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Nunavut Information and Privacy Commissioner
Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina
Commissaire à l'information et à la protection de la vie privée du Nunavut

Commissioner's Final Report

Report Number:	22-212-RR
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Summary

- [1] The Applicant applied for review of disclosure by the Nunavut Court of Justice. The Commissioner finds that the court is not a “public body” within the meaning of the ATIPPA, and therefore the Commissioner lacks jurisdiction to conduct the review.

Nature of Review and Jurisdiction

- [2] The Applicant requests review of disclosure by the Nunavut Court of Justice. In response to a request from the Applicant, the court agreed to disclose some records to the Applicant. The Applicant is not satisfied with the extent of disclosure. The Applicant further complains that the court did not conform in its response, to the requirements of the *Access to Information and Protection of Privacy Act* (ATIPPA).
- [3] This Review Report deals solely with the preliminary issue of whether the information and Privacy Commissioner has jurisdiction over the Nunavut Court of Justice.

Issue

- [4] The only issue in this review is whether the Nunavut Court of Justice is a “public body” within the meaning of the ATIPPA. If it is not, the Information and Privacy Commissioner has no jurisdiction to conduct a review of the court’s response to a request for records.

Facts

- [5] On December 20, 2021, the Applicant wrote to the Nunavut Court of Justice, seeking certain records. Four sets of records were requested. The request purported to be made under the ATIPPA and included a money order for the \$25 application fee.
- [6] On January 27, 2022, a court employee replied to the Applicant. The employee identified themselves as the Court Records Officer (CRO). The CRO said they would authorize release to the Applicant of three of the four requested sets of records. For the fourth set, the CRO said the information requested was not a court record in the custody and control of the court, and suggested that the request be submitted to the Manager, Territorial ATIPP Office. Other than that, the CRO does not refer to the ATIPPA. The CRO said that the \$25 money order would be returned to the Applicant.
- [7] On February 1, 2022, the Applicant filed a Request for Review with this office.
- [8] On February 2, 2022, I wrote a letter to the Applicant, indicating that the Nunavut Court of Justice is not a “public body” within the meaning of the ATIPPA, and therefore I did not have jurisdiction to conduct the requested review.
- [9] On February 3, 2022, the Applicant replied to my letter. The Applicant submitted that I was wrong on the jurisdictional issue, and presented arguments as to why I do have jurisdiction over the Nunavut Court of Justice. The Applicant asked me to remedy my error, and concluded with

the statement “time is of the essence”. They did not explain why time was of the essence.

- [10]** In the circumstances, I believe that the best way to respond to the Applicant’s letter of February 3 is to write a formal decision on the jurisdictional issue. I did not invite the Nunavut Court of Justice to make a submission. This is my decision.

Law

- [11]** The scope of the ATIPPA is set out in section 3, the relevant parts of which read as follows:

3. (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (a) a record in a court file, a record of a judge of the Nunavut Court of Justice or of the Court of Appeal, or a record of a justice of the peace;
- (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity; ...

- [12]** The term “public body” is defined in section 2 as follows:

"public body" means

- (a) a department, branch or office of the Government of Nunavut, or
- (b) an agency, board, commission, corporation, office, municipality or other body designated in the regulations,

but does not include

- (c) the Office of the Legislative Assembly or the office of a member of the Legislative Assembly or a member of the Executive Council; ...

- [13]** Section 16(1) of the *Legislation Act*, S.Nu. 2020, c. 15, provides guidance on how to interpret an enactment:

16. (1) The words of an Act and regulations authorized under 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 the Legislature.

