May 30, 2013

New Developments in Long Running Alberta Privacy Case

Written by: Linda McKay-Panos

Decision Considered:

Alberta Teachers' Association v Alberta (Information and Privacy Commissioner), 2013 ABQB 106.

This case, which has a long judicial history, has been followed closely by those interested in information and privacy procedures. The issues raised by the decision were discussed in my previous ABlawg post "Supreme Court of Canada Saves Timing for the Alberta Information and Privacy Commissioner" here. Also see Alice Woolley's ABlawg post on this decision 'True Questions of Jurisdiction: Administrative Law's Unicorns" here. The current case is interesting because the Alberta Teachers' Association (ATA) now seeks to amend its Originating Application to the Court of Queen's Bench to include a request for declarations that selected provisions of the *Personal Information Protection Act* SA 2003, c P-6.5 (PIPA) and the PIPA Regulation, Alta Reg 366/2003 are unconstitutional, or that the adjudicator's order is unconstitutional.

While the ATA case was being addressed by the Courts (with respect to the issue of whether the original case was dealt with under the time limits provided under the PIPA), another case addressed whether certain provisions of the PIPA were constitutional (see: *United Food and Commercial Workers, Local 401 v Alberta (Information and Privacy Commissioner*), 2011 ABQB 415, varied 2012 ABCA 130 ("UFCW"). Justice Goss at the Court of Queen's Bench declared that a portion of s 4(3) of PIPA and the definition of "publicly available information" in the PIPA Regulation were invalid. The Alberta Court of Appeal varied the order, held that there were "a number of aspects of over-breadth" in PIPA's impact on free expression, and concluded that the proper remedy was a declaration that the order was unconstitutional (rather than a remedy holding that the statute was unconstitutional). The Supreme Court of Canada granted leave to appeal the decision (October 25, 2012), 2012 CanLII 64739 (SCC), but no judgment has yet been released.

In the current ATA case, the Alberta Information and Privacy Commissioner ("Commissioner") objected to the amendments to the Originating Application issues requested by the ATA on the basis that the Supreme Court of Canada ("SCC") had remitted the matter back to the Court of Queen's Bench, and the amendments would require the court to consider issues that had not been previously dealt with in the judicial review. Further, the constitutional issues were not raised on the original application (ATA, para 14), nor were they before the adjudicator in the first place (ATA, para 17).

Madam Justice Ross reviewed the circumstances in which amendments to pleadings will not be permitted: (1) they would cause serious prejudice that cannot be repaired by payment of costs; (2) the amendment would be hopeless; (3) it would add a new cause of action or party outside of the limitation period; and (4) it indicates bad faith (*Canadian Deposit Insurance Corp v Canadian Commercial Bank*, 2000 ABQB 440 at para 11, 82 Alta LR (3d) 382) (ATA, para 24). Justice Ross concluded that there was no irreparable prejudice arising from the amendments, there was no argument that the claims made in the amendments are hopeless, the limitation period of the PIPA s 54.1 had been met and did not prevent the addition of grounds or new claims in an amended Originating Application, and there was no bad faith, as the ATA wanted to avoid the cost of litigating a similar issue while the law is unsettled (ATA, paras 24 to 38).

So, stay tuned to see how the Court now addresses the constitutionality of some sections of the PIPA, the *PIPA Regulation* and/or the original order of the adjudicator in this matter.