

SUPREME COURT OF YUKON

Citation: *Yukon Ombudsman v Yukon Human Rights Commission*,
2022 YKSC 16

Date: 20220411
S.C. No. 21-A0065
Registry: Whitehorse

BETWEEN:

YUKON OMBUDSMAN

APPLICANT

AND

YUKON HUMAN RIGHTS COMMISSION

RESPONDENT

Before Justice K. Wenckebach

Counsel for the Applicant

Joni Ellerton

Counsel for the Respondent

Alexander Dezan

REASONS FOR DECISION

INTRODUCTION

[1] The Yukon Ombudsman (the “Ombudsman”) received a complaint about the Yukon Human Rights Commission (the “Commission”). The question that arose was whether the Ombudsman has the jurisdiction to investigate the Commission. The parties discussed the issue, but were unable to agree. They have therefore brought a stated case application pursuant to Rule 35 of the *Rules of Court* of the Supreme Court of Yukon.

[2] The questions before the Court are:

- a. Is the Commission “appointed by an Act” in accordance with s. 2(a) of Schedule A of the *Ombudsman Act*, RSY 2002, c. 163 (the “Act”)?
- b. Is the Commission, in the discharge of its duties, a public officer or servant of the Yukon, pursuant to s. 2(b) of Schedule A?

BACKGROUND

[3] During the hearing, I questioned counsel for the Ombudsman about the breadth of the Ombudsman’s interpretation of s. 2(a) of Schedule A. Counsel asked to provide further written submissions on the issue and about the impact of the French version of the legislation on the interpretation of s. 2(b) of Schedule A. The Commission consented to further written submissions, and I permitted them to be filed.

[4] Counsel to the Commission says that paras. 12-24 and 67-73 of the Ombudsman’s additional submissions go beyond the questions at issue, and asks that I disregard those submissions.

[5] I partially agree with the Commission. In paras. 12-23 of her additional written submissions, the Ombudsman seems to be arguing that the Commission is part of the Department of Justice of the Government of Yukon pursuant to s. 1 of Schedule A. Not only does this not assist in resolving the questions posed to counsel, but the Ombudsman is raising a new ground, thus splitting her case. I will therefore not take into consideration paras. 12-23 of the Ombudsman’s additional written submissions.

[6] With regard to the other paragraphs, although they do not speak specifically about s. 2 of Schedule A, at times the information provided can help inform the parameters of what is included in s. 2 of Schedule A, and are therefore relevant.

ANALYSIS

[7] The *Act* gives the Ombudsman the authority to investigate complaints of maladministration by governmental actors, called “authorities” in the *Act* (s. 1). The criteria for identifying who is an authority is set out in Schedule A of the *Act* (“Schedule A”), with exceptions carved out in s. 1 of the *Act*.

[8] The issue in this application is whether the Commission is an authority pursuant to ss. 2(a) or 2(b) of Schedule A.

[9] As the issue in this application relates to statutory interpretation, the statement from the Supreme Court of Canada in *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21, adopted from Elmer Dreidger in *Construction of Statutes* (2nd ed. 1983), about the proper approach to interpreting legislation, is applicable:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

a. *Is the Commission “appointed by an Act” in accordance with s. 2(a) of Schedule A of the Ombudsman Act, RSY 2002, c. 163 (the “Act”)?*

[10] Section 2(a) of Schedule A states that an authority is:

A person, corporation, commission, board, bureau, or authority who is or the majority of the members of which are, or the majority of the board or board of directors of which are:

(a) appointed by an Act, Minister, or the Commissioner in Executive Council;

...

[11] The Ombudsman argues that, as the Commission is established through s. 17 of the *Human Rights Act*, RSY 2002, c. 116 (the “*HRA*”), it is “appointed by an *Act*” pursuant to s. 2(a) of Schedule A.

[12] Section 17 of the *HRA* states:

(1) The commission shall consist of a minimum of three and a maximum of five members who shall be appointed for a term of three years by the Legislative Assembly.

(2) A member of the commission may only be removed from office by resolution of the Legislative Assembly.

