SUPREME COURT OF YUKON

Citation: *Wright v Yukon (Government of)*, 2024 YKSC 41

Date: 20240905
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
Counsel for the Intervenor	Brent Olthuis (by videoconference) and Fraser Harland (by videoconference)

REASONS FOR DECISION

I. Introduction

[1] On December 9, 2020, the petitioner was served at the home she rented at 5 Coho Trail two notices by two investigators representing the Director of Public Safety ("Director") of the Department of Justice, Government of Yukon. One notice was signed by the petitioner's landlord, and one was signed by the Director. The notices stated that

the petitioner, her spouse, their eight children, and her mother-in-law were required to leave their home in five days. The Director was authorized to do this under s. 3(2) of the *Safer Communities and Neighbourhoods Act*, SY 2006, c 7 (the "*SCAN Act*"), based on anonymous complaints and an investigation that began in 2016. The investigators informed the petitioner that illegal drug activities at her residence were adversely affecting the community or neighbourhood.

[2] The state's ability to assist a landlord in evicting a tenant on five days' notice for reasons related to community or neighbourhood safety and security, or peaceful enjoyment of property, has consequences for the tenant. The question is whether those consequences affect interests that attract the protections of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and whether s. 3(2) of the *SCAN Act* meets the legal tests required by the *Charter*.

[3] Neither notice in this case set out the petitioner's ability to object to the notice or to request an extension of the five days. One of the investigators advised her verbally that she could make a request for an extension of time to the Director by email.

[4] Approximately one month earlier, the petitioner and her spouse had been arrested for drug trafficking after a search warrant executed by the RCMP revealed suspected cocaine, $13,000 in cash, and a loaded firearm in the residence. The petitioner and her spouse were released from custody on bail with a condition to reside at the residence. The landlord was aware of the arrest and bail condition.

[5] The landlord extended the notice to terminate the tenancy to January 30, 2021. Ultimately, the landlord rescinded that notice in favour of a two-month notice of

termination of tenancy under the *Residential Landlord and Tenant Act*, SY 2012, c 20 (“*RLTA*”). The petitioner and her family left 5 Coho Trail on March 31, 2021.

[6] The petitioner is a member of the Ta’an Kwäch’än Council, a self-governing Yukon First Nation. Her mother-in-law, who lived in a legal suite at 5 Coho Trail, is a member of the Little Salmon Carmacks First Nation.

[7] This case is the petitioner’s challenge of the constitutional validity of s. 3(2) of the *SCAN Act*, based on a breach of s. 7 and/or s. 15 of the *Charter.* Section 7 provides everyone has the right to life, liberty and security of the person and can only be deprived of those rights in accordance with the principles of fundamental justice. Section 15 provides every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

II. Issues

[8] The first question is whether the petitioner was deprived of her s. 7 *Charter* right to life, liberty, or security of the person by the state action taken under s. 3(2) of the *SCAN Act*. This requires a finding that: i) s. 3(2) requires state action; and ii) life, liberty or security of the person is engaged in the circumstances of this case. If the answer is no to either of these, the inquiry ends.

[9] If the answer is yes to both of these, the second question is whether s. 3(2) is consistent with the principles of fundamental justice? Or is it lacking in procedural fairness, overbroad, grossly disproportionate, or arbitrary?

[10] If s. 3(2) is not consistent with the principles of fundamental justice, is it saved by s. 1 of the *Charter* – i.e. is it a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society?

[11] Finally, does s. 3(2) breach s. 15 of the *Charter* – the equality rights provision that guarantees every individual equality before the law and the right to equal protection and equal benefit of the law without discrimination – because First Nation people are disproportionately affected by it?

III. Brief Conclusion

[12] The petitioner's security of the person interest under s. 7 of the *Charter* is engaged by s. 3(2). Where a law creates extraordinary psychological suffering and a risk to a person's health, this can be a deprivation of the right to security of the person (See *Chaoulli v Quebec (Attorney General),* 2005 SCC 35 ("*Chaoulli*") at para. 205). A state-initiated eviction under s. 3(2) of the *SCAN Act* can detrimentally affect a tenant's psychological integrity, and can lead to housing instability or homelessness, which in turn can increase the risks to health.

[13] The deprivation of security of the person by s. 3(2) of *SCAN Act* is not in accordance with the principles of fundamental justice. It is procedurally unfair because it does not allow the person affected to know the case against them or provide them with an opportunity to present their case fully and fairly. It is overbroad because its implementation can affect certain individuals in a way that is not rationally connected to its purpose. A consequence of a five-day eviction under s. 3(2) can be, as it was in this case, a termination of tenancy of those who had no involvement in or control over activities complained of that adversely affected the community or neighbourhood. It is

also grossly disproportionate because the seriousness of the deprivation is out of sync with the objective of the measure. Evicting someone from their home in five days without effective recourse, for the purpose of restoring the peaceful enjoyment of property of others in the neighbourhood, is grossly disproportionate.

[14] The s. 7 violation is not justified under s. 1 of the *Charter*. It does not meet the test of rational connection and minimal impairment, and the public benefits of s. 3(2) do not outweigh the impact on individual rights.

[15] A breach of s. 15 is not found in this case as there was insufficient evidence for the purpose of the application of this *Charter* right to demonstrate a disproportionate effect of s. 3(2) on Indigenous people in the Yukon.

[16] In the following, I will set out the background, summary of the third party and expert evidence, the legislative scheme of the *SCAN Act,* the legal framework of s. 7 of the *Charter,* the positions of the parties and intervenor on the applicability of s. 7, the state conduct at issue under s. 3(2), how the s. 7 security of the person interest is engaged, how the state conduct under s. 3(2) is not in accordance with the principles of fundamental justice, and why s. 3(2) is not saved by s. 1 of the *Charter*. Finally, I will explain why the evidence does not meet the requirements of s. 15 in this case.

IV. Background

[17] The petitioner, Ms. Celia Wright, who was age 29 on December 9, 2020, and her spouse, Levy Blanchard, rented the home at 5 Coho Trail in Cowley Creek, a country residential subdivision approximately 20 kilometres south of downtown Whitehorse. Levy Blanchard had begun to rent the property in July 2015. The couple began renting it together in 2016. The monthly rent was $5,350, according to the partial lease in

evidence. The property is owned by Mr. Dean Philpott, who no longer lives in the Yukon.

[18] The property consisted of a main residence with five bedrooms and three bathrooms, in addition to a garage suite and a separate suite, occupied by extended family members, including the petitioner's mother-in-law.

[19] The property is a rectangular-shaped lot between three and five acres, surrounded by trees, two similar sized lots on either side, and greenbelt behind it. There are no immediate neighbours. A daycare operates out of the family home on one side of the property, there is a school bus stop nearby, and there are several playgrounds with skating rinks in the subdivision.

[20] The petitioner and her spouse had eight children at the date of the original eviction on December 9, 2020, ranging in age from 15 months to 17 years. The family also had a three-year old dog. The petitioner was approximately three months pregnant at the time. All of the younger school-aged children attended Golden Horn Elementary School, a two-minute drive from the home.

[21] The petitioner operated several businesses: Lashtastic lash extensions, a pawn shop, and a clothing store. Her spouse operated a chuckwagon food truck.

[22] On November 5, 2020, the petitioner and her spouse were charged with drug related offences under the *Criminal Code*, RSC, 1985, c C-46, and the *Controlled Drugs and Substances Act*, SC 1996, c 19, in Territorial Court. That same day, the petitioner was released by a Territorial Court judge, with a release condition that she reside at 5 Coho Trail.

[23] The charges arose after a search warrant was executed on November 4, 2020, at 5 Coho Trail, uncovering suspected cocaine, $13,000 in cash, and a loaded, unregistered handgun.

[24] Six investigators and one analyst work for the SCAN unit. They report to the Director of Public Safety, who works for the Department of Justice, Government of Yukon. Many of the investigators have backgrounds as police officers or other law enforcement officers. This background is particularly helpful in the covert surveillance activities that are undertaken by the investigators. Other investigators have diverse social service backgrounds or, in one case, a background as a former director at a First Nation government.

[25] This file's lead SCAN investigator, Kurt Bringsli, previously an RCMP officer in the Yukon and Alberta for 10 years, and a SCAN investigator and peace officer since 2011, deposed that he had received a confidential complaint in November 2016 that significant drug activity was occurring at the residence at 5 Coho Trail. Based on this complaint the Director authorized an investigation. Kurt Bringsli further deposed that "reports of safety concerns and drug trafficking" continued to be received until late November 2020. Kurt Bringsli advised that the SCAN investigators were aware of an ongoing RCMP investigation with which they did not want to interfere during that time. The evidence provided no details of the number and nature of these complaints or reports. Nor was there any information about who received and investigated them. Kurt Bringsli deposed that the SCAN investigators received the RCMP media report about the results of the warrant execution on the residence done on November 4, 2020. This

information was provided to the Director who authorized Kurt Bringsli to pursue an assisted eviction as resolution.

[26] Kurt Bringsli testified the reasons SCAN pursued an assisted eviction were the results of the SCAN investigation, the RCMP search warrant execution, the criminal charges, and further evidence of drug activity including the number of individuals coming and going at the property and the level of drug activity.

[27] No evidence was provided of the kind of investigative activities that occurred, or the results of any investigation done by any SCAN investigators. No evidence of surveillance; or eye-witness accounts of activities, their nature, frequency, time of day or night; and their effect on the surrounding community or neighbourhood was introduced.

[28] On December 8, 2020, Kurt Bringsli contacted the landlord, Mr. Dean Philpott, to advise him of the complaints of drug activity received by SCAN, and their investigation. Dean Philpott advised he was aware of the execution of the RCMP search warrant at the property a few weeks earlier. Kurt Bringsli advised Dean Philpott of options available to him with respect to the tenancy of the petitioner and her family: an eviction on five days' notice with the assistance of SCAN; or a community safety order, requiring a court application. Dean Philpott agreed to the five days' notice eviction with SCAN's assistance. There was no discussion about options under the *RLTA.*

[29] On December 9, 2020, Kurt Bringsli and Mark London, another SCAN investigator, peace officer, and former RCMP officer, attended at 5 Coho Trail. They knocked on the door and served the petitioner with i) a notice to terminate tenancy in five days signed by Dean Philpott and dated December 8, 2020, and ii) a notice to terminate dated December 7, 2020, on letterhead with a Yukon logo, Safer Community

and Neighbourhoods, Department of Justice, with phone numbers, and signed on behalf of the landlord by Jeff Simons, Director of Public Safety and Investigations, Department of Justice, Government of Yukon.

[30] The notice from Jeff Simons was addressed to Levy Blanchard, Celia Wright, Violet Blanchard (the petitioner's mother-in-law), and all the other occupants residing at 5 Coho Trail. It stated that SCAN of the Department of Justice had received a complaint under the *SCAN Act* in relation to 5 Coho Trail, alleging that the community or neighbourhood was being adversely affected by illegal activity on the property. It further stated:

> I have investigated the complaint(s) in relation to your property and based on the evidence a reasonable inference arises that the property is being habitually used for illegal activity and that this activity is adversely affecting the neighbourhood and the safety and security of one or more persons. The evidence establishes that the following specified use of the property has occurred:
>
> > **For the possession, production, use, consumption, sale, transfer, or exchange of, or traffic in, a controlled substance, as defined in the *Controlled Drug and Substance Act* (Canada), in contravention of that Act.**
>
> With the approval of the landlord, this letter serves as notice that your tenancy at the premises located at 5 Coho Trail, Whitehorse, Yukon ("Premises") is terminated effective **five (5) days** from service of this Notice to Terminate upon you, pursuant to Part 1 of the *Safer Communities and Neighborhoods* (*SCAN*) *Act*. You are required to vacate the Premises on or before that date, and contact the SCAN office, at toll free 1-866-530-7226 or 1-867-456-7226 to advise that you have done so.
>
> A copy of sections 1 through 7 of the *Safer Communities and Neighbourhoods Act* is attached for reference.
>
> Sincerely

> Jeff Simons
>
> Director of Public Safety and Investigations and on behalf of the Landlord
> Department of Justice
> Government of Yukon
>
> Enclosure
> [emphasis in original]

[31] The notice to the petitioner and her family signed by Dean Philpott was similar to the letter from Jeff Simons, although it contained less information. It was also addressed to Levy Blanchard, Celia Wright, Violet Blanchard, and all other occupants residing at 5 Coho Trail and stated:

> Your tenancy[1] at the premises located at 5 Coho Trail, Whitehorse, Yukon is terminated effective **five (5) days** from service of this notice.
>
> I have been advised that the Safer Communities and Neighbourhoods Unit of the Yukon Department of Justice has conducted an investigation under the *Safer Communities and Neighbourhoods Act* and the evidence gives rise to a reasonable inference that you are habitually using the above named premises 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.
>
> These activities are adversely affecting the community and neighbourhood and the safety and security of one or more persons and for these reasons your tenancy is being terminated on 5 days notice as per Part 1 of the *Safer Communities and Neighbourhoods Act*.
> Signed: Dean Philpott [emphasis in original]

[1] Please note that a tenancy agreement for the possession of residential premises does not need to be in the form of a written lease. According to the *Residential Landlord and Tenant Act*, it can be written or oral, expressed or implied (s. 1).

