

COURT OF APPEAL OF YUKON

Citation: *Yukon (Government of) v Information and
Privacy Commissioner*,
2026 YKCA 14

Date: 20261009
Docket: 26-YU945

Between:

**Government of Yukon (Department of Justice),
Ian Davis, and Michael Laffin**

Appellants
(Petitioners)

And

Information and Privacy Commissioner

Respondent
(Respondent)

- and -

Between:

**Government of Yukon (Department of Justice),
Kerri Kemp, Drew MacNeil, and Amanda Russell**

Appellants
(Petitioners)

And

Information and Privacy Commissioner

Respondent
(Respondent)

Before: The Honourable Mr. Justice Riley
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated
July 7, 2026 (*Yukon (Government of) v Information and Privacy Commissioner*,
2026 YKSC 50, Whitehorse Dockets 25-A0122 and 25-AP015).

Oral Reasons for Judgment

Counsel for the Appellants
(via videoconference):

I.H. Fraser
S. Dumbleton

Counsel for the Respondent
(via videoconference):

K.R. Phipps
S. Stikeman
E. Chan

Place and Date of Hearing:

Whitehorse, Yukon
October 2, 2026

Place and Date of Judgment:

Whitehorse, Yukon
October 9, 2026

Summary:

The appellants apply to stay five subpoenas issued by the Information and Privacy Commissioner pending an appeal from the dismissal of an application to quash the subpoenas as exceeding the Commissioner's statutory authority.

Held: Application dismissed. The balance of convenience does not favour the applicants. The prejudice to the public from further delaying the Commissioner's investigation outweighs any prejudice to the applicants if the subpoenas are ultimately found to be unlawful.

RILEY J.A.:**Introduction**

[1] This is an application by the Government of Yukon (Department of Justice) ("Yukon") and several individual appellants for a stay pending appeal. Yukon appeals a decision of the Chief Justice of the Supreme Court of Yukon dismissing an application to quash subpoenas issued to the individual appellants and several other public officials by the Information and Privacy Commissioner ("IPC") in an investigation into the handling of information requests at the Whitehorse Correctional Centre. In addition to a stay, Yukon seeks an extension of time to appeal, having filed its notice of appeal one day late. The IPC consents to the extension of time but opposes the stay.

Background

[2] The IPC is a statutory body responsible for supervising the enforcement of access to information under Yukon's *Access to Information and Protection of Privacy Act*, SY 2018, c 9 [ATIPPA]. Under s 94, the commissioner may conduct an investigation in the absence of a complaint—a situation referred to by the parties as an "own-motion investigation"—in certain circumstances. Section 94(1) provides that the IPC may conduct an investigation of a matter that the commissioner reasonably believes could be the subject of a complaint, where the commissioner: (a) is satisfied that an investigation in the absence of a complaint is practicable and warranted, and (b) provides notice of the investigation under s 94(2) to the public body responsible for the matter to be investigated, and other appropriate parties.

[3] On 8 July 2025, the IPC gave notice of an own-motion investigation into the Yukon Department of Justice's response to an individual's request to access video surveillance information recorded while in custody at the Whitehorse Correctional Centre. Yukon had informed the individual who made the access request that no records were found because the recordings were stored on servers belonging to the RCMP, a federal entity not subject to the *ATIPPA*.

[4] On 1 August 2026, Yukon responded by delivering statutory declarations of relevant government personnel, supporting documents, and a written submission.

[5] The IPC issued subpoenas to two senior government personnel on 15 August 2025, and further subpoenas to three more government personnel on 16 September 2025. All five subpoenas sought information pertaining to, among other things, why Yukon said it did not have custody or control over the RCMP records, a position that the IPC considered to be contrary to the conclusion reached in an earlier, separate investigation following an *ATIPPA* complaint.

[6] On 21 August 2025 and 19 September 2025, Yukon petitioned to quash the subpoenas. Those petitions were eventually consolidated and heard by the Chief Justice on 2 April 2026.

Decision Below

[7] On 7 July 2026, the Chief Justice dismissed Yukon's petitions, in reasons indexed as *Yukon (Government of) v Information and Privacy Commissioner*, 2026 YKSC 50. It should be noted that the Chief Justice's reasons use the words subpoena and summons interchangeably: at para 7. Nothing turns on this.

