

SUPREME COURT OF YUKON

Citation: *Wright v Yukon (Government of)*,
2026 YKSC 37

Date: 20260514
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

AND

CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENOR

Before Chief Justice S.M. Duncan

Counsel for the Petitioner

Vincent Larochelle

Counsel for the Respondent

Kelly McGill and
Amy Porteus

REASONS FOR DECISION

Overview

[1] This is an application for costs by the petitioner in the matter of her successful petition challenging the constitutionality of s. 3(2) of the *Safer Communities and Neighbourhoods Act*, SY 2006, c 7 (*SCAN Act*). She seeks special costs in an unspecified amount, or in the alternative, increased lump sum costs in the amount of \$75,000 plus disbursements of approximately \$11,000 and tax, or in the further alternative, an assessment of costs at Tariff Scale C set out in Appendix B in the *Rules*

of Court of the Supreme Court of Yukon (the *Rules of Court*), plus disbursements and tax, for a total amount of \$58,775.50.

[2] The Yukon government acknowledges its obligations to pay costs, but objects to all of these amounts and the bases for their requests. They say this Court has already decided in making its award after the Yukon government's unsuccessful motion to strike the petition for lack of standing of the petitioner, that the case as a whole did not meet the first criterion of the test for special costs. Rearguing this now is barred by *res judicata*. Alternatively, the Yukon government says this constitutional challenge was not a matter of public interest that had significant and widespread societal impact, and it was not truly exceptional. The Yukon government does not object to a reasonable lump sum cost award and asks that certain facts about the way in which the case unfolded be considered. Finally, if the Court decides to apply the Tariff, the Yukon government says that Scale B is the appropriate scale. There is no justification for increased costs because there was no misconduct, and the issues were not overly complex. They dispute certain line items on the Bill of Costs submitted by the petitioner, and state the amount should instead be \$19,305, plus disbursements of approximately \$10,950, before tax, for an approximate total of \$30,255.

[3] In this case, given the nature of the litigation, the complexity of the issues, and the importance of the litigation to the parties and to the development of the law, I will exercise my discretion to award reasonable lump sum costs in the amount of \$35,000 plus disbursements. This calculation is guided by the Tariff at Scale C, as well as a consideration and application of the criteria for increased costs. My reasons are as follows.

Background

[4] This case was a successful challenge to the constitutional validity of s. 3(2) of the *SCAN Act*. That section allows the Director of Public Safety and Investigations (the Director) under the *SCAN Act* to facilitate a landlord's termination of a tenancy on five days' notice, as a resolution of a complaint or informal action. Complaints under the *SCAN Act* can be made about illegal activities occurring on a property that are adversely affecting the neighbourhood and/or the safety and security of others. In this case, on December 9, 2020, the petitioner, her spouse, her eight children and her mother-in-law were served with two notices to terminate their tenancy in five days – one from the landlord and one from the Director. The notice from the Director stated that based on the evidence from his investigation of the complaints related to the property, the property was being used for drug trafficking activities that were adversely affecting the community and neighbourhood, and the safety and security of one or more persons. On November 5, 2020, the petitioner and her spouse had been charged with drug related offences and were released on bail, with a condition to reside at the property.

[5] The petitioner was successful in obtaining an order striking s. 3(2) of the *SCAN Act* because it breached the right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). It was found to create extraordinary psychological suffering and risk to a person's health; to affect a tenant's psychological integrity, and to lead potentially to housing instability or homelessness, thereby increasing risks to health. The deprivation of the right to security under s. 3(2) of the *SCAN Act* was not done in accordance with the principles of fundamental justice as

s. 7 of the *Charter* requires, because of an absence of procedural fairness, overbreadth, and gross disproportionality. It was not justified under s. 1 of the *Charter*.

[6] The petitioner also argued that s. 3(2) of the *SCAN Act* violated s. 15 of the *Charter* – the right of every individual to equality before and under the law and equal protection and benefit without discrimination based on certain grounds such as race and national or ethnic origin. The petitioner argued that First Nation people are disproportionately affected by s. 3(2) of the *SCAN Act*. This argument was unsuccessful due to an absence of evidence in demonstrating a disproportionate effect.

[7] This case was argued on a *pro bono* basis. The petitioner’s counsel stated he spent hundreds of hours preparing and litigating the case. He advised his legal fees amounted to \$127,201.50. The actual number of hours spent and the hourly rate he used to calculate this amount were not provided.