[32] There was no mention in either notice of any legal recourse available to the petitioner if she wished to dispute the notice of termination of tenancy.

[33] The evidence of the petitioner and Kurt Bringsli differs about their interaction at the time of service of the notices around noon on December 9, 2020. The petitioner says the investigators "flashed a badge and answered evasively" when she asked if they were with the RCMP. She testified they were taking pictures of the property, and refused to answer her questions about the law and the provision they were relying on, or why the family was being "kicked out". They repeatedly told her she and her family had to leave within five days.

[34] Kurt Bringsli testified he and Mark London introduced themselves by name and showed her their identification. They told the petitioner and her spouse that SCAN had investigated and confirmed drug activity occurring at the property. They advised that a reasonable extension to the five days' notice would be provided on request in writing. There was no evasiveness and no photographs were taken. Questions about the notice and the appeal process were answered.

[35] It is not necessary for me to resolve these two versions for the purpose of this decision. It is undisputed that the two notices of termination of tenancy were served in person by two SCAN investigators on December 9, 2020. The basis for the five-day eviction notice was a complaint (or complaints) and a subsequent SCAN investigation confirming drug activity at 5 Coho Trail. There is no dispute that the petitioner was advised by the SCAN investigators that she could request a reasonable extension of time in writing from the Director, as she did so that same day.

[36] The petitioner requested from the investigators copies of all of the information by email so she could provide it to her legal counsel. The information was sent by email to the petitioner at 2:24 p.m. December 9, 2020 from ytg-justice-scan@gov.yk.ca, along with confirmation that the petitioner could request an extension of the five days' notice, as long as it was made in writing by reply to that email, with the length of and reasons for the request, within that five-day period, that is, before December 15, 2020, at 8:30 a.m.

[37] It is not disputed by the Yukon government that the petitioner learned about the SCAN process for the first time on December 9, 2020.

[38] On December 9, 2020, at 3:46 p.m., the petitioner emailed ytg-justice-scan@gov.yk.ca requesting an extension of the eviction until July 2021 to prevent disruption to the children's school and other activities, and because of the difficulties in finding another place to live in the middle of a housing crisis, winter, the COVID-19 pandemic, and the recent publicity of their names associated with the criminal charges.

[39] On December 10, 2020, the petitioner advised this Court and the Yukon government through her lawyer of her intention to file a *Charter* challenge and an interlocutory injunction in response to the termination of tenancy notices.

[40] Kurt Bringsli spoke with Dean Philpott on December 10, 2020, and received his agreement to an extension of termination of tenancy to January 30, 2021. The Director signed a letter granting the extension and it was sent to the petitioner through the SCAN email on December 10 at 6:45 p.m. The letter signed by the Director further advised that 5 Coho Trail may be subject to investigation during this period and if evidence of drug activity were obtained, the extension may be rescinded.

[41] There were ongoing text messages between Kurt Bringsli and Dean Philpott from December 9, 2020, to January 8, 2021, about 5 Coho Trail. They were related to the extension of time, the legal challenge brought by the petitioner, aggressive messages from the petitioner, and the identity of legal counsel from the Yukon government for SCAN and for the landlord. During that time, Dean Philpott provided the lease to Kurt Bringsli. Its term was from July 2015 to July 2019.

[42] Counsel for the petitioner also engaged in discussions with Dean Philpott and lawyers for the Yukon government over that same time. On January 8, 2021, Kurt Bringsli sent Dean Philpott by email a copy of the petition in this matter.

[43] On January 11, 2021, Dean Philpott rescinded the notice to terminate issued under the *SCAN Act*. He then served notice to the petitioner and her spouse under the *RLTA* of termination of tenancy on March 31, 2021. SCAN had no further involvement in the matter and closed their file.

[44] At the end of December 2020, the petitioner miscarried.

[45] The petitioner and her family left 5 Coho Trail on March 31, 2021. For approximately four months, the family of 10 lived in a toy hauler trailer on a friend's property without running water and limited electricity through an extension cord. On or about June 1, 2021, the petitioner's First Nation, the Ta'an Kwäch'än Council, was able to offer a three-bedroom, one-bathroom apartment for the family. The family at that point consisted of six children as the two older ones were living elsewhere.

[46] For several months, the petitioner's mother-in-law, who suffered from schizophrenia and bipolar disorder, lived in a tent at the Robert Service campground in Whitehorse.

[47] SCAN or the Yukon government provided no assistance to the petitioner to find alternative housing.

V. Third Party and Expert Evidence

[48] The petitioner provided evidence from four non-profit societies in Whitehorse, Yukon, who provide support to people experiencing homelessness and housing instability. These societies all shared observations of their experiences with people affected by SCAN eviction notices, and the impacts of housing instability and homelessness on health outcomes. The affidavits were sworn in August 2021. This evidence was uncontradicted.

[49] The Yukon Anti-Poverty Coalition ("YAPC") fosters strategies, actions, and partnerships with organizations to reduce and prevent poverty in the Yukon; identifies gaps, supports collaboration, and facilitates solutions to deal with the effects of poverty; provides specific programming to alleviate the impacts of poverty on individuals and families; advocates and supports individuals and families to navigate current systems. YAPC is a landlord for two residential rental units rented to vulnerable tenants under the Landlords Working to End Homelessness program. YAPC has a program called Voices Influencing Change where people with lived experience of homelessness, poverty, and social exclusion have informed YAPC's awareness of barriers and prejudices faced by them in finding and retaining housing.

[50] The YAPC co-chair, Charlotte Hrenchuk, and the affiant in this case, was a member of the housing task force of YAPC which released a comprehensive housing action plan in February 2011, updated in 2021, outlining gaps and barriers in the housing spectrum and recommending actions. She deposed that YAPC has seen many

situations in which marginalized community members have been subject to SCAN eviction notices and lost housing. In many of these cases, people who were evicted were left without housing for long or indefinite periods of time, as a result of the Yukon housing crisis.

[51] Yukon Status of Women Council ("YSWC") in Whitehorse, established in 1973, uses participatory action research and gender-based analyses as a way of understanding the impacts of specific policies and legislation on Yukon women. It uses the results of this research to advocate for policies and practices that reduce stigma, increase access to supports and promote gender equity and equality. Aja Mason, the YSWC Executive Director, deposed:

> Finding affordable and safe long-term housing is very challenging in the Yukon. We face low vacancy rates, a high cost of living and increasingly high rental costs. There is very limited availability of supportive housing units and programs in the territory. If facing a SCAN eviction that has a short notice period before eviction, it becomes even more unlikely that an individual will be able to secure safe and affordable housing in the time period given.

[52] She further notes that the impact of a SCAN induced eviction includes a reduced likelihood of being able to secure rental accommodation in future, because landlords, including public housing, view a SCAN eviction negatively. Aja Mason wrote that YSWC regularly sees the adverse effects of housing instability on Yukon women – including working longer hours that prevents pursuing opportunities to advance education, accepting unsafe, unregulated or exploitative employment, or facing apprehension of their children by Family and Children Services because of their inability to provide adequate housing. YSWC has witnessed firsthand the negative impact of homelessness and housing insecurity on an individual's health and social outcomes.

[53] The Safe at Home Society ("Safe at Home") provides a coordinated, intentional, data driven, person-centred continuum of housing and supports for individuals and families to prevent and end homelessness. Executive Director Kate Mechan deposed that their services include outreach; support navigating and accessing housing supports and resources; completing intakes to match people with housing initiatives; connecting vulnerable people with landlords involved with Safe at Home's access programs; supporting people housed through their program; supporting people facing housing barriers or in crisis; working collaboratively with other organizations to provide quality integrated service.

[54] Kate Mechan deposed that people affected by SCAN evictions are destabilized and experience adverse impacts such as displacement from home and community, stigmatization, and in some cases, increased violence and trauma, and loss of support networks and systems of care. Safe at Home has experienced additional resource pressures because of the immediate and urgent needs for housing supports by people evicted under SCAN.

[55] More generally, Kate Mechan deposed that the adverse effects on individuals of housing instability and homelessness observed first hand by Safe at Home include: negative impacts on mental and physical health; negative relationships with family and friends; increased risk of substance abuse and/or overdose; increased risk of experiencing unsafe or violent situations; decreased sense of value to community; decreased connections with health and social supports; increased involvement in unhealthy environments; increased involvement with the justice system.

[56] Safe at Home has observed that in the Yukon, Indigenous people are seriously over-represented in housing instability and homelessness.

[57] Blood Ties Four Directions Centre ("Blood Ties") in Whitehorse provides support to individuals experiencing homelessness, individuals with insecure or unsafe housing and people who have barriers to finding and maintaining housing, including shelter diversion, eviction prevention and ongoing support for people in their housing programs. Brontë Renwick-Shields, Executive Director, stated the same thing as the YSWC about the challenges of finding affordable and safe long-term housing in Whitehorse. She deposed that Blood Ties has observed multiple situations where marginalized community members have been subject to SCAN eviction notices and lost their housing as a result. Many were without housing for extended periods of time and in some cases indefinitely. Many of Blood Ties' clients who were evicted under SCAN end up couch-surfing or living in the emergency shelter. Brontë Renwick-Shields deposes that Blood Ties routinely witnesses the adverse effects of housing instability on its client base including negative impacts on mental and physical health and on family and friend relationships; increased risk of overdose, experiencing violence, and involvement with the justice system; and decreased connections with health and social supports.

[58] The petitioner introduced expert evidence from Professor Stephen Gaetz, qualified as an expert in the field of anthropology to provide opinion evidence on the causes, consequences, and potential solutions to homelessness on individual and societal levels. His testimony, based on research and experience in other parts of Canada and globally, supported the affidavit evidence from the Whitehorse non-profit societies. He opined from his research that one of the factors contributing to

vulnerability to homelessness includes households facing eviction, lacking the resources needed to afford other housing including social supports, or living in areas with low availability of affordable housing. He concluded from reviewing research into eviction and homelessness that evicting people into homelessness who have a history of behavioural, mental health and addictions challenges will likely magnify those problems and increase emergency service use. Further, when people with a history of involvement in the criminal justice system become homeless, they are likely to recidivate, affecting individual well-being and potentially undermining community safety. He opined that those experiencing homelessness in Canada have “markedly worse health outcomes than the general population, with lower life expectancy and significantly higher rates of chronic disease as well as mental health and substance abuse conditions. The relationship between homelessness and health is complex and is said to be “bi-directional” – homelessness causes poor health and poor health can lead to homelessness. His report provides statistics from studies done in Ontario, other parts of Canada, the United States, and Australia about negative health conditions present in the homeless community.

[59] Professor Gaetz concludes that the housing first model, meaning prioritizing the establishment of stable housing in order to address other needs of vulnerable and marginalized people, is one of the few best practices in answer to homelessness.

[60] Professor Gaetz also opined that Indigenous people are disproportionately represented in the homeless population in Canada. The 2016 point in time survey (a survey done in cities across Canada on the same day, using common methodology to count the number of homeless people) results in Canada showed 30% of the homeless

respondents were Indigenous, in contrast to approximately 5% of the Canadian population who identify as Indigenous. Professor Gaetz was present in Whitehorse for the 2016 point in time count and noted the people counted were 82% Indigenous. 40% of those who responded to the 2016 point in time survey identified eviction as a reason for their current situation.