[8] The Chief Justice reasoned that the common law test for setting aside subpoenas is modified where a statutory body is the issuer. Whereas the civil standard is "likely relevant" and the criminal standard is "strictly relevant", relevance for a statutory body is satisfied where there is a basis for believing that the information sought by the subpoenas is reasonably within the investigatory scope: at para 34. Thus, "[a]s long as the information sought is reasonably relevant, within the

scope of the investigation, and compliant with any statutory constraints on the power to summons, the test will be met”: at para 36.

[9] The Chief Justice went on to hold that: (i) the notice of investigation complied with the relevant provisions of *ATIPPA*, (ii) the summonses were “tied to the investigation”, and there was no “collateral purpose”, (iii) the scope of the investigation was not restricted to the specific “issue” stated in the notice of investigation, (iv) even if the scope of the summonses was restricted to the “issue” set out in the notice, the framing of that issue was broad enough to authorize the summonses, (v) there was no dispute that each of the summonsed individuals had relevant information, as confirmed by the statutory declarations and supporting documents furnished by Yukon in response to the notice of investigation; (vi) the issuance of the summonses was not an abuse of process because, even if some of the information sought had already been provided in the statutory declarations and supporting documents, the IPC can issue a summons for further relevant information so long as the summons complies with the statute, and (vii) the IPC was not required to give the summonsed individuals advance notice of the additional relevant information sought under the summonses: at paras 45-48, 52, 60-61.

[10] Finally, the Chief Justice ruled, in the alternative, that even under the common law test for quashing a subpoena as provided for in the Supreme Court of Yukon *Rules of Court*, YOIC 2022/168, the summonses were lawfully issued. As she put it:

[62] If I am wrong about the applicable legal test, and instead the common law test, reflected in the *Rules*, applies in this context, I find that the summonses were issued lawfully. It is clear and undisputed from the material provided by the public body through the statutory declarations and the affidavits that the individuals likely have relevant information to provide to the IPC. As an example, Ian Davis, who attested to an awareness of the issue but a lack of involvement, was part of email discussions and plans of how to manage such requests in future. The burden to establish on a *prima facie* basis likely relevance of information sought through the summons is met by the IPC.

[11] The Chief Justice dismissed the petitions, paving the way for the IPC to enforce the subpoenas. Yukon filed its appeal from that decision on 7 August 2026.

Legal Framework

[12] Neither party raised the issue of whether a justice of this Court has jurisdiction to stay a summons or subpoena issued by a statutory body. In *Whitehorse (City) v Darragh*, 2008 YKCA 19 at paras 12-16, Justice Frankel determined that he had jurisdiction under s 1 of the *Yukon Court of Appeal Act*, RSY 2002, c 47, to issue a stay to preserve the subject matter of an appeal, as a single justice of the Court, at least while no division of the Court was in session. For present purposes, for reasons that will become obvious, I am content to proceed on the uncontested assumption that I have jurisdiction to grant the order Yukon is seeking.

[13] The parties agree the application is governed by the three-part test set out in *RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117, [1994] 1 SCR 311 at pp 334, 337, 340–42 [*RJR*].

[14] In accordance with *RJR*, the appellants have the onus to establish three criteria: (1) there is merit to the appeal in the sense that there is a serious question to be tried; (2) they will suffer irreparable harm if the stay was refused; and (3) the balance of convenience favours granting the stay.

[15] The merits threshold is low. A prolonged examination of the merits is generally neither necessary nor desirable: *RJR* at p 338. An applicant only needs to show that the “claim is not frivolous or vexatious”: *RJR* at pp 335, 337-338. The question is not whether the applicant can establish a strong *prima facie* case, but whether there is a serious question to be tried: *RJR* at p 335.

[16] Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which otherwise cannot be cured: *RJR* at p 341.

[17] The balance of convenience analysis is fact-driven. It includes consideration of the potential harm to the respondent. The question is which party will suffer the greater harm from the granting or refusal of the application: *RJR* at pp 335, 342-344. Harm to the public interest must also be considered. Prejudice to the public may be

presumed where the stay would interfere with the due administration of a statute: *RJR* at p 346.

Analysis

Serious Issue

[18] Yukon submits that the appeal raises important questions about the interpretation and scope of the IPC's statutory authority in relation to own-motion investigations. Counsel says these issues are matters of first impression in this jurisdiction. While there is appellate jurisprudence elsewhere, those authorities are not binding in the Yukon. Moreover, the Supreme Court of Canada has recently agreed to hear an appeal in one such case, *Binance Holdings Ltd. v Ontario Securities Commission*, 2025 ONCA 751, leave granted 2026 CanLII 47886 (SCC), which involved the scope of subpoena powers in the context of a regulatory body investigation.

