

Queen's Bench Follows Business Watch rather than Kellogg, Brown and Root Regarding Jurisdiction of Privacy Commissioner

By Linda McKay-Panos

Cases Considered:

[Edmonton Police Service v. Alberta \(Information and Privacy Commissioner\)](#), 2009 ABQB 268

In an earlier [post](#) on *Kellogg, Brown and Root* ("KBR"), 2007 ABQB 499, I noted the unfortunate impact on a complainant when, as provided in the *Personal Information Protection Act*, R.S.A., 2000, c. 6.5 ("PIPA"), the Privacy Commissioner failed to launch an Inquiry within 90 days, and the Alberta Court of Queen's Bench held that PIPA s. 50(5) was mandatory. Thus, the Privacy Commissioner lost jurisdiction. The matter was appealed, and Alberta Court of Appeal did not deal with the issue, as the complainant had died, and the appeal was declared moot (see 2008 ABCA 384).

The Edmonton Police Service ("EPS") case seems to indicate that the *KBR* decision may be distinguished and confined to its specific facts.

Relying on the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIPP"), David A. Cassels had submitted a Request to Access Information Form for information held by the EPS, including paper and electronic information about him collected from 2002 to 2005. He indicated that this included email messages received or distributed internally or externally. The EPS assembled some of the information in response to the request, but informed Cassels that they had been unable to conduct a search of the EPS Information Technology Branch in the format requested by Cassels.

Cassels requested that the Privacy Commissioner review the matter under the *FOIPP Act*. The Privacy Commissioner authorized a Portfolio Officer to investigate and settle the matter, and advised EPS and Cassels of this on March 28, 2006. The Portfolio Officer was unable to settle the matter and Cassels asked the Privacy Commissioner to conduct an Inquiry. On February 21, 2007, the Office of the Information and Privacy Commissioner ("OIPC") sent a letter to Cassels advising him that inquiries were currently being scheduled in the fall of 2007, and that a Notice of Inquiry would be sent to the parties about two and a half to three months before the Inquiry was to be held. On June 13, 2007, the OIPC notified Cassels and EPS of the Inquiry and

indicated that the parties' briefs were due on July 20, 2007. On July 13, 2007, the deadline for submission of EPS's brief was extended to August 8, 2007.

On July 30, 2007, the reasons of the Alberta Court of Queen's Bench in *KBR* were released. On August 1, 2007, the Privacy Commissioner wrote to the parties, indicating that he was extending the time for completing the review of the case, and that the anticipated date for completion of the review was February 1, 2008. On August 8, 2007, the parties were advised that the deadline for submission of rebuttal briefs was September 5, 2007. The Privacy Commissioner reviewed the written materials and issued an order on February 14, 2008. The time that elapsed between the receipt of the initial request for review and the date of the order was 22 ½ months.

The Privacy Commissioner ordered the EPS to disclose to Cassels the information that had been severed from the emails before they were released and ordered the head of the EPS to conduct an adequate search for the records, including a search of the back-up system for a two month period. (see Office of the Information and Privacy Commissioner, [Order F2007-028](#) (February 14, 2008)).

In October, 2008, the EPS applied to the Alberta Court of Queen's Bench for judicial review, seeking a Declaration that the order of the Privacy Commissioner was void ab initio, on the basis that the Commissioner failed to comply with the timelines set out in s. 69(6) of the *FOIPP Act* (failing to complete an inquiry within 90 days of the request). This section is worded in a very similar manner to *PIPA*, s. 50(5), the subject of the *KBR* decision.

In the meantime, on February 6, 2009, the Court of Queen's Bench issued the decision in [Business Watch International Inc. v. Alberta \(Information and Privacy Commissioner\)](#), 2009 ABQB 10 ("*Business Watch*"). Madam Justice Veit distinguished *KBR*, holding that was a decision in which the applicants were requesting prohibition, rather than applying for judicial review. The Court of Queen's Bench held that it was reasonable for the Privacy Commissioner to conclude that s. 50(5) was directory rather than mandatory. Thus, the Privacy Commissioner had not lost jurisdiction.

The holding in *Business Watch* may appear to be at odds with the decision in *KBR*. EPS argued that *KBR* (and another decision in *Alberta Teachers' Association v. Information and Privacy Commissioner et al* (12 October 2008) Edmonton No. 0903 05279 (Alta. Q.B.) ("*ATA*")) were the first Alberta decisions in this area, thus the doctrines of judicial comity and *stare decisis* should operate to affect subsequent decisions.

In *EPS*, Justice K.G. Nielsen noted that the reasoning in *KBR* and *ATA* was distinguishable, and that the reasoning in *Business Watch* was applicable because the fact situation was closer to the matter before him. First, he held that although the EPS had not raised the issue of jurisdiction before the Inquiry, EPS could raise the issue of jurisdiction at the stage of judicial review. Next, he ruled that he did not have to remit the issue of jurisdiction to the Privacy Commissioner to be considered. Finally, Justice Nielsen held that the standard of review regarding the decision of the Privacy Commissioner that he had jurisdiction was reasonableness. Noting that, in some cases,

there may be more than one reasonable outcome, Justice Nielsen held that under the circumstances of this case, s. 69(6) was directory for a number of reasons. He noted that if s. 69(6) was held to be mandatory, Cassels would suffer prejudice through no fault of his own. Thus, Justice Nielsen held that the Privacy Commissioner did not lose jurisdiction when he did not complete the Inquiry within 90 days.

Therefore, at least in the case of judicial review, the Privacy Commissioner will not necessarily lose jurisdiction for failing to complete a review within the 90 days directed by the *FOIPP Act*. This result seems more just than that in *KBR*, especially since the practical matter of when a review is completed by the Privacy Commissioner is out of the hands of the complainant.