



Order F21-30

ROYAL BRITISH COLUMBIA MUSEUM, BC ARCHIVES

Elizabeth Barker
Director of Adjudication

July 23, 2021

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Summary: An applicant requested access to a record related to her maternal grandmother's incarceration in a juvenile reformatory in the 1940s. The adjudicator confirmed the Museum's decision that it was not authorized to disclose the record under the *Youth Criminal Justice Act*. The adjudicator found that the doctrine of federal legislative paramountcy applied, so it was not necessary to decide whether the Museum was required to refuse to disclose the record under s. 22(1) of the *Freedom of Information and Protection of Privacy Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22 and 79; *Youth Criminal Justice Act*, S.C. 2002, c. 1, ss. 110, 118, 126 and 163; *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res., UNGAOR, 61st Sess., Supp. No. 49, UN Doc A/RES/61/295 (2007); *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

INTRODUCTION

[1] This inquiry is about an applicant's request for records about her maternal grandmother's incarceration at the former Willingdon Industrial School for Girls, a juvenile reformatory. The Royal BC Museum (Museum) identified one responsive record but refused access to it under s. 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Museum's decision.¹ Mediation did not resolve the matter and it proceeded to inquiry.

¹ The Royal British Columbia Museum is listed as a public body in Schedule 2 of FIPPA.

Preliminary matter

[3] In its initial inquiry submission, the Museum raised a new issue that was not included in the OIPC's fact report and notice of inquiry. It argued that the *Youth Criminal Justice Act* also restricts the applicant's access to the record in dispute. After considering the applicant's objection to the late addition of this issue, the OIPC decided it would be added into the inquiry due to the mandatory nature of the provisions in that Act. A revised notice of inquiry was issued and the applicant was given additional time to respond to the Museum's initial submission.²

ISSUES

[4] The issues to be decided in this inquiry are:

1. Is the Museum required to refuse to disclose the disputed information under s. 22(1) of FIPPA?
2. Is the Museum required to deny access to the disputed information under the *Youth Criminal Justice Act*?

DISCUSSION

Background

[5] The Museum is a provincial crown corporation whose responsibilities include BC Archives. Among other things, BC Archives preserves and manages the archival records of the provincial government and other government agencies.³

[6] The *Youth Criminal Justice Act* (YCJA) is the current federal legislation that governs Canada's youth justice system.⁴ As I describe in more detail below, the YCJA prohibits disclosure of information that identifies young offenders involved in proceedings under the YCJA.

[7] The applicant's maternal grandmother (IA) was detained at the former Willingdon Industrial School for Girls (Reformatory) in the 1940s.⁵ At that time, youth were committed to the Reformatory by juvenile courts under the *Juvenile Delinquents Act*, which was a predecessor of the YCJA.⁶

² The applicant has been represented throughout the request, review and inquiry by the University of BC's Indigenous Community Legal Clinic.

³ Museum's initial submission at paras. 3.1-3.2 and the *Museum Act*, SBC 2003, c 12.

⁴ *Youth Criminal Justice Act*, S.C. 2002, c. 1.

⁵ The Reformatory was also formerly known as the Provincial Industrial School for Girls.

⁶ The *Juvenile Delinquents Act*, RSC 1970, c J-3, was replaced by the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which was replaced by the YCJA in 2002.

[8] While at the Reformatory, IA gave birth to the applicant's mother who was adopted out.⁷ The applicant was also adopted out of her biological family when she was a child and she never met or communicated with IA. The applicant knows that IA was born in 1923 but has not been able to determine if IA is alive or deceased.⁸

[9] The applicant is Indigenous and seeks access to IA's Reformatory records to help research and validate her claim for Indian Status under the *Indian Act*. She would like information about her family background, such as IA's Indigenous Nation.⁹

[10] The Museum's decision letter responding to the applicant's access request stated that if the applicant could provide evidence that IA was deceased, the Museum would be happy to release the record to her.¹⁰ The applicant has been unable to find evidence to establish that IA is deceased.