[61] The petitioner's other expert, Professor Carmela Murdocca, provided an opinion about how systemic discrimination and systemic racism may arise through the *SCAN Act*. She characterized the *SCAN Act* as a complaint-based nuisance property ordinance intended to promote community safety and reduce the burden on police and courts. She opined that nuisance property ordinances have a disproportionate punitive impact on Indigenous and other racialized and vulnerable people and pointed to the evidence from the Yukon civil societies in support. She further noted the links made by researchers in the United States (Matthew Desmond – Princeton University and Nicol Valdez – University of Wisconsin) and other parts of Canada (Drew Kaufman – Toronto) between eviction and homelessness, material hardship, increased residential mobility, job loss, depression and suicide. She referenced American studies that show nuisance property ordinances disproportionately target low income, racialized, marginalized people, including sex workers and those challenged by addiction, mental health issues and disabilities. She concluded that nuisance ordinances have been a tool of racial and class discrimination and exclusion.

VI. Legislative Scheme

[62] The *SCAN Act* became law in the Yukon in 2006. It is complaint driven legislation. Any person can complain confidentially to the Director of Public Safety (a)

that his or her community or neighbourhood is being adversely affected by activities on or near a property in the community or neighbourhood; and (b) that the activities indicate that the property is being habitually used for a specified use (s. 2(1)).

[63] The *SCAN Act* describes a community or neighbourhood as adversely affected by activities if the activities (a) negatively affect the safety or security of one of 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 publicly or privately owned (s. 1(5)).

[64] "Specified use" in the *SCAN Act* means 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*;
>
> (b.01) for the possession, consumption, purchase, sale, distribution, production, cultivation, propagation, harvesting or other use of cannabis in contravention of *the Cannabis Act* (Canada) or the *Cannabis Control and Regulation Act*;
>
> (c) for the use or consumption as an intoxicant by any person of an intoxicating substance, or the sale, transfer, or exchange of an intoxicating substance where there is a reasonable basis to believe that the recipient will use or consume the substance as an intoxicant, or cause or permit the substance to be used or consumed as an intoxicant;
>
> (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
>
> (e) for prostitution and activities related to prostitution;
>
> (f) for the sexual abuse or sexual exploitation of a child or for activities related to the sexual abuse or sexual exploitation of a child;

(g) for the possession or storage of

(i) a prohibited firearm, prohibited weapon, restricted firearm or restricted weapon unless the possession or storage is authorized by law,

(ii) a firearm, prohibited weapon or restricted weapon that has been imported into Canada in contravention of the *Firearms Act* (Canada) or any other federal enactment,

(iii) a stolen firearm, or

(iv) an explosive, as defined in the *Explosives Act* (Canada), if the possession or storage is in contravention of that Act or any regulation made under that Act; or

(h) for the commission or facilitation of a criminal organization offence;

(i) for the accommodation, aid, assistance or support of any kind of a gang or criminal organization (s. 1(1)).

[65] The Director and all persons acting under their instruction or supervision in the administration or enforcement of the *SCAN Act* are a law enforcement agency, and investigations, acts, and proceedings under *SCAN Act* are law enforcement (s. 1(4)).

[66] The Director has broad powers under s. 3(1) of the *SCAN Act*. At any time after receiving a complaint, the Director may:

(a) investigate the complaint;

(b) require the complainant to provide further information;

(c) send a warning letter to the owner of the property or its occupant, or to anyone else the Director considers appropriate;

(d) attempt to resolve the complaint by agreement or informal action;

(e) apply for an order under section 4;

(f) decide not to act on the complaint; or

> (g) take any other action that the Director considers appropriate.

[67] Section 3(2), the provision under challenge, allows the Director to assist the landlord to terminate a tenancy on five days' notice. Specifically, s. 3(2) builds on the Director's power in s. 3(1)(d) and provides:

> If the complaint is resolved by agreement or informal action that involves terminating a tenancy agreement or a lease, then despite anything in the lease or tenancy agreement or in any *Act*
>
> (a) the landlord of the property may terminate the tenancy agreement or lease by giving five days notice of termination to the tenant stating
>
> > (i) the effective date of the termination,
> >
> > (ii) that the lease or tenancy agreement is terminated under this Part, and
> >
> > (iii) the specified use that is the reason for the termination under this Part;
>
> (b) the Director may, at the request of the landlord, serve the notice of termination; and
>
> (c) the notice of termination may be served in any manner by which a community safety order may be served.

[68] Any resident affected by the termination of tenancy under s. 3(2) of the *SCAN Act* may bring an application to this Court under s. 13(10) on notice to the landlord for an order rescinding the termination of the tenancy or lease and the restoration of the tenancy agreement or lease with the resident as tenant.

[69] Other powers in the statute given to the Director for the purpose of investigations include:

i) obtaining information, including personal information, from any person about any person who owns, occupies or enters a property under investigation or the subject of an application under the *SCAN Act*;

ii) obtaining information from any source about the ownership of the property or the activities at a property which is the subject of an application under the *SCAN Act*;

iii) making and maintaining written, recorded, or videotaped records, or audio records, or records produced by any other method of any information received related to an investigation or application under the *SCAN Act* including information about the occurrence of activities;

iv) disclosing information obtained and records made to any person, court, tribunal, public body as defined in the *Access to Information and Protection of Privacy Act*, SY 2018, c 9, government department, government agency, First Nation government, municipality, local government body for the purpose of enforcing laws or by laws relating to public health and safety, building standards, zoning or other land use controls, environmental protection or workplace safety; or to a law enforcement agency for the purpose of that agency's work in law enforcement (s. 27(1)).

[70] The Director is not compellable as a witness in court to give evidence that will identify the complainant, or about any information obtained by or on behalf of the Director; or to produce any document or thing obtained by or on behalf of the Director.

This immunity does not apply where the Director makes or continues an application or intervention in an application (s. 33).

[71] There are other provisions in the *SCAN Act* by which a tenancy may be terminated, or activities stopped. First, s. 4 allows the Director to apply to the court for a community safety order once a complaint is received. The owner of the property is required to be a respondent. 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 are adversely affected by the activities (s. 6).

[72] The court requires evidence from the Director that satisfies its onus on a balance of probabilities before it issues a community safety order. The order has mandatory and discretionary elements. It must describe the property and the activities giving rise to the order, must enjoin all persons from doing anything related to the prohibited activities, must require the respondent owner to do anything to prevent the recurrence or continuation of the activities, and must provide an end-date for the order (s. 6).

[73] The discretionary elements include the court's ability to make an order that requires the occupants to vacate the property and prevents them from re-entering; terminates the tenancy; closes the property; and whatever else the court considers necessary to make the order effective, such as an order giving the owner possession (s. 6).

[74] Section 7 is another *SCAN Act* provision which allows the Director to apply for a community safety order that includes an order for the emergency closure of the property

on a without notice or short notice basis. The Director must show the activities are a serious and immediate threat to the safety of any or all occupants of the property or persons in the community or neighbourhood. The order may contain a closure order for up to 90 days, a requirement that the occupants vacate the property, the termination of a tenancy, or any other provision the court considers necessary to counter the threat or give effect to the order.

VII. Legal Framework for s. 7 of the Charter

[75] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[76] The *Charter* is remedial in purpose and *Charter* rights must be interpreted purposively, generously, contextually and in a large and liberal manner: see *Quebec (Attorney General) v 9147-0732 Québec Inc.,* 2020 SCC 32 at para. 7. The goal of *Charter* interpretation is to secure for all people “the full benefit of the *Charter*'s protection.” (*R v Big M Drug Mart* Ltd, [1985] 1 SCR 295 at 344).

[77] Although historically, s. 7 was used primarily to protect rights in criminal law matters, its scope now extends beyond that context. The Supreme Court of Canada stated in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (“*Blencoe*”) at paras. 45-46, citing *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 (“*G(J)*”) at para. 66, that s. 7 extends to “state action which directly engages the justice system and its administration”. In *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 (“*Gosselin*”) at para. 77, citing *G(J)* at para. 65, the Court stated: “‘[t]he justice system and its administration’ refer to ‘the state’s conduct in

the course of enforcing and securing compliance with the law'". There are other examples in the cases cited below where the s. 7 elements of life, liberty and security of the person have been engaged in a non-criminal context. The Supreme Court of Canada also confirmed in *Blencoe* at para. 48, that each of the three interests of life, liberty and security of the person was separate and distinct, with their own meanings, and each was to be analyzed separately.

[78] The establishment of s. 7 *Charter* rights in the context of a challenge to legislation involving state action requires two steps. First, the rights claimant must establish on a balance of probabilities that the state conduct or impugned legislation has deprived or could deprive them of life, liberty, or security of the person (*Charkaoui v. Canada (Citizenship and Immigration*), 2007 SCC 9 at para. 12). It is not necessary to show that the state conduct or impugned legislation is the sole cause of the interference with the s. 7 rights. If the interests at stake do not fall within the scope of life, liberty, or security of the person, the s. 7 constitutional challenge ends there. If they do, the second step is for the claimant to establish that the deprivation is not in accordance with the principles of fundamental justice.

[79] Once the claimant successfully meets their onus under these two steps, the burden shifts to the respondent to justify under s. 1 of the *Charter* the deprivation was a "reasonable" limit prescribed by law and demonstrably justified in a free and democratic society (see *R v Oakes*, [1986] 1 SCR 103 at 136).

VIII. Positions of the Parties and Intervenor on s. 7

[80] The petitioner argues the state involvement in the operation of s. 3(2) infringes each of life, liberty, and security of the person.

[81] The petitioner argues the right to life is engaged because the ability to provide shelter for oneself is a necessity of life that engages the right to life (see *The Regional Municipality of Waterloo v Persons Unknown*, 2023 ONSC 670 ("*Waterloo*"); *Black v Toronto (City)*, 2020 ONSC 6398). Forced eviction through s. 3(2) can result in housing instability and homelessness which, according to the expert evidence of Professor Stephen Gaetz, can increase the risk of health issues and early death.

[82] The petitioner also says her right to provide shelter and the basic necessities of life for herself and her family is a liberty right infringed by s. 3(2) of the *SCAN Act,* relying on the meaning of liberty set out by the Supreme Court of Canada in *R v Morgentaler*, [1988] 1 SCR 30 ("*Morgentaler*") and *Godbout v Longueuil*, [1997] 3 SCR 844 ("*Godbout*") and its extension in the "shelter" cases such as *Victoria (City) v Adams*, 2009 BCCA 563 ("*Adams*"). This is described by the petitioner as a negative right - to be left alone by the state in one's own home. She says she is not arguing that the s. 7 liberty interest includes "choice of residency in the sense of which neighbourhood, city or province one wants to live in".

[83] As an alternative argument under the liberty interest, the petitioner says that the potential effect of revocation of bail because of her inability to comply with the condition to reside at 5 Coho Trail is a s. 7 infringement. The absence of stable housing, a likely result of a SCAN eviction, can lead to bail revocation, because of the inability to comply with the reside condition, thereby engaging the right to liberty.

[84] The petitioner says the right to security of the person is engaged because eviction can result in serious psychological suffering, as occurred here, as well as

physical harm, by exposure to the elements especially in winter, and increased health risks due to housing instability.

[85] The petitioner argues that the s. 7 interests are infringed in a way that is not in accordance with the principles of fundamental justice. Section 3(2) is overbroad, grossly disproportionate and arbitrary. There is no rational connection between the objectives of the *SCAN Act*, which the petitioner describes as reducing substance use and abuse in Yukon communities, and the operation of s. 3(2).

[86] Recognizing that it is difficult once a law has been found to infringe s. 7 for it to be saved under s. 1 of the *Charter*, the petitioner notes the respondent advanced no evidence in support of its s. 1 argument, and says the test of rational connection, minimal impairment, and public benefits outweighing the impact on rights, has not been met.

[87] The respondent Yukon government says the petitioner's rights under s. 7 are not engaged. They characterize this case as a question of whether the *SCAN Act*'s provision of a minimum five days' notice of termination of tenancy is a *Charter* violation. The only difference between s. 3(2) and other provisions in the *SCAN Act* and the *RLTA* is that s. 3(2) allows the landlord to terminate a tenancy on five days' notice, rather than 14 days' notice as in the *RLTA*. They say there is no constitutional right to a specific minimum notice period.

