SUPREME COURT OF YUKON

Citation: *Maraj v Commissioner of the Yukon Territory*, 2022 YKSC 3

Date: 20220126
S.C. No. 21-AP002
Registry: Whitehorse

BETWEEN

RAMONA MARAJ, Phd

APPELLANT

AND

COMMISSIONER OF THE YUKON TERRITORY

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the appellant — Vincent Larochelle

Counsel for the respondent — Lesley Banton

REASONS FOR DECISION

Introduction

[1] This is an application to strike a notice of appeal by the respondent Yukon government on the basis that the appeal is time-barred. The appeal is from the Yukon government's decision not to follow the recommendations of the Information and Privacy Commissioner ("IPC") to disclose certain data about caribou that had been requested by the appellant. Yukon government argues that the appellant failed to comply with s. 59(3) of the *Access to Information and Protection of Privacy Act*, RSY 2002, c. 1 ("*ATIPP Act*")[1], which states an appeal to the Supreme Court must be made

[1] The new *Access to Information and Protection of Privacy Act*, SY 2018, c.9, was proclaimed in force on April 1, 2021. This appeal was brought under the previous *ATIPP Act*. All references in these reasons to the *ATIPP Act* are to the previous *ATIPP Act*.

by giving written notice to the government department that made a decision on the IPC's report and recommendations within 30 days of receiving that decision.

[2] The appellant states that the notice of appeal was filed at the Supreme Court of Yukon within the 30-day period of receipt of a letter from the Department of Environment, although concedes it was not served on the Yukon government until after that period. The appellant argues that the appeal was not discoverable on April 22, 2021; that the respondent has not shown it received notice outside of the statutory time limit; that any time limit was suspended by the *Civil Emergency Measures Limitation Periods and Legislated Time Periods (COVID-19) Order* (MO 2020/25); and that even if the time limit was not met by the appellant, this Court has jurisdiction to extend the time to serve the notice of appeal filed on May 14, 2021.

Preliminary Issue

[3] A preliminary issue is the basis on which this matter comes before the Court. The respondent's notice of application refers to Rule 18(3) of the *Rules of Court* of the Supreme Court of Yukon. However, that rule applies to actions, not appeals. Further, contrary to what the respondent has argued, this application to strike is not the same as a summary judgment application. The circumstances required for a summary judgment application do not exist here: there are no pleadings as there are in an action; the issue to be determined is not whether there are facts to substantiate the whole or part of the appeal; nor is the question to be decided about whether there is a genuine issue to be "tried". Instead, this application requires a relatively simple determination of whether the statutory notice obligation for an appeal was met by the appellant and if not, whether the Court has jurisdiction to extend time or whether the notice of appeal should be struck.

[4] Rule 53 governs appeals to this Court, as long as there is no conflict with any statutory provision related to appeals. Rule 53(6) permits this Court to provide directions or make orders on various procedural matters, including time limits and whether an appeal may be disposed of summarily. Subsection 60(4) of the *ATIPP Act* provides this Court with the ability to make rules of procedure for the conduct of an appeal under that section, and in the absence of a rule, a judge may on application by notice of motion give directions on how the matter is to be dealt with. This application is properly brought under Rule 53, and s. 60(4) of the *ATIPP Act*, based on an alleged breach of s. 59 of the *ATIPP Act*. I will determine the matter on this basis.

[5] Further, I note the only reason this Court can hear this application is because there is a filed notice of appeal. It was filed with the Court within 30 days of the appellant's receipt of the respondent's letter on April 22, 2021. This is not a situation where the respondent is seeking to strike the appeal because the notice was filed with the Court outside of the 30-day notice period. There is no need therefore for the Court to decide whether the appeal is extinguished for failure to file within a statutory limitation period, or whether it is necessary to extend the time for filing the notice of appeal. The sole issue to be decided is whether the failure to provide written notice to the respondent within 30 days is fatal to the appeal.

Background

[6] The appellant, a biologist, requested data from the Department of Environment of Yukon government ("Environment") about caribou in the Yukon on November 25, 2019. Environment refused her request on December 17, 2019. The appellant then asked the IPC on January 10, 2020, to review Environment's refusal.

[7] The IPC launched an inquiry during which submissions were made by both the appellant and Environment. The IPC released a report on March 22, 2021, recommending disclosure of a significant amount of the data requested by the appellant.