Information in dispute

[11] The information in dispute is a photocopy of what appears to one side of an index card with typing on it. The Museum says the record is a "case file" from the Reformatory. The card contains the following information:

- IA's name and an assigned (three digit) number;
- IA's year of birth, the season she was born, and where she was born;
- The date IA was committed to the Reformatory, the charge and the official who committed her;
- The facility where IA's daughter was born and the date;
- IA's date of release and where she was to work when she was released;
- A statement about where, broadly, IA's daughter would go;
- The street address where IA was living approximately two years after her release, where she had been working, the name of the official who met with her and the name of the agency where they met;
- IA's height, weight, figure, complexion, hair and eye colour and distinguishing marks.

⁷ The applicant's mother is now deceased.

⁸ The applicant has a copy of a landing card issued to IA by a United States Border agent in 1946. The landing card provides IA's date of birth and states that she was Indigenous. This landing card is Exhibit A of the applicant's submission.

⁹ Applicant's October 19, 2018, access request.

¹⁰ Museum's June 4, 2019 access decision.

Doctrine of federal legislative paramountcy

[12] This is a case where both provincial legislation (FIPPA) and federal legislation (YCJA) have something to say about disclosure of the record in dispute. If there were a conflict between the two - for example if the YCJA said disclosure is prohibited but FIPPA said the opposite - it would trigger the doctrine of federal paramountcy. The Supreme Court of Canada has explained the doctrine as follows:

In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law...¹¹

[13] For that reason, I will first decide whether disclosure of the record is authorized or prohibited under the YCJA. Only if the YCJA authorizes disclosure, will I need to consider whether the applicant is entitled to access under FIPPA. If the YCJA prohibits disclosure, that is the end of the matter. No purpose would be served by considering if the opposite result might arise under FIPPA because the YCJA takes precedence.¹²

Youth Criminal Justice Act

[14] The stated principles of the YCJA include “enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected” as well as rehabilitation and reintegration (s. 3(1)(b)). Thus, the YCJA protects and regulates access to records and information that would identify a young person dealt with under the YCJA. It sets restrictive limits on what type of records can be released, when and to whom and what test governs the release of records beyond the legislated periods of access. Specifically, the YCJA contains provisions that regulate the retention (ss. 114-116) and the access, disclosure and disposal (ss. 117-129) of identifying records and information. Section 138 of the YCJA creates an offence for contravening the provisions that protect the identity of a young offender.

[15] IA was not sentenced under the YCJA. Instead, she was detained at the Reformatory under the former *Juvenile Delinquents Act*. Therefore, s. 163 of the YCJA is important to note here. Section 163 says “Sections 114 to 129 apply, with any modifications that the circumstances require, in respect of records

¹¹ *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 29. See also Order F18-38, 2018 BCIPC 41, at para. 119 where federal paramountcy was discussed in the context of the YCJA.

¹² Section 79 of FIPPA addresses the situation where there is a conflict or inconsistency between a provision of FIPPA and a provision of another “Act”. Under the *Interpretation Act*, RSBC 1996 c 238, “Act” means an Act of the *Legislature* (i.e., provincial), not an Act of *Parliament* (i.e., federal).

relating to the offence of delinquency under the *Juvenile Delinquents Act*, chapter J-3 of the Revised Statutes of Canada, 1970.”

[16] Sections 118 and 126 of the YCJA are also relevant provisions in this case. They state:

No access unless authorized

118 (1) Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116 [authorizing youth justice court, review board, court, police force, and government agency/department to keep records], and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.

...

Records in the custody, etc., of archivists

126 When records originally kept under sections 114 to 116 are under the custody or control of the Librarian and Archivist of Canada or the archivist for any province, that person may disclose any information contained in the records to any other person if

(a) a youth justice court judge is satisfied that the disclosure is desirable in the public interest for research or statistical purposes; and

(b) the person to whom the information is disclosed undertakes not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates.

Museum's submission

[17] The Museum says that since the record deals with a young offender it is restricted in accordance with the YCJA and its predecessors, the *Young Offenders Act* and *Juvenile Delinquent's Act*. Although the Museum does not specifically state which YCJA provisions it believes prohibit disclosure of the record, I understand that it is relying on ss. 118(1) and 126 because it quotes both.

[18] The Museum also says that the applicant's request is for a file that could reasonably be expected to identify the young person to whom it relates and the request is not for research or statistical purposes since it is for a specific file of an individual.¹³

¹³ Museum's initial submission at paras. 3.15-3.19.

