

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER M2004-001

March 29, 2005

REGISTRAR OF MOTOR VEHICLE SERVICES

REGISTRY=RECOVERY INC.

Review Number M0006

Office URL: <http://www.oipc.ab.ca>

Summary:

The Applicant applied under the *Access to Motor Vehicle Information Regulation*, Alta Reg. 140/2003, for personal driving and motor vehicle information from the Registrar of Motor Vehicle Services. The Registrar denied the Applicant's request. The Applicant subsequently requested a review of this decision from the Office of the Information and Privacy Commissioner.

The issues before the Adjudicator were whether the Applicant's request for review was received within the time period set out in section 74.3(2) of the *Freedom of Information and Protection of Privacy Act* and, if not, whether the Adjudicator nevertheless had the jurisdiction to review the Registrar's decision.

The Adjudicator held that he did not have the jurisdiction to review the decision of the Registrar. The Adjudicator held that the request for review was delivered to the Office of the Information and Privacy Commissioner outside the time limit set out in section 74.3(2) and that he did not have the inherent jurisdiction to review the Registrar's decision.

Statutes Cited:

Access to Motor Vehicle Information Regulation, Alta. Reg. 140/2003, ss. 2(1)(a), 2(1)(b), 2(1)(p), 4(1), 4(1)(d)

Alberta Rules of Court, r. 548

Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c.F-25, ss. 4(1)(l)(ii), 56(1), 65, 66(1), 66(2), 69, 74.2, 74.3(1), 74.3(2), 74.5(1), 74.7, 74.91

Health Disciplines Act, R.S.A. 1980, c. H-3.5, s.15.1

Interpretation Act, R.S.A. 2000, c.I-8, ss. 22(1), 22(7), 28(1)(x)(i), 28(2)(d)

Judicature Act, R.S.A. 2000, c. J-2 , ss.1, 10

Physical Therapy Profession Act, S.A. 1984, c. P-7.5, ss. 64, 65(1)

Planning Act, R.S.A. 1970, c.276, s.128

Public Inquiries Act, R.S.A. 2000, c. P-39

Authorities Cited:

Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at 168

Maxwell on the Interpretation of Statutes, 10th ed. (London: Sweet & Maxwell, 1953) at 376

Cases Cited:

Black Diamond Land and Cattle Co v. Oasis Gardeners Ltd. [1996], A.J. No. 736 (QL)

Carlin v. Registered Psychiatric Nurses' Assn. (Alberta) (1996), 186 A.R. 186 (Alta. Q.B.)

Coventry Homes Inc. v. Beaumont (Town) Subdivision & Development Appeal Board (2001), 277 A.R. 278 (Alta. C.A.)

Hansaraj v. Ao, [2004] A.J. No. 734 (QL)

Houg Alberta Ltd. v. 417034 Alberta Ltd. [1991], A.J. No. 563 (QL)

K.C. v. College of Physical Therapists of Alberta, [1998] A.J. No. 99 (QL)

Lakevold v. Dome Petroleum Ltd. (1979), 181 A.R. 254 (Alta. C.A.)

Laurel Construction Ltd. v. St. John's (City) (1997), 486 A.P.R. 343 (Nfld. S.C.T.D.)

Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink [2002] 3 S.C.R. 209

Masterpiece Cabinetry & Finishing Ltd. v. Risi, [2001] A.J. No.198 (QL)

MacNeil v. Hodgkin, [1998] A.J. No. 133 (QL)

McMahon v. Canada (Attorney General), [2004] F.C.J. No. 644 (QL)

Montreal Street Railway Co. v. Normandin, [1917] A.C. 170 (P.C.)

Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services) (2001), 200 D.L.R. (4th) 193 (S.C.C.)

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) [1990] 3 S.C.R. 1170

Ottawa-Carleton (Regional Municipality) v. Canada (Employment and Immigration Commission), [1986] F.C.J. No. 556 (QL)

Rahman v. Alberta College and Assn. of Respiratory Therapy, [2001] A.J. No. 343 (QL)

Stuart Olson Construction Ltd. v. Edmonton (City), (1977), 3 Alta. L.R. (2d) 239 (Alta. S.C.A.D.)

