SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Information and Privacy Commissioner*, 2025 YKSC 75

Date: 20251121
S.C. No. 25-A0122
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON (DEPARTMENT OF JUSTICE),
IAN DAVIS, and MICHAEL LAFFIN

PETITIONERS

AND

INFORMATION AND PRIVACY COMMISSIONER

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioners — I.H. Fraser and Simone Dumbleton

Counsel for the Respondent — Amy Steele and Shaunagh Stikeman

REASONS FOR DECISION

Overview

[1] This is an application by the Yukon Information and Privacy Commissioner (IPC or commissioner) to strike the petition of the Government of Yukon and two individual employees for an order setting aside the summonses issued by the IPC to the two government employees requiring them to appear before and provide sworn testimony to the IPC during an investigation.

[2] The IPC argues the petition should be struck because it is not a reasonable claim and has no reasonable prospect of success; and a petition is the wrong legal mechanism to set aside a lawfully issued summons.

[3] The Government of Yukon responds that the two summonsed employees have no information relevant to the investigation that has not already been provided to the IPC. Whether the matter comes before the Court by petition or by application for judicial review, as suggested by the IPC, the same question is to be answered. If the form is incorrect, it is an irregularity that can be fixed and does not warrant a successful application to strike.

[4] For the following reasons, I deny the IPC's application to strike. It does not meet the high threshold required by Rule 20(26)(a) of the Supreme Court of Yukon *Rules of Court* (the *Rules*). The petition has a reasonable chance of success, and its merits should be heard. The format of a petition is appropriate, given the implicit importation of the common law and the *Rules* into the statutory powers of the IPC at issue. This Court has jurisdiction to hear the petition on the basis of its inherent jurisdiction, including supervisory jurisdiction over administrative tribunals.

Background

[5] The petition sets out the following facts:

I) On 8 July 2025, the IPC delivered a Notice of Formal Investigation to the Minister of Justice.

II) On 1 August 2025, the Department of Justice responded by delivering two statutory declarations (one by Mr. Laffin and one by Ms. Russell, both Yukon government employees) and a written submission.

III) On 15 August 2025 Mr. Hjorth (counsel for the IPC) issued summonses to Mr. Davis and Mr. Laffin (Yukon government employees) to appear before the IPC and testify as witnesses.

IV) Neither Mr. Davis nor Mr. Laffin have any information relevant to this investigation that has not already been provided to the IPC.

[6] The IPC commenced the investigation on its own motion, that is, without a complainant, into the access to and release of video footage from the Whitehorse Correctional Centre.

[7] The relevant purpose of the *Access to Information and Protection of Privacy Act*, SY 2018, c 9 (the *Act*) is found at s. 6(e):

> to provide the public with a right to access information held by public bodies (subject to specific exceptions) in order to ensure government transparency and to facilitate the public's ability to meaningfully participate in the democratic process

[8] S. 95(1)(a) and (b) of the *Act* provide the IPC with the "same power as is vested in the Court" to summon a person to appear before the commissioner, and to compel them to give oral or written testimony on oath during the conduct of an IPC investigation.

Issues

[9] The following are the issues in this application:

a) should this Court exercise discretion to strike the petition to set aside the IPC summonses to two Yukon government employees because it discloses no reasonable claim;

b) should the petition be struck on the basis that a petition is the wrong legal mechanism, and it should have been brought as an application for judicial review; and

c) does the court have jurisdiction to hear the merits of the petition to set aside the summonses.

Legal test for application to strike

[10] Rule 20(26)(a) states:

> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that:
>
> > (a) it discloses no reasonable claim or defence as the case may be.

No evidence is permitted on an application under this rule.

[11] The applicable test for striking a claim was set out by the Supreme Court of Canada in *R v Imperial Tobacco Canada Ltd*., 2011 SCC 42:

> A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial (at para. 17, citations omitted).
>
> …
>
> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial (at para. 19).
>
> ….

