SUPREME COURT OF YUKON

Citation: *Wright v Yukon (Director of Public Safety and Investigations*), 2023 YKSC 77

Date: 20231107
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 Porteous
Counsel for the Intervenor	Brent Olthuis (by videoconference) and Fraser Harland (by videoconference)

This decision was delivered in the form of Oral Reasons on November 7, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): The petitioner is challenging the constitutionality of s. 3(2) of the *Safer Communities and Neighbourhoods Act*, SY 2006, c. 7 ("*SCAN Act*"), the

section that allows for the Director under the *Act* to facilitate a landlord's termination of a tenancy on five days' notice, as an informal action or resolution of a complaint to the Director under the *SCAN Act*. The petitioner argues that this provision infringes s. 7 and s. 15 of the *Charter*. As part of their argument, the petitioner proposes to introduce two expert reports and one academic article that are disputed in whole or in part by the government respondent.

[2] The first report I will address is by Prof. Stephen Gaetz of York University, whom the petitioner seeks to qualify as an expert in the field of anthropology so that he can give opinion evidence on the causes, consequences, and potential solutions to homelessness on individual and societal levels. The government respondent does not object to Prof. Gaetz's expert qualifications or to two sections of his report. They object to the sections in the report dealing with the definition of homelessness, the causes of homelessness, who is homeless in Canada, and supporting people experiencing homelessness through Housing First.

[3] The second report is by Dr. Bill McCarthy of Rutgers University in New Jersey. The petitioner seeks to qualify him as an expert in the fields of sociology and criminology; and seeks to have him give opinion evidence on the subject of residential evictions, homelessness, and their relationship with individual and social outcomes. His report consists of a summary of his literature review of articles addressing the outcomes, individually and societally, associated with evictions. The government objects to its admissibility in its entirety.

[4] The final document is an academic article authored by Dr. Bill McCarthy and Dr. John Hagan entitled *Homelessness, Offending, Victimization, and Criminal Legal*

System Contact. It was not referred to by Dr. McCarthy in his literature review report. It was provided to the respondents last Thursday, November 2nd, and sought to be introduced over their objections in court on the first day of hearing.

[5] This ruling will address the admissibility of these materials as evidence in these proceedings. I will first review the law on the admissibility of expert evidence with a particular focus on social science evidence and then I will apply that law to the circumstances here.

[6] A good summary of the law on expert evidence can be found in *ANC Timber Ltd v Alberta (Minister of Agriculture and Forestry)*, 2019 ABQB 653. The *ANC* decision is quoted in *R v Howell*, 2020 ABQB 385. At para. 195 of the *Howell* decision, it quotes paras. 126 to 129 of *ANC*:

> [126] Expert evidence is allowed "on matters requiring specialized knowledge": ***White Burgess*** at para 15. In ***R v Bingley***, the Supreme Court reaffirmed the purpose of the framework for admissibility noting, at para 13:
>
> > The modern legal framework for the admissibility of expert opinion evidence was set out in Mohan and clarified in ***White Burgess Langille Inman v. Abbott and Haliburton Co.*** This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into "trial by expert" and that the trier of fact maintains the ability to critically assess the evidence: see ***White Burgess***, at paras 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.
>
> [127] The Court in ***Bingley*** also observed that "[t]he boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized": para 17.

> [128] Similarly, in ***White Burgess***, the Supreme Court explained the importance of the gatekeeper role at paras 12 and 16:
>
> > … we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice…
>
> The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.
>
> [129] The expert evidence analysis is divided into two stages. First, it must first meet the four ***Mohan*** factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. If it does, the Court then weighs the potential risks and benefits of admitting the evidence against the benefits: ***White Burgess*** at paras 23-24. [emphasis in original, citations omitted]

[7] This case is a *Charter* challenge. The law provides that *Charter* decisions should not and must not be made in a factual vacuum (*Mackay v Manitoba*, [1989] 2 SCR 357).