University of Saskatchewan v. Saskatchewan (Labour Relations Board) [1978] 2 S.C.R. 830

I. BACKGROUND

[para 1] On April 27, 2004, Registry=Recovery Inc. (the “Applicant”) applied for information from the Registrar of Motor Vehicle Services under the *Access to Motor Vehicle Information Regulation*, Alta. Reg. 140/2003 (“AMVIR”). On the Applicant’s application form, the Applicant applied for “Vehicle registration search” and “Individual demographic search” information under section 2(1)(p) of AMVIR.

[para 2] On June 8, 2004, the Executive Director of Registry Services wrote to the Applicant informing the Applicant that the application was denied because the Applicant’s purpose identified in the application was not covered under AMVIR and the “Registrar’s Decisions”.

[para 3] On July 13, 2004, this Office received a request for review from the Applicant. In that letter the Applicant stated that the Applicant would like to appeal “the whole of Notification 01/2004. In particular, the Applicant stated that he would like the

Adjudicator to review the application of section 2(1)(a), 2(1)(b) and 2(1)(p) of AMVIR to his request for information. In that letter the Applicant also stated that the Applicant is requesting access to “Type 3 Non-personal Motor Vehicle Information”.

[para 4] On August 11, 2004, I wrote to the Applicant informing the Applicant that the Applicant’s request for review was received outside the 60-day time-limit found within section 74.3 of the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”). As such, I had no jurisdiction to hold an inquiry regarding the request for review.

[para 5] On August 16, 2004, the Applicant wrote to this Office requesting that I reconsider my decision not to hold an inquiry.

[para 6] On August 17, 2004, I notified the parties that I would convene an oral inquiry regarding whether I have the jurisdiction to review the Registrar’s decision. In addition, in response to a request by the Applicant, on August 31, 2004, I also informed the parties that I would address whether I have the jurisdiction to address all of the decisions of the Registrar contained in Notification 01/2004.

[para 7] I note that the FOIP Act was amended, effective May 1, 2004, to provide the Commissioner with the power to review a decision by the Registrar of Motor Vehicle Services to grant or deny access to personal driving and motor vehicle information. The Commissioner has delegated this authority to me pursuant to section 61 of the FOIP Act.

II. ISSUES

[para 8] There are three issues outlined in the inquiry notice:

1. Was the Applicant’s request for review received by the Office of the Information and Privacy Commissioner within the time period specified in section 74.3 of the *Freedom of Information and Protection of Privacy Act*? In determining the issue, the Adjudicator will address the following:

a) When was the Registrar’s notification of decision published?

b) Was the Registrar’s notification of decision published in accordance with the *Access to Motor Vehicle Information Regulation* (AMVIR)?

2. If the Applicant’s request for review was not received within that specified time period, does the Adjudicator nevertheless have the jurisdiction to review the Registrar’s decision?

3. Does the Adjudicator have the jurisdiction, in this inquiry, to address all of the decisions of the Registrar contained in Notification 01/2004, or is he confined to the specific request made by the Applicant?

III. DISCUSSION

1. Was the Applicant's request for review received by the Office of the Information and Privacy Commissioner within the time period specified in section 74.3 of the *Freedom of Information and Protection of Privacy Act*?

[para 9] Sections 74.3(1) and (2) read:

74.3(1) To ask for a review under this Division, a written request must be delivered to the Commissioner.

(2) A request for review under this Division must be delivered to the Commissioner within 60 days after the date the notification of the decision was published in accordance with the regulations under section 8 of the Traffic Safety Act.

a) When was the Registrar's notification of decision published?

[para 10] The Registrar of Motor Vehicle Services provided this Office with an affidavit signed by the Graphic Designer/Web Master for Alberta Government Services. In that affidavit the Graphic Designer/Web Master states that she posted the original version of the Registrar's notification on the morning of May 12, 2004 and that she posted a revised version of the notification at 1:51pm on the same day. The Registrar posted a revised notification in order to correct an error in the first notification which identified the notification date as May 4, 2004 instead of May 12, 2004.

b) Was the Registrar's notification of decision published in accordance with the *Access to Motor Vehicle Information Regulation (AMVIR)*?