[8] On April 19, 2021, the Deputy Minister of Environment advised the IPC by letter that Environment was responding as required by s. 58 of the *ATIPP Act*. He wrote:

a) consultation with partners, mainly other governments, was necessary before data can be released, because of the risk of damaging relationships and implications for meeting responsibilities to manage and conserve caribou;

b) the territorial election held on April 12, 2021, meant that no consultations could occur until after the new government was sworn in;

c) he "shared [the IPC's] interests in promoting transparency and information-sharing", he would be providing more information about her recommendations as soon as possible, and he would be pleased to meet with the IPC to discuss.

[9] The letter did not include anything about the appellant's right to appeal Environment's decision to the Supreme Court of Yukon as required by s. 59 of the *ATIPP Act* in the event of Environment's decision not to follow the recommendations.

[10] On April 22, 2021, the appellant received the Deputy Minister's letter from the IPC. The IPC told the appellant she deemed this letter to be a refusal to accept her recommendations, triggering the appellant's right of appeal under the *ATIPP Act*.

[11] On April 23, 2021, the appellant asked the office of the IPC about the appeal process and next steps. A call was scheduled for May 5, 2021. The appellant began looking for a lawyer to represent her on April 26, 2021. She deposed it took quite some time because all the lawyers she contacted were unable to practise in the Yukon, unfamiliar with the *ATIPP Act*, or did not have time to assist her. She remained self-represented until after May 31, 2021.

[12] On May 5, 2021, the IPC office advised the appellant she was required to submit a formal appeal through the court. The appellant deposed the IPC did not tell her she was required to provide notice to the Yukon government.

[13] After the appellant made the initial request for data to Environment and received the answer from the records manager, she had no further correspondence with anyone from the Yukon government on this issue. Once the IPC became involved, all communication occurred between her and the IPC. Similarly, Environment corresponded only with the IPC, to preserve the anonymity of the appellant requester. The appellant deposed she advised the IPC on numerous occasions by telephone and email her intention to appeal if Environment decided not to follow the recommendations.

[14] By May 14, 2021, the appellant had not received any further information from Yukon government or the IPC about the government's position on the IPC recommendations. The new government had been sworn in since May 3, 2021, with a new Minister of Environment. The appellant filed her notice of appeal with the Supreme Court of Yukon, without the assistance of counsel, despite her ongoing efforts to retain someone.

[15] On May 31, 2021, the appellant was advised by legal counsel of the need to serve the notice of appeal on Yukon government. She immediately engaged a process server to do so. The notice was served on June 7, 2021. In the meantime, the appellant sent a letter by email on June 4, 2021, to the new Deputy Minister of Environment informing her of her intention to appeal.

Issues

[16] Did the appellant fail to comply with s. 59(1) of *ATIPP Act* by providing written notice of her court-filed appeal to the Yukon government on June 4, 2021, more than 30 days after receiving the letter dated April 19, 2021?

[17] If so, should the notice of appeal be struck or does this Court have authority to extend the time for the statutory written notice provision and should it exercise that authority?

Analysis

Statutory provisions

[18] The relevant statutory provisions are:

> 58(1) Within 30 days of receiving the report of the commissioner under section 57, the public body must
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> > (a) decide whether to follow the recommendations of the commissioner; and
> >
> > (b) give written notice of its decision to the commissioner and the persons who were given a copy of the report under section 57.
>
> (2) If the public body does not follow the recommendations of the commissioner, the public body must, in writing, inform the persons to whom the commissioner is required to give a copy of the report of their right to appeal the body's decision to the Supreme Court under section 59.

(3) If the public body does not give notice within the time required by paragraph (1)(b), the public body is deemed to have refused to follow the recommendation of the commissioner.

59(1) An applicant may appeal to the Supreme Court

(a) a decision by a public body under section 58 to not follow the commissioner's recommendation that the public body give the applicant access to a record or to part of a record;…

…

(3) An appeal under subsection (1) or (2) must be made by giving written notice of the appeal to the public body within 30 days of the appellant receiving the body's decision.

…

60(1) On an appeal, the Supreme Court may

(a) conduct a new hearing and consider any matter that the commissioner could have considered; and

(b) examine any record privately in order to determine the issue involved.

(2) Despite any other Act or any privilege that is available at law, the Supreme Court may, on an appeal, examine any record in the custody or under the control of a public body, and no information shall be withheld from the Supreme Court on any grounds.

(3) The Supreme Court must take every reasonable precaution, including, if appropriate, receiving representations from one party in the absence of others and conducting hearings privately, to avoid disclosure by the Supreme Court or any person of

(a) any information or other material if the nature of the information or material could justify a refusal by the public body to give access to a record or part of a record; or

> (b) any information as to whether a record exists if the public body, in refusing to give access, does not indicate whether the record exists.
>
> (4) The Supreme Court may make rules of procedure for the conduct of an appeal under this section and, in the absence of a rule on the matter, a judge of the court may, on application by notice of motion give directions on how the matter is to be dealt with.

