

SUPREME COURT OF YUKON

Citation: *Yukon (Director of Public Safety and Investigations) v. Devilliers*, 2019 YKSC 19

Date: 20190322
S.C. No.: 18-A0149
Registry: Whitehorse

BETWEEN:

DIRECTOR OF PUBLIC SAFETY AND INVESTIGATIONS

PETITIONER

AND

ARIELLE COURTNEY LEE DEVILLIERS

RESPONDENT

Before Madam Justice S.M. Duncan

Appearances:
Kelly McGill
No one

Counsel for the Petitioner
Appearing for the Respondent

REASONS FOR JUDGMENT

[1] DUNCAN J. (Oral): This is a petition by the Director of Public Safety and Investigations under the *Safer Communities and Neighbourhoods Act*, S.Y. 2006, c. 7, for a community safety order related to the property at 81-4 Prospector Road.

[2] Before issuing a community safety order, the Court must be satisfied that activities occurring at or near the property at 81-4 Prospector Road give rise to a reasonable inference that the property is being habitually used for a "specified use", as defined in the *Act*, and the community or neighbourhood is adversely affected by those activities. Section 6(1) of the *Act* sets out this test.

[3] "Specified use", as defined in the *Act*, includes use of the property:

(d) for the possession, production, use, consumption, sale, transfer, or exchange of, or traffic in, a controlled substance, as defined in the *Controlled Drugs and Substances Act* (Canada), in contravention of that Act; or...

[4] "Habitual use" is not defined in the *Act*, but through case law — specifically *Dixon v. Nova Scotia (Director of Public Safety)*, 2012 NSCA 2, and *Nova Scotia (Public Safety, Director) v. Cochrane*, 2008 NSSC 60, cases, which are included in the materials — a definition has emerged.

[5] At para. 26 of the *Dixon* case, the Court noted that habitual use requires "a more contextual approach." It is "more than a discrete event" and it is enough if there is occasional activity implying ongoing conduct. It is not an "isolated incident or ancient history."

[6] "Adverse affect" is also not defined in the *Act* directly but s. 1(5) of the *Act* does describe activities that may create an adverse affect. Specifically, that subsection states:

(5) For the purposes of this Part, a community or neighbourhood is adversely affected by activities if the activities

(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.

[7] This petition was originally scheduled to be heard on March 6, 2019. Arielle Devilliers, who is also known as Arielle Lee or Arielle Lee Devilliers, the respondent, was served by text and email, as she is currently in Yellowknife, NWT. She recently had surgery and has a newborn child. She was unable to travel to Whitehorse but on

March 6, she did attend by phone and stated her opposition to this petition. She also said she could not stay on the phone for the two-hour time period for which the petition was scheduled that day.

[8] I adjourned the application to March 21 to allow Ms. Devilliers time to file an affidavit or any other material in response to this petition by March 19. I further advised that she could appear by phone on March 21 and that she should ensure she would be available for the two-hour time period.

[9] Ms. Devilliers did not file any responding material by March 19 or at all. On March 21, just before 2 p.m., the court clerk attempted to call the phone number where Ms. Devilliers had been reached on March 6 four times. There was either no response or the call went to voicemail.

[10] Just after 2 p.m., when court began, the court clerk tried again to call Ms. Devilliers at the same number and again received voicemail.

[11] Given the adjournment granted to Ms. Devilliers of just over two weeks, her failure to file material, and her absence from the phone at and before 2 p.m. on March 21, I ordered that the matter proceed in her absence.

[12] The evidence presented by the Director included five affidavits: three from investigators in this matter; one from an RCMP sergeant; and one from a fire prevention officer.

[13] The affidavit of Investigator Kurt Bringsli describes the property and includes an aerial view map. The property is located in the densely populated Kopper King mobile home park near the Alaska Highway. The park is close to a neighbourhood pub, retail

store, gas station, and convenience store, as well as a school bus stop on the highway.

The property in question is in the part of the park that is closest to the Alaska Highway.

[14] The *Act* is complaint driven. In this case, there were five complaints on separate occasions from two complainants. The first complaint was made in 2017. The file was closed, as there was not sufficient evidence to support the complaint. The other four complaints were made between July 2018 and January 2019. The complaints are not the only evidence but they provide a foundation for further investigation.

[15] The anonymity of the complainants is protected by s. 32(1) of the *Act*. Here, the complaints were about apparent drug dealing at Unit 81 - 4 Prospector Road or at nearby Unit 74, where there was much foot traffic back and forth, a lot of vehicle traffic and foot traffic throughout the day and night around Unit 81, and many people visiting Unit 81 for short periods of time. The traffic and noise affected the sleep of the complainants and made them frustrated and fed up.

[16] One of the complainants also advised the investigator that he had seen Arielle Devilliers staying at the unit from time to time. The presence of Ms. Devilliers at the unit was confirmed by the investigators on September 15, 2018; November 15, 2018; and some time in December 2018.

[17] Each of the affiants is well-qualified and experienced either through participation in previous *Safer Communities and Neighbourhoods Act (SCAN)* investigations, or as RCMP officers, or both.