[para 11] The Registrar states that Notification 01/2004 was published in accordance with section 4(1) of AMVIR. Section 4 reads:

4(1) Before releasing any information pursuant to a request under section 2, the Registrar must publish a notification

(a) on the Registrar's website maintained on the Government of Alberta, Department of Government Services website,

(b) of the category of information to be or not to be released by the Registrar and the person or category of persons to whom the Registrar is or is not to release the information,

(c) that states that, on request by a person, information may or may not be released in accordance with clause (b) for the purposes set out in this Regulation, and

(d) that includes the date of the publication and a statement that any person may, within 60 days after the date of publication under this subsection, ask the Commissioner to review the decision of the Registrar in accordance with Part 5, Division 1.1 of the Freedom of Information and Protection of Privacy Act.

(2) The Registrar may release information to a person who requested the information before the expiry of the 60-day period referred to in subsection 1(d), if the Registrar was providing information to that person prior to May 1, 2004.

(3) On the issuance of the notification in accordance with subsection (1), notice is deemed to have been given for the current and any future releases of the category of information and of the person or category of persons to whom the information is released or not released, as described in the notification, for the purposes of notice under Part 5, Division 1.1 of the Freedom of Information and Protection of Privacy Act.

(4) On the coming into force of any amendments to section 2, a new notification must be issued in respect of any request for information pursuant to those amendments in accordance with subsection (1).

[para 12] I have reviewed Notification 01/2004. I find that it was published in accordance with section 4(1) of AMVIR.

c) Section 74.3 of the Freedom of Information and Protection of Privacy Act

[para 13] Section 74.3(1) and (2) of the FOIP Act states that a request for review must be delivered to the Commissioner within 60 days after the date the notification of decision is published.

[para 14] In order to calculate the 60 day period, I reviewed sections 22(1), 22(7) and 28(1)(x)(i) of the Alberta *Interpretation Act*, R.S.A. 2000, c. I-8. These sections read:

22(1) If in an enactment the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.

...

(7) If an enactment provides that anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

...

28(1) In an enactment,

(x) “holiday” includes

(i) every Sunday

[para 15] The evidence before me is that the Registrar’s notification was published on May 12, 2004. According to section 22(7) of the Alberta *Interpretation Act*, the 60 days would begin on May 13, 2004 with the 60th calendar day falling on July 11, 2004. However, because July 11, 2004 was a Sunday, section 22(1) of the *Interpretation Act* read in conjunction with section 28(1)(x)(i) of the *Interpretation Act* would effectively make Monday, July 12, 2004 the 60th day.

[para 16] The Applicant did not deliver the request for review to this Office until July 13, 2004. As such, I find that the Applicant’s request for review was delivered to this Office outside the 60-day time-limit required by section 74.3(2) of the FOIP Act.

2. If the Applicant’s request for review was not received within that specified time period, does the Adjudicator nevertheless have the jurisdiction to review the Registrar’s decision?

a) Does section 74.3 of the FOIP Act give the Adjudicator the jurisdiction to extend the time to request a review?

[para 17] Section 74.3(2) reads:

74.3(2) A request for a review under this Division must be delivered to the Commissioner within 60 days after the date the notification of the decision was published in accordance with the regulations under section 8 of the Traffic Safety Act.

(emphasis added)

[para 18] The Registrar states that section 74.3(2) of the FOIP Act does not give me the ability to extend the 60-day time-limit. This section states that a request for review “must” be delivered to the Commissioner within 60 days. The Registrar states that the wording of section 74.3(2) is mandatory.

[para 19] The Applicant stated that the word “must” within section 74.3(2) should be read as directory, that is, a “may” provision. In support, the Applicant cited the Alberta Court of Queen’s Bench decision by Justice Coutu of *Rahman v. Alberta College and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (QL) (*Rahman*).

[para 20] In *Rahman*, the issue before the Court was whether the Alberta College and Association of Respiratory Therapy lost its jurisdiction by failing to commence a hearing within the 90-day time limit set out in section 15.1(2) of the *Health Disciplines Act*, R.S.A. 1980, c. H-3.5. Section 15.1 read as follows:

15.1(1) On referral to it of a matter under section 14 or on determining under section 14.1 that a hearing should be held, the committee shall hold a hearing.

(2) A hearing under subsection (1) shall be commenced not more than 90 days after the date on which the matter is referred to the committee or the determination that a hearing should be held is made.

[para 21] The issue before the Court was whether section 15.1(2) should be read as mandatory or directory. The Court identified a number of factors relevant to this determination. I have addressed each of these factors below.

i) The wording of the section

[para 22] In *Rahman*, the Court stated that the wording of a section and the definitions accorded by the Alberta *Interpretation Act* are factors which must be considered when determining whether a provision is to be construed as mandatory or directory.