[13] The Ombudsman says that, although s. 17 of the *HRA* does not specifically establish the Commission, appointments to the Commission cannot be made if the Commission is not established. The *HRA* therefore creates and appoints the Commission through s. 17, and the Commission is thereby captured by s. 2(a) of Schedule A.

[14] The Ombudsman further submits that this interpretation is in accordance with a broad and purposive interpretation of the *Act*. It takes into consideration the purpose of the *Act*, which is to give the Ombudsman extensive authority to investigate government action.

[15] The Commission, on the other hand, says that it does not fall under s. 2(a) of Schedule A. It submits that s. 2(a) establishes three enumerated categories through which an individual or body is deemed to be an authority. The three enumerated categories are: appointment by *Act*, appointment by Minister, or appointment by the Commissioner in Executive Council.

[16] The Commission is not appointed by an Act, a Minister, or the Commissioner in Executive Council. It is, rather, appointed by the Legislative Assembly pursuant to s. 17 of the *HRA*. It is therefore not an authority under s. 2(a) of Schedule A.

[17] I agree with the Commission. My reasoning rests on my analysis of the word “appointed” and the phrase “Act, Minister, or the Commissioner in Executive Council” in s. 2(a) of Schedule A.

[18] The Ombudsman’s argument that the *HRA* appoints the Commission because the Commission is established under s. 17 is flawed. It is s. 16 that establishes the Commission and sets out its roles and responsibilities (s. 16 states, in part: “There shall be a Yukon Human Rights Commission accountable to the Legislative Assembly ...”). Section 17 addresses the composition of the Commission and the mechanism for the Commission’s appointment.

[19] The Ombudsman compounds this error when she suggests that s. 2(a) of Schedule A applies because the Commission is established by s. 17 of the *HRA*. In doing this, the Ombudsman blurs the distinction between the creation of a position and the appointment to it. However, the legislature does not collapse the ideas of creation and appointment into one.

[20] The legislature chose to use the word “appointed” in s. 2(a) of Schedule A. The ordinary meaning of appoint is to name an individual or body to a position. The legislation did not include words such as “established” or “created”. I therefore conclude that s. 2(a) of Schedule A is not concerned with the way a position has been created. Instead, the intent of s. 2(a) of Schedule A is to deem individuals or bodies as

authorities based on who has been given the power to make appointments to the position.

[21] The next question is whether the mechanism of appointment in s. 17 of the *HRA* is captured by s. 2(a) of Schedule A. This involves analyzing the phrase: "... by an Act, Minister, or Commissioner in Executive Council". This phrase constitutes a list of three mechanisms of appointment. It does not include words suggesting that the list is non-exhaustive, for example "such as" or "including". In addition, it does not use general descriptors, but rather delineates specific mechanisms of appointment, all of which are defined terms in the *Interpretation Act*, RSY 2002, c. 125 ("*Interpretation Act*"). It seems to me that the list is intended to be an exhaustive list that includes only those mechanisms of appointment that are specifically described in s. 2(a) of Schedule A. These factors support the conclusion that s. 2(a) does not apply to bodies, such as the Commission, which are appointed by the Legislative Assembly.

[22] The Ombudsman raises several objections to the interpretation that s. 2(a) of Schedule A does not apply to bodies appointed by the Legislative Assembly. She says that this interpretation does not take into consideration the purpose of the legislation, which is to give the Ombudsman a broad mandate to investigate governmental action. If the interpretation is accepted, then any act which provides that individuals or members are appointed by the Legislative Assembly would not be subject to the Ombudsman's oversight.

[23] While the *Act* is to be given a large and liberal interpretation, the Ombudsman is still a creature of statute. The extent of her authority is therefore defined by legislation.

An interpretation which goes beyond the intent of the legislation is as much an error as one which is too narrow.

[24] Moreover, it is not clear to me that excluding bodies that are appointed by the Legislative Assembly from the purview of the Ombudsman under s. 2(a) of Schedule A is particularly problematic. The Ombudsman has not identified whether there are other individuals or bodies that are appointed by the Legislative Assembly. I therefore have no information that interpreting s. 2(a) to exclude those who are appointed by Legislative Assembly would leave large numbers of governmental entities without oversight.