[8] The case was argued over three and a half days. The first day was spent hearing the Yukon government’s partially successful challenge to two expert reports and one academic article. One expert report and the article were excluded. There were thirteen affidavits in total, nine from the petitioner, as well as three expert reports filed by the petitioner. There were four *viva voce* witnesses. The written record was large and consisted mostly of material prepared by the petitioner.

Alternative Bases for Calculation of Costs

i) Special Costs not appropriate

[9] Costs are usually assessed as party and party costs (Rule 60(1) of the *Rules of Court*), based on the Tariff in Appendix B of the *Rules of Court*, on one of the three Scales – A- matter is less than ordinary difficulty, B-matter is of ordinary difficulty, or C –

matter is more than ordinary difficulty. The Court may in the alternative order that costs be assessed as special costs, also referred to as costs awarded on a full indemnity basis, or solicitor and client costs.

[10] An order for special costs is discretionary. The test guiding the exercise of discretion to award special costs in the context of public interest litigation was stated by the Supreme Court of Canada in the case of *Carter v Canada (Attorney General)*, 2015 SCC 5 (*Carter*). First, the case must involve matters of public interest that are truly exceptional – meaning not only must they have been previously unresolved and transcend the individual interests of the successful litigant, but they also must have a significant and widespread societal impact. Second, the successful litigant must show they have no personal, proprietary or pecuniary interest in the litigation to justify it on economic grounds, and that it would not have been possible to pursue the litigation effectively with private funding (*Carter* at para. 140).

[11] In my decision on the costs of the Yukon government's unsuccessful application to dismiss the petition for lack of standing of the petitioner, I assessed this case against the test set out in *Carter*. I found it did not meet the first criterion of that test. While there was no doubt the case raised important public interest issues that had not been resolved and which transcended the interests of the petitioner and her family, I could not conclude that their impact reached the level of significant and widespread societal impact similar to the issues of physician-assisted dying or of the ability of an organization without an individual plaintiff to bring a court challenge.

[12] The Yukon government argued this prior finding prohibits its reconsideration now because of *res judicata*. There may be an argument that the additional information

about the merits of the case that is now known and that was not available at the time of the preliminary standing motion allows the matter to be reconsidered. However, I do not need to decide this issue because, for the same reasons that are set out in my earlier costs decision, I find that special costs are not applicable here for failure to meet the first criterion.

[13] The impact of this case is limited. While it is important to those affected, they are a narrow group. Before s. 3(2) of the *SCAN Act* was struck down, it was rarely used. One of the outcomes of the case was a contribution to the development of the law of s. 7 of the *Charter*, but thus far, the effect of this contribution is limited to academic commentary, media reports and teaching opportunities. These factors have been considered below under increased costs. They are insufficient to justify an award of special costs.

ii) Increased costs on a lump sum basis in the amount of \$75,000 plus GST and disbursements not appropriate

[14] I will address lump sum costs and increased costs separately.

Lump sum costs award

[15] Rule 60(1.3) of the *Rules of Court* allows for lump sum costs to be awarded. In this case, the Yukon government does not object to a reasonable lump sum costs award. The guidance provided by the jurisprudence is that a lump sum award must be reasonable. In awarding a lump sum amount, courts do not apply a mathematical approach of multiplying the number of hours worked by the lawyer by their hourly rate. Nor do courts pull a number out of thin air. There must be some predictability and consistency to costs awards, so that counsel can make informed decisions about litigation risks and can properly advise their clients (*Nova Chemicals Corporation v Dow*

Chemical Company, 2017 FCA 25 (*Nova*) at para. 19). Bill of costs units based on the Tariff can be used as a guide, as well as the principles underlying the *Rules of Court* cost provisions, and the purpose of costs award in general: indemnification of the successful party; discouraging inappropriate behaviour in the conduct of the proceeding; and encouraging settlement (*Frost v Blake*, 2021 YKSC 62 (Frost) at para. 18). Costs awards in general must balance two conflicting interests – ensuring a successful party is compensated, and ensuring access to justice is maintained by not putting litigation beyond the reach of the losing party through a prohibitive costs award (*Tanious v The Empire Life Insurance Company*, 2019 BCCA 329 (*Tanious*) at para. 47). The nature of the litigation as public interest must also be considered, although its effect on modifying the compensatory aspect of costs is less applicable when the public interest litigant is entitled to their costs as opposed to being required to pay costs.

