

SUPREME COURT OF YUKON

Citation: *Yukon (Director of Public Safety and Investigations) v. Selkirk First Nation*,
2020 YKSC 30

Date: 20200717
S.C. No.: 20-A0031
Registry: Whitehorse

BETWEEN:

DIRECTOR OF PUBLIC SAFETY AND INVESTIGATIONS

PETITIONER

AND

SELKIRK FIRST NATION

RESPONDENT

Before Madam Justice S.M. Duncan

Appearances:

Kelly McGill

Darcy Marcotte (by telephone)

Counsel for the Petitioner
Representative of Selkirk First Nation

REASONS FOR JUDGMENT

[1] DUNCAN J. (Oral): This is a petition brought by the Director of Public Safety and Investigations for a community safety order related to the property at 14 Jon Ra Subdivision, Pelly Crossing, Yukon. The order is sought to enjoin all persons, including the current occupant of the property, from engaging in or permitting certain activities in contravention of the *Liquor Act*, R.S.Y. 2012, c. 14 (the "*Liquor Act*"), as amended — essentially, bootlegging.

[2] The petition is brought under the *Safer Communities and Neighbourhoods Act*, S.Y. 2006, c. 7 (the "*Act*"). The respondent is Selkirk First Nation, the owner of the property at 14 Jon Ra Subdivision. This property is part of the residential subdivision

within Pelly Crossing, a community of 300 people located off the North Klondike Highway between Whitehorse and Dawson City. It is an unlicensed community, meaning that there are no establishments in the community licensed to sell or distribute alcohol. This is different from a dry community, where alcohol is prohibited within the community.

[3] The current occupant of the property is Richard Hager. He is the sole occupant and has lived there for 14 years. He is a citizen of Selkirk First Nation.

[4] Selkirk First Nation is supportive of this order. In fact, the complaints that gave rise to the investigation were made by representatives of Selkirk First Nation.

[5] Mr. Darcy Marcotte, the second complainant, is a Community Safety Officer at Selkirk First Nation. He was present by telephone for the hearing and also submitted affidavit evidence in support of the application.

[6] Mr. Hager, although not technically a respondent, was served and does not oppose the application. He did appear on the day of the hearing, spoke to a lawyer during a brief adjournment at the outset of the hearing, but then advised the Court through counsel for the Government of Yukon, Ms. McGill, that he would not be staying for the hearing and left the courthouse. He did not file any materials.

[7] Section 20 of the *Act* requires that despite the fact that the respondent consents to an order or does not oppose an application, the Court must be satisfied on the merits that the order should be made.

[8] I will first review the legal test under the *Act* and then the evidence in this case before setting out my conclusion about whether the test has been met, and then I will discuss the wording of the order.

[9] The onus is on the Director on a balance of probabilities to satisfy the Court that the test set out in s. 6(1) of the *Act* is met.

[10] Section 6(1) reads:

6(1) The court may make a community safety order if it is satisfied that

(a) activities have been occurring on or near the property that give rise to a reasonable inference that it is being habitually used for a specified use; and

(b) the community or neighbourhood is adversely affected by the activities.

[11] “Property” is defined in the *Act* as “a building and the land on which it is located” and “building” is defined to include “a structure of any kind”.

[12] “Specified use” is defined in the *Act* in relation to property, and includes:

... use of the property

(a) for the use, consumption, or sale of liquor, in contravention of the *Liquor Act* or regulations under it;

(b) for the sale of liquor without a licence issued under the *Liquor Act*;

...

[13] The sale of liquor is a highly regulated activity in the Yukon. Regulation is done primarily by licences and permits with multiple and specific conditions.

[14] Section 24(4) of the *Liquor Act* states that “no person may sell or keep for sale liquor without a licence.”

[15] Section 74 of the *Liquor Act* provides that:

No person authorized by this Act to sell liquor shall sell liquor in any other place, at any other time, in any other quantities or otherwise than as authorized by this Act.

[16] The penalty for breaching either of these two sections is set out in s. 95.1(1)(a) of the *Liquor Act* under “Penalty for bootlegging” and includes a fine of \$25,000 for a first offence or imprisonment up to 12 months, or both.

