IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Tan* v. *Yukon* (*Government of*) 2005 YKSC 19

Date: 20050406
Docket No.: S.C. No. 04 – A0215
Registry: Whitehorse

BETWEEN:

SA TAN

AND

GOVERNMENT OF THE YUKON TERRITORY

Before: Mr. Justice L.F. Gower

Appearances:
Sa Tan — Self-Represented

MEMORANDUM OF RULING

INTRODUCTION

[1] Mr. Tan has made without notice applications for indigency status in this matter and in a related matter against four individually named defendants (04-A0216). If granted, he will be exempt from paying the usual filing fees to commence these actions. For the sake of convenience, these reasons will address both applications.

ISSUES

1. Is Mr. Tan indigent?

2. Even if Mr. Tan is indigent, is his claim proper and sufficiently meritorious to justify an order exempting him from paying filing fees?

ANALYSIS

Is Mr. Tan indigent?

[2] In his notices of motion, Mr. Tan purported to rely on Rule 56 of the *British Columbia Court of Appeal Rules*, B.C. Reg. 297/01, which deals with indigent litigants. While recognizing that those *Rules* might apply to some Yukon matters, by virtue of section 12 of the *Court of Appeal Act*, R.S.Y. 2002, c. 47, as these matters are not appeals, that Rule clearly is not applicable. Given that Mr. Tan is self-represented, I have treated his reference to Rule 56 as a technical error and instead I have taken him to be relying on S1 of Appendix C, Schedule 1, B.C. Reg. 10/96, as amended, of the *Rules of Court* of the British Columbia Supreme Court, adopted as the *Rules* of this Court by section 38 of the *Judicature Act*, R.S.Y. 2002, c. 128.

[3] S1 of Appendix C, Schedule 1 states:

> S1 (1) If the court, on summary application before or after the commencement of a proceeding, finds that a person is indigent, the court may order that no fee is payable to the Crown by the person to commence, defend or continue the whole or any part of the proceeding unless the court considers that the claim or defence
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> (a) discloses no reasonable claim or defence as the case may be,
> (b) is scandalous, frivolous or vexatious, or
> (c) is otherwise an abuse of the process of the court.
>
> (2) An order under subsection (1) may apply to one or more of the following:
>
> (a) a proceeding generally;
> (b) any part of a proceeding;
> (c) a specific period of time;
> (d) one or more particular steps in a proceeding.
>
> (3) On application or on the court's own motion, the court may review, vary or rescind any order made under subsection (1) or (2).

> (4) Despite anything in this Schedule, if the court makes an order in relation to a person under this section, no fee is payable to the Crown by that person in relation to the proceeding, part of the proceeding, period of time or steps to which the order applies.

[4] To avoid any confusion, I note this Court's Practice Direction #19 states that effective July 4, 1994, "the fees payable to the Crown" are those set out in Appendix C, Schedule 1 of the B.C. Reg. 144/94. That version of Appendix C, Schedule 1 has an indigency status provision at the end, which is similar but not identical to S1(1) of the current Appendix C, Schedule 1, set out above. Pursuant to this Court's Practice Direction #35, which in turn refers to s. 38 of the Yukon *Judicature Act*, the British Columbia Supreme Court *Rules* are, with necessary changes, to be followed in all causes, matters and proceedings in this Court. That includes S1 of the current Appendix C, Schedule 1. Practice Direction #19 only applies to the actual fees listed as payable to the Crown in that Schedule (B.C. Reg. 144/94), and not to the indigency status clause at the foot of that Schedule.

[5] "Indigent" is not further defined in the *Rules of Court*, but its meaning has been considered in a number of cases. Generally, it means a person who is not penniless, but who has such few resources that they may be considered needy. In *Griffith* v. *Canada (Royal Canadian Mounted Police)*, 2000 BCCA 371, Hall J.A. said at paragraph 3:

> In a case that is often referred to as being the leading case on the meaning of the word "indigent", *National Sanitarium Association* v. *The Town of Mattawa*, [1925] 2 D.L.R. 491 (Ont. C.A.), Mulock C.J.O. noted that ***it means a person is a person is*** [as written] ***possessed of some means but such scanty means that he is needy or poor*****.** (emphasis added)

[6] The purpose of granting indigency status is to ensure that those with arguable cases, but inadequate finances, have access to justice. In *Trautmann* v. *Baker*, [1997] B.C.J. 452 (C.A.), Hall J.A. said at paragraph 4:

> ... As I see it, the underlying rationale for the granting of indigent status is to ensure that no litigant will be denied access to the courts by reason of impecuniosity. … As I observed earlier, the concern of the court must be that no arguably meritorious case should be prevented from getting a hearing merely because a person is without the financial resources to carry on with the litigation.