> This promotes two goods — efficiency in the conduct of the litigation and correct results (at para. 20).

In determining whether a claim should proceed:

> the approach must be generous and err on the side of permitting a novel but arguable claim to proceed…
> (at para. 21)

Analysis

a) Does the petition to set aside the summonses disclose a reasonable claim?

[12] The petitioners say the summonses are unnecessary because the employees have nothing further of relevance to add to the information they have already provided to the IPC. Consequently, enforcement of the summons would be vexatious and an abuse of process.

[13] The IPC say that as investigators, given the statutory powers to summons people and compel sworn testimony the way a court can, and to decide matters of fact and law in the course of the investigation, only they can determine relevance of testimony and information. To protect the integrity of the investigation, they cannot disclose all of its aspects to the witnesses to justify the relevance of the information sought. They say this exclusive right of the IPC to determine relevance in an investigation is necessary to preserve the integrity and effectiveness of investigations. If persons connected to the object of the investigation were able to refuse to be bound by a summons from the IPC based on their own determination of relevance, the ability of the IPC to fulfill the *Act*'s purpose of allowing the public the right of access to information held by public bodies may be compromised. The IPC says the petition's assertion that the summonses are unnecessary is speculative, without factual foundation and patently ridiculous and

therefore meets the test for an application to strike because it has no reasonable chance of success.

[14] The IPC further argues there can be no abuse of process for issuing the summonses because this is not a rare situation of unfairness that reaches the point of being contrary to the interests of justice, as contemplated in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (*Blencoe*) at para 120.

[15] It is instructive to review the law applicable to the court's powers to issue subpoenas because s. 95 of the *Act* bestows on the IPC in the conduct of an investigation the same powers as are vested in the court to summon a person to appear and give sworn oral or written testimony.

[16] A subpoena, referenced in the common law and the *Rules*, is a summons under the authority of the court to a person to appear and testify before the court and or produce documents in accordance with the terms stated in the subpoena (*Carroll (Re); Kent v Kent*, 2010 NLCA 53 at para. 57). Failure to appear could lead to civil arrest and a contempt charge. It is an administrative act flowing from a simple request from one of the parties to the proceeding. There is no pre-screening by the court as to its appropriateness (at para 58). The court forms, procedure and authority are used by the party in civil proceedings, but one of the parties, not the court, decides to issue the subpoena.

[17] The jurisprudence is clear that the court has inherent jurisdiction to set aside or quash subpoenas based on the common law and specifically the court's ability to control and prevent abuses of its own processes (*Raymond v Halifax Regional Municipality*, 2020 NSSC 316 (*Raymond*) at para. 13 – quoting from *Howatt v Chandler*,

2016 NSSC 2016 (*Howatt*) at paras. 16-17). Once an application to quash a subpoena is brought, the evidentiary burden rests with "the party who requested issuance of the subpoena to establish a link of relevance between the proposed witness and an issue in the proceeding" (*Raymond* at para. 13 quoting *Howatt* at para. 16). If relevance is shown, the subpoena may be issued on a *prima facie* basis. The burden then shifts to the person seeking to quash the subpoena to show good reason to do so, such as oppressiveness or abuse of power (*Raymond* at para. 14, quoting *Bowater Mersey Paper Co. v Nova Scotia (Minister of Finance)*, [1991] 111 NSR (2d) 425 (NS SC) at para. 10).

[18] To establish relevance, it is not enough for the party issuing the subpoena to claim the witness 'may have' material evidence; instead, the party must establish 'it is likely' that the witness will have material evidence on an issue. The purpose of this threshold is to prevent fishing expeditions through the issuance of multiple and unnecessary subpoenas (*Raymond* at para. 16; see also *Paradis Honey Ltd. v Canada (Agriculture and Agri-food)*, 2023 FC 1415 at para 20, quoting *Zündel, Re*, at para. 8).