[16] The advantage of a lump sum award is the avoidance of a detailed granular analysis of each Tariff item (*Nova* at para. 11) and a consequent saving of time and money for the litigants. It can also address situations where the strict application of the Tariff may not be fair. In this case the Tariff may not fully allow for a consideration of the unique aspects of a constitutional challenge, where some of the steps taken in a regular civil litigation proceeding do not occur (such as oral discovery), while other steps may not be fully accounted for (such as assisting witnesses in preparing lengthy affidavits and preparing complex written legal arguments).

[17] I will adopt a lump sum costs award approach, using as a general guide the principles and purposes underlying costs awards, and the petitioner's Bill of Costs, including a consideration of the Yukon government's objections.

Increased costs

[18] Increased costs are permitted under Rule 60(1.2) of the *Rules of Court*. They are tied to the Tariff as they allow the units for one or more steps in the proceedings to be increased to an amount 1.5 times the value. The test to be applied is where the award of costs without the increase would be “grossly inadequate or unjust” due to “unusual circumstances” (*JP v BC*, 2018 BCCA 325 (*JP v BC*) at para. 55). This in turn has been determined through a fact-based inquiry, considering the nature of the litigation and the conduct of the parties (*Herbison v Canada (Attorney General)*, 2014 BCCA 461 at para. 42). Factors courts have considered include the misconduct of a party, the seriousness of the allegations, the complexity or difficulty of the issues, and the importance of the litigation to the parties or the development of the law (*JP v BC* at paras. 57-58).

[19] This is a case where increased costs above the Tariff amounts are warranted, but not at the amount of \$75,000 plus disbursements. I will address the reasons below.

iii) Tariff Scale C of 224.5 units in the amount of \$58,775.50 not appropriate

[20] As noted above, the strict application of the Tariff items is not ideal for assessing costs in this kind of case, because of the unique approach required in constitutional challenges, the unusual nature of preparation required, and the complexity of the legal argument. I have however, reviewed the petitioner’s Bill of Costs and the Yukon government’s responses to each line item as well as their general submissions. As noted above, they provide some guidance in the calculation of the lump sum award.

[21] The test for determining whether Scale A, B, or C applies is:

- i) Whether a difficult issue of law, fact or construction is involved;

- ii) Whether an issue is of importance to a class or body of persons, or is of general interest;
- iii) Whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied (Appendix B Party and Party costs (2)(c)).

[22] Scale A is for matters of little or less than ordinary difficulty (\$70/unit); Scale B is for matters of ordinary difficulty (\$130/unit); and Scale C is for matters of more than ordinary difficulty (\$200/unit).

[23] I accept this was a matter of more than ordinary difficulty and if the Tariff were being applied, Scale C would be appropriate. The reasons are set out in my conclusion below.

[24] The difference between the proposed costs award amounts based on the Tariff (Scale C by the petitioner or Scale B by the Yukon government) is approximately \$30,000.

Conclusion

[25] A reasonable lump sum award in this case is \$35,000 plus disbursements in the amount of \$10,950, as requested by the petitioner. This is loosely based on the Tariff items at Scale C, taking into account the concerns expressed by Yukon government counsel about the inapplicability of several of the line items (eg lines 1A – 1C, lines 20-21) and the disproportionate amounts claimed for case management conferences (lines 22-23) and also taking into account an award of some increased costs due to the unique nature of the case. Specifically, I have considered the following factors:

- the legal arguments for a constitutional challenge are complex;

- a breadth of evidence from a variety of sources is required, as evidenced from the nine affidavits from the civil societies and the petitioner;
- experts had to be located, their expertise evaluated, and they had to be prepared to present written and oral evidence;
- the issue was important enough to attract the intervention of the Canadian Civil Liberties Association;
- it was public interest litigation, pursued on a *pro bono* basis, and the petitioner had no pecuniary interest in the matter;
- non-profit civil societies in the Yukon expressed concern about the impact of this subsection, if it were permitted to stand;
- the result was important to those persons in the Yukon who may have been subject to, and will now no longer be subject to, a short notice eviction without adequate recourse under the *SCAN Act*;
- the outcome was of interest to provinces and territories seeking to introduce similar legislation;
- the interpretation and application of s. 7 of the *Charter*, the development of the jurisprudence, and the evidentiary issues were of some interest in some academic circles;
- there were no precedents on which the petitioner could rely and creativity in approach and argument was required.

[26] For all of these reasons, a reasonable lump sum costs award is \$35,000 plus disbursements, as listed in the Bill of Costs.

[27] The Yukon government appears to object to the inclusion of GST in the costs award. Neither party made submissions on this issue. I make no finding about whether GST is included or not at this time, and leave it to the parties to address, on the understanding that they may return to Case Management if they cannot agree.

DUNCAN C.J.