Applicant's submission

[19] The applicant submits that the YCJA does not bar disclosure of the disputed record to her.¹⁴

[20] In response to what the Museum says about s. 126, the applicant talks about how she tried in 2017 to obtain a court order from a youth justice court judge. She says she submitted the application but her “efforts came to a dead end when she was informed by Crown counsel that her application would most likely be unsuccessful.”¹⁵

[21] As for the second element required for disclosure under s. 126, namely undertaking not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates, the applicant says:

The applicant and her counsel are willing to make such an undertaking without delay, with the clear understanding that the applicant has no intention to publish any information in the record in dispute and that the applicant may be compelled to share identifying information about her grandmother with government agencies for the sole purpose of establishing her Indigenous ancestry and her entitlement to Indian Status.¹⁶

[22] Although the Museum did not raise s. 110 of the YCJA as a reason for refusing access, the applicant submits that the exception in s. 110(2)(c) applies. The parts of the YCJA that are relevant to what the applicant says state as follows:

Identity of offender not to be published

110 (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

Limitation

(2) Subsection (1) does not apply

...

(c) in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

¹⁴ Applicant's submission at para. 1.2

¹⁵ Applicant's submission at para. 2.5.

¹⁶ Applicant's submission at para. 2.14.

Definitions

2(1) publication means the communication of information by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means.

[23] The applicant says that she has no intention of making any information in the disputed record known to the community and she only wants it for the purpose of establishing her Indigenous ancestry and entitlement to Indian Status. She submits that the information is relevant to a fair determination of her rights and it will assist in researching or validating the claims, disputes or grievances of aboriginal people.¹⁷

[24] The applicant also says that refusing her access to the record contravenes BC's *Declaration on the Rights of Indigenous Peoples Act*¹⁸ (BC's Declaration Act) and Canada's commitment to reconciliation.¹⁹ She says that while the Reformatory was not an Indian Residential School, it was a government facility that held Indigenous children against their will. Therefore, she submits, the principles discussed in BC's Declaration Act, the *United Nations Declaration on the Rights of Indigenous Peoples*²⁰ (UN Declaration) and the calls to action of the Truth and Reconciliation Commission of Canada (TRC) apply. Specifically, she cites TRC Calls to Action 69 and 70 which speak of the need to: recognize Aboriginal peoples' inalienable right to know the truth about what happened and why, with regard to human rights violations committed against them in the residential schools; ensure residential school records are accessible to the public; and provide government funding to review archival policies and practices.²¹

[25] The applicant says that as a direct result of her adoption out of her Indigenous community she has had to struggle to prove her Indigenous ancestry in order to establish her entitlement to Indian Status. She says, "Recent decisions citing DRIPA [BC's Declaration Act] have emphasised the significance of historical context and the need to account for the legacy of cultural genocide in giving effect to Indigenous peoples' rights."²² She submits:

In sum, the public body is not obliged to interpret FIPPA or YCJA so narrowly as to efface the applicant's Indigenous background and the context in which she is seeking access to the disputed records. Instead, the public body is compelled, by the TRC, UNDRIP, DRIPA, and recent

¹⁷ Applicant's submission at para. 2.13.

¹⁸ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

¹⁹ Applicant's submission at paras. 2.15.

²⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res., UNGAOR, 61st Sess., Supp. No. 49, UN Doc A/RES/61/295 (2007).

²¹ Applicant's submission at para. 2.15.

²² The applicant cites *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 and *Servatius v Alberni School District No. 70*, 2020 BCSC 15.

jurisprudence, to account for the applicant's unique circumstances as an Indigenous woman, a victim of the 60s scoop, and a survivor of cultural genocide, in making a decision that will invariably impact her ability to exercise her Indigenous rights and transmit her Indigenous identity.²³

Museum's reply

[26] The Museum says that the OIPC "does not have jurisdiction for" the YCJA, and if the OIPC finds that the applicant is entitled to access under FIPPA, permission of a youth justice court judge is still required under s. 126(a).²⁴

[27] The Museum says that BC Archives will work with the applicant to help her make an application to a youth justice court judge.²⁵