[88] The Yukon government notes that similar to the *SCAN Act*, the *RLTA* authorizes terminations of tenancy for reasons such as "offensive or illegal activity" that affect adversely the quiet enjoyment, security, safety, or physical well-being of another tenant or occupant of the residential property, the landlord, or a person in an adjacent property.

In effect, the Yukon government says, the petitioner is challenging the way the *SCAN Act* is administered, and this is not constitutionally protected.

[89] The Yukon government further says s. 3(2) relates to individual property rights, which are not protected by s. 7 of the *Charter*.

[90] The Yukon government says state action under s. 3(2) is limited and narrower than the petitioner suggests, as it authorizes the landlord, not the Director or SCAN unit investigator, to terminate the tenancy on five days' notice. The operation of s. 3(2) is discretionary, and dependent on the landlord. Eviction is a common law concept and is part of the landlord and tenant relationship.

[91] The Yukon government says none of the s. 7 rights is engaged by s. 3(2). The right to life is not engaged because s. 3(2) does not impose death or a risk of death.

[92] The liberty interest is not engaged because there is no jurisprudential support for its application in this context. The decision in *Godbout* relied on by the petitioner was not a majority decision. The "shelter" cases are distinguishable because of the different and narrower context there of the claimants' right to create a shelter as protection from the elements due to a lack of available and accessible shelter beds. The Yukon government says the more general right to shelter oneself is not protected by the liberty interest in s. 7.

[93] The Yukon government says potential revocation of bail because the reside condition may not be met is not a liberty interest engagement. Any bail condition, including a reside clause, may be varied by consent or on application and there is no evidence that the petitioner's bail condition of residing at a certain address could not be amended.

[94] The Yukon government says the level of psychological stress suffered by the petitioner was not sufficient to violate the right to security of the person under s. 7.

[95] The Yukon government says the purpose of the *SCAN Act* and s. 3(2) is essentially the same – to regulate the use of property to suppress uses that adversely affect the property of others or interferes with others' enjoyment of their property. The *SCAN Act* and the *RLTA* provide sufficient procedural protections to the tenant. Section 3(2) is rationally connected to this purpose so is not overbroad or arbitrary. It is not grossly disproportionate because it does not lead to worse results than an eviction under the *RLTA*, nor does it necessarily lead to homelessness.

[96] If s. 7 is infringed, s. 3(2) is saved by s. 1 according to the Yukon government, because its objective is pressing and substantial and there is a rational connection between a reduced notice period and the suppression of uses that adversely affect others' property. While it is not the least impairing option, it is reasonable and not unusual. The benefits to the community outweigh the negative effects on the tenants.

[97] The intervenor addresses only the s. 7 liberty interest. A person's choice of where and how to live is within the ambit of s. 7. Section 3(2) infringes that interest by permitting the state to serve a notice of a termination of tenancy of a person's chosen home, with the consent of the landlord on five days' notice, without meeting any burden of proof, providing evidence of the case to be met, or providing the tenant with the opportunity to respond. The provision is procedurally unfair, overbroad, and grossly disproportionate to its objective and is not saved by s. 1 of the *Charter*.

IX. Analysis

Issue #1i) Is there State action in s. 3(2) of SCAN Act?

[98] In order for s. 7 to be engaged, there must be state action with a negative effect on the life, liberty, or security of the person. State action is conduct that engages with the justice system such as enforcing and securing compliance with the law (*Gosselin* at para. 211).

[99] The Director and all persons acting under their instruction or supervision in the administration or enforcement of the *SCAN Act* form part of a law enforcement agency, and investigations, acts, and proceedings under *SCAN Act* are law enforcement (s. 1(4)).

[100] The facts here demonstrate the significant state involvement in the actions taken that resulted in the notice of termination of tenancy.

[101] The landlord knew of the search warrant executed by the RCMP at 5 Coho Trail approximately one month earlier and took no steps to evict the petitioner and her family under the *RLTA*. After SCAN investigator Kurt Bringsli spoke to the landlord about the SCAN investigation and offered assistance to the landlord to terminate the tenancy, the landlord agreed to do so on five days' notice.

[102] Additional state action in this case under the *SCAN Act* included:

- SCAN investigation of 5 Coho Trail after receiving a complaint or complaints, starting in 2016;
- SCAN received and acted under s. 3(2) in part as a result of the RCMP media report about the execution of the search warrant at 5 Coho Trail -

(s. 27(1)(a) allows SCAN to obtain information from anyone who owns, occupies, enters the property at issue, or from any source);

- Director authorized the SCAN investigator to pursue an assisted eviction as an informal resolution of the complaint(s) as provided s.3(1)(d);
- the complaints to the SCAN investigator and the SCAN investigation were disclosed to the landlord (s. 27(1)(e) allows SCAN to disclose information to any person, court, tribunal, government or enforcement agencies);
- SCAN offered significant assistance to the landlord for the termination of tenancy (s. 3(2) allows resolution of a complaint(s) by agreement or informal action);
- SCAN investigators did not discuss the alternative of termination of tenancy under the *RLTA* with the landlord;
- Director signed the notice to terminate tenancy, on Yukon Justice Department letterhead, stating it was done with the "approval of the landlord", suggesting it was SCAN initiated;
- SCAN investigators served the notices to terminate tenancy from the Yukon Justice Department and the landlord personally on the tenant;
- Director issued and signed the extension of time letter to the tenant from five days, (December 14, 2020) to January 30, 2021, after requiring the tenant to request the extension from the SCAN unit at email ytg-justice-scan@gov.yk.ca, receiving and responding to the request, and advising the tenant that further SCAN investigation would occur during the

extension period, and if further specified use activities were noted, the extension could be rescinded;

- SCAN investigators advised the tenant to tell the SCAN office when she had vacated the premises.

[103] Section 3(2) of *SCAN Act* introduces the state into the landlord and tenant relationship. This is one of the several distinguishing features between the *RLTA* and the *SCAN Act*. Although the SCAN investigator needs approval of the landlord in order to implement the termination of tenancy on five days' notice under s. 3(2), without SCAN, the termination of tenancy on five days' notice under the *SCAN Act* provisions, could not occur.

[104] The state action is more than a reduction of time for the termination of tenancy from 14 days (under the *RLTA*) to five days, as the Yukon government argues. It is more than the provision to the landlord of another tool to use in managing the landlord-tenant relationship. The state action, through SCAN's acceptance and investigation of the confidential complaints, and their disclosure of same to the landlord, along with their assistance to the landlord, forms the basis for the termination of tenancy.

[105] As noted above, s. 3(2) applies when the Director is attempting to resolve the complaint through agreement or informal action that involves terminating a tenancy agreement or lease. In practice, agreement or informal action in s. 3(1)(d) can comprise a range of activity, described by Kurt Bringsli, that does not involve terminating a tenancy agreement or lease. For example: the investigator can ask the tenant involved in the activity to stop it and require them to sign a letter undertaking to undergo drug and alcohol counselling; or the investigator can have a conversation at the door of the

residence with the tenant about the activities at issue and connect them with appropriate agencies. This kind of informal resolution is not the state conduct at issue in this case. It is only the informal action or agreement initiated by the state to terminate a tenancy, and terminate it on five days' notice, that is at issue.

Issue #1ii) Are s. 7 rights to life, liberty or security of the person engaged?

a. Right to life not engaged

[106] The Supreme Court of Canada in *Carter v Canada (Attorney General)*, 2015 SCC 5 ("*Carter*"), concluded that the right to life is engaged "where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly" (at para. 62).

[107] The court in *Waterloo* found that the ability to provide adequate shelter for oneself in the context of a homeless person with no other accessible alternative shelter is a necessity of life that falls within the s. 7 protected right to life. The risk of harm of exposure to the elements that necessarily results is serious enough to lead to an increased risk of death or death.

[108] In this case, there is no doubt that the petitioner and her family had significant housing instability as a result of the s. 3(2) initiated eviction, including the mother-in-law living in a tent in a campground for a period of time. There was also a risk of homelessness, at least temporarily, given the unavailability of shelter beds for the family, or suitable housing in the midst of a housing crisis. However, this context is different from the shelter cases. In those cases, the state removal of the homeless encampment in the situation of insufficient accessible shelter beds, created a direct increased risk of harm or death. There were no other options for these otherwise

homeless individuals. By contrast, while the risk of homelessness or housing instability with all of its recognized negative health consequences was present in this case, as explained by the non-profit societies and Professor Gaetz, a complete absence of shelter from the elements was not the inevitable result of a s. 3(2) notice of termination of tenancy. The state in this case did not interfere with the petitioner's attempt to create a shelter that was the only barrier against exposure to the elements for her and her family and resulting negative health consequences and increased risk of death. There is not a direct link between the s. 3(2) eviction and death or an increased risk or death as there is in the shelter cases. As a result, the right to life is not engaged.

b. Right to Liberty not engaged

[109] The two liberty interests proposed in this case are: the right of a person to provide shelter and the necessities of life for themselves, argued by the petitioner, and the right to choose where and how to live, argued by the intervenor. Neither has been identified by a Canadian court in a binding decision as part of the s. 7 liberty interest.

[110] Courts have acknowledged that liberty under s. 7 encompasses more than freedom from physical restraint, such as imprisonment. In 1995, the Court wrote in *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 ("*B(R)*") at 317:

> …liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

[111] The majority judgment drew upon the conclusions in *Morgentaler* in relation to the liberty interest at pages 164-166:

> The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are

> afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, **the right to choose where they will live** and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.
>
> **Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty.** Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance. [emphasis added]

[112] Along with the fundamental decisions about raising children described in *B(R)*, courts have found the s. 7 liberty interest to be engaged in the following circumstances:

- the ability to make choices about medical treatment (*Carter* at paras. 64-69; *R v Smith*, 2015 SCC 34 at paras. 18-20);
- the ability to frequent public spaces such as playground, parks, and bathing areas (*R v Heywood*, [1994] 3 SCR 761 ("*Heywood*") where there are statutory duties not to loiter there;
- the choice of using marijuana (at that time illegal) to alleviate the effects of epilepsy, an illness with life-threatening consequences (*R v Parker* (2000), 49 OR (3d) 481(CA));
- the choice to take mind-altering psychotropic drugs for treatment of mental illness: described as "fundamental and deserving of the highest order of protection" in *Fleming v Reid* (1991), 4 OR (3d) 74 (CA) at 22-3.

[113] In *Godbout,* La Forest, J. in a concurring, not majority, judgment found the s. 7 right to liberty is engaged where a person is deprived of the choice of where to establish one's home (at para. 68):

> … the ability to determine the environment in which to live one's private life and, thereby, to make choices in respect of other highly individual matters (such as family life, education of children or care of loved ones) is inextricably bound up in the notion of personal autonomy I have been discussing. To put the point plainly, choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly, by his or her aspirations, concerns, values and priorities. Based on all these considerations, then, I conclude that choosing where to establish one's home falls within that narrow class of decisions deserving of constitutional protection.

[114] The majority reasons in *Godbout* were based on an infringement of the Quebec *Charter of Human Rights and Freedoms*, not s. 7 of the *Charter*. La Forest, J.'s judgment, while often referenced in s. 7 liberty interest discussions, has not been endorsed in any subsequent majority judgment. The right to choose where and how to live has not to date been accepted as part of the s. 7 liberty right.