[7] These statements of Hall J.A. in *Griffith* and *Trautmann* were quoted with approval by Rowles J.A. in *De Fehr* v. *De Fehr*, 2001 BCCA 485 and by Ryan J.A. in *M.K.M*. v. *L.D*., 2002 BCCA 216.

[8] Hall J.A. further cautioned in *Trautmann*, at paragraph 4, that while the courts should not be "overly rigorous" in approaching such an application, "it must be recognized that giving a litigant indigent status may be affording an unfair advantage to that litigant vis-à-vis the other party".

[9] As for Mr. Tan's claim for indigency, I note that his affidavit material discloses a monthly income of $800.00, of which he nets approximately $750.00 after taxes. His stated monthly expenses equal his gross monthly income. He claims to have no assets and $2,000.00 in loans outstanding to friends. He has also affirmed that he does not have the ability to borrow money for the filing fees under the *Rules of Court*. Those fees would be $140.00 per claim. Thus, although Mr. Tan may not be totally destitute, he does appear to be a person of "such scanty means that he is needy or poor" and that the total of $280.00 in filing fees for both claims (indeed, even the fee for one claim) would effectively deny him access to justice.

Even if Mr. Tan is indigent, is his claim proper and sufficiently meritorious to justify an order exempting him from paying filing fees?

[10] To answer this question, I must also determine the standard for the strength of the applicant's case on such an application.

[11] *De Fehr*, cited above, was a case involving an earlier version of S1 under Appendix C, Schedule 1 of the *Rules of* Court, which is similarly worded to the present S1(1). Both sections provide the court with discretion to refuse an application under S1(1)(a) if it considers that the claim or defence "discloses no reasonable claim or defence as the case may be". Rowles J.A., at paragraph 19, applied this test by examining whether the applicant's appeal was "without merit or, put another way, is bound to fail".

[12] *M.K.M.,* also cited above, involved an application under section 56 of the *British Columbia Court of Appeal Rules*. That section is also similarly worded to S1(1). The only significant difference is that paragraph (a) of Rule 56 provides that an application for indigent status may be refused if the justice that considers the position being argued by the applicant "lacks merit". At paragraph 8, Ryan J.A. could not say that the applicant's appeal lacked merit because she could not say at that stage of the proceedings that the applicant's grounds were "not arguable".

[13] In *Scarlett* v. *Canada (Royal Canadian Mounted Police),* 1999 BCCA 618, Hollinrake J.A. was also dealing with a precursor of S1 under Appendix C, Schedule 1, in combination with a motion to extend time to file an application for judicial review. He determined that the test for the extension of time application was more rigorous than for the motion to obtain indigent status. With respect to the former, he felt he must be satisfied that there was "no merit whatsoever" in the appeal itself.

However, with respect to the indigent status application, he need only be satisfied that there was a “reasonable” claim to be made. That of course tracks the language of S1(1)(a), both in the precursor and present legislation.

[14] S1(1)(b) also requires the applicant to demonstrate that his claim is not “frivolous”. Vertes J.A. interpreted that standard in *Kolausok* v. *H.M.T.Q.*, 2004 NWTCA 1, a criminal case involving release pending appeal, where the applicant similarly had to establish that his appeal was not frivolous. At paragraph 3, Vertes J.A. said this is a low threshold, where it is unnecessary to show a likelihood of success, and continued as follows:

> It is simply a requirement to show that there are grounds of appeal that are at least arguable. An appeal that is frivolous is one that has no hope of success. This is not synonymous, however, with a little likelihood of success. The threshold is met if there is at least some prospect of success.

[15] Thus, I have some difficulty discerning whether there is any distinction between the requirement that an applicant for indigency status must establish that he has a “reasonable claim” (S1(1)(a)), from the requirement that he establish his claim is not “frivolous” (S1(1)(b)). In my view, there is a low threshold for both requirements, which is met if there is at least some prospect of success.