[28] The Museum says that BC Archives is strongly committed to responding to the Calls to Action of the TRC and the UN Declaration. It also says it is committed to following the Canadian Archival Community's recommendations in response to the calls to action and the UN Declaration. The Museum says that although BC Archives is committed to following those recommendations, it is also subject to FIPPA which impacts access to records.²⁶ The Museum says that "since the individuals were held at Willingdon School against their will then they should be accorded an expectation of privacy to their personal information."²⁷

Analysis and findings

[29] There is no evidence before me about why exactly IA was sent to the Reformatory. However, given the date, context and content of the record, and the definition of delinquency in the *Juvenile Delinquents Act*, it is reasonable to conclude that she was sent to the Reformatory for delinquency.²⁸ What the parties say in their submissions does not suggest otherwise. Therefore, I find that s. 163 of the YCJA applies in this case such that the provisions governing access and disclosure in ss. 117-129 of the YCJA apply.

[30] Section 118(1) states that, except as authorized by the YCJA, no person shall be given access to a record or information in a record kept under ss. 114 - 116, where to do so would identify the young person to whom it relates as a young person dealt with under the YCJA.

²³ Applicant's submission at paras. 2.15 and 2.17.

²⁴ Museum's reply at paras. 3.9-3.10.

²⁵ Museum's reply at para. 3.10.

²⁶ Museum's reply at paras. 3.11-3.13.

²⁷ Museum's reply at para. 3.15.

²⁸ Delinquency under the *Juvenile Delinquents Act*, ss. 2 and 3(1), meant violating the *Criminal Code*, any federal or provincial statute or any by-law or ordinance of any municipality, being guilty of "sexual immorality or any similar form of vice", or being liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute.

[31] The record in this case is about a named individual who was incarcerated in the Reformatory when she was under 18 years of age.²⁹ I find that disclosing the record would identify IA as a “young person dealt with under this Act”, so s. 118(1) applies.

[32] Section 126 provides that the Museum, as the archivist for the province, may disclose the record if both of the following conditions are met:

(a) a youth justice court judge is satisfied that the disclosure is desirable in the public interest for research or statistical purposes; and

(b) the person to whom the information is disclosed undertakes not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates.

[33] There is no evidence that the first condition has been met in this case. It is also uncertain whether the applicant would meet the second condition if she plans on sharing the information about IA with government agencies for the purpose of establishing her entitlement to Indian Status.

[34] I do not find that s. 110 is applicable in this case. The Museum has not raised it as a ground for refusing access and there is nothing to suggest that this is a case about “publication” as that term is defined in the YCJA.

[35] In summary, I find that the Museum is not authorized to disclose the record to the applicant because s. 118(1) of the YCJA applies and the required conditions of s. 126(a) and (b) of the YCJA have not been met. No purpose would be served by going on to decide if s. 22(1) of FIPPA does or does not permit access to the record. Any conflict between the two laws about access to the record must be resolved in favour of the YCJA because it is the paramount, federal legislation.

[36] This was a particularly difficult decision to write because I sympathize with the applicant and find her submission to be compelling. What she says about the consequences of her and her mother being adopted outside their Indigenous community is affecting, as are her observations about the TRC, the UN Declaration and BC’s Declaration Act. However, it is not open to me to refuse to apply the law unless it is successfully challenged as being unconstitutional, and no such challenge was raised here.³⁰

²⁹ Section 2 of the YCJA says, “*young person* means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old...”.

³⁰ *A.A.A.M. v. Director of Adoption*, 2017 BCCA 409 (CanLII) at para. 8.

[37] My hope is that the Museum will follow through on its offer to assist the applicant in making an application to obtain access to the information in the record, at the very least the location of IA's birth and the information about her date of birth. It seems to me that this may be the pertinent information missing in the applicant's endeavours to locate her Indigenous community.

[38] I also note that this case highlights legislative barriers facing individuals trying to access information in order to establish contact with their Indigenous communities and assert their Indigenous identity. It appears that this is an area where the principles of the UN Declaration, the BC Declaration Act and the TRC, which the applicant references in her submission, indicate that legislative change is required.

CONCLUSION

[39] For the reasons given above, under s. 58 of FIPPA, I confirm the Museum's decision that it is authorized to refuse the applicant access to the record.

July 23, 2021

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

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