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Supreme Court of Canada Saves Timing for the Alberta Information and Privacy Commissioner

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Decision Considered:

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61

This case has been followed closely by those interested in information and privacy procedures. The issues raised by the decision were discussed in my previous blog (see here). [*Editor's note, also see Alice Woolley's ABlawg on this decision True Questions of Jurisdiction: Administrative Law's Unicorns*]

In sum, the Information and Privacy Commissioner (IPC) received complaints that the Alberta Teachers' Association (ATA) had disclosed personal information in contravention of Alberta's *Personal Information Protection Act*, SA 2003 c P-6.5 (PIPA). At the relevant time, subsection 50(5) provided that an inquiry must be completed within 90 days of the complaint being received, unless the IPC notified the parties that he or she was extending the time period. The IPC took 22 months from the initial complaint before extending the date on which the inquiry would be concluded. Then, seven months later, an adjudicator issued an order on behalf of the IPC, finding that ATA had contravened the PIPA. The ATA applied for judicial review, arguing for the first time that the IPC had lost jurisdiction for failing to extend the time period for the inquiry within 90 days of the complaint being received. The chambers judge quashed the adjudicator's decision on the basis of timing, and the majority of the Court of Appeal upheld the chambers judge's decision. As noted in the blog above, this decision prompted the rare move on the part of the IPC, who publicly expressed concern about the implications of the Court of Appeal ruling.

A majority of the Supreme Court of Canada (SCC) allowed the IPC's appeal (per Justices McLachlin CJ, LeBel, Fish, Abella, Charron and Rothstein), reinstating the adjudicator's order and remitting the matter to the chambers judge to consider the issues that were not dealt with in the original judicial review. The SCC noted the adjudicator had implicitly decided that providing an extension after 90 days did not automatically terminate the inquiry (paras 27-29). Although a court has discretion not to judicially review an issue that could have been, but was not raised before the tribunal (in this case, timing), the IPC had consistently expressed his views about timing in other cases. Further, the issue of timeliness did not require the consideration of evidence and there was no allegation of prejudice.

The SCC (per Justice Rothstein) noted that because a reasonableness standard of review applied, the court will usually defer in cases where a tribunal is interpreting its own statute. This was not an exceptional case, and thus, deference was owed to the IPC. Furthermore, the fact that the

decision about timeliness was not explicit should not cause the reviewing court to "gut the deference owed to a tribunal" (para 54). Also, when a decision under review concerns an issue that was not raised before the decision-maker, the reviewing court can consider reasons which could have been offered in support of the decision (para 53). In this case, there was a reasonable basis for the decision, and thus the reviewing court should have upheld the IPC's decision as reasonable. The majority noted that in some cases, it will be reasonable for the reviewing court to give the tribunal the opportunity to give reasons for its decision (i.e., with respect to timing). The SCC was also influenced by prior decisions made by the IPC on the interpretation of similar provisions (e.g., s 69(6) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000 c F-25) (paras 56-7). The IPC had determined that this virtually identical section only applied to the IPC's duty to complete an inquiry and not to extending time to complete an inquiry.

The three dissenting justices (Cromwell, Binnie and Deschamps) focused on whether the majority had overstated the level of deference given a tribunal in the interpretation of its home statute. They emphasized that the last word on questions of law should be left with the courts. Justice Cromwell noted that the reviewing court had a duty to consider whether the legislators had intended that subsection 50(5) be reviewed on a standard of correctness.

It is interesting to note that PIPA subsection 50(5) was amended in 2010 to require that the inquiry must be completed within one year from the date that the written request for review or written complaint was received by the IPC.

It seems that the outcry of the IPC and the litigation on the matter caused the Alberta Legislature to respond. The SCC decision and the amendment should ease the concerns of the IPC.

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