[18] The affidavit evidence of the three investigators, which is the most relevant evidence in this case, details the type of investigations that occurred here, specifically: video surveillance; live surveillance; and mobile surveillance. The surveillance occurred

between September and December 2018. The results of the investigations and surveillance confirmed the complaints. Those results are summarized in the Bringsli affidavit,:

50. The following patterns of behavior were observed from SCAN's surveillance:
 - i. High volume, short duration visits to the Property;
 - ii. Vehicle traffic from the Property all over Whitehorse;
 - iii. Law Enforcement Evasion Techniques
 - a. Switching Vehicles and Have Others Register
 - b. Heat Checks
 - c. Dial-A-Dope Operations; and
 - iv. The presence of known drug offenders at the Property.

[19] Law enforcement evasion techniques, including switching vehicles and getting others to register them, are common among drug traffickers as an attempt to avoid law enforcement detection, according to the investigators.

[20] Heat checks are a way of driving to avoid law enforcement detection. They include doubling back, sudden turns, roundabout routes, stopping and parking, and signalling one way and going the opposite way, also used commonly by drug traffickers according to the affiants.

[21] Dial-A-Dope operations are where drug orders are called in to a cell phone and arrangements are made to meet somewhere to exchange drugs and cash. This activity was confirmed by the investigators to be occurring between the property and other parts of the city.

[22] The affidavit of Sergeant MacLeod of the RCMP lists the criminal records of some of the individuals identified at the property in question. Many of the individuals have convictions for drug charges.

[23] The basis of identifying the individuals by the investigators is set out in the affidavit of Drew Horbachewsky.

[24] The final affidavit is from the City of Whitehorse fire prevention officer Wayne Smyth, who investigated a fire that occurred under the main wooden entry deck of the property adjacent to the trailer skirting when no one was home. His investigation revealed the presence of gasoline in samples of the wood from the deck area. He concluded that the fire was an arson. The damage was approximately between \$8,000 and \$10,000.

[25] It is well-settled that the burden of proof under the *Act* as to what gives rise to a reasonable inference is on a balance of probabilities. Reasonable inference is not speculation or conjecture but a deduction from the evidence. There must be objective facts from which to infer the facts that are sought to be established. This is set out in the *Dixon* decision, para. 43.

[26] Some of the evidence in this case is hearsay or not able to be tested because of anonymity. However, the evidence comes from a variety of sources, including personal observation from neighbours and investigators, video surveillance, mobile surveillance, and research of criminal records all set out in uncontested affidavits. The evidence does not consist of an isolated incident or discrete events, nor does it consist of ancient history. The evidence consistently describes the same kind of activities over a period of approximately six months involving people with criminal records with convictions for drug charges, as confirmed by the RCMP. This includes the record and the pending charge of the existing tenant at the property.

[27] I find on the totality of evidence presented that the property at 81-4 Prospector Road is being habitually used for the activities of specified use as defined in the *Act* and as I read earlier from s. 2(d) of the *Act*.

[28] I also adopt the reasoning in the case of Nova Scotia (*Director of Public Safety*) v. *Matheson*, 2016 NSSC 365, specifically, para. 20 in which the Court states that:

[20] . . . drug activity, by its very nature negatively affects the safety and security of the neighbourhood and interferes with the peaceful enjoyment of the properties. . . .

[29] I find that the second part of the test in s. 6(1) has also been met.

[30] Finally, the affidavit evidence about the presence of Ms. Devilliers at the unit at specific times throughout this period — and particularly after the fire deemed to be an arson occurred — suggests that she knew about the activities and either would not or could not prevent them from continuing.

[31] I therefore grant the following order. Ms. McGill, I am using the draft order that you provided yesterday as a base but I have made some changes to it.

[32] This Court orders that:

1. The style of cause in this petition be amended so that the name of the respondent is Arielle Devilliers.
2. The property is 81-4 Prospector Road, Whitehorse, Yukon, and the activities or specified use are the possession, use, consumption, sale, transfer, or exchange of, or traffic in, a controlled illegal substance, as defined in the *Controlled Drugs and Substances Act* (Canada).

3. All persons shall be enjoined from causing, contributing to, permitting, or acquiescing in the activities beginning on the day after the person is served with the order and continuing until the order ceases to be in effect.
4. Arielle Devilliers shall do everything reasonably possible to prevent the activities from continuing or reoccurring on the property, including complying with provisions of the order as set out below.
5. All persons shall vacate the property within seven days of the date of this order and shall be enjoined from re-entering or re-occupying it until the order ceases to be in effect, except for the owner or her agent for the purposes of maintaining or repairing the property after obtaining the consent of the Director.
6. The Director shall close the property from use and occupation commencing seven days after the date of this order and keep it closed for 90 days.
7. The Director shall post a copy of the order in a conspicuous place on the property.
8. A peace officer, including an RCMP officer, shall, on request, provide any assistance required by the Director or his agent in posting this order or in serving this order.
9. 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 the order may be found.

10. The Director or his agents may monitor the property for compliance with this order.
11. The Director may take any measures that he considers necessary to safely and effectively close the property and keep it closed, including but not limited to:
 - (a) subject to para. 5, requesting any occupants still occupying the property and any other persons at the property to leave it immediately; and
 - (b) attaching locks and/or other security devices.
12. This order shall cease to be in effect following the 90 days provided for in provision 6.
13. Arielle Devilliers shall, on demand from the Director, pay to the Government of Yukon any reasonable costs of closing the property and keeping it closed in the amount certified by the Director.

DUNCAN J.