[8] Courts have distinguished two kinds of facts in constitutional litigation: adjudicative facts, those specific facts related to the parties (who did what, where, when, how, and by what motive, and those are normally proven by evidence); and legislative facts, also called "social facts", which are of a more general nature. They are subject to a less stringent admissibility requirement, and they establish the purpose and background of legislation, including its social, economic, and cultural context. Social fact has been defined as social science research used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case. If these general facts are properly linked to adjudicative facts, they can explain

aspects of the evidence, such as feminization of poverty in *Moge v Moge*, [1992] 3 SCR 813, or systemic background factors that have contributed to difficulties faced by Indigenous people within the criminal justice system in *R v Gladue*, [1999] 1 SCR 688.

[9] The Court still needs to test the trustworthiness of these social and legislative facts. The Supreme Court of Canada in *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 ("*Malmo-Levine*"), expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to the value and weight of the studies and reports instead of relying on judicial notice. The judge must then evaluate and weigh that evidence to arrive at conclusions of fact necessary to decide the case. The judge has to determine the reliability of the social science evidence, if it goes beyond the scope of the writer's expertise, and whether it is argumentative or unbalanced. This approach is different from the more traditional expert report, which would contain a statement of assumed facts needing to be proved in court. The expert then gives an opinion or theory relevant to the case using their training, knowledge, and expertise of a kind not possessed by the judge, based on those assumed to be proven facts. The opinion would then be verifiable.

[10] The Ontario Court of Appeal in *R v Abbey*, 2009 ONCA 624, built on *R v Mohan*, [1994] 2 SCR 9, and set out a two-step approach to assess the admissibility of expert evidence. First, the onus is on the party seeking to introduce the evidence to show that the preconditions in *Mohan* have been met on a "yes" or "no" basis.

[11] To repeat from the quote that I just read: first, the witness must be a qualified expert; second, the opinion must be logically relevant to a material issue — that is, relevance; third, the opinion must relate to a subject matter that is properly the subject

of expert evidence, that is, it provides information likely to be outside the experience of a judge or jury — that is, necessity; and fourth, it must not be subject to any exclusionary rule.

[12] If the judge decides the evidence meets those preconditions of admissibility, the next step is to conduct a cost-benefit analysis using judicial discretion: do the benefits of the potential value of the evidence to prove something of significance outweigh the costs of time, prejudice, and confusion? (see *R v J-LJ*, [2000] 2 SCR 600).

[13] This step involves a consideration of reliability of the evidence through looking at the subject matter, methodology used, expertise of the expert, and impartiality of the expert. This second step is called the "gatekeeper" function. Courts have stated in *Charter* cases, in particular, that judges should not apply an unnecessarily restrictive approach.

The Gaetz report

[14] There is no objection by the respondent to the expertise of Prof. Gaetz. They object to the admissibility of the first two and the last sections of the report: causes of homelessness, who was homeless in Canada, and supporting people through Housing First. They say that these sections are not relevant to the issues in this case and the material reviewed and conclusions reached are too general or too remote from the issues in this case to be of assistance. I also believe that the government opposes to the definition of homelessness section.

[15] They note that the report contains nothing about the effect of short-notice periods for eviction and nothing specific about the Yukon context. They say these sections that they object to do not meet the preconditions of relevance and necessity.

[16] The petitioner notes that under the causes of homelessness, the structural factors, including racism and the experience of colonialism for Indigenous people, contribute to housing precarity; and under individual and relational factors, the expert concludes that for people who are precariously housed, evictions, both legal and illegal, could be a major cause of homelessness. The petitioner notes that the final section sets out an alternative policy and program approach that the government can take to prevent homelessness.

[17] I agree that this report is logically relevant to the facts in issue here.

[18] Assuming the petitioner can show that eviction on short notice can lead to homelessness, the opinion of Prof. Gaetz backed by research — most of which is Canadian-based — on the nature, causes, conditions, and consequences of homelessness is logically relevant. Prof. Gaetz will be cross-examined, and so the basis for his views and the quality and nature of his research and that which he relies on will be probed and thus reliability will be tested.

[19] The proposed report is also necessary because it does provide information based on social science research that is outside the experience or knowledge of a judge.

[20] Assessing the proposed report through a cost-benefit analysis, its value and benefit outweigh any prejudice that could be created by confusion or distortion of the fact-finding process.

[21] The definition section of homelessness refers to a Canadian definition of homelessness and is helpful to understand the rest of the report. I note that the report refers to fluidity of experience of homelessness and refers to people at risk of

homelessness but not actually homeless and the factors that contribute to that vulnerable state.