[25] As well, while the Ombudsman plays an important role in holding government to account, there are other ways of ensuring that government acts responsibly. Thus, for instance, the Commission is required to report to the Legislative Assembly on a yearly basis. Simply because individuals or bodies appointed by Legislative Assembly are not overseen by the Ombudsman does not necessarily mean that they do not have oversight.

[26] The Ombudsman also says s. 1 of the *Act* supports her argument that the Commission is an authority under s. 2(a) of Schedule A.

[27] Section 1 of the *Act*, the definitions section, states in part:

“authority” means an authority set out in Schedule A and includes members and employees of the authority but does not include

- (a) a corporation of which the controlling share capital is owned by a person other than the Government of the Yukon or an agency of the Government of the Yukon, or
- (b) the Legislative Assembly Office or offices of the members of the Legislative Assembly, or

- (c) the Chief Electoral Officer and election officers acting under the *Elections Act*, or
- (d) a court established by an enactment;

[28] The Ombudsman argues that if the legislation intended to exclude bodies appointed by the Legislative Assembly, it would have included them in the exceptions listed under s. 1.

[29] However, s. 1 of the *Act* excludes certain individuals or bodies from being deemed authorities when they would otherwise be captured by Schedule A. If the body or individual does not fall under Schedule A, it need not be exempted under s. 1 of the *Act*. Thus, if the Commission is not deemed an authority under Schedule A, there is no need to exclude it under s. 1.

[30] Finally, the Ombudsman relies on a statement made in *Ombudsman Act (Re)* (1974), 46 DLR (3d) 452 (SKQB), in support of her submission. In *Ombudsman Act (Re)* the court stated at para. 9:

A reading of the whole Act convinces me that the legislators intended the Ombudsman to have the power to investigate certain administrative decisions emanating from only those boards, tribunals, commissions, agencies, departments and other public bodies which owe their existence, either ultimate or immediate, to some Act passed by the provincial Legislature or to an order of the Lieutenant Governor in Council, and only those whose members are exercising or purporting to exercise powers conferred upon them by some Act passed by the provincial Legislature. ...

[31] The Ombudsman says that the Commission owes its existence, either ultimate or immediate, to an act passed by the legislature, and therefore falls under s. 2(a) of Schedule A.

[32] The paragraph from *Ombudsman Act (Re)* provides a broad proposition about the purpose of the *Ombudsman Act* of Saskatchewan generally, and is not about the interpretation of the provision in question. It is therefore not of assistance.

[33] I therefore conclude that the Commission is not an authority under s. 2(a) of Schedule A.

b. *Is the Commission, in the discharge of its duties, a public officer or servant of the Yukon, pursuant to s. 2(b) of Schedule A?*

[34] Section 2(b) of Schedule A states that an authority includes:

2 A person, corporation, commission, board, bureau, or authority who is or the majority of the members of which are, or the majority of the board or board of directors of which are

...

(b) in the discharge of their duties, public officers or servants of the Yukon; or ...

[35] The Ombudsman states that the Commission is both a servant and a public officer. The Commission submits that it is neither a servant of the Yukon nor a public officer.

Servants

[36] The Ombudsman argues that the Commission is a servant pursuant to s. 2(b) of Schedule A. She says that servants are engaged in the public service. “Public service”, in turn, according to *Black’s Law Dictionary* (9th ed. 2009), means “... any work that serves the public good ...”. As the Commission acts in the public good, it is engaged in public service and is therefore an authority pursuant to s. 2(b) of Schedule A.

[37] The Commission’s position, on the other hand, is that “servants” should be defined as members of the public service of the Government of Yukon. The

Commission members are not members of the public service of the Government of Yukon and are therefore not servants under s. 2(b) of Schedule A.

[38] The Commission argues that the term at issue is not simply the word servant, but the phrase in its entirety, “servants of the Yukon”.

[39] It also says that “servants of the Yukon” should be interpreted in light of the French version of s. 2(b) of Schedule A and in light of the definition of “public service” in the *Public Service Act*, RSY 2002, c. 183.