[19] This common law rule is reflected in the *Rules*. Rule 42(44) allows for an application to be made to court by the person served with a subpoena for it to be set aside because compliance with it is unnecessary or will cause a hardship to the person, and the court may make any order it considers just, including postponing a trial.

[20] The IPC does not have inherent jurisdiction; its powers are derived from its originating statute. Section 95 of the *Act* specifically states (a) "[the commissioner] has the same power as is vested in the Court to summon a person to appear before the commissioner [and]…(b) to compel a person summoned under paragraph (a) to give

oral or written testimony on oath." The powers of the IPC are therefore circumscribed by the powers and constraints provided to a court. The IPC cannot have greater unconstrained powers than a court. The Supreme Court of Canada in *Canadian Pacific Air Lines Ltd v Canadian Air Line Pilots Association*, [1993] 3 SCR 724 (*Canadian Pacific Air Lines Ltd)* at 737-738 addressed this point. The issue in that case was whether the statutory power of the Canada Labour Relations Board, s. 118(a) of the *Canada Labour Code*, RSC 1970, c L-1, to require that certain persons attend before them and to compel them to give evidence, oral or written, and to produce documents could occur in an administrative context or only in a hearing context. In finding that this power of compulsion could only be exercised in the context of a formal hearing, the Court held s. 118(a) was an exceptional provision which grants a body a significant power, and the nature of the act of summonsing witnesses to provide sworn testimony was judicial. Special attention must be given for this reason alone to any limits which are placed on the exercise of that power by the words of the provision granting it (*Canadian Pacific Air Lines Ltd* at 737-738). Safeguards normally associated with judicial processes would be appropriate to apply to the ability to summons. The main safeguard was to ensure the individual being summoned was able to present any objections adequately, consistent with ensuring a fair hearing (*Canadian Pacific Air Lines Ltd* at 742-743).

[21] In this case, the wording in other subsections of s. 95 of the *Act* reinforces the interpretation that the constraints on court powers apply to the IPC when exercising these powers. The statutory provisions granting powers to the IPC that do not have an equivalent in a court process, contain specific constraints of relevance (see s. 95(1)(g)

and (h)[1]). This deliberate choice of wording by the legislature supports the interpretation that the s. 95 powers that are the same as those vested in a court (see s. 95(1)(a), (b), (c), (d)) are likewise subject to the same constraints as the court.

[22] A court may hear and rule on objections of a summonsed person on the basis of relevance, hardship, privilege, or oppression. This same process must be available here. While it may be challenging for a court to determine an objection on these bases in the investigatory context instead of a hearing context because of the absence of pleadings defining the issues and the need for the tribunal to keep the parameters of their investigation confidential to allow for a proper investigation, the ability to object must be available. The importation of the powers vested in a court into the *Act* also allows for the relevant *Rules* to be applied.

[23] The IPC's argument that the summoned employees or their representative are not able to make any representations on relevance or necessity of the information held by the summonsed witnesses is not supported by the jurisprudence. Accepting the facts in the petition as true, as the jurisprudence directs, the petition has a reasonable chance of success.

[24] There is no need to consider at this time the argument of the IPC that the issuance of the summons is not an abuse of process because it is not a rare situation of unfairness, contrary to the interests of justice, as set out in *Blencoe*, as that determination is for the hearing on the merits. At this stage, the question for

[1] (1) In conducting an investigation, the commissioner

(g) may conduct interviews with the head or an employee of a public body that the commissioner reasonably believes may know or hold information relevant to an investigation;

(h) may receive and consider evidence of any other type that is relevant to the investigation, whether or not the evidence would be admissible in a proceeding before a court;

determination is whether there is a reasonable chance of success of the petition to set aside the summons, accepting as true all the facts in the petition. In this case the petition is not unreasonable. Whether the threshold set out in *Blencoe* for abuse of process is met is for the merits determination.

b) Should the petition be struck because it is the wrong legal mechanism to challenge the summons?

