December 17th, 2008

What happens to our "day in court" when someone else drops the ball?

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Cases Considered:

Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner), 2008 ABCA 384, affirming *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499.

This is a privacy case involving Kellogg Brown and Root's ("KBR") drug testing policy. (For earlier posts involving a human rights complaint against this company's drug testing policy, in which the S.C.C. denied leave to appeal; see: http://ablawg.ca/wp-content/uploads/2008/02/lmp_chiasson_jan2008.pdf and http://ablawg.ca/wp-content/uploads/2008/03/dc_chiasson_march10.pdf). The case is relatively straightforward, but it does raise an interesting access to justice issue: What happens when the privacy commissioner fails to complete an inquiry on a complaint within the legislated time limit?

The unnamed complainant launched a complaint to both the Alberta Human Rights and Citizenship Commission and the Privacy Commission of Alberta. The complaint pertained to the issue of pre-employment alcohol and drug testing for potential employees of KBR. On October 4, 2004, the Information and Privacy Commissioner ("IPC") notified Syncrude (KBR was its contractor) that the IPC was conducting an investigation under s. 36(2)(e) of the *Personal Information Protection Act*, R.S.A. 2000, c. P-6.5 ("*PIPA*"). The complainant alleged KBR'S pre-employment random drug and alcohol testing policy violated the *PIPA*.

Section 36(2)(e) reads:

> 36 (2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that …
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> > (e) personal information has been collected, used or disclosed by an organization in contravention of this Act or in circumstances that are not in compliance with this Act;…

On November 5, 2004, Syncrude wrote to the IPC, stating, among other facts, that the complainant was not an employee of Syncrude and that Syncrude did not have a pre-employment drug testing policy. After meeting with Syncrude officials, on November 29, 2004, the IPC informed KBR that it was going to investigate KBR's policy. KBR was not contacted by the IPC until over a year later, in early December 2005. Syncrude received no further communication from the IPC until October 7, 2005 and wrote to the IPC on November 2, 2005 complaining about the timeliness of the IPC's investigation.

On December 12, 2005, the complainant advised the IPC that he wanted his complaint to proceed to a formal inquiry. KBR was notified on December 22, 2005, and Syncrude was notified on January 10, 2006, that the complainant wished to continue with the complaint and proceed to a formal inquiry. On August 11, 2006, KBR's counsel received a letter confirming a Notice of Inquiry on the case. The Notice of Inquiry indicated that the IPC would first conduct an inquiry into whether it had jurisdiction to conduct the complaint and second, if there were jurisdiction, a second Notice of Inquiry would be issued setting out the issues to be decided under the *PIPA*.

Section 47 of the *PIPA* permits an individual to initiate a complaint by delivering a written request to the IPC. Section 50 authorizes the IPC to conduct an inquiry arising from a complaint.

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
> >
> > (b) provides an anticipated date for the completion of the review.

The IPC investigation was never concluded and no report issued. Syncrude and KBR were never provided with an anticipated date for the completion of the investigation.

KBR and Syncrude applied to the Alberta Court of Queen's Bench (Justice R. Paul Belzil) for declarations that the IPC lost jurisdiction and that he be prohibited from conducting an inquiry under the *PIPA*. The IPC argued that prohibition should not be granted as he had offered to hold a two stage inquiry and further, the respondent companies could seek judicial review if dissatisfied with the results of the inquiry. In addition, the IPC argued that s. 50(5) was merely directory and not mandatory.

Justice Belzil noted that if s. 50(5) were interpreted to be mandatory, thus causing the complainant to lose his right to have an inquiry under *PIPA*, he would still be able to pursue his human rights complaint or to launch a grievance to his union. Further, Justice Belzil held that it is in the public interest to have complaints resolved in a timely fashion. Thus, considering a number of factors, Justice Belzil concluded that s. 50(5) was mandatory and that because the IPC failed to conduct the inquiry within 90 days, he lost jurisdiction, and the IPC was further prohibited from proceeding with the inquiry.

The matter was appealed to the Alberta Court of Appeal. At the outset of the Memorandum of Judgment, Justice Ronald Berger (speaking for Justices Keith Ritter and Donna Read) noted that the complainant had died on July 24, 2007. KBR and Syncrude argued that the appeal should be dismissed because it was moot. The IPC argued that the public interest issue raised by the complainant warranted hearing the appeal. KBR and Syncrude argued that the complaint was

brought on behalf of the complainant alone and that if the IPC so chose, it could initiate its own investigation of the alcohol and drug testing policy under s. 36 of the *PIPA*.

The Court of Appeal did not address the issue of whether the language in *PIPA* s. 50(5) was mandatory or directory. In addition, neither case provided any indication as to why the IPC did not proceed to investigate the complaint in a timely fashion.

The Court of Appeal concluded that the underlying factual underpinnings of the case were peculiar to the complainant's personal circumstances and therefore the complaint was not a broad-based complaint. In addition, the IPC had recently decided a case on the same issue (*Alberta Teachers' Association and the Information and Privacy Commissioner*, Action No. 0803-05729). The Court set out the test for determining mootness from *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 432:

> 1. Has the tangible and concrete dispute disappeared and the issues become academic rendering the matter moot?
>
> 2. If so, should the Court exercise its discretion to hear the case?

Applying this test, the Court of Appeal determined that the appeal was moot and declined to exercise its discretion to hear it. The appeal was dismissed.

The larger question raised by these cases is whether it is fair that the complainant could not "have his day in court" when the completion date for holding an inquiry was out of his hands. Can the complainant force the IPC, having accepted the complaint and having indicated that he would pursue an inquiry, to actually hold one? Perhaps had he not died, the complainant could have gone to court and asked for an order of *mandamus* to compel the IPC to hold the inquiry. However, this would have required him to expend his own funds and time to try to force the IPC to act. Presumably, the complainant was entitled to assume the matter was proceeding as indicated by the IPC.

Some may argue that this case must be confined to its unique facts: the Court exercised its discretion not to hear the appeal because the complainant had died, the matter was not a public interest matter but rather confined to the individual complainant and the fact that there was also a case before the IPC dealing with the same issue. In addition, one might argue that with the legal system's limited resources, the decision not to hear the matter was correct.

The big concern, though, is that in other situations where the IPC has not completed the required inquiry under the *PIPA* within 90 days, a matter which is outside of the control of the complainant, the respondents can go to court and ask that the matter be dismissed. This circumstance seems unfair.