[19] The IPC accepts that Yukon has met the low bar of showing there is a serious issue to be tried. However, counsel stresses that this concession is largely a function of the low threshold. While it is true that there is no binding appellate authority on the scope of the IPC's subpoena power in an own-motion investigation, counsel says the legal issues raised by Yukon are entirely abstract, given the Chief Justice's alternative holding that even under the conventional test, the subpoenas were lawfully issued. The Chief Justice made an affirmative finding that the "burden to establish on a *prima facie* basis likely relevance of information sought through the summons is met by the IPC": at para 62. The IPC's submission on this point foreshadows its balance of convenience argument.

Irreparable Harm

[20] The parties disagree on whether there is irreparable harm.

[21] Yukon submits that if a stay is refused and the subpoenas are enforced before the appeal is heard, the appeal will become moot. For its part, the IPC frankly

acknowledged its intent to enforce the subpoenas if a stay is not granted but maintained that the resulting mootness does not qualify as irreparable harm.

[22] While recognizing the Court's discretion to hear a moot appeal, counsel for Yukon submits that this discretionary power is an exception to the general rule requiring dismissal based on mootness. Counsel says the loss of an appeal right flowing from the enforcement of the subpoenas is a form of irreparable harm.

[23] The IPC's response is that loss of an appeal right due to mootness does not always amount to irreparable harm. In counsel's submission, the case law takes a more nuanced approach, in which the outcome depends on the circumstances. In support of this submission, counsel cites *Canglobe Financial Group v Johnson*, 2010 NSCA 46 at paras 13-14 (Chambers) and *Lawton's Drug Stores Ltd. v United Food and Commercial Workers Union Canada, Local 864*, 2016 NSCA 14 at paras 30-31 (Chambers).

[24] The IPC also cites *Goel v Dhaliwal*, 2022 BCCA 87 at para 45 (Chambers) [*Goel*] as a case where mootness of the appeal was found not to give rise to irreparable harm. In reaching that conclusion, Justice Voith reasoned as follows:

[45] Second, the appellants argue that if a stay is not granted their appeal will become moot, giving rise to irreparable harm. There are cases where irreparable harm may arise because an appeal would become moot if a stay is not granted. This, however, is a fact or circumstance-specific issue: see, for example, *Romspen Investment Corporation v. Chemainus Quay and Marina Complex Ltd.*, 2012 BCCA 292 at para. 15 (Chambers). Without wishing to express a firm view on the issue, it is not clear to me why the appellants would not be able to maintain a claim, for example, in unjust enrichment, if the CPL on Lot 39 is removed and Ms. Sangha thereafter sells her property.

[Emphasis added.]

[25] In *Goel*, there was no irreparable harm because the only relief sought was monetary in nature, and it was possible to maintain the underlying claim even if the certificate of pending litigation was lifted. I do not read *Goel* as having any bearing on the facts in this case. It is distinguishable from a circumstance such as this, where the stay is said to be necessary to preserve the status quo, in the

circumstances where the only issue in the litigation is the validity of the order or instrument that is the subject of the appeal.

[26] In oral submissions, counsel for Yukon acknowledged that mootness and corresponding loss of an appeal right does not always amount to irreparable harm but maintained that the cases where mootness did not produce irreparable harm involved situations where the “harm” could be remedied or undone. Counsel for Yukon says this is not such a situation. If the subpoenas are enforced, then even if this Court later exercised its discretion to hear the otherwise moot appeal and ultimately found them to be invalid, this would not undo the resulting harm. Relying on *Bisaillon v Canada*, 1999 CanLII 8197 (FCTAD), counsel submits that “[t]he invasion of the privacy interest that is inherent in any forced disclosure of information, even if slight ... constitutes irreparable harm”. Counsel then made submissions about how the requirement to attend and provide information to the authorities under due process of law engages interests under both ss 7 and 8 of the *Charter*.

[27] For my part, I agree with the IPC that the fact an appeal may become moot as a result of a failure to grant an interim stay does not automatically result in irreparable harm. As Voith J.A. stated in *Goel*, this is a “fact or circumstance-specific issue”. However, I also agree with Yukon that in this particular case, the refusal to grant a stay could give rise to a form of irremediable harm. If a stay is not granted, and the subpoenas are acted upon, then the personal appellants and other government personnel who have been summonsed will be compelled by law to answer questions under oath or affirmation, making the appeal liable to dismissal based on mootness. And even if the court exercised its discretion to hear the appeal despite its mootness, a subsequent finding that the subpoenas were not lawfully issued could not reverse the situation.