[40] The French version of s. 2(b) states that an authority includes individuals or bodies who are:

dans l’exercice de leurs attributions, fonctionnaires publics
ou employés du gouvernement du Yukon; [emphasis added]

[41] The Commission notes that the French version uses the word “employés”, rather than “servants”, and “gouvernement du Yukon” instead of “of the Yukon”. Interpreted in light of the French version, “servants of the Yukon” means public servants in the Government of Yukon.

[42] The Commission also relies on the definition of “public service” in the *Public Service Act* to support its position that “servants” or “public servants” found in s. 2(b) of Schedule A means a member of the public service.

[43] In my opinion, members of the Commission are not servants pursuant to s. 2(b) of Schedule A. My conclusion is based on my interpretation of the term “of the Yukon”, and the word “servants”.

[44] I agree with the Commission that it is necessary to consider the meaning of “of the Yukon”, as it modifies the word “servants”, and therefore helps to determine how the word “servants” should be interpreted.

[45] The meaning of the term “of the Yukon” is not simple to determine, as principles of statutory interpretation and the context of the provision and legislation can lead to two different meanings. On the one hand, there are good arguments to be made that “of the Yukon” means the geographical area of the territory.

[46] This argument is based on the *Interpretation Act*, as amended. The *Interpretation Act* contains defined terms that have application to all Territorial legislation. One of these defined terms is “Yukon”. Under the *Interpretation Act*, “Yukon” or “the Yukon” means: “... the Yukon Territory as defined in the *Yukon Act (Canada)*” (s. 21). The *Yukon Act*, S.C. 2002, c. 7, in turn, defines the Yukon by its geographical area (s. 2). “The Yukon” as a defined term according the *Interpretation Act*, therefore, means the physical area that is called Yukon.

[47] In addition, the context of the provision lends itself to this interpretation. Section 2(c) of Schedule A states that an authority is a body or person who is “... responsible to the *Government* of the Yukon” [emphasis added]. Thus, s. 2(c) uses different language than s. 2(b) and includes the word “Government”. Pursuant to the presumption that, when the legislature uses different words in relation to the same subject, it intends the words to have different meanings, the choice to exclude the word “Government” from the phrase “of the Yukon” in s. 2(b) has significance. Thus, if the presumption is applicable, “the Yukon” in s. 2(b) means something different than “Government of the Yukon”. This strengthens the argument that “the Yukon” means the geographical location.

[48] The definition in the *Interpretation Act* is not simply a tool of statutory interpretation, but is a legislated definition. As a result, that should be definitive in

determining the meaning of “of the Yukon”. Despite this, I do not believe that “of the Yukon” in s. 2(b) of Schedule A means the physical area of the Yukon in this context.

[49] I come to this conclusion, firstly, because this interpretation would lead to redundancy. The Ombudsman’s jurisdiction is limited to the territory of the Yukon. It is unnecessary to define a servant based on the location in which their employment is found.

[50] Moreover, as the Commission points out, the French version of the legislation says “du gouvernement du Yukon”. The French version therefore specifies that “du Yukon” does not simply mean the physical area of the Yukon, but means the “Government of the Yukon”. On the basis of these considerations, I conclude that “the Yukon” means the Government of Yukon.

[51] With regard to the meaning of “servants” the ordinary definition of the word in this context is of someone paid for work done for another. The French version uses the word “employés”, which also generally means an employee. This supports the use of the ordinary definition.

[52] The phrase “of the [Government of] Yukon” further helps specify that the servant is paid for work done for the Government of Yukon.

[53] I am not prepared to conclude, as the Commission suggests, that the word “servants” only applies to the public servants of the Government of Yukon rather than more broadly to other employment relationships with the Government of Yukon. Whether there exist other employment relationships with the Government of Yukon, and whether they would be covered by s. 2(b) of Schedule A, was not canvassed in argument. For this application, however, I need not consider the exact definition of

“servants”. It is sufficient to conclude that the phrase applies to those who work for pay for the Government of Yukon.

[54] In this case, members of the Commission do not work for pay for the Government of Yukon. Instead, they are members of a body that is independent from the Government of Yukon. They are therefore not servants pursuant to s. 2(b) of Schedule A.

Public Officer

[55] The Ombudsman submits that, not only is the Commission a public servant, but it is also a public officer.