[17] “Habitually used” is not defined in the *Act* but the leading decision in this area and the only appellate level decision, *Dixon v. Nova Scotia (Director of Public Safety)*, 2012 NSCA 2, a decision of the Nova Scotia Court of Appeal from 2012, where the governing statute contains identical wording to the Yukon statute, describes “habitual use” as “occasional activity implying ongoing conduct”, more than an “isolated incident” or a “discrete event”.

[18] “Reasonable inference” is also discussed by the Nova Scotia Court of Appeal in *Dixon*. It is described as “a deduction from the evidence”; not speculation or conjecture; and based on “objective facts from which to infer the other facts which it is sought to establish” (*Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 (H.L.), at p. 45; *Caswell v. Duffryn Associated Collieries, Limited*, [1940] A.C. 152, at p. 169 – 170 quoted in *Dixon*, at para. 43).

[19] Activities that adversely affect the community or neighbourhood are defined in s. 1(5) of the *Act* as activities that:

- (a) negatively affect the safety or security of one or more persons in the community or neighbourhood; or
- (b) interfere with the peaceful enjoyment of one or more properties in the community or neighbourhood, whether the property is privately or publicly owned.

[20] The *Act* is complaint driven. When complaints are made, complainants are entitled to anonymity. The Safer Community and Neighbourhood Unit, which I will refer to as the “SCAN Unit”, decides whether or not to investigate upon receiving complaints.

[21] Here, there were two complaints about activities at the property in question. Neither of the complainants sought anonymity.

[22] The first complaint was made on November 1, 2018, with a follow-up on December 13, 2018, by Gina Nagano who was working for Selkirk First Nation in the community. She reported that Richard Hager at 14 Jon Ra Subdivision was identified to her by members of the community as a bootlegger and was regularly driving to Whitehorse and Mayo to buy liquor to distribute illegally in Pelly Crossing.

[23] As a result of this complaint, Kurt Bringsli and Drew Horbachewsky, two of the investigators in the SCAN Unit, advised Mr. Hager of these community concerns and warned him that selling and distributing liquor without a licence was illegal and he could face sanctions for doing so. Mr. Hager denied engaging in these activities and the complaint file was closed.

[24] The second complaint was received on May 7, 2019, from Darcy Marcotte, as noted, one of the Community Safety Officers in Pelly Crossing employed by Selkirk First Nation and a resident of the community since 1999. Community Safety Officers are unarmed and act as intermediaries between citizens and law enforcement. In a sense, they are the eyes and ears of the community.

[25] Mr. Marcotte reported that he had found a cell phone on the road on the main village side on May 4, 2019, belonging to Richard Hager. He confirmed this was Mr. Hager's phone by calling the number he had for Mr. Hager when he, Darcy Marcotte, had been his work supervisor. The phone contained text messages with requests from different people to purchase liquor from Mr. Hager with different prices for different amounts.

[26] The second complaint resulted in a four-person team investigation by the SCAN Unit. Evidence of the investigation is set out in the affidavits from Mark London, Drew Horbachewsky, Kurt Bringsli, and Navhreet Nijhar. Three of the four investigators are former RCMP officers with significant training and experience in investigations and the effects of bootlegging activities in small communities. Mr. Marcotte also provided affidavit evidence of his finding of a cell phone and his knowledge of Mr. Hager, among other things.

[27] The screenshots of the text messages attached to Mr. Marcotte's affidavit contain messages from various dates mostly in 2018.

[28] For example:

Richard , do u have anything for sell I need two bottles, I have 100\$ cash

...

Can U drop off a half please I just wanna shot lol I have money

...

█ can u drop a bottle off? Got 50

...

Sell me a bottle I'm sick

...

please dont sell to █ today at the █ house. we want him sober up. thx 4 quittin.

...

maybe pelly can b gd place if ppl quit selling. sober ppl get sick c them.

[29] Mr. Marcotte's affidavit also confirms that he was the Capital Director at Selkirk First Nation from 2011 to 2013 and from 2016 to 2019, and was Mr. Hager's supervisor during the last few years. He received complaints from citizens about Mr. Hager's bootlegging during that time and spoke to him about it. Mr. Hager denied the allegations each time. Mr. Hager no longer works for Selkirk First Nation, according to Mr. Marcotte's affidavit.