[115] More recently, the "shelter" cases have further developed the law on s. 7 interests. They have arisen from applications brought by municipalities to enforce bylaws prohibiting the erection by homeless people of temporary shelters in parks or other empty spaces such as parking lots. In determining whether s. 7 liberty right was engaged in this context, courts have held there was no freestanding constitutional right to erect shelters in public parks. The engagement of s. 7 in the context of such prohibitive bylaws was expressly linked to the factual finding that the number of homeless people exceeded the number of available shelter beds. A broadening of this

parameter was articulated by the Court in *Waterloo*, where the judge found the determination of whether there were sufficient shelter beds required an assessment of how accessible those beds were to those who needed them. For example, if the shelter beds were not low barrier, meaning that occupants could not consume alcohol or drugs on the premises, then those beds were unavailable to those with addictions, where sudden withdrawal created by abstinence could be harmful. Similarly, if a homeless person had a mental or physical disability, wanted to be with their family members or pets, or required certain other services that could not be provided by the shelter facility, then those beds are not accessible (*Abbotsford (City) v Shantz*, 2015 BCSC 1909 ("*Shantz*"); *Prince George (City) v Stewart*, 2021 BCSC 2089 ("*Stewart*"); and *Bamberger v Vancouver (Board of Parks and Recreation*, 2022 BSCS 49 ("*Bamberger*")). In this context:

> … creating shelter to protect oneself is … a matter critical to any individual's dignity and independence. The Region's attempt to prevent the homeless population from sheltering itself interferes with that population's choice to protect itself from the elements and is a deprivation of liberty within the scope of section 7 (*Waterloo* at para. 101).

[116] The s. 7 liberty right described in the shelter cases is narrowly contextually circumscribed. It applies in the context of homeless people, who are unable to access shelter beds because they are unavailable or do not meet their needs. Municipal bylaws and government actions that limit or restrict the ability of people experiencing homelessness to erect and maintain shelters to protect themselves from the elements where there are insufficient accessible shelter beds are not constitutionally valid. The s. 7 liberty interest has not been broadened to include a right to provide shelter and necessities of life for oneself and one's family, outside of this context of a homeless

person with no alternative place to live, creating their own shelter (*Bamberger* at paras. 11-20).

[117] The petitioner asserts a constitutional right to provide shelter from her position as renter of a large home in a country residential neighbourhood, not from a position of homelessness, and not in the context of creating her own shelter. The s. 7 liberty interest is not engaged in this context.

Revocation of bail

[118] The petitioner argues in the alternative that the potential revocation of bail as a result of the petitioner not being able to reside at 5 Coho Trail is a s. 7 liberty infringement. There is an insufficient link between eviction, bail revocation, and a subsequent infringement on s. 7 liberty interest.

[119] As noted by the Yukon government, judicial interim release conditions, such as a reside condition, can be varied or amended if there is a change of circumstances, by the bail supervisor or the court. A change of address of an accused does not necessarily result in the revocation of bail. Housing instability can affect judicial interim release decisions and conditions, and bail revocation affects a person's liberty. However, there is no evidence in this case that the petitioner's bail was revoked as a result of her eviction from 5 Coho Trail. Further, no general evidence was provided in support of this argument.

c. Right to Security of the Person engaged

[120] The right under s. 7 to security of the person is engaged.

[121] Security of the person has two dimensions – psychological and physical. It can be infringed by legislation that is criminal or non-criminal. The Supreme Court of

Canada stated in *Chaoulli* at paras. 123-24 that the impact, whether psychological or physical, must be serious. In *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 588, the Court held:

> … personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.

[122] Early examples of infringement of security of the person include situations where the state has taken steps to interfere, through criminal legislation, with personal autonomy and a person's ability to control his or her own physical or psychological integrity, such as prohibiting assisted suicide or regulating abortion (*Morgentaler*, *Rodriguez*, *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123). More recently, *R v Smith*, 2015 SCC 34, where access to non-dried forms of marijuana (then illegal) for treatment of some serious health conditions was illegal. The court found the treatment to be medically reasonable, and the criminalization of access infringed liberty and security of the person interests.

[123] Infringement of the physical dimension of security of the person can occur outside of the criminal law context. In *Chaoulli,* the challenged legislation related to access to health care and health insurance. The Court found the s. 7 rights to security and life were infringed because the Quebec government failed to ensure patient access to a reasonable quality of health care within a reasonable time. Access to a waiting list was not access to health care and this denial that could affect their current and future health was sufficient to engage security of the person. Similarly, in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, the government's refusal

to renew an exemption for workers resulting in the denial of addicts' access to a safe injection health facility, was found to infringe security and life because of the threat to the health of the addicts.

[124] The psychological dimension of security of the person must be serious state-imposed psychological stress (*Blencoe* at para. 56; *G(J)* at para. 60). Serious psychological stress is greater than ordinary stress and anxiety and must be at a level that has a serious and profound effect on a person's psychological integrity. However, it need not rise to the level of nervous shock or psychiatric illness. It is an objective assessment.

[125] For example, the failure of the government to provide legal representation to a mother in a court process that could have resulted in the state removal of her children from her custody *(G(J))* engaged security of the person under s. 7. The resulting psychological stress, stigmatization, loss of privacy and disruption of family life was sufficiently serious.

[126] By contrast, in *Blencoe*, a provincial cabinet minister involved in legal proceedings related to human rights complaints of sexual harassment against him suffered intense media scrutiny, stigma, loss of employment, pressure to change his residence twice, stress and anxiety, and financial hardship, all exacerbated by a significant procedural delay. The Supreme Court of Canada recognized the loss of dignity and reputation he experienced along with the stress and anxiety caused by the legal proceedings but found that the state interference with his psychological integrity did not amount to a violation of his right to security of the person. Dignity and reputation were values underlying *Charter* interpretation, not free-standing rights, and this was not

an exceptional case of a serious and profound effect on Mr. Blencoe's psychological integrity. The state had not interfered with his ability to make essential intimate and personal choices. Such choices were defined to include a woman's choice to terminate her pregnancy, an individual's decision to terminate their life, the right to raise one's children, and the ability of sexual assault victims to obtain therapy without fear of disclosure of their private records (at para. 86).

[127] In this case, the state initiated a termination of tenancy on five days' notice in December in Whitehorse of the petitioner, her spouse, their eight children and their extended family who included her mother-in-law, suffering from bipolar disorder and schizophrenia. The petitioner's children ranged in age from 15 months to 17 years. All who were of school age attended Golden Horn Elementary School, located approximately two minutes away by car from their rental home. The petitioner was still breast-feeding her youngest child. On December 9, 2020, she was three months pregnant. She miscarried several weeks later.

[128] The petitioner was surprised by the SCAN investigators' arrival at her home. She said they looked like police officers, and she felt intimidated. She told them it was impossible for her to comply with the eviction order in five days given the number of children in the home and the time of year – December, 16 days before Christmas. The petitioner received little information about the reasons for the notice to terminate, no information about any legal recourse, and no offer of assistance to find alternate accommodation.

[129] The petitioner described her failed immediate attempts to find alternate housing through her First Nation, the Salvation Army, the Women's Shelter, Safe at Home, and

several other organizations in Whitehorse. The First Nation could not assist because they were in a housing crisis with many of their citizens experiencing homelessness. The Salvation Army could not accommodate her family and the Women's Shelter could not accept her sons. The other organizations either did not respond or only had a one-bedroom space available.

[130] Nevertheless, the petitioner and her family began packing immediately, while trying to carry on with their life obligations, including school for the children. As a result of her request for an extension and the involvement of legal counsel, the notice of termination was extended to January 30, 2021, and then ultimately to March 31, 2021 under the *RLTA*.

[131] By the spring of 2021, the petitioner had still not found housing for her family. They had to move into a toy hauler on a friend's property. They had no running water and limited electricity through an extension cord. The petitioner recalled having to run with her two-year-old son through the slush and mud to her friend's house for potty training and trying to keep her children warm while she took them to the house and back for baths.

[132] Since June 2021, the petitioner and her family, except for the two oldest children, have been living in a three-bedroom, one-bathroom apartment in a newly built apartment project of her First Nation.

[133] After the termination of tenancy, the petitioner's mother-in-law lived for several months in a tent in the Robert Service campground in Whitehorse.

[134] The petitioner had been arrested and charged with criminal offences related to the drug and weapons seizure at the property. She deposed that the stress she felt from

the SCAN eviction was worse than getting arrested and charged. She could not sleep. She said as a mother, not knowing if she would have a safe home for her children was the worst feeling of her life.

[135] The notices to terminate tenancy served on the petitioner by the SCAN investigators on December 9, 2020, caused her significant psychological stress and anxiety. It was serious and the result of state action. Her psychological state can be compared to that of the mother in *G(J)* who did not know whether she would be able to retain custody of her children and as a result was entitled to legal representation. The petitioner had no idea how she was to provide a safe home for herself and her eight children. The compounding factors of the short notice of five days, the cold winter conditions, the housing crisis, the lack of housing options, and the existence of the pandemic all contributed to the extraordinary level of psychological stress. The precarious solution of living on a friend's property for several months in a toy hauler increased her stress level and housing instability. Housing instability or homelessness, at least temporarily, was a real possibility.

[136] The state through s. 3(2) has interfered with the petitioner's intimate and personal life choice to ensure a safe home for herself and her family at 5 Coho Trail. This is an interference with her psychological integrity, beyond the level of ordinary stress and anxiety.

[137] A s. 3(2) eviction can also affect physical health. For example, the petitioner believed it caused her miscarriage in December 2020, although there is no medical evidence in support of this.

[138] More generally, however, Professor Stephen Gaetz through his own research and his review of other research draws a connection between evictions, housing instability and homelessness, and poor mental and physical health outcomes. The Yukon government conceded that eviction may result in homelessness, at least temporarily. The non-profit societies described the high level of stress experienced by their clients who have received an eviction notice under SCAN. The deponents from YAPC, YSWC, Safe at Home, and Blood Ties, all commented on the destabilizing effects, the housing instability and sometimes homelessness that can result from a SCAN eviction. Their affidavits dated August 2021 referred to the Yukon housing crisis that existed then. They described the consequent negative effects of an eviction and its consequences on the physical and mental health of the affected individuals.

[139] The facts and evidence support the infringement of security of the person by the state action authorized under s. 3(2).

Issue #2: Is the deprivation of security of the person under s. 3(2) in accordance with the principles of fundamental justice?

[140] An infringement of a s. 7 interest may be constitutional if the state conduct at issue is done in accordance with the principles of fundamental justice.

[141] The petitioner argues that s. 3(2) of the *SCAN Act* is not in accordance with the principles of fundamental justice because it is not procedurally fair, and, substantively, it is overbroad, arbitrary, and grossly disproportionate. The intervenor agrees with the petitioner that s. 3(2) is overbroad and grossly disproportionate.

[142] The Yukon government disputes each of these arguments.

[143] In this case, s. 3(2) does not meet the test of procedural fairness, is overbroad and grossly disproportionate.

a. Procedural Fairness

[144] The British Columbia Supreme Court in *British Columbia Civil Liberties Association v Canada* (Attorney General), 2018 BCSC 62, summarized procedural fairness in the context of the principles of fundamental justice as follows at para. 340:

> The principles of fundamental justice guaranteed by s. 7 of the *Charter* include a guarantee of procedural fairness, having regard for the circumstances and consequences of the particular intrusion on life, liberty or security of the person: *Charkaoui* at para. 19. The values underlying the duty relate to the principle that the individual affected should have the opportunity to present his or her case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision: *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at para. 28.

[145] The primary aspect of procedural fairness in issue here is the right of those subject to s. 3(2) under the *SCAN Act* to know the case they have to meet, and to have the opportunity to present their case fully and fairly. The test for procedural fairness is not met here, despite the Yukon government's argument that processes and remedies under the *SCAN Act* and the *RLTA* exist to provide procedural fairness to the petitioner. A review of these processes shows otherwise.

[146] First, the Yukon government argues that fairness is preserved by the petitioner's ability to challenge the notice under s. 13(10) of the *SCAN Act* and notes the petitioner made no attempt to use this process:

> If the complaint under section 2 is resolved by agreement or informal action that involves terminating a tenancy agreement or a lease otherwise than through a court order under this Part or the consent of the resident, a resident who is affected by the termination may apply to the court on notice to the landlord and the Director for an order to rescind the termination of the tenancy agreement or lease and to

restore the tenancy agreement or lease with the resident as tenant.

[147] An order under s. 13(10) can also vary the original notice to terminate the tenancy, by extending the date of termination or by setting aside the requirement to vacate.

[148] Section 13(10) does not provide a fair process or recourse for the tenant. At the outset, there are strict conditions set out in s. 13(6)[2] that must be satisfied by the tenant before the court can grant an order to rescind under s. 13(10). Many of these will be difficult to meet, especially in a short time frame.