The Breach of Contract Action

[16] In the action which Mr. Tan intends to commence against the Government of Yukon, the primary cause of action is an allegation of a breach of an employment contract by the Government. He claims to have been successful in a competition for the position of Communications Manager with the Department of Economic Development (the Department). He has attached to his affidavit material excerpts of

e-mails he exchanged with the Yukon Public Service Commission. These would seem to indicate, on their face, that an offer of employment was made by the Yukon Government to Mr. Tan and that Mr. Tan accepted the offer. The e-mails further disclose that some reading material was provided by the Yukon Government to Mr. Tan in order to commence his duties. According to the affidavit material, one of Mr. Tan's first duties was to review and revise a briefing note for the Minister of Economic Development on a proposed Alaska-Yukon railway, which Mr. Tan did. Finally, about ten days after Mr. Tan was purportedly offered this employment, the Department stated that it was withdrawing the offer. The reason later given by the Public Service Commission was that Mr. Tan had not used his correct legal name in the competition and hiring process. At one point an e-mail was sent to the Public Service Commissioner by Laurie Butterworth, apparently in his capacity as a union representative for Mr. Tan, confirming his understanding that Mr. Tan had accepted the Yukon Government's offer of employment and had begun to carry out his duties as an employee. This is arguably corroborative of Mr. Tan's allegations.

[17] I emphasize these are simply allegations by Mr. Tan, and I am assuming for the moment that the e-mail material is legitimate and not fabricated. I am also quick to point out that an application for indigency status is without notice to the proposed defendants. Therefore, Mr. Tan's version of the facts is unchallenged at this stage. Nevertheless, I find that his claim of breach of contract has at least some prospect of success and his indigency application is not otherwise barred under S1(1).

The Defamation Action

[18] In the related matter (04 – A0216), Mr. Tan essentially alleges the four individual defendants are defaming his character by denying that there has been a breach of contract. He intends to plead that by denying the existence of the contract, those individuals, whom Mr. Tan apparently believes are Government employees, are effectively alleging that he is lying about "the facts". In addition, he suggests those employees, or some of them, have accused him of a "lack of candour" in his employment application. Mr. Tan says that this is compromising his ability to compete for other similar employment with the Yukon Government.

[19] I have difficulty with the notion that the alleged failure of these four individuals to agree with Mr. Tan's position is capable of constituting defamation. Defamation generally involves a false statement about someone to their discredit or an attack upon their moral character. I also question whether such information has been "published", in the sense of being made known to a person or persons other than Mr. Tan. Publication, of course, is an essential element in a defamation action. Nevertheless, there is some law which indicates that it is possible to publish defamatory material by leaving it in a place, such as a file, where others may see it: *Edgeworth* v. *New York* Central, [1936] 2 D.L.R. 577 (Ont. C.A.).

[20] Even with these misgivings, I cannot say at this stage that the proposed action has no hope of success. Nor do I find the proposed claim to be scandalous, vexatious or otherwise an abuse of this Court's process. It is conceivable that the Government's response to Mr. Tan's claim of breach of contract might be considered an attack on his character. Therefore, I grant Mr. Tan's application on that matter as well.

CONCLUSION

[21] Mr. Tan is granted indigency status on both applications, 04-A0215 and 04-A0216.

[22] However, Mr. Tan's status could change in the future and he may be challenged to defend it by any of the prospective defendants, or even by this Court. As was stated by Murphy L.J.S.C. in *Munro* v. *Stewart* (1989), 31 B.C.L.R. (2d) 164, at page 165:

> "… it does not necessarily follow that once an indigent, always an indigent. A person found to be indigent at the commencement of an action … may at some later date not fit that category."

[23] That concern echoes back to the comment of Hall J.A. in the *Trautmann* case, cited earlier, that the court should be cognizant of not affording an indigent litigant "an unfair advantage" to the other party. The current version of S1 in Appendix C, Schedule 1 appears to anticipate this concern by allowing the court to review, vary or rescind any order exempting a litigant from paying filing fees, either on the Court's own motion or on application. I take that to mean that any of the named defendants in the proposed actions could challenge Mr. Tan's claim for indigency at any time. Further, after the actions have been commenced, any of the proposed defendants could apply to have the writs of summons or statements of claim struck out under Rule 19(24) on grounds virtually identical to those set out in S1(1)(a) to (c).

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GOWER J.