[30] Mr. Marcotte also deposed that when he first arrived in Pelly — "he" being Mr. Marcotte — he was aware that Mr. Hager was drinking alcohol but he has not observed Mr. Hager under the influence of alcohol for many years.

[31] The affidavit evidence filed by the four investigators described the investigation. It consisted of, first, live surveillance of the Pelly Crossing property in September 2019, and on four occasions between November 2019 and February 2020; surveillance of Mr. Hager in Whitehorse at the liquor store; and obtaining information from the RCMP, Community Safety Officers, and liquor stores in Mayo, Whitehorse, and Carmacks.

[32] Section 27 of the *Act* authorizes the Director to obtain this kind of information from public bodies about persons who own, occupy, or enter the property in question or about the occurrence of other activities in question.

[33] The affidavit evidence from the investigators also sets out that the investigation revealed:

- Nine suspicious incidents of short duration visits from the property to locations around Pelly Crossing;
- Mr. Hager using law enforcement evasion techniques, such as switching vehicles for no apparent reason, avoiding the Community Safety Officers,

- and carrying on dial-a-dope operations in the bootlegging context - where alcohol orders are called in or texted to a cell phone and arrangements are made to exchange liquor for cash or other favours at a specific time and place;
- Mr. Hager purchasing large amounts of alcohol of the type and quantity normally bootlegged in Pelly Crossing at Carmacks, Mayo, and Whitehorse liquor stores — that is, Smirnoff Vodka — and evidence that 750 ml quantities were sold for \$50, 375 ml quantities were sold for \$25, and further evidence that a 1750 ml bottle of Smirnoff Vodka at the Whitehorse liquor store cost \$52;
 - Intelligence from Community Safety Officers corroborating Mr. Hager’s bootlegging;
 - Cell phone records with text messages; and
 - RCMP information of 12 documented police calls to the property while Mr. Hager was a resident there over the past 10 years, with at least four of them being between December 2018 and September 2019, related to assaults by intoxicated individuals, breaches of the peace or mischief by intoxicated people, or unlawful breaks and enters by intoxicated individuals — this was set out in an affidavit of evidence of Sgt. Ian Fraser of the RCMP, who was requested to provide RCMP information on file about the property.

[34] The affidavit of the senior investigator of the SCAN Unit, Kurt Bringsli, who is a 10-year former member of the RCMP with significant investigation experience, including

bootlegging investigations, set out his opinion that Mr. Hager was using the property to bootleg in Pelly Crossing. This opinion was shared by investigator Mark London, who is also a former RCMP member for 26 years, where he was a sergeant in charge of a major crime investigative unit for seven years and acting commander of the plainclothes unit for extended periods, requiring approval of operational plans targeting drug enforcement. Mr. London also worked in several small First Nation communities where liquor was prohibited or not available for public sale, including Old Crow, a dry community. Mr. London, in his affidavit describing the investigation, concluded the results of SCAN's investigation were "consistent with bootlegging."

[35] I should add that there is no evidence that Mr. Hager has ever obtained a licence or a permit under the *Liquor Act* enabling him to sell liquor lawfully.

[36] On the affidavit evidence provided in this case, I find on the balance of probabilities that there is a reasonable inference that the property at 14 Jon Ra Subdivision in Pelly Crossing, first of all, meets the definition of "property" under the statute and is being "habitually used", that is, there is occasional activity implying ongoing conduct, for the sale of liquor in contravention of the *Liquor Act* or for the sale of liquor without a licence issued under the *Liquor Act*.

[37] Further affidavit evidence filed supports the second part of the s. 6 test, which is that the community or neighbourhood is adversely affected by these activities, and can be summarized as follows:

- (i) Many members of the community have complained to the Community Safety Officers and the Selkirk First Nation government about the bootlegging activities.

- (ii) As noted in Kurt Bringsli's affidavit, bootlegging exploits vulnerable members of the community, including underage people, those with addictions, elders, and women who may be at risk of exchanging sexual favours for liquor.
- (iii) Because bootlegged liquor is marked up for sale at exorbitant prices, it exploits people financially — evidenced here by the text messages in the Marcotte affidavit.
- (iv) It attracts to the community people who may engage in related unlawful activity, such as violence against persons and property — and this is evidenced by the disproportionate number of calls to the RCMP from the property.