Context

[19] Several contextual factors are relevant to this decision:

a) the content of the April 19, 2021 letter of the Deputy Minister of Environment;

b) the communication gaps arising from the appellant receiving her information from the IPC and the respondent communicating with the IPC;

c) the fact that the appellant was self-represented; and

d) the purpose of the ATIPP legislation.

Did the appellant fail to comply with s. 59(2)?

[20] The respondent seeks to strike the notice of appeal filed by the appellant with the Supreme Court of Yukon on May 14, 2021, because it did not receive written notice of the appeal within 30 days of April 22, 2021, the date the appellant received from the IPC the April 19, 2021 letter of the respondent.

[21] As noted by the court in *Manitowich v Beattie*, 2001 MBQB 348, a party who seeks to have a matter dismissed because a statutory time limit has not been met has the onus to bring clear and convincing evidence before the court that a deadline has been missed (para. 12).

[22] The respondent does not take the position in this application that the notice of appeal should be struck because the decision by the respondent was not a refusal to

follow the recommendations of the IPC, meaning there is nothing for the appellant to appeal. The respondent is acknowledging that they have decided not to follow those recommendations.

[23] However, there is no clear and convincing evidence of when the decision not to follow the IPC recommendations was provided to the appellant. The respondent has not proved the appellant has missed the statutory notice period.

[24] The respondent's argument is premised on its characterization of the April 19 letter as a decision not to follow the IPC's recommendations under s. 58. However, the letter, attached to the appellant's affidavit, is ambiguous and inconclusive. Although the Deputy Minister began the letter by saying it was notice under s. 58, the content of the letter suggests no decision had yet been made. He refers to potentially negative implications of disclosure on government-to-government relationships and for mandates to conserve caribou. At the same time, he requests more unspecified time for a substantive response because of the recent election. The Deputy Minister also states that he would be providing more information about the IPC recommendations, was aware of their gravity and importance, and offered to meet with the IPC to discuss them. Notably, the letter did not inform the appellant of her right to appeal to the Supreme Court of Yukon under s. 59, as required by s. 58(2). If the respondent had intended this "decision" to be a refusal to follow the recommendations, they were required by s. 58 to advise the appellant in that same letter of her s. 59 right of appeal. The content of the April 19, 2021 letter created significant confusion in this case.

[25] The right of appeal belongs to the appellant, not the IPC. While the IPC deemed the letter to be a refusal of the recommendations, they are not the appellant. Other than

the IPC office's verbal statement of this view to the appellant, there was no confirmation of it in writing either for the appellant or the respondent.

[26] The appellant deposed that she did not interpret the letter as a refusal to follow the recommendations and anticipated a further response from the respondent, even after she filed her notice of appeal. This was a reasonable interpretation of the letter, given its ambivalent tone and content and its failure to notify the appellant of her right to appeal.

[27] There was no direct communication between Environment and the appellant; all correspondence on this matter from Environment came to the appellant through the IPC. What the appellant told IPC was not generally communicated to Environment; however, the appellant advised the IPC several times of her intention to appeal if the recommendations were refused. The process of communication established under the *ATIPP Act* is for the important purpose of preserving the appellant's anonymity until the filing of an appeal, but in this case, it may have been a hindrance to both parties. Direct communication with Environment could have increased the appellant's understanding of their position or provided them with notice of her intention to appeal any decision to refuse the IPC recommendations. The absence of this direct communication, albeit for legitimate reasons, contributed to the confusion created by the April 19 letter.

[28] The appellant's unsuccessful efforts to find legal counsel meant, as a self-represented person unfamiliar with court processes, she relied on the IPC to explain to her the appeal process. She deposed that this included information from the IPC that it was a formal process and the appeal had to be submitted to the Supreme Court of

Yukon. The appellant further deposed the information from IPC did not include the requirement to provide written notice to Environment.

[29] More importantly, the appellant never received notice from Environment of her right to appeal under s. 59 of the *ATIPP Act*, which includes the requirement to provide written notice to Environment within 30 days of receiving the decision.