[22] I agree with counsel for the petitioner that the causes of homelessness and who is homeless sections provide useful context and background to the issues raised in this case, based on Canadian research and experience for the most part, even if the section on factors identified and the nature of the homeless population in Canada may not all be directly relevant.

[23] Finally, the explanation of the Housing First policy and program approach — again, while not directly relevant to the facts — is useful context to assist in thinking about the problem of homelessness. It helps to complete the analysis of the issue from causes to solutions.

[24] This opinion evidence and the reference studies do not confuse, distort, or distract from the evidence and issues to be decided here, and the report will be admitted in its entirety.

The McCarthy report

[25] The petitioner says that this review by an expert in sociology and criminology is relevant and necessary. It is relevant because the literature summary reviewed shows the association between evictions and various outcomes, such as crime, offending, substance use, victimization, and health. The section of the *SCAN Act* being challenged is the provision allowing for terminations of tenancies on shorter notice or, eviction. The petitioner says this review supports the argument that this provision infringes the life, liberty, and security interests of those subject to the *SCAN Act*. The review of studies in U.S. cities, Sweden, and Denmark, and one Canadian city (Vancouver) does not detract

from the relevance as some themes exist that are consistent and, in the absence of studies from the Yukon, we can learn from other jurisdictions.

[26] The respondent does not object to the expertise of Dr. McCarthy. They object to the report on the basis of relevance and necessity. They say it is not relevant because the research reviewed is about cities in the U.S., including Boston, Philadelphia, Knoxville, and Los Angeles, or Vancouver — a city of 675,000 — or Europe. Significantly, Dr. McCarthy gives no opinion of his own and does not connect any of the information in the literature reviews to the Yukon to show how or why it could apply or be relevant here. The respondent says the review is too general to be helpful and its form is not proper expert evidence.

[27] A review and synthesis of literature on issues relevant to the constitutional challenge may in theory be helpful to the Court but only on certain conditions. Social science evidence still needs to be tested, assessed, and evaluated. Normally, this is done through a qualified expert providing an opinion or theory in their relevant area of expertise and sometimes — often — relying on literature. The opinion and the academic support for it may form a basis for cross-examination and subsequent assessment of its reliability.

[28] Here, Dr. McCarthy's failure to refer to any of his own research, his failure to say whether he agreed or disagreed with the findings in the review, and his failure to provide any sort of evaluative assessment of the literature raises questions. While the petitioner urged the Court to find either explicitly or implicitly that Dr. McCarthy's opinion is his agreement with the proposition that eviction is associated with the outcome set out in the literature review, nowhere does he explicitly state this.

[29] The first page of his report sets out his assumptions, such as social science research; addresses associations, not causes; and the difficulty in separating the consequences of eviction from the consequences of other attributes and experience likely to increase eviction. These are not opinions.

[30] Although a self-described expert on homelessness and crime, his resume does not contain any books, papers, articles, or presentations relating to evictions and outcomes. This suggests that, as the Court in *R v Mathisen*, 2008 ONCA 747, wrote, it is inappropriate to find a witness to be properly qualified where the source of their knowledge comes from reviewing literature. If it were, courts would be obliged to qualify as experts those who could not offer real opinions of their own on any given subject but could only point to what they had read.

[31] While I do not doubt that Dr. McCarthy is a qualified expert in sociology, criminology, homelessness, and crime, the question remains whether he can opine on the issues in the literature review. His report is not clear on this point.

[32] Literature that describes the association between evictions and negative outcomes may, in a broad sense, be logically relevant to the issues in this case, which include the effect on individuals of terminations of tenancy on short notice permitted under the *SCAN Act*. It is also necessary, as these social science studies are outside the experience and knowledge of a judge. However, in doing the cost-benefit analysis, I have concerns that the value of the information contained in Dr. McCarthy's report is outweighed by its potential prejudice. That prejudice includes the concerns I have just noted as well as the absence of any explanation as to how studies done in large U.S. cities, Vancouver, and Northern Europe apply to the Yukon context; the absence of

explanation about the database used and the extent of Dr. McCarthy's search; the absence of the articles themselves; and the ability to rely only on the summary provided.

