an asset that could disqualify individuals such as tenants in social housing from rent subsidy schemes (*S.A. v Metro Vancouver Housing Corp*, 2019 SCC 4 ("*S.A.*") at paras. 67-71);
- the implementation of a compensation scheme for residential school harm which affected claims of other residential school survivors under the residential schools' settlement agreement (*J.W. v Canada (Attorney General)*, 2019 SCC 20 at paras. 171-173);
- *Charter* challenges by an individual against the Toronto Police Services after encounters with police resulting in violations of his *Charter* rights (*Stewart v Toronto (City) Police Services Board*, 2020 ONCA 460 paras. 4-5);
- challenge by a plaintiff church of a municipal bylaw under which the church was ordered to close its homeless shelter (*Sarnia (City) v River City Vineyard Christian Fellowship of Sarnia (Trustees of)*, 2015 ONCA 732 at paras. 16-18);
- challenge to a membership code barring members of a First Nation from running for office or voting (*McCallum v Canoe Lake Cree First Nation*, 2022 FC 969 at paras. 128-130);
- whether certain provisions of the *Genetic Non-Discrimination Act,* S.C. 2017, c. 3, were *ultra vires* to the jurisdiction of Parliament over criminal law under s. 91(27) of the *Constitution Act, 1867* – a dispute between the Canadian Coalition for Genetic Fairness and the government

of Quebec (*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 ("*Reference re Genetic Non-Discrimination Act*") at paras. 106-107);

- whether homeless people could use land held in trust (*Beacon Hill Park Trust (Re)*, 2022 BCSC 284 ("*Beacon Hill Park Trust*") at para. 144); and
- individual remedies (*Charter* damages) to petitioners arising from a suspended declaration of invalidity of part of the automatic roadside prohibition legislation (*Beam v British Columbia (Superintendent of Motor Vehicles*) 2017 BCSC 1812).

[18] In these cases, the various courts held the issues they had to decide were not truly exceptional. They did not meet the required test of a "significant and widespread societal impact" for an award of special costs. Reasons included the unique facts of the issue combined with a lack of impact outside the relatively narrow context of the proceeding. In none of the cases did the court state the issue was not important or of public interest; the concern was instead that it did not reach the level of true exception or widespread societal impact. As noted by the Supreme Court of Canada in *Carter*, "[i]t is not enough that the issues raised have not previously been resolved or that they transcend the individual interests" (para. 140).

[19] On review of this jurisprudence, including *CCD* and *Carter*, I agree with the Yukon government that this case does not meet the first criterion of the test for special costs set out by the Supreme Court of Canada in *Carter* and *CCD.*

[20] While it does raise some important issues, their impact is limited. Like the homeless, residential school survivors, a church-operated homeless shelter, or those subject to a constitutionally invalidated roadside prohibition scheme, those affected or

potentially affected by SCAN legislation comprise a narrow group. This case does not have the widespread societal impact of a case related to physician-assisted dying or the ability of an organization to bring a public interest court challenge without an individual plaintiff.

[21] The participation of the CCLA and other civil society groups again shows the importance of the issues raised, but this fact alone does not raise it to the truly exceptional level. I note the examples of *Beacon Hill Park Trust*, *Reference re Genetic Non-Discrimination* and *S.A.,* where other civil society interest groups or public entities intervened and this did not affect the court's denial of special costs.

[22] The fact that this may be the first case granting public interest standing to a party litigant in the Yukon has not been confirmed. In any event this issue does not have widespread societal impact, as this has been done in other jurisdictions.

[23] Finally, the Yukon government notes the challenged section of the *SCAN Act* is unique to the Yukon. This also limits the effect of any decision to the Yukon, and not beyond.

[24] While it is unnecessary to consider the second criterion of the test set out by the Supreme Court of Canada, given my finding on the first criterion, I make the following comment. It is clear that the petitioner no longer has any personal, proprietary or pecuniary interest in the litigation to justify the proceedings on economic grounds, although when the petition was originally brought she did. Other than the assertion of counsel for the petitioner that he is working *pro bono* for the petitioner, which is not disputed, there is no evidence on the record that Ms. Wright (or the CCLA) are

impecunious or unable to pursue the litigation effectively. To satisfy this criterion more evidence would be required.

[25] The application for special costs is denied.

_____
DUNCAN C.J.