[para 23] Section 74.3(2) of the FOIP Act states that a request for review “must” be delivered to the Commissioner within 60 days. Section 28(2)(d) of the Alberta *Interpretation Act* states that the word “must” within an enactment is to be construed as imperative. As such, I find that the wording of section 74.3(2) indicates that the Legislature intended for section 74.3(2) to be interpreted as a mandatory provision.

ii) The scope and purpose of the Act

[para 24] In *Rahman*, the Court held that the scope and purpose of an Act are factors which should be used to determine whether a provision should be interpreted as mandatory or directory. As previously mentioned, in *Rahman*, the issue before the Court was whether the Alberta College and Association of Respiratory Therapy lost its jurisdiction by failing to commence a hearing within the 90-day time limit set out in section 15.1(2) of the *Health Disciplines Act*. This section stated that the Alberta College and Association of Respiratory Therapy “shall” commence a hearing within 90 days.

[para 25] The Court held that section 15.1(2) should be interpreted as a directory provision. The Court held that the Legislature did not intend for a hearing to proceed within 90 days at all costs and no matter what the circumstances. The Court held that the Legislature must have contemplated that it may not be possible to commence a hearing in 90 days, particularly if there was an application for an out-of-province witness or if a witness failed to attend.

[para 26] In this inquiry, I find that the scope and purpose of the FOIP Act indicates that section 74.3(2) is a mandatory provision. The facts in this inquiry differ from those found in *Rahman*. In this inquiry, it was not impossible for the Applicant to file a request for review within the 60-day time limit set out in section 74.3(2) of the FOIP Act. Although the Applicant states that the Applicant was given incorrect information by the

Registrar's Office regarding the deadline to request a review by this Office, the Applicant was not prevented from delivering the request for review to this Office before the 60 days expired.

[para 27] In the alternative, even if I had found that it was impossible for the Applicant to file the request for review within the 60-day time limit, the difference in wording between section 74.3(2) and section 66 of the FOIP Act clearly indicates that it was the Legislature's intention that the 60-day time limit be construed as mandatory. Section 66 gives the Commissioner the discretion to extend the 60-day time limit to deliver a request for review. However, this discretion is conspicuously absent from section 74.3(2) of the FOIP Act. I find that the difference in wording between these two sections supports the conclusion that the discretion was deliberately excluded from section 74.3(2) and, in this regard, find that the statutory principle of implied exclusion, also known as "Expressio unius est exclusio alterius" is applicable in this inquiry. This principle means "to express one thing is to exclude another". *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 168 describes the statutory interpretation principle of *Expressio unius est exclusio alterius* as follows:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

[para 28] I find that the Legislature's failure to give the Commissioner the discretion to extend the time limit in section 74.3(2) of the FOIP Act while including the discretion in section 66 implies that this reference was deliberately excluded from section 74.3(2).

iii) Public duty rule

[para 29] In *Rahman*, the Court held that when a public duty is imposed on an entity and a statute requires that the public duty be performed within a certain time, the requirement may be construed as directory in cases when injustice or inconvenience to others, who have no control over those exercising the duty. In its decision, the Court cited *Maxwell on the Interpretation of Statutes*, 10th ed. (London: Sweet & Maxwell, 1953) at 376 which summarized the public duty rule as follows:

A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions

shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right of authority conferred, and it is therefore probable that such was the intention of the legislature. But when a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

[para 30] Section 74.3(2) states that an Applicant must deliver a request for review to the Commissioner within 60 days if the Applicant would like this Office to review the Registrar's decision. However, section 74.3(2) does not impose a public duty on the Applicant. As such, I find that the public duty rule does not support the Applicant's assertion that section 74.3(2) is a directory provision.

iv) The consequences of holding a statute to be directory or mandatory

[para 31] In *Rahman* the Court held that prejudice against a party is one of the factors to be considered in determining whether to construe a provision as mandatory or directory. In *Rahman*, the Court addressed whether a Complainant would be prejudiced if the time limit was considered mandatory. The Court answered this question in the affirmative. The Court held that if the hearing did not proceed, the Complainant would be unable to pursue the complaint, and the public interest in ensuring that a complaint against a member of a health discipline is investigated would be lost. However, it is noteworthy that in *Rahman* the prejudice was not against the Committee which missed the time limit, but against the Complainant who was a party to the proceeding.