[33] The value of social science evidence being presented through an expert is so the Court could have the benefit of that expert's assistance in understanding and assessing the reliability of that evidence. While undoubtedly Dr. McCarthy's summary, using the skills and knowledge he has obtained over many years as an academic, could be of some assistance and contains context information that may be relevant, the gaps I have noted suggests that the information as presented could distort the fact-finding process.

[34] Distortion can occur through the application of a general summary of general studies. This report is double hearsay and does not give the Court tools to assess its reliability. There is no obligation on the respondent to cross-examine Dr. McCarthy to fill or confirm these gaps. The burden is on the petitioner to persuade the Court that the report meets the legal criteria. I also note that no cases were provided where an expert's report was admitted and was limited to a literature review without any opinion.

[35] On balance, then, in exercising the "gatekeeper" function of the Court, I am of the view that the probative value is outweighed by the potential prejudicial effect of misleading the Court even in the context of the less restrictive standard that is applied to social science evidence.

The Article

[36] The petitioner seeks to introduce an article entitled *Homelessness, Offending, Victimization, and Criminal Legal System Contact* by Bill McCarthy and John Hagan. It appears to be an advanced copy to be published in 2024 in the *Annual Review of*

Criminology. The front page contains a note that changes may still occur before final publication. It is not referred to in Dr. McCarthy's report and it is not attached to an affidavit.

[37] While counsel for the petitioner is correct that social science evidence, such as this article, may be acceptable and admissible in *Charter* challenge cases, there is still an evidentiary process that must be followed. As noted above, the Supreme Court of Canada in *Malmo-Levine* first expressed a preference for social science evidence to be presented through an expert witness who could be cross-examined as to value and weight to be given to the social studies and reports.

[38] The Court in *R v Hair*, 2016 ONSC 900 described the issue in this way. The issue was most succinctly summarized in *R v Powley* (2001), 53 OR (3d) 35 (ONCA) at para. 62:

> … A party cannot escape the obligation to prove controversial facts at trial by filing academic writings as "authorities" on appeal. …

That was in the appellate context, but I think the principle applies here.

[39] In *RL c Ministère du Travail de l'Emploi et de la Solidarité sociale*, 2021 QCCS 3784, the applicant, who was, among other things, challenging a section of the *Individual and Family Assistance Act* under s. 7 of the *Charter*, sought to introduce a scholarly text. The author was a professor who concluded the age at which individuals receive their retirement pension had a significant effect on poverty. In refusing to admit the text, the Court wrote at para. 105:

> While such social science evidence can be useful to assist the Court in understanding the context in which legislation operates, the Court cannot rely on academic writing as evidence of an infringement. It would be necessary that

> reports such as Prof. Michaud's be filed as expert reports or through a knowledgeable witness to allow the truth to be tested. Considering the Court's conclusions with respect to the lack of evidence of infringement, this report plays no role in the Court's conclusion. [hyperlinks omitted]

[40] Finally, in *BW v CYS*, 2019 NLSC 166, the Court refused to admit an academic article on appeal. In their analysis, they referred to a trial judgment from Ontario (*Sordi v Sordi*, 2010 ONSC 2344), where the Court stated:

> [141] … Candidly, I have always been troubled by the idea that the court should just accept, at face value, the contents of academic articles submitted during argument, or found by the court on its own. Unlike any person offered as an expert witness during a trial, there is no opportunity to determine the degree of expertise [if any] of the author of the article, or to test the validity of the study, as it relates to the issues at hand. In this post The Inquiry into Paediatric Pathology in Ontario world, it is my view that trial judges should be very careful about incorporating social science articles into judgments, unless they have been produced in an acceptable fashion during the trial. … [hyperlink omitted]

[41] Now, I understand that this is not being produced in the context of final submissions but the way it is being presented is the same as it was done in submissions in those other cases.

[42] In addition to the applicability of these same concerns in this case, this article was only provided to the government last Thursday, November 2nd, less than two days before the start of this hearing. Even if it were presented in a different or proper forum — for example, as a form of expert evidence — this was not sufficient time for the government to respond and does not comply with the *Rules of Court*.

[43] So, for all of these reasons, I decline to admit the article.

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DUNCAN C.J.