[25] The Yukon government says the substantive argument will be the same, whether it is brought through a petition or a judicial review. The question is whether the issuance of the summonses was reasonable in all of the circumstances. If the challenge to the summonses is improperly brought as a petition instead of an application for judicial review, it is a procedural irregularity that may be addressed under Rule 2 of the *Rules*. Specifically Rule 2(3) provides that a proceeding shall not be wholly set aside or stayed on the ground that the originating process used was incorrect.

[26] The Yukon government further notes the complexity of a judicial review in this context, based on the developments as the investigation and this matter progressed. The initial issuance of the summons may have been appropriate and therefore not subject to challenge; once the affidavits of the employees in support of the petition were provided, however, and the summonses were not withdrawn, there was an arguable additional basis to challenge the summonses. This makes the determination of which decision is being reviewed, and what evidence is to be considered, unclear and complex.

[27] The IPC argues that the proper mechanism for this challenge is a judicial review. The decision by the IPC to issue summonses was made under s. 95 of the *Act*, which sets out a statutory administrative power. The proper recourse is a judicial review of that

administrative decision. The inquiry to be undertaken in a judicial review is different than that through a petition, due to the jurisprudence applicable to judicial reviews.

[28] The IPC argues further that the petition is an impermissible collateral attack on the obligation to comply with the summons and a pre-emptive attempt to avoid its legal enforcement, relying on a paragraph in the decision of *R v Consolidated Maybrun Mines Ltd.*, [1998] 1 SCR 706 (*Consolidated Maybrun*) which they say stands for the general proposition that a respondent cannot argue that an administrative order was unreasonable or unfounded to avoid its obligations.

[29] The IPC also says that if I determine the originating process should be an application for judicial review instead of a petition, this is a case where Rule 1(14) should apply to prevent the application of Rule 2(3). Rule 1(14) allows the Court to order that any provision of the *Rules* not apply, in order to ensure that the rules do not become instruments of injustice. In this case, the IPC says Rule 2(3) should not be interpreted to prevent the court from striking the petition because it is brought in the wrong form. If Rule 2(3) were used, wholesale amendments would be required; it would be a cumbersome process, requiring more than a minor procedural adjustment.

[30] A petition may be brought under Rule 10 where:

> …
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> (b) the sole or principal question at issue is alleged to be one of interpretation of a statute or regulation, will, deed, oral or written contract, or other document; or
>
> (c) the petitioner is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;
>
> …

[31] In this case, the sole question is whether the summons should be set aside, which involves an interpretation of s. 95 and other related provisions of the *Act.* There is no person against whom relief is sought - it is the IPC as an institution that has initiated the investigation and the summonses. A petition is therefore an available process to determine this matter.

[32] The IPC's issuance of summonses is not amenable to a judicial review for several reasons. First, as noted by *Canadian Pacific Airlines Ltd*, the power to summon is of judicial character. Although this characterization accompanied the Court's determination in that case that the power could only be exercised in the context of a hearing, instead of in an administrative context such as the one here, I find it applicable because the *Act* specifically imports the powers vested in the court into the *Act*. This makes a judicial review inappropriate. Second, in a judicial review, it may be difficult for the IPC to maintain confidentiality over the nature and purpose of the investigation due to the ability of a party to request the decision-maker to disclose the record of the proceeding leading to the decision under Rule 54(18). By contrast, in responding to a petition, the IPC can decide the scope and breadth of the disclosure related to its investigation in explaining the reasons for the summons. Third, I agree with counsel for the Yukon government that the underlying argument is the same whether the originating process is an application for judicial review or a petition, so that in the end the chosen process may have little impact. Both processes ultimately require a determination of whether it is reasonable in the circumstances to require compliance with the summonses. The process originating with a petition is generally simpler for a question such as this than a judicial review process. Finally, the determination of the outcome

through the application of the shifting burden as provided at common law and Rule 42(44) is more conducive to a petition process than to a judicial review.