[para 32] In the case before me, the Applicant had it within its control to file the request for review within the time limit. The failure of the Applicant to file within the 60-day time limit resulted in prejudice to the Applicant alone. No other party was prejudiced. This is not a situation where a tribunal's failure to act resulted in harm to a party which had no control over the process. I find that the Applicant's control over when to file the request for review and the lack of prejudice to other parties supports the conclusion that the Legislature intended section 74.3(2) to be a mandatory provision.

[para 33] In coming to this conclusion, I took into account the Federal Court decision of *McMahon v. Canada (Attorney General)*, [2004] F.C.J. No. 644 (QL) which referred to the Privy Council decision of *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.) and the Federal Court of Appeal decision of *Ottawa-Carleton (Regional Municipality) v. Canada (Employment and Immigration Commission)*, [1986] F.C.J. No. 556 (QL). In both of these later cases the Courts held that a provision may be considered directory where inconvenience or injustice results to those persons who have no control over those entrusted with a public duty, not those whose duty it is.

v) Penalty for failing to comply with the time limit

[para 34] In *Rahman*, the Court held that the presence of a penalty for failing to observe a time limit indicates that the Legislature intended for the provision to be construed as mandatory, while the absence of a penalty supports a directory interpretation.

[para 35] There is no penalty within the FOIP Act for failure to comply with the time-limit within section 74.3(2). As such, this factor would support the Applicant's assertion that the Legislature intended for section 74.3(2) to be construed as a directory provision.

vi) The procedural or substantive nature of the provision

[para 36] In *Rahman* the Court stated that the procedural or substantive nature of a provision is one of the factors to be considered in determining whether to construe a provision as mandatory or directory. If a provision is considered procedural, the provision may be construed as directory. Alternatively, if the provision is considered substantive, this indicates that the Legislature intended that the provision be construed as mandatory.

[para 37] After a review of the numerous decisions presented before me, I find that the 60-day time limit within section 74.3(2) of the FOIP Act should be considered a substantive provision. Section 74.3(2) states that an Applicant must deliver a request for review within 60 days in order to request a review of the Registrar's decision. If no application is made, no review will occur. The application results in a substantive right.

[para 38] In coming to my decision I took into account the following decisions which were distinguished in the *Rahman* decision. These included the Alberta Court of Appeal decisions of *Lakevold v. Dome Petroleum Ltd.* (1979), 181 A.R. 254 (Alta. C.A.) (*Lakevold*) and *Houg Alberta Ltd. v. 417034 Alberta Ltd.* [1991], A.J. No. 563 (QL) and the Alberta Court of Queen's Bench decision of *Black Diamond Land and Cattle Co v. Oasis Gardeners Ltd.* [1996], A.J. No. 736 (QL). In each of these decisions the Court held that if an Applicant fails to appeal or file a leave to appeal within the statutory time limit, a Court cannot extend a statutory time limit if the statute does not confer this power on the Court.

[para 39] In addition, I reviewed the Court of Queen's Bench decision of *Masterpiece Cabinetry & Finishing Ltd. v. Risi*, [2001] A.J. No.198 (QL) which was decided by Justice Coutu after the *Rahman* decision. In that decision, Justice Coutu adopted the reasoning of *Lakevold* and clearly stated that a failure to appeal or file for leave to appeal within the specified statutory time period is fatal to the application.

[para 40] I would also differentiate the Alberta Court of Appeal decision of *K.C. v. College of Physical Therapists of Alberta*, [1998] A.J. No. 99 (QL) from this inquiry. In *K.C. v. College of Physical Therapists of Alberta* the Appellant was a physical therapist

who was found guilty of professional misconduct. The Appellant filed a notice of appeal within the 30-day time limit set out under section 64 of the *Physical Therapy Profession Act*, S.A. 1984, c. P-7.5, but failed to serve the appeal within that time limit. The issue before the Court was whether the time limit should be characterized as substantive or procedural. The Court held that the time limit to serve the notice was procedural and therefore Rule 548 of the *Alberta Rules of Court* could be used to extend the time.