[149] The shortcomings of s. 13(10) are evident from the case of *Nicloux v Whitehorse Housing Authority*, 2009 YKSC 45 ("*Nicloux*"), the only reported decision to date under this section.

[150] In *Nicloux*, s. 3(2) was used to provide notice of termination of tenancy because of illegal drug activities occurring at the residence. The tenant brought an application under s. 13(10) for an order to rescind the notice. She argued she was a victim of guilt by association because a person known to be a drug dealer was seen in her housing unit.

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[2] The court may make an order varying a community safety order or an order under section 8 if it is satisfied (a) that the applicant is a resident; (b) that neither the resident nor any member of his or her household for whom he or she is seeking a variation caused or contributed to any of the activities in respect of which the order was made; (c) that no person who caused or contributed to any of the activities is still present at or occupying the property; (d) that the resident or a member of his or her household for whom he or she is seeking a variation order will suffer undue hardship if the order is not varied; (e) that the resident will prevent or assist the Director in preventing any specified use of the property by any person; and (f) if the order was made under section 8, that neither the resident nor any member of his or her household for whom he or she is seeking a variation order was an occupant of the property when the community safety order was made.

[151] The first problem with s. 13(10) arose when the Yukon government in that case, representing the Director, argued that the tenant bore the onus of proof for an order to rescind. The Court noted:

> [19] I am satisfied that the interpretation suggested by the Director cannot have been intended by the legislature. In my view there is a gap in the legislation about this alternative route. The court is directed to analyze the evidence as if it was considering an application to vary a community safety order even though one was never made. This interpretation would lead to the absurd result of permitting the Director to avoid judicial scrutiny and shift the burden of proof to the tenant despite the lack of specific wording to this effect in the Act.
>
> [20] The absurdity is even more evident because the tenant is unable to cross examine the confidential informant whose identity is protected by section 32 of the Act.
>
> [21] The Act authorizes the erosion or short-circuiting of the rights of tenants under the Landlord and Tenant Act because of the perceived higher social value of preventing drug trafficking and other illegal activities from endangering residential neighborhoods. It is because of this impact on the rights of tenants that the legislature requires the Director to satisfy a court under 6 that the:
>
>> (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.
>
> …
>
> [23] It is logical that when the tenant seeks to vary the public safety order the onus should be on the tenant. The evidence has been judicially considered and presumably the tenant has taken some steps to address the problems that resulted in the granting of the order. However it is illogical to place the burden of proof on the tenant when there has been no public safety order made. To proceed in this fashion the court would have to assume an order would have been granted if the Director had applied for an order. Taking this

> approach would subvert the whole purpose of section 6 and
> the remove the burden of proof on the Director.

[152] The Court required the Yukon government to meet the criteria in s. 6 of the *SCAN Act* on a balance of probabilities first, before requiring the tenant to satisfy the test in s. 13(6).

[153] This preliminary argument revealed the legislated incongruity if the Yukon government's interpretation had been accepted – that is, the state can initiate the eviction of a tenant on five days' notice without any court or third-party oversight or evidentiary standard to be met. But the evicted tenant must come to court and meet significant conditions to have their eviction varied or set aside.

[154] Substantively, there are several distinguishing factors in *Nicloux* from the case at bar which would make the use of s.13(10) even more difficult in the circumstances of this case. In addition, a further judicial observation in *Nicloux* supports the absence of procedural fairness of the s. 13(10) process. The written notice of termination of the lease in that case was effective April 20, 2009, and was served on the tenant by the Director on April 9, 2009, providing the tenant with 11 days' notice, not five days, and in early spring, not in winter. The tenant's application in *Nicloux* was brought to court on short notice and the court granted an interim order postponing the termination of the lease for 60 days, to allow time for the case to be heard and decided. After hearing the evidence of the Director, the Court found he did not meet the onus on a balance of probabilities that there were sufficient grounds to issue the termination of tenancy under s. 6 (i.e. activities occurring on or near the property that give rise to a reasonable inference that it was being habitually used for a specified use, and the activities adversely effect the community or neighbourhood).

[155] The Court observed:

> [59] The short time frame for preparation of the evidence in this application flows from the choice of the Director to use informal action instead of applying for an order. It put the tenant under the immediate threat of eviction and forced this application to proceed on short notice.
>
> [60] An application for an order would have been preferable and would have given the Director sufficient time to prepare affidavits of better quality to substantiate the allegations. There would also have been time to cross-examine the tenant on the alleged inconsistencies in her affidavit. Hopefully this is how the Director will proceed in the future. If there is a true emergency section 7 is available.

[156] Costs were awarded to the tenant in *Nicloux*. This decision shows the numerous shortcomings of the process under s. 3(2) and s. 13(10). It is insufficient to address the procedural fairness concerns of the tenant knowing the case to meet and being able to present their case fully and fairly.

[157] The Yukon government also argues the *RLTA* provides a complete code for disputes arising in the context of residential tenancies, including one such as this. This option was not communicated to the petitioner when she received the notices of termination. An application under s. 65 of the *RLTA* for resolution of a dispute goes to the Director under the *RLTA*. Like s. 13(10) of the *SCAN Act,* there is nothing in the *RLTA* that allows the Director to postpone the termination of tenancy pending a decision on the dispute. Further, the Yukon government may not be a party to an *RLTA* dispute resolution process, making it difficult for the tenant and the *RLTA* Director to know all of the facts and decide fairly in the circumstances of a termination of tenancy under the *SCAN Act*.

[158] In this case, Kurt Bringsli testified that informal action was chosen in part because an application to court for a community safety order with the effect of terminating a tenancy can take more time and be more complex. The Yukon government further argued that the shortened time frame to five days is justified because of the expeditious contribution to ensuring community safety. This is an insufficient justification for state action against individuals that lacks procedural fairness.

[159] In this case, the petitioner had no knowledge of the complaints and investigation, and no ability to answer the allegations. No information was provided about any legal recourse available to her other than the verbal offer of the ability to request via the SCAN email an extension of the five-day notice period, within the five days, the granting of which was discretionary. There was no offer to the petitioner of any opportunity for her to correct or change the behaviour that was the subject of the complaints. No offer of assistance to find alternative accommodation was provided.

[160] Any court or third party oversight or requirement of the SCAN Director or investigators to meet an evidentiary standard was absent. There is no requirement in s. 3(2) for the Director to be satisfied that the complaint is well-founded, or that the situation has reached a threshold of seriousness before acting under s. 3(2) to terminate a tenancy. While the RCMP search warrant had resulted in criminal charges against the petitioner, no information was provided to the petitioner about how activities that may have given rise to the criminal charges were adversely affecting the neighbourhood or community. The consequence of the state action, which need not be the sole cause of the infringement (*Adams* at para. 87, citing *Morgentaler* and *Rodriguez*), was an immediate loss of housing for the family of 10 in December, during

the COVID-19 pandemic, in a housing crisis in Whitehorse. The absence of procedural fairness in this situation was a breach of one of the principles of fundamental justice.

[161] The discretionary ability for the extension of time from five days to longer, as occurred in this case, is no answer to the constitutional challenge to s. 3(2) (see *R v Nur*, 2015 SCC 15 at paras. 85-86; *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SC 17 at para. 80).The possibility that the state might act more leniently in a case does not cure a constitutionally defective provision.

b. Overbroad

[162] A law that addresses conduct that has no relation to the purpose of the law suffers from overbreadth. In this case, s.3(2) is overbroad because it includes people that are not involved in the activities at issue.

[163] The Supreme Court of Canada in *Heywood* at 792, explained overbreadth as follows:

> Overbreadth analysis looks at the means chosen by the state in relation to [the legislative] purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual’s rights will have been limited for no reason. …

[164] The Supreme Court of Canada in *Canada (Attorney General) v Bedford*, 2013 SCC 72, stated that the root question in an overbreadth analysis “is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose” (at para 119). Put another way, overbreadth exists where there is an

absence of connection between the infringement of rights under s. 7 and what the law seeks to achieve (at para 108).

[165] Examples of laws that have found to be overbroad are:

i) the *Criminal Code* offence of loitering in or near a school ground, playground, public park or bathing area by someone convicted of certain listed offences, was overbroad because although its purpose was to protect children, all parks were included, not only those in which children played, there was no time limit and no review process, it applied to people convicted of offences not involving children, and it could be enforced without notice to the accused (*Heywood*);

ii) *Criminal Code* provision denying those found to be permanently unfit to stand trial the possibility of an absolute discharge, because the means are not the least restrictive of the person's liberty and not necessary to achieve the law's objective *(R v Demers*, 2004 SCC 46); and

iii) the offence of assisted suicide with the legitimate objective of protecting vulnerable people of being coerced into taking their own lives, because it unnecessarily applied to competent adults able to make a choice to end their lives due to intolerable suffering from an irremediable condition (*Carter*).

[166] The overbreadth analysis thus begins with an identification of the law's purpose and effects, "because overbreadth is concerned with whether there is a disconnect between the two" and "the overbreadth analysis thus depends on being able to distinguish between the objective of the law and its effects (resulting from the means by

which the law seeks to achieve the objective)" (*R v Moriarity* 2015 SCC 55 ("*Moriarity*") at para. 24). The focus in this case is on the challenged provision, s. 3(2), considered in the context of the legislative scheme.

[167] The articulation of the objective of s. 3(2) needs to: focus on the ends of the legislation rather than on its means, be at an appropriate level of generality, and capture the main thrust of the law in precise and succinct terms. If the objective is stated too generally, it will provide no meaningful check on the means employed to achieve it; if it is stated too narrowly, the distinction between ends and means may be lost, and the statement of purpose will effectively foreclose any separate inquiry into the connection between them. An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth (*Moriarity* at para. 28).

[168] The purpose must be derived from the text of the provision, considered in the full context of the legislative scheme (*Moriarity* at para. 31). Extrinsic evidence such as legislative history may also be used; however, appropriate caution should be exercised as legislative statements of purpose may be vague and incomplete and inferences of legislative purpose may be subjective and prone to error (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014) at 9.41-9.66 as quoted in *Moriarity* at para. 31).

[169] The analysis assumes the legislative objective is appropriate and lawful.

[170] The petitioner relies on the *Hansard* debates when the legislation was introduced to arrive at the following description of the purpose of the legislation as a whole: "*Make the community safer by preventing substance abuse and reducing harm associated with substance abuse.*" The petitioner says s. 3(2) shares this purpose,

along with the effect of removing the tenant in spite of any contractual or legal constraints of a lease.

[171] This statement of purpose is flawed. The petitioner has fallen into the trap identified by Ruth Sullivan (quoted in *Moriarity*) of relying on statements made in the legislature that are incomplete, subjective, and not accurate. Since those debates, the activities of concern set out in SCAN have been amended to include prostitution, child sex abuse, possession or storage of illegal or stolen weapons, committing or facilitating a criminal organization offence, or aiding, accommodating or assisting a gang or criminal organization. Inclusion of all of these activities makes the purpose of the legislation much broader than preventing substance abuse and reducing harm associated with it, while this is undoubtedly part of its purpose. In addition, the petitioner has described the effect of s. 3(2) as its purpose. As noted in *Moriarity* at para. 25, the effect of the challenged provisions is what they do. Here the petitioner describes the displacement of the tenant and the termination of the lease without any legal constraints as the purpose of s. 3(2), when in fact that is what the provision does, that is, its effect, not its purpose.

[172] The intervenor articulates the purpose of s. 3(2) as removing tenants from property where their illegal conduct on that property harms the public safety of the community. While this proposed purpose properly addresses s. 3(2) in the context of the legislative scheme, that is, to make communities and neighbourhoods safer and more secure for and able to be enjoyed by residents, it still focuses on the means or the effects of the provision – i.e. removing tenants who engage in illegal conduct on the property - rather than describing its objective.

[173] The Yukon government, in its written argument, focuses on the purpose of the legislation as a whole. It relies for a statement of purpose on the decision of the Nova Scotia Court of Appeal in *Dixon v Nova Scotia (Director of Public Safety)*, 2012 NSCA 2 ("*Dixon*"), who followed the court in *Nova Scotia (Public Safety) v Cochrane*, 2008 NSSC 60 at para. 31 – "…to regulate the use of property so as to suppress uses that adversely affect the property of others or interferes with others' enjoyment of their property ..." This Court has referenced the *Dixon* decision in its interpretation of the Yukon *SCAN Act*. While the overall legislative context must be considered as part of the determination of the provision's purpose, the overbreadth analysis requires a specific examination of s. 3(2). The Yukon government references s. 3(2) as part of the scheme used by landlords to regulate their property within the parameters of the *SCAN Act,* thus making the purpose of the *Act* the purpose of s. 3(2).