Analysis

- [14] When Nunavut came into existence on April 1, 1999, the Nunavut Court of Justice took over the functions of both the Territorial Court and the Supreme Court of the Northwest Territories: see *An Act to amend the Nunavut Act with respect to the Nunavut Court of Justice and to amend other Acts in consequence*, SC 1999, c 3. The Nunavut Court of Justice is a unified court. It has all the jurisdiction, powers and authority of a superior court of record: *Judicature Act*, SNWT (Nu) 1998, ch 34, section 2(1).
- [15] The only question on this review is whether the ATIPPA applies to the Nunavut Court of Justice. I could find only one previous case in Nunavut in which this question was addressed. In *Review Report 09-049 (Re)*, 2009 NUIPC 3 (CanLII), the former Commissioner wrote “court records are not properly the subject of an ATIPP request”, relying on section 3(1)(a) of the ATIPPA. However there is no further analysis of the point, and it is not a key element of the case. Therefore I will, in this decision, consider the question in more detail.

Judicial independence

- [16] I start with a few comments on judicial independence.
- [17] Judicial independence is a cornerstone of our constitutional government. To name only the most recent Supreme Court of Canada decisions involving the principle of judicial independence, see *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 (CanLII); *British Columbia (Attorney General) v. Provincial Court Judges’ Association of British Columbia*, 2020 SCC 20 (CanLII); and *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39 (CanLII).
- [18] The three core characteristics of judicial independence are security of tenure, financial security and administrative independence: *Reference re Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC) at paragraph 118.

- [19] Administrative independence gives courts necessary power over matters of administration bearing directly on the exercise of their functions: *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 SCR 673 at pages 694-712. That does not entirely exclude the possibility of executive involvement with ancillary matters, such as the construction and operation of court buildings. As Ontario Chief Justice Howland said in a passage quoted by Le Dain J. for the Supreme Court of Canada, at paragraph 47 of the *Valente* judgment, “there must necessarily be reasonable management constraints”.
- [20] Nevertheless, because of the constitutional importance of judicial independence, it is reasonable to expect strong, clear language in any administrative statute or other executive action that purports to apply to the Nunavut Court of Justice. The court should not be bound by an administrative regime like the ATIPPA through oblique statutory language.
- [21] I turn now to an analysis of the statutory language setting out the scope of the ATIPPA.

The definition of “public body”

- [22] The ATIPPA applies to all records in the custody or under the control of a “public body”. The definition of “public body” is quoted in the Law section above. It uses the word “means” (rather than “includes”), so paragraphs (a) and (b) of the definition are exhaustive.
- [23] I will deal with the easier one first: the Nunavut Court of Justice is not designated in the ATIPP regulations as a “public body”, so paragraph (b) of the definition cannot apply.
- [24] That leaves paragraph (a): is the Nunavut Court of Justice “a department, branch or office of the Government of Nunavut”?
- [25] The Applicant argues that the Government of Nunavut has three branches – legislative, executive and judicial – and the Nunavut Court of Justice is

part of the judicial branch. It is therefore a “public body” within the meaning of the ATIPPA.

- [26] I do not accept this argument. The word “branch” in relation to government has more than one meaning. The Applicant is correct that one meaning of the word “branch”, commonly used in constitutional theory, is to speak of legislature, executive and judiciary as the three branches of government. But that is not its only meaning.
- [27] The word “branch” is also commonly used to refer to a small unit of the executive, in the same way that the words “office”, “division”, “secretariat” and “bureau” (among many others) are used. Sometimes, for example, one hears of the “Motor Vehicle Branch” to refer to the administrative unit that administers motor vehicle registration. The terminology for units of government changes over time, and some words go in and out of favour. The word “branch” is perhaps heard less commonly these days than it used to be. But that is the meaning I ascribe to the word “branch” in the definition of “public body”.
- [28] My conclusion is reinforced by the rule of statutory interpretation known as *ejusdem generis* or “of the same kind”. When a statute contains a list, the words should be interpreted as being of the same kind. Paragraph (a) of the definition contains the list “department, branch or office”. According to the *ejusdem generis* rule, the word “branch” takes its colour from the adjoining words “department” and “office”. It should be interpreted as referring to the same kind of thing. It would violate the *ejusdem generis* rule to interpret “branch” as referring to the entire judicial branch of government, which is something qualitatively different from a “department” or an “office”.
- [29] My conclusion is further reinforced by the fact that I could find only one instance in the Nunavut statute books where the word “branch” clearly refers to the judiciary. The *Northern Employee Benefits Services Pension Plan Act*, S.Nu. 2015, c. 10, section 22(1)(b), defines “public sector employer” to include “the legislative and judicial branches of