[56] The Ombudsman argues that the definition of “public officer” in the *Interpretation Act* applies to s. 2(b) of Schedule A. The definition of “public officer” in the *Interpretation Act* states:

“Public officer” includes any person in the public service of the Yukon

(a) who is authorized to do or enforce the doing of any act or thing or to exercise any power, or

(b) on whom any duty is imposed by or under any public Act;

[57] The Ombudsman notes that the *HRA* requires the Commission to investigate when a human rights complaint has been filed with it. The *HRA* imposes a duty on the Commission, and is therefore a public officer in accordance with s. 2(b) of Schedule A.

[58] The Commission also relies on the definition of “public officer” in the *Interpretation Act* in its argument, but it does not agree with the Ombudsman’s analysis. Rather, it states that public officer means “public servants.”

[59] The Commission argues that, pursuant to the *Interpretation Act*, a public officer is a member of the public service. As the Commission is not a member of the public service, it does not fall under s. 2(b) of Schedule A.

[60] The Commission acknowledges that the *Interpretation Act* limits the applicability of this definition to the *Interpretation Act* itself. However, the Commission says that it is appropriate in this case to rely on definitions from different pieces of legislation because the question in issue is a jurisdictional question and the scope of the term is unclear (*Canada (Attorney General) v Public Service Alliance of Canada*, [1991] 1 SCR 614).

[61] The Commission furthermore argues that the French version of the legislation assists in interpreting the meaning of “public officer”. First, the French version uses “fonctionnaires”, which means: “state employee *ou* official ... civil servant.” (*Collins Le Robert French-English/English-French Dictionary* (HarperCollins Publisher Toronto, 2016). Second, “du gouvernement du Yukon” also suggests that a fonctionnaire is a fonctionnaire of the Government of Yukon. The effect of the French version is to narrow the definition of public officer. Thus, “public officer” should be interpreted as a public servant in the Government of Yukon.

[62] The Commission also says that *Yukon Medical Council v Privacy Commissioner*, 2001 YKSC 531 (“*Yukon Medical Council*”), provides the appropriate test for determining if the Commission is an authority pursuant to s. 2(b) of Schedule A.

[63] In *Yukon Medical Council*, the court was asked to determine whether the Yukon Medical Council was part of government and therefore subject to the disclosure regime under the *Access to Information and Protection of Privacy Act*, SY 1995, c 1 (the “1995 ATIPP”), which was then in force. The court made its decision by applying a test that

assessed the degree of control or influence the government had over the Yukon Medical Council. The Commission says that *Yukon Medical Council* is analogous, and the nature and degree of control test should be applied here, as well. Applying the degree of control or influence test to the facts here leads to the conclusion that the Commission is not an authority pursuant to s. 2(b) of Schedule A.

[64] I do not believe that “public officers” should be interpreted to mean members of the public service of the Government of Yukon. I also conclude that Commission members are public officers.

[65] The Ombudsman’s and the Commission’s reliance on the interpretation of “public officer” in the *Interpretation Act* is misplaced. Under the *Interpretation Act* public officers are a subset of the public service. They are provided a unique identifier in the *Interpretation Act* because they have specific roles and employment relationships with the Government of Yukon that other public servants do not have. The context and reason for including the term “public officer” is different in the *Interpretation Act* than the *Act*. The *Interpretation Act*’s definition should not be applied to the *Act*.

[66] As the Ombudsman’s arguments about the meaning of “public officer” rests on the definition in the *Interpretation Act*, I conclude that the Ombudsman’s arguments do not assist in determining the meaning of “public officer”.

[67] At the same time, the Commission’s arguments are not persuasive. *Yukon Medical Council* is not analogous. The language used in the 1995 *ATIPP* is different than the *Act*. Under the 1995 *ATIPP*, a body was deemed to be part of government if it was “an agent of the government” (s. 3, definition “public body”). Therefore, the question

before the court in *Yukon Medical Council* was whether the Yukon Medical Council was an agent of the government.

[68] The court identified that “agent of the government” is a term found in the common law, and that the test for determining whether an entity is an agent of the government is the degree of control or influence test. The court decided that the test was equally applicable to the case before it (at paras. 30-36). Here, however, the *Act* does not use the language of agency. Therefore, the common law test for determining agency does not apply.