[para 41] However, *K.C. v. College of Physical Therapists of Alberta* differs from the present inquiry. In *K.C. v. College of Physical Therapists of Alberta*, section 65(1) of the *Physical Therapy Profession Act* explicitly provided that the Rules of Court, which could be used to extend the time limit, applied to the *Physical Therapy Profession Act*. As such, if the Court would have read the time limit within section 64 of the *Physical Therapy Profession Act* as a mandatory provision, it would have nullified section 65(1) of that Act which specifically referred to the *Alberta Rules of Court*. In the case before me, section 74.3(2) of the FOIP Act does not specifically provide for an extension of time.

vii) Conclusion

[para 42] After a review of the factors outlined in the *Rahman* decision and the decisions referred to above, I find that section 74.3(2) of the FOIP Act must be construed as a mandatory provision. As such, I find that section 74.3(2) does not give me the discretion to extend the 60-day time limit.

b) Is the Applicant entitled to ask for a request for review under Division 1 of the FOIP Act?

[para 43] The Applicant states that in addition to section 74.3(2), the Applicant has the right to ask for a review under Division 1 and, in particular, sections 65 and 66 of the FOIP Act. I note that of particular interest to the Applicant is section 66(2)(a) which permits the Commissioner to extend the 60-day time limit under section 66. Sections 65(1), 66(1) and 66(2) read as follows:

65(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.

66(1) To ask for a review under this Division, a written request must be delivered to the Commissioner.

(2) A request for a review of a decision of the head of a public body must be delivered to the Commissioner

(a) if the request is pursuant to section 65(1), (3) or (4) within

(i) 60 days after the person asking for the review is notified of the decision, or

(ii) any longer period allowed by the Commissioner,

[para 44] The Applicant states that although sections 65 and 66 of Division 1 do not specifically refer to request for reviews of the Registrar's decisions, these sections nevertheless permit the Applicant to ask for a review under those sections. In support of this argument, the Applicant refers to the wording of section 74.2(1) in Division 1.1. Section 74.2(1) states that "the Commissioner may review the Registrar's decision as set out in the notification". The Applicant states that if the Legislature had intended Division 1.1 to be the only Division that addresses the Applicant's right to request a review of the Registrar's decision, section 74.2 would have used the word "shall" instead of "may".

[para 45] The Registrar states that the Applicant cannot request a review under sections 65 and 66 of the FOIP Act.

[para 46] I find that the Applicant does not have a right to request a review of the Registrar's decision under sections 65 and 66 of the FOIP Act. My reasons are as follows.

[para 47] First, I find that the wording in section 74.2(1) does not support the Applicant's argument. I find that the word "may" in section 74.2(1) refers to the Commissioner's discretion to review a decision or, in the alternative, to refuse to review the decision. Section 74.5(1) states that the Commissioner must conduct an inquiry, subject to section 74.6. The Commissioner can refuse to conduct an inquiry in the limited circumstances set out in section 74.6. Section 74.2 does not specifically refer to the Applicant's discretion to request a review under another section such as sections 65 and 66.

[para 48] Second, section 74.91, which is found in Division 1.1 of the FOIP Act, states that Division 1 (which includes sections 65 and 66) does not apply to a review under Division 1.1. This section reads:

74.91 Sections 53(1)(a) and 54 and Division 1 do not apply to a review under this Division.

[para 49] Third, section 4(1)(d) of AMVIR states that a review of the Registrar's decision may be requested under Part 5, Division 1.1 of the FOIP Act. Section 4(1)(d) of AMVIR does not state that a review of the Registrar's decision may be requested under Division 1 of the FOIP Act.

[para 50] Fourth, section 4(1)(l)(ii) of the FOIP Act precludes the Commissioner from conducting a review of the Registrar's decision to refuse access under sections 65 and 66. Section 4(1)(l)(ii) reads:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(l) a record made from information

...

(ii) in the Office of the Registrar of Motor Vehicle Services,

[para 51] I note, however, that section 74.2(1) provides an exception to section 4(1)(l) and gives the Commissioner the jurisdiction to review a decision of the Registrar in the limited circumstances outlined under Division 1.1. Section 74.2(1) reads as follows:

74.2(1) Despite section 4(1)(l)(ii), if a person makes a request to the Registrar for access to personal driving and motor vehicle information and a notification is published in accordance with the regulations made under section 8 of the Traffic Safety Act, the Commissioner may review the Registrar's decision as set out in the notification.