[38] All of this negatively affects the safety and security of the residents of Pelly Crossing community and negatively affects the peaceful enjoyment of their settlement land and homes.

[39] The Selkirk First Nation is also concerned about and committed to addressing illegal activity, such bootlegging, because of its negative effects on the community. This is clear from the protocol they entered into with the SCAN Unit of the Government of Yukon. This protocol is also included in the affidavit material. In it, Selkirk First Nation and the Government of Yukon agree that they share a common interest in creating safer communities by addressing habitual illegal activities — such as bootlegging, drug trafficking, and prostitution — that negatively affect community safety and the peaceful use and enjoyment of property on settlement land by their members.

[40] I find, then, on a balance of probabilities that the community of Pelly Crossing is being adversely affected by the bootlegging activity occurring at 14 Jon Ra Subdivision. I am therefore satisfied that the test under s. 6 of the *Act* has been met.

[41] Turning to the remedy, the statute sets out mandatory terms for a community safety order in s. 6(3) of the *Act*. Discretionary terms are also available and some of these are set out in s. 6(2).

[42] The case law interpreting similar statutes in other jurisdictions has described the purpose of these statutes and orders made pursuant to them as remedial, not punitive. The *Act* is aimed at protecting the safety and security of the people in the neighbourhood or community and ensuring the cessation of the activities in question.

[43] In this case, the Director is seeking the mandatory terms — the primary one of which is to enjoin all persons, in particular Mr. Hager — from causing, contributing to, permitting, or acquiescing in the activities for a period of one year. This is to ensure that the people of Pelly Crossing know that 14 Jon Ra is no longer a place to buy liquor. There are no time limits for a community safety order set out in the statute, but this requested time period does seem to be reasonable in the circumstances.

[44] As the Manitoba Court of Queen's Bench stated in the case of *Aboriginal and Community Law Enforcement (Director) v. Manaigre*, 2009 MBQB 113:

[48] . . . It is unlikely that the setting of such a time frame, for the purpose of achieving the goal and not for any other extraneous purpose, can be more precise than a reasoned estimate based on general experience and the specific factors in a given situation.

[45] At the request of Selkirk First Nation, the Director is not seeking to terminate Mr. Hager's tenancy, nor are they seeking to close the property.

[DISCUSSIONS]

[46] I have just made a few changes to the order, mostly to the format and a little bit in content, so I will read out what I think the order should say:

THE APPLICATION of the Petitioner, Director of Public Safety and Investigations, coming on for hearing at Whitehorse, Yukon, on the 13th day of July 2020, and on reviewing the materials filed, and on hearing Kelly McGill, counsel for the Petitioner; Darcy Marcotte, Community Safety Officer at the Selkirk First Nation, appearing by teleconference as representative of the Selkirk First Nation; and Richard Hager, not appearing although duly served, and the decision being reserved to this date.

AND ON FINDING that:

1. The property located at 14 Jon Ra Subdivision, Pelly Crossing, Yukon, is being habitually used for a specified use as defined in the *Safer Communities and Neighbourhoods Act*, namely:
 - (i) for the use, consumption, or sale of liquor, in contravention of the *Liquor Act* or regulations made under it; or
 - (ii) for the sale of liquor without having a licence issued under the *Liquor Act* (the “Activities”); and
2. The community of Pelly Crossing is adversely affected by the Activities.

THIS COURT ORDERS that:

1. All persons, in particular the current occupant of the property, Richard Hager, be enjoined from causing, contributing to, permitting, or acquiescing in the Activities, beginning on the day after the Selkirk First

Nation is served with this Order and continuing until this Order ceases to be in effect.

2. The Selkirk First Nation do everything reasonably possible to prevent the Activities from continuing or reoccurring.
3. The Director shall post a copy of this Order in a conspicuous place on the Property.
4. A peace officer, including an RCMP officer, shall on request provide any assistance required by the Director, or his agent, in serving or posting this Order.
5. For the purpose of enforcing this Order, a peace officer has full power and authority to enter the Property or onto any land on which any person required to be served with this Order may be found.
6. The Director or his agents may monitor the Property for compliance with this Order.
7. This Order shall cease to be in effect 12 months after the date it is made.
8. The requirement for the signature of the Respondent on this Order is dispensed with.

DUNCAN J.