[174] I find that the purpose of s. 3(2) is to eliminate specified activities occurring on a property that threaten community and neighbourhood safety, security, and peaceful enjoyment of property. The means used to do this, or its effect, is the Director's resolution of a complaint informally or by agreement, involving the expeditious removal of tenants through the provision of five days' notice despite the existence of any contractual or legal arrangement.

[175] In determining the effects of a provision in the overbreadth analysis, the focus is on the individual, and is qualitative, not quantitative. It is enough under s. 7 if one person suffers from a law that is overbroad. Further, the Court is not to consider or balance the infringement against the beneficial effects of the law for society as a whole in its analysis under s. 7.

[176] Here, s. 3(2) is overbroad because it impinges on the security of the person interests of people who may not have been involved in any specified activities that threaten safety, security and peaceful enjoyment of property in the neighbourhood. For example, roommates or relatives in the same residence who have not participated in the activities at issue, as tenants, may be subject to a summary eviction on five days' notice. This effect was noted by Kate Mechan of Safe at Home who said that individuals who live in multi-unit buildings "are lumped in" with those charged or engaged in criminal activities and can experience the resulting trauma and stigmatization in the same building. Brontë Renwick-Shields of Blood Ties deposed that roommates have been evicted under the *SCAN Act* even though they were not named in the SCAN investigation. The punishment of people who have no involvement in any of the activities at issue, demonstrates an absence of connection between the purpose and effects of s. 3(2). In the case at bar, there was no evidence that the children in the household or the mother-in-law of the petitioner had any involvement in the alleged illegal drug activity. The existence of other residents at 5 Coho Trail who were not involved in the activities at issue but were subject to the five-day eviction notice demonstrates the law's overbreadth.

[177] This is similar to the Supreme Court of Canada's finding in *Bedford* that the avails of prostitution provisions were overbroad because everyone who lived off the avails of prostitution was punished, without distinguishing between those who exploited sex workers, and others such as drivers, managers, bodyguards, accountants, or receptionists who increased the safety and security of sex workers.

[178] The petitioner argues s. 3(2) suffers from overbreadth for another reason: it sweeps in conduct that bears no relation to the law's objective. She argues that one of the flaws of the *SCAN Act* is that it assumes every illegal activity as defined in specified use will adversely affect community or neighbourhood safety, security, or peaceful enjoyment. The petitioner argues that some of the activities encompassed in specified use will never endanger the safety, security or peaceful enjoyment of the community/neighbourhood, such as possession and consumption of drugs recreationally in one's own home. She also argues that evicting a tenant from their home in one community or neighbourhood will not cure them of substance abuse, and may not eliminate the activities at issue, but instead move them to another community or neighbourhood.

[179] The petitioner has been clear that her constitutional challenge is limited to s. 3(2) of the *SCAN Act*. These arguments are beyond the challenge to the constitutionality of s. 3(2). A finding that the definition of specified use is overbroad because it includes activities that do not endanger community or neighbourhood safety, security and enjoyment, would affect the ability to obtain community safety orders under s. 4 or s. 7, as well as determinations under s. 2 and s. 6. Similarly, a finding of overbreadth because evictions are not a sufficient tool to address substance use or the elimination of the activities beyond the immediate neighbourhood or community goes beyond the purpose and effect of s. 3(2). While the operation of s. 3(2) is clearly affected by these arguments, and they deserve consideration, they are beyond the scope of this constitutional challenge to s. 3(2).

c. Gross Disproportionality

[180] A law is grossly disproportionate when its effects on life, liberty, or security of the person are extreme. The Supreme Court of Canada has stated that the rule against gross disproportionality applies in extreme cases where the seriousness of the deprivation of the s. 7 right is out of sync with the objective of the measure *(Bedford* at para. 120). While the law's impact on the s. 7 interest is connected to its purpose, gross disproportionality occurs when its impact is so severe that it violates our fundamental norms (*Bedford* at para. 109). The connection between the draconian impact of the law and its object must be entirely outside the norms of a free and democratic society (*Bedford* at para. 120).

[181] Similar to the overbreadth analysis, when determining gross disproportionality, the court is not to consider the beneficial effects on society of the law at issue, as that is for the s. 1 analysis. The focus is on its impact on the rights of the individuals. It is also enough if the effect of the impugned provision on just one person is grossly disproportionate.

[182] In this case, s.3(2) is grossly disproportionate because of its severe impact on the individual to whom it is directed.

[183] Examples of laws that have been struck down for gross disproportionality include: outlawing bawdy houses and communicating for the purposes of prostitution because the objective of preventing public nuisance associated with the sale of sex (neighbourhood disruption or disorder and safeguarding health and safety) was grossly disproportionate to the law's harmful effects in preventing sex workers from doing things such as using indoor premises (bawdy houses) and screening customers

(communicating for the purposes of prostitution) that could reduce risks to their health, safety and lives; preventing people from obtaining adequate shelter, thereby increasing their risk of harm and death, was out of sync with the objectives of the bylaw to protect public spaces and property.

[184] The Yukon government argues s. 3(2) is not grossly disproportionate, as it does not result in any worse harm than an eviction under the *RLTA*, except to shorten the period of notice from 14 days to five days. However, as is described below, the *RLTA* contains procedural fairness protections that do not exist under the *SCAN Act*.

[185] The petitioner argues that the significant impacts of an eviction of a family in December in Whitehorse on five days' notice, creating risks to their health, is grossly disproportionate to the restoration of peaceful enjoyment of property or community safety and security.

[186] The evidence in this case supports a finding of a deprivation of the security of the person interest that is disproportionate to the objective of the legislation. The effect of the eviction on the petitioner's family, even after the notice period was extended by almost four months, was significant, as described above. Further, the evidence from the Yukon non-profit societies in their experience in helping vulnerable people, was that the existing housing crisis in Whitehorse made it difficult for individuals to find affordable housing. The risk of housing instability is increased by an eviction under s. 3(2) on five days' notice, with no advance warning to the tenant and no chance for the tenant to ameliorate the situation. The link between evictions and homelessness and housing instability identified by Professor Stephen Gaetz, and his testimony about the negative effects of homelessness and housing instability on the mental and physical health of

individuals supports the grossly disproportionate impact that an eviction under s. 3(2) could have.

[187] The intervenor noted in its argument for overbreadth that less extreme approaches to fulfilling the objective of the statute are available. This argument is better applied to gross disproportionality. The alternatives to an eviction on five days' notice under s. 3(2), without warning, disclosure, or any ability to respond or correct the behaviour giving rise to the eviction, exist under the *SCAN Act* and the *RLTA*. Under s. 3(1)(d), agreement is achieved, or informal action may be taken by SCAN investigators that does not involve termination of tenancy, such as referral to agencies, counselling, or provision of undertakings. Under s. 4 of the *SCAN Act*, the Director can apply to court for a community safety order. Such an order will be granted once the Director shows on a balance of probabilities that activities at the property give rise to a reasonable inference the property is being used for a specified use that is adversely affecting the neighbourhood or community. This threshold and standard of proof allow the tenant to know the case against them, and the court hearing provides an opportunity for the landlord (who is the respondent by statute) and the tenant to respond and provide information for the court's consideration. This process takes longer than five days and the court can decide when granting an order how much time may be reasonable to balance the objective of the legislation in preserving community safety and security and enjoyment of property with the interests of the tenant.

[188] If the activities at issue are considered to be a serious and immediate threat to the safety and security of one or more occupants of the property or persons in the community or neighbourhood, the Director may bring an application for a community

safety order without notice or on short notice under s. 7 of the *SCAN Act*. The potential remedies include a termination of the tenancy.

[189] A further alternative is available under the *RLTA*, which provides, in s. 52, a mechanism for landlords to end tenancy agreements for cause on the ground that the tenants have seriously jeopardized the health and safety of others on or adjacent to the property or are engaging in offensive or illegal activity. Under the *RLTA*, tenants are given a longer notice period, an opportunity to correct the situation and the ability to dispute the notice in a less formal and simpler manner than proceeding to the Supreme Court of Yukon.

[190] These alternative existing measures under the *SCAN Act* and the *RLTA* meet the objective of s. 3(2) to eliminate activities that threaten the neighbourhood safety, security and/or enjoyment of property in a less extreme, drastic way that is more proportionate to the liberty interest at stake.

d. Arbitrariness

[191] Arbitrariness as a principle of fundamental justice asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual (*Bedford* at para. 111). A law that imposes limits on s. 7 interests in a way that bears no connection to its objective arbitrarily impinges on those interests. Like overbreadth and gross disproportionality, arbitrariness is intended to address "the failures of instrumental rationality" (*Bedford* at para. 107 quoting Hamish Steward, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012) Toronto: Irwin Law, 2012 at 151). The court's role is to scrutinize the policy instrument that has been enacted as a means to achieve a legitimate legislative objective. Arbitrariness is similar

to overbreadth in that the question for both is whether there is any connection between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective (*Bedford* at para. 117). Another question to be asked in the analysis of both arbitrariness and overbreadth is whether the law's effects are inconsistent or unnecessary to achieve its objective.

[192] An example of a law that has been struck down as arbitrary under s. 7 is the law prohibiting private health insurance, as it was found to be unrelated to the objective of protecting the public health system (*Bedford* at para. 111, citing *Chaoulli*).

[193] The petitioner argues s. 3(2) is arbitrary, but the analytical framework she proposes is better suited to the analysis of overbreadth - i.e. sweeping conduct into s. 3(2) that does not relate to its objective – and the analysis of gross disproportionality - i.e. measures in s. 3(2) are an overly extreme incursion into the interest protected by s. 7 to achieve the legislative objective and there are acceptable existing alternatives to do so.

[194] The intervenor does not address arbitrariness in its argument.

[195] Given the nature of these arguments and my findings on overbreadth and gross disproportionality, it is not necessary to address arbitrariness.

Issue #3: Is s. 3(2) saved by s. 1 of the Charter

[196] A law that breaches s. 7 may still be constitutionally valid if it can be justified under s. 1 of the *Charter*. That section provides that the *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[197] Thus, a law that infringes a *Charter* protected right or freedom will survive a constitutional challenge if it meets the threshold of a reasonable limit that is demonstrably justified in a free and democratic society.

[198] The question for the court in determining whether s. 1 applies is "whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest". The question of justification on the basis of an overarching public goal is at the heart of s. 1, unlike in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights (*Bedford* at para. 125).

[199] The test under s. 1 has been expressed as follows:

- the government bears the onus on a balance of probabilities to show that a law that breaches an individual's *Charter* rights can be justified;
- the objective of the law in question must be pressing and substantial;
- the means by which the law's objective is achieved must be rationally connected to that objective;
- the law must be minimally impairing of the *Charter* protected right; i.e. there are no reasonable alternatives to achieve the objective; and
- the law's negative impact on individual rights and freedoms is outweighed by the beneficial impact of the law in achieving its goal for a greater public good.

[200] The Yukon government argues that the purpose of regulating the use of property to suppress uses that adversely affect the property of others or interfere with others' enjoyment of their property is a pressing and substantial objective. They argue that the

effect of s. 3(2) is to reduce the notice of termination period to five days from 14 days (under the *RLTA*) and this effect is rationally connected to the suppression of certain uses of the property that interfere with enjoyment or affect safety and security of the community or neighbourhood because it allows the suppression to occur more quickly. While the Yukon government acknowledges the five-day notice period is not the least impairing option, it is within the realm of reasonableness and not unusual. Finally, the negative impact on tenants is proportionate and outweighed by the beneficial effects on those who own the property where the activities at issue were occurring or were affected negatively by those activities through their proximity to them or being victimized by them. The government provided no evidence in support of its arguments under s. 1.