[30] The appellant filed her notice of appeal with the Supreme Court of Yukon on May 14, 2021. By May 14, 2021, the new government, including a new Minister of the Environment had been sworn in since May 3, 2021. The appellant continued to ask the office of the IPC if they had received further information from the Environment about the recommendations. No further information was forthcoming from the either Environment or IPC, and no meetings were held between Environment and the IPC to discuss the recommendations. By mid-May, it was reasonable for the appellant to conclude that Environment did not intend to provide additional information about the recommendations or accept any of them. In other words, the passage of time of approximately one month after the April 19, 2021 letter and 10 days after the new government was sworn in, changed the character of the inconclusive response letter from a possible acceptance by the Environment of some or all of the recommendations, to a likelihood or probability that they had decided not to follow the recommendations.

[31] I disagree with the argument of counsel for the respondent that discoverability does not apply in this case because s. 59(3) is clear and explicit that the 30-day time limit for written notice begins to run from receipt of the decision of the public body (in this case, Environment). The discoverability issue is what constitutes a decision under s. 58 and when the appellant had knowledge of that decision. As described in *Peixeiro v*

Haberman, [1997] SCR 549 at 564, quoting from *Fehr v Jacob* (1993), 14 CCLT (2d) 200 (Man. C.A.), at 206:

> when time runs from "the accrual of a cause of action" or **from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies …**" [emphasis added].

[32] Here the event is the appellant's receipt of the decision under s. 58 from Environment. Without any evidence from the respondent, other than the inconclusive April 19 letter, of their decision not to follow the recommendations, I accept the appellant's statement that she did not have knowledge until on or about May 14 of the decision not to follow the recommendations. By then, sufficient time had passed without further communication as promised from Environment, for the appellant to consider their silence to be a refusal. Written notice of the appeal by June 4, 2021, and service by June 7, 2021, are therefore both within the 30-day time period of the decision not to follow the recommendations, based on the discoverability principle.

[33] Both parties agree and I find that s. 58(3), a deemed refusal of the IPC recommendations for failure of the public body to respond within 30 days of the IPC report, is not applicable here. The content of the April 19 letter can be reasonably interpreted to mean that some of the recommendations may have been accepted, or at least further clarity would be provided. The respondent called the letter notice under s. 58. This reference combined with the absence of notice of the appellant's right to appeal strongly suggests that the respondent did not consider this letter to be a decision not to follow the recommendations. In other words, no decision had been made, more time for consultation and discussion was requested, and it was possible that the

decision when made would not be a full refusal. Section 58(3) applies where there is no notice provided under s. 58(1)(b). The existence of this letter, even in its ambivalent state, without fulfilling all notice requirements, is still more than no notice.

[34] The purpose of the *ATIPP Act* is to provide for public accountability by public bodies such as Environment for decisions about access to public records, limited exceptions to that access, and an independent review of those decisions. Section 1(1) of the *ATIPP Act* states in part:

> The purposes of this Act are to make public bodies more accountable to the public… by:
>
> a) giving the public a right of access to records;
>
> …
>
> c) specifying limited exceptions to the rights of access;
>
> … and
>
> e) providing for an independent review of decisions made under this Act.

[35] Public body is defined in s. 3 of the *ATIPP Act* as each department, secretariat, or other similar executive agency of the Government of Yukon, in this case, Environment.

[36] If either s. 58(3) or s. 59(3) were to apply in these circumstances, the respondent would benefit from its unclear and confusing letter, assuming the Court did not grant an extension of time for notice. This would be contrary to the purpose of the statute, which is to increase the accountability of public bodies in their decisions about access to records and to allow for an independent review of those decisions. For the respondent

Yukon government to attempt to extinguish the appellant's appeal based on the facts here, is to frustrate the accountability and transparency purposes of its own legislation.

[37] It is ironic that the respondent argues that the appellant's right of appeal should be extinguished on the basis of a failure to comply with a statutory notice provision when their own letter, on which they rely for the commencement of the 30-day notice period for the appellant, failed to comply with another statutory provision in two ways: it was not a clear decision within 30 days of the IPC report and recommendations not to follow the recommendations and it did not contain notice to the appellant of her right to appeal under s. 59.

[38] Due to the failure of the respondent to provide clear and convincing evidence of their decision to refuse to accept the recommendations of the IPC, and my finding that s. 58(3) does not apply on these facts, I accept the appellant's interpretation of when a decision not to follow the recommendations was made, and find that the written notice required by s. 59(3) was given within the 30-day time period of that decision.

[39] There is no need for me to consider whether I have jurisdiction to extend time. There is also no need for me to consider whether the CEMA order applies in this case.

[40] This application is dismissed, with costs of the application to the appellant in any event of the cause, payable forthwith.

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DUNCAN C.J.