government”. There, the reference to the judiciary is explicit. In all other Nunavut laws using the word “branch”, of which there are several dozen, the word is used in a different or narrower sense.

Court administration records and court files

- [30] The Applicant argues that section 3(1) the ATIPPA applies to “court administration records”, and so the Nunavut Court of Justice must be covered by the ATIPPA.
- [31] There is an interpretive conundrum here, because the opening words of subsection 3(1) says that “court administration records” are covered, but clause 3(1)(a) says that “a record in a court file” is not covered. What is the difference between a “court administration record” and “a record in a court file”?
- [32] The term “court administration record” appears in the access legislation of some other Canadian jurisdictions, but I cannot find any decision in the CanLII database that interprets it.
- [33] In the end, I conclude that I do not have to resolve the conundrum. Section 3(1) says that the ATIPPA applies to a “court administration record” held by a public body. I have already found that the Nunavut Court of Justice is not a public body.

Other practical considerations

- [34] There are other, practical reasons why the ATIPPA cannot be interpreted as applying to the Nunavut Court of Justice.
- [35] First, a public body’s responsibilities under the ATIPPA are placed on the “head”. The word “head” is defined in section 2, and correlates to the definition of “public body” that has been discussed above. The head of a public body that is a “department, branch or office of the Government of Nunavut” is the presiding minister. The Nunavut Court of Justice does not have a presiding minister. This may be contrasted, for example, with a department of government, each of which has a presiding minister.

- [36] Public bodies designated in the ATIPP regulations also have the “head” named in the regulation. The Nunavut Court of Justice is not named in the regulation. There is no other mechanism in the ATIPPA for designating a “head”.
- [37] If the legislature had intended that the ATIPPA should apply to the Nunavut Court of Justice, one would expect it to have designated a “head”. It did not do so.
- [38] Second, disclosure under the ATIPPA can be reviewed by the Information and Privacy Commissioner, who makes a recommendation to the “head”. The head then makes a decision on disclosure. If an applicant is dissatisfied with the head’s decision, they may appeal to the Nunavut Court of Justice: sections 37(1).
- [39] If the legislature had intended that the ATIPPA should apply to the Nunavut Court of Justice, one would expect it to have designated a different method for appealing the court’s own ATIPP decisions. It did not do so.
- [40] We can see, then, that the scheme of the Act breaks down if it is interpreted as applying to the Nunavut Court of Justice. In contrast, the scheme of the Act makes perfect sense if it is interpreted as not applying to the court, which is the way it has been interpreted since Nunavut was created. The latter interpretation is to be preferred.

A final comment on statutory interpretation

- [41] As stated in the Law section above, the correct approach to statutory interpretation is to read the words of the statute 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 the Legislature.
- [42] The Applicant’s arguments rely on two small pieces of the ATIPPA – the word “branch” and the reference to “court administration records” –

taken out of the context in which they occur. They lead to a result that is inconsistent with the overall scheme of the ATIPPA.

[43] I find also that applying the ATIPPA to the Nunavut Court of Justice has the potential to be an intrusion on the administrative independence of the judiciary. If that were the Legislative Assembly's intention, I would expect stronger, clearer statutory language than the oblique references to which the Applicant is able to point.

Conclusion

[44] The Nunavut Court of Justice is not a "public body" within the meaning of the ATIPPA.

[45] The Information and Privacy Commissioner does not have jurisdiction to review the Nunavut Court of Justice's response to a request for records.

Graham Steele

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