[69] Moreover, the Commission’s interpretation is that both “public officer” and “servants of the Yukon” mean “public servants of the Government of Yukon”. This interpretation, however, would render “public officer” redundant. Thus, the phrase “public officer” must mean something other than someone who works for pay for the Government of Yukon.

[70] In my opinion, the common law and the context of the provision provide the keys for interpreting the term “public officer”.

[71] “Public officer” is a defined term in the common law and means: “Every one who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise ...” (*McLaughlin v Halifax-Dartmouth Bridge Commission*, 1993 NSCA 202 at 9).

[72] The purpose of the *Act* supports this definition. One of the roles of the Ombudsman is to oversee those who are responsible for the implementation of legislation (*Re Alberta Ombudsman Act (1970)*, 10 DLR (3d) 47 at para. 18). The common law definition of public officers, which captures those who implement

legislation even though not employed by government, is consistent with the intention of the legislation to grant the Ombudsman broad authority to investigate the government.

[73] Moreover, contrary to the Commission's submissions, the French version is consistent with a broad interpretation of the phrase. The Commission submits that the phrase "du gouvernement du Yukon" modifies the phrase "fonctionnaires publics". However, "du gouvernement du Yukon" may modify both "fonctionnaires publics" and "employés" or it may modify "employés" only. It is not clear on a plain reading of the provision what the legislation's intention is (*McLaughlin* at 7 (considering the same phrase in relation to different legislation)). Given the context of the legislation and the extensive powers granted to the Ombudsman, adding the modifier would unduly narrow the meaning of the term.

[74] As the dictionary definition of "fonctionnaire" means public or civil servant, the French version does support the Commission's interpretation to an extent. However, dictionary definitions should, at best, be used as a starting point or an aid to interpretation: they are not determinative (*TransCanada Pipeline Ltd v Manitoba*, 2013 MBCA 88 at para. 53).

[75] Additionally, here the legislation refers not simply to a "fonctionnaires", but rather to "fonctionnaires publics". The inclusion of the word "publics" also suggests that the term means something other than public servants.

[76] The phrase "fonctionnaires publics" is not easy to define. Given the intent of the legislation, and given that a narrow interpretation of the term would render it redundant, a broad interpretation is preferable.

[77] In her arguments on this issue, the Ombudsman suggests that the English version should be preferred because in the Yukon, legislation is written in English and translated into French. This submission, however, is contrary to the explicit statement in the *Languages Act*, RSY 2002, c 133, that English and French versions of legislation are “equally authoritative” (s. 4). It disregards the principles emanating from the Supreme Court of Canada about how English and French versions of legislation are to be read together (*Re Manitoba Language Rights*, [1985] 1 SCR 721 at 778). It furthermore dismisses the role of the French language in the Yukon as set out in the *Languages Act* (s.1; *Kilrich Industries Ltd v Halotier*, 2007 YKCA 12 at paras. 47-48). It is surprising that the Ombudsman, given her role, would put forward such arguments about quasi-Constitutional legislation.

[78] I therefore conclude that a public officer is anyone who is appointed to discharge a public duty for recompense of any kind and who works in the public interest. It includes those who are responsible for implementing Government of Yukon policy and/or legislation.

[79] Applying the principles to the case at bar, the Commission’s purpose and responsibilities are set out in the *HRA*. The nature of its work is to respond to human rights complaints and to promote human rights, cultural diversity, and education and research in human rights. The legislation which the Commission implements is “... the law of the people” (*Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para. 33). The Commission is a public officer under s. 2(b) of Schedule A, therefore, because it is implementing the *HRA* and acting in the public interest.

CONCLUSION

[80] It would be appropriate to grant a declaration in this instance, but that is not what the parties sought. Therefore, I will simply provide my opinion.

- (a) The Yukon Human Rights Commission is not an authority pursuant to s. 2(a) of Schedule A of the *Act*; and
- (b) The Yukon Human Rights Commission is a public officer pursuant to s. 2(b) of Schedule A of the *Act*.

WENCKEBACH J.