[28] I find the reasoning in *Nova Scotia v O’Connor*, 2001 NSCA 47 at paras 14-17 (Chambers) [O’Connor] particularly compelling on the issue of irreparable harm. In *O’Connor*, Justice Cromwell (as he then was) considered “the risk of harm in the

specific context of an access to information case in which an order granting access has been made and is being appealed”: at para 14. In that context, Cromwell J.A., as he then was, was concerned with the risk that, if a stay was not granted, “the information will be released and thereafter, if the appeal succeeds, that release will be found to have been unlawful”: at para 14. Justice Cromwell went on to identify three somewhat interrelated forms of irreparable harm arising in this context: (i) the release of the information could create a non-compensable injury to the interests of the individuals compelled to provide it, (ii) the release of information under a process later determined to be unlawful, even where it does not injure anyone, is a wrong which cannot be undone or cured, and (iii) the very fact that the release of the information will render the appeal nugatory: at paras 15-17.

[29] I accept that being compelled to attend and answer questions under oath in circumstances where a court later finds there was no lawful basis for doing so can in theory qualify as a form of irreparable harm, in the ways described in *O'Connor*. I hasten to add that the magnitude of the harm will depend on the circumstances, but that is a question to be considered at the third stage of the analysis.

[30] I conclude that the appellants have satisfied the irreparable harm element of the test.

Balance of Convenience

[31] I turn to the balance of convenience. On the one hand is the prejudice to Yukon and the individual appellants if the stay is refused and the subpoenas are enforced before the appeal is heard. On the other hand is the prejudice to the IPC if the stay is granted and the enforcement of the subpoenas is delayed pending the hearing of the appeal.

[32] The prejudice to Yukon is largely theoretical. If the stay is refused, its employees will have to answer questions under oath or affirmation and provide documents about the subject matter of the investigation, in circumstances where the authority to compel those answers and documents may later be found unlawful. Insofar as the importance of the underlying legal question is concerned, I consider it

relevant that while refusal of the stay will likely render the appeal practically moot, it would remain open to Yukon to resist dismissal on the basis that the underlying legal questions are of sufficient importance to engage the court's residual discretion to decide a moot appeal. In other words, if the underlying legal points of law are shown to be of sufficient importance, the Court may agree to decide them even if a stay is refused and the appeal becomes technically moot.

[33] With regard to the prejudice to the individual appellants, Yukon submits that an unlawful subpoena engages both liberty interests under s 7 of the *Charter*, and privacy interests under s 8. Counsel acknowledges that there was no constitutional challenge to the validity of either the legislation or the subpoenas but maintains that s 7 *Charter* interests are implicated because the requirement to answer a subpoena is a statutory compulsion that could be enforced by due process of law, including, in theory, imprisonment. Counsel says s 8 interests are also implicated because the individual appellants (and the other public servants to whom the impugned subpoenas have been issued) will be compelled to answer questions and provide documents. While conceding that the s 8 interests are minimal because the subpoenas merely compel the answering of questions and production of documents in connection with work-related duties of public officials, counsel says the s 7 interests are more significant because statutory compulsion to attend and answer questions on pain of imprisonment should always be regarded as a serious matter.

[34] The IPC responds by emphasizing the point largely conceded by Yukon—that the ss 7 and 8 interests at stake in this particular case are minimal, because the individual appellants (and other individuals who have been subpoenaed) are all public servants being compelled to provide information about matters falling exclusively within the scope of their duties as public servants. In such circumstances, counsel says there is no s 8 expectation of privacy at stake. And counsel submits the s 7 interests are also negligible, because requiring public servants to attend and answer questions related to their work is hardly any intrusion at all on their liberty, even where it is done under a legal compulsion.

[35] I have considerable sympathy for the position advanced by the IPC. There is no suggestion in the record before me that the matters under investigation will engage non-work-related, private interests of the individual appellants. Nor is there any suggestion that the individual appellants have independent personal or professional interests which may diverge in any way from their status, duties, and responsibilities as public servants for the Yukon government. Absent evidence to that effect, I would not assign much weight to the ss 7 and 8 *Charter* interests of the individual appellants.

[36] On the other side of the scale is the prejudice to the IPC, and the public, if the stay is granted such that enforcement of the subpoenas is suspended until the appeal is decided.