[201] The Supreme Court of Canada has noted that it is difficult but not impossible to justify a law found to violate s. 7 under s. 1. This is because the basis on which a violation of s. 7 is found will often be fatal to the arguments necessary to be met under s. 1. In this case, the reasons why s. 3(2) was found to be procedurally unfair, overbroad and grossly disproportionate are the same reasons why it cannot meet the test under s. 1. While the objective of s. 3(2) is legitimate, the means of achieving it through a five-day eviction, without procedural fairness, that negatively affects those who have nothing to do with the basis for the eviction, and in light of other less impairing alternatives already available in existing legislation, does not meet the s. 1 test. The negative impacts on the individuals' rights are not outweighed by the beneficial effects of eliminating the threats to safety, security or peaceful enjoyment of property.

Issue #4: Is s. 3(2) a breach of s. 15?

[202] Section 15 of the *Charter* provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[203] The onus is on the petitioner to prove a *prima facie* violation of s. 15(1) by establishing that:

a) the impugned law, on its face or in its impact creates a distinction based on enumerated or analogous grounds; and

b) the impugned law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage of the group (*Fraser v Canada (Attorney General)*, 2020 SCC 28 at para. 27).

[204] Here, the petitioner fails to meet the onus due to an absence of evidence.

[205] The Supreme Court of Canada in *R v Sharma*, 2022 SCC 39 ("*Sharma*"), noted at para. 34 the Court's description of s. 15(1) as the *Charter's* "'most conceptually difficult provision' (*Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 2)". The development of its analytical framework is "daunting" and the common criticism from academics is that it is unclear and leads to inconsistent application.

[206] The Supreme Court of Canada in *Sharma* emphasizes the importance of separating the analysis at each of the two steps because they ask fundamentally different questions. The first step of determining whether the law created or contributed

a disproportionate impact on Indigenous people requires a comparison between the claimant groups and other groups in the general population. The second step asks whether the impact imposes burdens or denies benefits in a way that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage. A finding of disproportionate impact in the first step does not automatically mean a finding of a discriminatory distinction in the second step.

[207] The Court at para. 49 of *Sharma* described two types of evidence that are helpful in proving disproportionate impact in step one of the s. 15 test: first, evidence about the "full context of the claimant group's situation (*Withler* at para. 43, cited in *Fraser*, at para. 57)" and second, evidence about "the outcomes that the impugned law … has produced in practice" *(Fraser* at para. 58)".

[208] The Court explained further that no specific form of evidence was required, that the claimant only needed to show that the law was **a** cause, not the only or dominant cause, that the causal connection may be satisfied by reasonable inference, that where statistics may not be available, expert testimony, case studies or other qualitative evidence may be sufficient, and that scientific evidence be carefully scrutinized and only admitted if it has a reliable foundation.

[209] At the second step, the Court in *Sharma* said at para. 55 that the claimant need not prove the legislature intended to discriminate. Judicial notice can play a role, and courts may infer a law has the effect of reinforcing, perpetuating or exacerbating disadvantage where such an inference is supported by the available evidence.

[210] The petitioner does not argue that s. 3(2) creates a distinction on its face, but says it has an adverse impact on Indigenous people. She says s. 3(2) offends the first

step of the test in s. 15 - i.e. causing or contributing to a disproportionate impact on Indigenous people - in the following ways:

- SCAN evictions target a disproportionate number of Indigenous people as evidenced by Kurt Bringsli's testimony about six evictions in which he was involved, four of which affected Indigenous people;
- Professor Carmela Murdocca's expert evidence confirmed that property ordinance type of legislation such as s. 3(2) of *SCAN Act* that relies on anonymous complaints, no administrative or court oversight, with a poorly defined concept of adverse effect perpetuates systemic and structural unconscious racism and predominantly affects racialized groups, which, in the Yukon will be Indigenous people;
- most complaints under SCAN are related to the criminal conduct of drug trafficking, – and Indigenous people continue to be vastly over-represented in the criminal justice system - (*R v Ipeelee*, 2012 SCC 13 at para. 60), and they are part of the racialized and low-income communities who are overpoliced (*R v Le*, 2019 SCC 34 at para. 97);
- the 2018 SCAN Annual Report ("2018 Report") shows certain neighbourhoods are disproportionately affected by SCAN activities and they are not wealthy, predominantly white neighbourhoods.

[211] The petitioner argues that the second step of the s. 15 argument is also met - i.e. s. 3(2) imposes burdens or denies a benefit in a way that has an effect of reinforcing, perpetuating or exacerbating disadvantage - in the following ways:

- the majority of people in Whitehorse who experience homelessness or housing instability and resulting negative effects on their physical and mental health are Indigenous, and there is a link between this circumstance and SCAN evictions under s 3(2);
- the structure of the law – complaints-based, confidential, without court or administrative oversight and based on a subjective, poorly defined concept of adverse effect – perpetuates and reinforces the presence of unconscious or systemic racism in society according to Professor Murdocca;
- the Yukon government's failure to collect race-based data about the effects of SCAN evictions results in the perpetuation of historical disadvantage by preventing transparent disclosure of potential adverse effects.

[212] The Yukon government raises the following arguments in response to the petitioner's arguments on the first step - that s. 3(2) causes or contributes to a disproportionate impact:

- the effect of s. 3(2) is to shorten the notice period for evictions from 14 days to 5 days and the ability to evict exists at common law; therefore, the focus should be on the effect of the shortened notice period, not the effect of evictions;
- it is not sufficient for a claimant to show that a law leaves an already-existing gap between Indigenous people and others unaffected (*Sharma*, para. 40), or to point to adverse impacts that exist independently of the

impugned law; instead, the claimant must provide enough evidence to show the impact of s. 3(2) creates or contributes to a disproportionate impact on Indigenous people;

- a court can draw reasonable inferences about the provision's disproportionate impact, but it cannot do so on a "web of instinct"- the inferences need to be based on evidence that establishes a nexus or connection between the state conduct at issue and a *Charter* infringement: here, the petitioner's evidence does not establish that s. 3(2) disproportionately affects Indigenous people, especially since there have been no evictions using s. 3(2) since December 2020 and before that there were very few per year;
- more specifically, two of the four Indigenous people who were evicted under SCAN in the examples provided by Kurt Bringsli, were a result of requests to the SCAN investigators from Yukon First Nation governments for assistance from SCAN.

[213] The Yukon government responds as follows to the arguments of the petitioner on the second step of imposing a burden or denying a benefit that reinforces, perpetuates or exacerbates a disadvantage:

- the general statements that the *SCAN Act* will perpetuate and exacerbate racism against Indigenous people, even as expressed by Professor Murdocca in her expert testimony, do not amount to evidence;
- the overall number of people who were subject to SCAN evictions and particularly through the use of s. 3(2) is so low that if even race based

statistics were kept, they would be statistically insignificant and not sufficient to support conclusions about exacerbation of impacts by s. 3(2) on Indigenous people;

- while the Yukon government accepts that the Yukon has a history of colonialism and Indigenous people face many disadvantages in the Yukon including an increased rate of homelessness, there is no evidence that evictions under s. 3(2) of SCAN have caused (step one) or exacerbated (step two) those disadvantages;
- while the Yukon government accepts there is a link between eviction and homelessness, they say that evictions do not inevitably lead to homelessness, which can result from a number of factors not related to evictions; and
- 10 of 11 self-governing First Nation governments in the Yukon have entered into agreements with SCAN enforcement authorities stating that they "share a common interest in creating safer communities by addressing habitual illegal activities that negatively affect community safety" and that they "seek the peaceful use and enjoyment of property on settlement land by their members" and "to reduce the supply of harmful substances and to ensure community safety and order is maintained…as part of Chief and Council's overall work towards a healthier community and First Nation"; showing that the *SCAN Act* serves the interests of First Nation governments by providing them with a tool to protect Indigenous citizens when appropriate.

[214] It is not necessary for the petitioner to show that the discrimination affects all members of a protected group in the same way. Laws that do not affect all members of the protected group may still be discriminatory. The petitioner must show that the distinction relates to personal characteristics of the individual or group that has the effect of imposing burdens on them that are not imposed on others, or that denies benefits to them that are available to others in society (*Waterloo* at para. 122 and *Fraser* at para. 70).

[215] Here, the petitioner has not satisfied the necessary evidentiary burden in step one to show a disproportionate impact of s. 3(2) on Indigenous people. The information provided by Kurt Bringsli was anecdotal and represented only approximately one quarter of the SCAN evictions. While the Supreme Court of Canada directed in *Sharma* that where statistical information is not available, other qualitative evidence such as expert evidence or case studies can be relied on, here the expert evidence was not Yukon specific, as it related to nuisance ordinance legislation generally and made assumptions from there. The evidence from the non-profit societies was that Indigenous people were over-represented in the homeless and housing instability population, but there was no evidence from them about over-representation of Indigenous people in the population of people subjected to *SCAN Act* evictions. This evidence is helpful in the step two part of the analysis but does not address the disproportionate impact of s. 3(2) on Indigenous people necessary to prove at the step one.

[216] The evidence from the 2018 Report about the neighbourhoods in which the *SCAN Act* evictions occurred, while providing some helpful context, is not detailed enough to demonstrate an actual disproportionate impact on Indigenous people.

[217] The petitioner argues that because Indigenous people are over-represented in the criminal justice system, and SCAN evictions most frequently occur because of the criminal offence of illegal drug activity (without providing evidence in support), there must be a disproportionate effect on Indigenous people. She is asking the court to draw inferences without evidence and to focus on the link between disadvantages created by colonial policies and the justice system. As noted in *Sharma* at para. 71, the situation of the claimant group is relevant at step one (i.e. over-representation in the criminal justice system) but is not enough on its own to establish disproportionate impact.

[218] I appreciate the difficulties for the petitioner in obtaining evidence sufficient to meet the test under the first part of s. 15, especially when the Yukon government does not keep race-based statistics. In this case, the work of the non-profit societies may be helpful if they were to keep statistics about evictions under s. 3(2) of *SCAN Act*.

[219] However, the evidentiary burden, while "not be undue, [it] must be fulfilled" (*Sharma* at para. 50). The effect of a constitutional challenge under s. 15 is significant, and to be successful it must be based on more than anecdotal evidence or assumptions. A court can draw reasonable inferences but cannot do so on a "web of instinct" rather than actual evidence (*Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para. 34). In this case, the petitioner has not met the evidentiary burden required under the first step in s. 15.

[220] I will briefly address the evidence relied on for step two in the event I am wrong, and the petitioner has been found to meet her onus to show that s. 3(2) has a disproportionate impact on Indigenous people.

[221] On step two, I agree with the arguments of the Yukon government. Their evidence, while not providing race-based statistics, shows the number of SCAN evictions in total since 2018 is 25. Of those, two were done by the landlord without information or involvement from SCAN investigators, six were done by the landlord after receiving information from SCAN, and 17 were files in which SCAN investigators provided assistance to the landlord. Between 2020 and 2022, there were 12 SCAN evictions, and none of them was effected using the five-day notice period in s. 3(2). This is a small sample size on which to base conclusions that disadvantages experienced by Indigenous people are exacerbated.

[222] I further agree that the general statements made by Professor Murdocca are theoretically insightful, but do not provide evidence of the Yukon experience. Indigenous people are clearly disadvantaged in the Yukon in many ways due to the impacts of colonialism and legislation, but there is insufficient evidence before the Court to show that s. 3(2) exacerbates those disadvantages. While Indigenous people are over-represented in the homeless and unstable housing communities in Whitehorse, and there is a connection between those communities and evictions, there are also many other causes of homelessness and housing instability, and there is no evidence of the numbers of people suffering those consequences due to evictions. Finally, the fact that 10 self-governing First Nations have entered into agreements with the Yukon government to implement the *SCAN Act* on their settlement land is evidence they see it as a benefit to their own communities, who are First Nation, and not discriminatory. In sum, the evidentiary test is not met under step two of s. 15.

[223] For these reasons, the s. 15 argument fails.

X. Conclusion

[224] Section 3(2) of the *SCAN Act* is struck down for failure to comply with s. 7 of the *Charter*. It infringes the s. 7 security of the person interest in a way that is not in accordance with the principles of fundamental justice because of an absence of procedural fairness, overbreadth, and gross disproportionality. It is not saved by s. 1.

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DUNCAN C.J.