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Court of Appeal Decision on Privacy Process Likely to Have Significant Impact on Office of Information and Privacy Commissioner

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Case Considered:

Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner), 2010 ABCA 26

In a rare move, the Alberta Information and Privacy Commissioner, Frank Work, issued a strongly worded news release in response to the Alberta Court of Appeal's decision in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner) ("ATA")*. See January 29, 2010, "Commissioner Work expresses Grave Concern over Recent Court of Appeal Ruling." Mr. Work said, "This decision may have dire implications for every tribunal in this province which has stipulated timelines. There should be a lot of concern on that front." What prompted this comment?

In an earlier blog, What happens to our "day in court" when someone else drops the ball? , I discussed the implications of time limitations in performing inquiries in privacy cases under the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("PIPA"). In the case I commented on — *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner*) 2007 ABQB 499, appeal dismissed, 2008 ABCA 384 ("*Kellogg*") — the Alberta Court of Queen's Bench held that the time rules in section 50(5) PIPA were mandatory and that the consequence of departure from them was a "loss of jurisdiction" to inquire. The Alberta Court of Appeal dismissed the appeal as moot (the complainant had died in the interim). Section 50(5) of the PIPA states:

> Inquiry by Commissioner
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> 50(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner
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> (a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and
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> (b) provides an anticipated date for the completion of the review.

The *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 69(6), and the *Health Information Act*, R.S.A. 2000 c. H-5, s. 77(6), also contain similar time limitations.

While the *Kellogg* case had peculiar facts, and therefore could be argued not to have set down generally applicable principles, the *ATA* case's principles appear to be more general in application. Ten complainants had alleged contraventions of the PIPA by the ATA in a publication called "ATA News" in October and December 2005. Seventeen and a half months after the request for an inquiry, an adjudicator found that the ATA had violated ss. 7 and 19 of the PIPA (Order No. P2007-14). The ATA applied to the Court of Queen's Bench (A.B. Digest, F/53) for judicial review based on eighteen grounds. Although the adjudicator had not been asked to deal with the issue of extending the time outside of the 90-day period provided for under section 50(5), the Court of Queen's Bench permitted the ATA to raise this issue. The Court of Queen's Bench quashed the adjudicator's decision, on the basis that the Commissioner lost jurisdiction for failing to comply with section 50(5) PIPA. The judicial review judge found that the time rules in section 50(5) were "mandatory" and that the consequence of departure from them was a loss of jurisdiction.

On appeal, the Information and Privacy Commissioner (IPC) argued that the adjudicator's decision should not have been invalidated by a breach of the time rules in section 50(5) PIPA. Second, the IPC argued that because they had sent letters to the parties indicating timelines and extensions, they had effectively complied with section 50(5).

In rejecting these arguments, a majority of the Alberta Court of Appeal (Justices Jack Watson and Frans Slatter) held that, from a grammatical perspective, the language in section 50(5) PIPA does not suggest that the legislature intended that the IPC have the power to extend the time limitation period both before and *after* expiry. If that were the proper reading of the section, then the 90-day period would be surplus and the word "must" would be meaningless. While the time rules in section 50(5) are mandatory, the Court of Appeal was not persuaded that the legislature intended that a breach of these rules would be an automatic and unforgivable termination of the ability to complete the inquiry process (para. 19). Complaints are initiated by individuals, who do not have control over the agency's compliance with the time rules. However, both complainants and respondents have a reasonable expectation of timely resolution of complaints (para. 21). In addition, the Court of Appeal inferred that the legislature intended that the time rules were mandatory, with a presumption that the inquiry would be terminated at the time the objection is made.

However, the Court also concluded (para. 35) that this presumption can be overcome by showing both of the following:

> (a) substantial consistency with the intent of the time rules having regard to the reason for the delay, the responsibility for the delay, any waiver, any unusual complexity in the case, and whether the complaint can be or was resolved in a reasonably timely manner, and
> (b) that there was no prejudice to the parties, or, alternatively, that any prejudice to the parties is outweighed by the prejudice to the values to be served by PIPA.

In his dissent, Justice Ronald Berger concluded (para. 50) that once the inquiry process begins, each time a new date or next step occurs, the parties are notified that the 90-day period is extended. This can be done before or after the 90 days expire, either of which satisfies the requirements of section 50(5). Because the section is silent about when an extension of time can be granted, one cannot presume then that silence means the extension must be granted *before* expiry. Second, judicial review should not have proceeded without proper notice to the complainants, who were denied an opportunity to tender evidence or advance arguments. A strict interpretation of section 50(5) penalizes complainants whose rights to privacy have been affected. Even though they are not to blame for the delay, they are left without a remedy as the proceedings are dismissed on a "procedural technicality" (para. 64). Third, quashing the adjudicator's order without the benefit of reasons from the IPC on the loss of jurisdiction under section 50(5) had the effect of compromising the judicial review. Finally, quashing the adjudicator's order without considering alternative remedies was an error in law. In sum, the dissenting Justice held that the issues are such that the IPC should have had the opportunity to interpret the enabling statute and to pronounce on the alleged loss of jurisdiction. Otherwise the courts are denied the benefit of the "Commissioner's expertise and analysis relative to questions of mixed fact and law" (para. 78).

Frank Work, the IPC, indicated in his News Release that, "As a result of this decision, likely hundreds of Albertans will lose the privacy remedies they thought they received in response to their complaints under the *Personal Information Protection Act.* All the efforts and resources put into pursuing complaints and preparing submissions has [sic] gone for naught." Furthermore, now that the IPC is required to give reasons for every time extension in the inquiry process, and the court can review those reasons in every case, "I anticipate a tidal wave of judicial review applications based on this order. This has implications for the Courts themselves."

If Frank Work is correct in his estimates about the number of complaints that would be placed in jeopardy because of time constraints and lack of resources to abide by the court's requirements, it is understandable that he has expressed "grave concern" about this ruling. It seems patently unfair that complainants will not have their complaints adjudicated for reasons over which they have no control. If the Office of the IPC is not able to comply with the court's requirements, the PIPA should either be amended or the government should provide the IPC with sufficient resources to comply with the court's ruling. Otherwise, many Albertans will not effectively have any privacy remedies.

Frank Work has indicated that he will be seeking leave to appeal the decision to the Supreme Court of Canada, and that he will be asking the Alberta Legislature to amend the PIPA as soon as possible to address the situation.