[33] Given these reasons, I find it unnecessary to address the Yukon government's additional argument about the complexity of which decision is to be reviewed if it were an application for judicial review.

[34] The petition is not a collateral attack on the obligation to comply with the summons. It arises legitimately from the necessary constraints on the IPC as they exercise powers that are the same as a court's powers. Further, the IPC's reliance on the case of *Consolidated Maybrun* is misplaced. That case was about whether the appellant should have exercised his right of appeal to the Environmental Appeal Board after receiving an administrative clean-up order under the *Environmental Protection Act,* rather than raise his objection to the administrative order before the Court at his hearing into the charge of failure to comply with the order. The Supreme Court of Canada held among other things that a person charged with failing to comply with an order may not collaterally attack the validity of that order after they have failed to avail themselves of the appeal mechanisms provided by statute. The facts of this case are different from those in *Consolidated Maybrun* and the paragraph relied on by the IPC is not a general proposition but circumscribed by the above factual circumstances.

[35] The petition is an appropriate originating process for this case.

c) Does the Court have jurisdiction to determine the Yukon government's petition?

[36] The Yukon government raised this jurisdictional issue. I find that the Court does have jurisdiction to determine the underlying petition.

[37] The IPC did not dispute that this Court has jurisdiction to decide the matter if they were unsuccessful in the application to strike, as evidenced by their position that this should be an application for judicial review, not a petition. However, the IPC also referenced several cases that provide the court should not intervene except sparingly or as a last resort in an administrative tribunal's process (*Raymond* at para. 35), suggesting that this Court should not intervene here.

[38] As a superior court of record, this Court has wide jurisdiction and remedial power. The *Supreme Court Act,* RSY 2002, c 211 confirms this in s. 4(1), "The Court is a superior court of record having full civil and criminal jurisdiction throughout the Yukon", and s. 4(3), "A judge of the Court shall, throughout the Yukon, have and may exercise all the powers, duties, and functions that are vested in the Court." Further, superior courts have inherent jurisdiction, broadly defined as:

> "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so" I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23 (Jacob) at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). (*Caron* at para. 24)

[39] The powers have also been described as "essential to the administration of justice and the maintenance of the rule of law" (*Caron* at para. 24 quoting *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 (SCC), at para. 38).

[40] Superior courts have a supervisory jurisdiction over inferior courts and tribunals. Its exercise can include or encompass offering assistance to those courts or administrative tribunals, such as where tribunals may be powerless to act and it is

essential for a court to intervene in order to avoid an injustice (*Caron* at para. 30). Courts have clearly stated that superior courts may not "meddle" or interfere in the work of the tribunals.

[41] In this case, there is no mechanism other than the court process to determine objections to the summonses. The IPC is not an administrative tribunal that conducts hearings. Their power to summons differs from the process used for issuing subpoenas in a court process because there, the court does not issue the subpoena, one of the parties to the litigation does. When the subpoena is challenged, the court acts as a neutral arbiter in deciding the objection as it has had no role in the decision to issue it. In this case, the IPC cannot be a neutral arbiter in deciding the objection to the summons, because they decided to issue the summonses and are requiring compliance.

[42] In exercising its jurisdiction to determine the objection to the summons, the Court needs to do in the context of the purpose of the Act, and the role of the IPC. It must balance the important public interest and other purposes of the investigatory powers given to the IPC with the notion that all powers have constraints and safeguards, including the prevention of unlimited fishing expeditions, and of unnecessary hardship on the persons summonsed.

Conclusion

[43] The IPC's petition to strike is dismissed. The IPC have not met the test that it is plain and obvious the petition of the Yukon government and the two employees has no reasonable chance of success. The petition is an appropriate originating process in these circumstances. This Court has jurisdiction to determine the petition based on its

supervisory and inherent jurisdiction, and the court process is a practical and just mechanism to resolve the issue.

DUNCAN C.J.