[37] The IPC says there is a well-recognized public interest in the due administration of a statute. The IPC is entrusted with broad powers in the conduct of investigations under *ATIPPA*. In this case, the Chief Justice determined that, among other things, the notice of investigation complied with the relevant provisions of the *ATIPPA*, the subpoenas were “tied to the investigation”, and the information sought in the subpoenas did not exceed the scope of the investigation. The IPC says granting a stay will further delay the progress of the investigation, which will, in turn, hamper the IPC’s ability to assess whether the Yukon—a public body within the meaning of *ATIPPA*—has properly responded to a particular access to information request in a manner that accords with the purposes of the *Act*. Under the timeline contemplated in *ATIPPA*, “own motion” investigations are supposed to be completed within 90 days. In this case, proceedings in the court below have impeded the investigation by more than a year and staying the subpoenas will only extend the delay.

[38] One of the points Yukon makes in response is to remind the Court that because this is an “own motion” investigation, there is no complainant in this case. In other words, the IPC’s investigation does not involve an aggrieved individual seeking vindication of a right to access information held by Yukon. IPC concedes this point,

but maintains that this is no answer to the concern that a stay of the subpoenas will impede the proper administration of *ATIPPA* in the manner articulated in the preceding paragraph. I agree.

[39] Another point advanced by Yukon is to say there is no “urgency to the investigation”, and no reason to be particularly concerned about additional delay associated with allowing the appeal to take its course. Counsel emphasizes that the role played by the subpoenaed individuals in the matters under investigation has been effectively memorialized in the statutory declarations and supporting documents provided to the IPC by Yukon shortly after the delivery of the notice of investigation. Nor does the record suggest anything “ephemeral in any of the information that might be collected through the enforcement of these subpoenas”.

[40] The IPC fundamentally disagrees that there is no concern about the effect of delay on the quality of the investigation. Counsel refers to the matters the IPC is likely to ask the subpoenaed individuals about, as described in the seven bullet points listed at para 54 of the Chief Justice’s reasons. In counsel’s submission, there is no reason to assume that memories about some or all of these matters will not degrade over time. It follows, says counsel, that the longer the delay in the investigation, the greater the prejudice to the public interest in the proper and timely administration of the statute.

[41] Taking all these points into account, my conclusion is that the balance of convenience in this particular case favours the IPC. The result might well have been different if there was a genuine concern that the release of the information sought by the subpoenas could have some non-trivial impact on the personal interests of the individuals compelled to provide it. In the circumstances of this particular case, I agree with the IPC that the prejudice to the personal interests of the individual appellants is negligible. I find that the prejudice to the institutional interests of Yukon is largely theoretical rather than practical. The suggestion that refusal of the stay will deprive Yukon of its right to appellate review of the legal basis on which the subpoenas was issued is met by observing that Yukon will have the opportunity to

convince the Court, if it can, that the legal principles at stake are of sufficient importance for the Court to exercise its discretion to hear the appeal even if it becomes moot.

[42] I find the prejudice to the IPC associated with granting the stay to be more concrete, and more compelling. The Chief Justice has determined that, even on an application of the conventional test for quashing a subpoena, the IPC met the burden of showing a *prima facie* basis to believe the impugned subpoenas would yield information that is likely relevant to the matter under investigation. I appreciate that Yukon seeks to challenge that conclusion on appeal, on various grounds. However, the reality is that a superior court judge has already determined the subpoenas were lawfully issued, and further delay will impede the progress of an investigation, the purpose of which is to determine compliance of a public body's decision making with the principles in *ATTIPA*. In these circumstances, granting a stay will prejudice the public interest in due administration of the statute.

Disposition

[43] Yukon's application to extend the time to appeal is granted. The time to file the notice of appeal is extended to the date on which the notice of appeal was filed.

[44] Yukon's application for a stay of the subpoenas pending appeal is dismissed.

[45] I am also inclined to include a term of the order dismissing the stay application to the effect that, subject to further order of the Court, any motion to quash the appeal as moot should be dealt with by the division that hears the appeal. If the IPC takes issue with the inclusion of such a term in the order, then (i) the IPC may file a supplementary written submission of not more than four pages by 13 October 2026, (ii) Yukon may file a responding submission of not more than four pages by 19 October 2026, and (iii) the IPC may file a reply of not more than two pages by 23 October 2026.

"The Honourable Mr. Justice Riley"