(emphasis added)

[para 52] The words “despite section 4(1)(l)(ii)” clearly indicate that, notwithstanding the exclusion in section 4(1)(l), the Commissioner has the jurisdiction to review the Registrar’s decision under Division 1.1.

c) **Do the powers given to the Commissioner under the *Public Inquiries Act*, in conjunction with the provisions of the *Judicature Act* give the Commissioner the jurisdiction to extend the 60-day time limit to request a review?**

[para 53] The Applicant states that I have the power of a Commissioner under the *Public Inquiries Act*, R.S.A. 2000, c. P-39. The Applicant states that, under that Act, the Commissioner is given the powers of a Court of Queen’s Bench Justice. The Applicant further states that those powers would give the Commissioner the power to relieve from forfeiture under section 10 of the *Judicature Act*, R.S.A. 2000, c. J-2. In support, the Applicant refers to the Alberta Queen’s Bench decision of *MacNeil v. Hodgin*, [1998] A.J. No. 133 (QL) which addressed section 10 of the *Judicature Act*.

[para 54] The Registrar states that the *Public Inquiries Act* does not give me the authority to exercise the powers outlined in the *Judicature Act*. The Registrar states that the powers outlined in the *Judicature Act* do not apply to the Commissioner as they are only accorded to judges of the Court which are defined as judges of the Court of Queen’s Bench or the Court of Appeal. In addition, the Registrar refers to Court of Appeal decision of *Hansaraj v. Ao*, [2004] A.J. No. 734 which states that section 10 of the *Judicature Act* should not be applied to extend limitation periods.

[para 55] Section 56(1) of the FOIP Act states that, in conducting an inquiry under section 74.5, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*. The provisions of the *Public Inquiries Act* outline the general powers of a Commissioner including the power to summon any

person as a witness and require witnesses to give evidence under oath. Section 5 of the *Public Inquiries Act* also provides a Commissioner with the same “privileges and immunities as a judge of the Court of Queen’s Bench”.

[para 56] Notwithstanding the extensive powers given to the Commissioner under the *Public Inquiries Act*, I do not find that these provisions give me the power to relieve from forfeiture under section 10 of the *Judicature Act*. Section 10 of the *Judicature Act* gives a “Court” the ability to “relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit”. However, section 1 of the *Judicature Act* defines a Court as a judge of the Court of Queen’s Bench or the Court of Appeal.

[para 57] In addition, although section 5 of the *Public Inquiries Act* provides me with the same “privileges and immunities” as a judge of the Court of Queen’s Bench, I do not find that these “privileges and immunities” give me the power or authority to exercise the power of a judge of the Court of Queen’s Bench under the *Judicature Act*.

d) Does the Adjudicator have the inherent jurisdiction to extend the time to request a review?

[para 58] The Applicant states that I have the inherent jurisdiction under the FOIP Act to extend the 60-day time limit. The Applicant states that this authority is given to me under sections 69(1) and 74.5(1) of the FOIP Act which permit me to decide all questions of fact and law arising in the course of an inquiry. In addition, the Applicant states that the modern trend of the courts is to acknowledge broad judicial power to grant relief or extend time limits. In this regard the Applicant referred to the Supreme Court of Canada decision of *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink* [2002] 3 S.C.R. 209 (*Lavallee*).

[para 59] In the Applicant’s submission the Applicant also stated that the discretion to extend time periods may occur when all or some of the following factors are present:

- (i) a bona fide intention to appeal (or review);
- (ii) a reasonable excuse for the delay; and/or
- (iii) lack of prejudice in the delay.

[para 60] The Applicant further states that even in cases where there is no reasonable excuse for delay, the chief factor is the absence of serious prejudice to the other party: *University of Saskatchewan v. Saskatchewan (Labour Relations Board)* [1978] 2 S.C.R. 830 (*University of Saskatchewan*).

[para 61] The statutory declaration of the Applicant’s employee states that on or about June 17, 2004, the Applicant’s employee contacted Mr. Vlad Sirbu at Alberta

Government Services. The Applicant states that Mr. Sirbu told the Applicant's employee that July 14, 2004 was the deadline to appeal the Registrar's decision to this Office. The Applicant states that the Applicant had both an intention to appeal and a reasonable excuse for the delay. The Applicant also states that there is no prejudice because the Applicant missed the deadline by only one day.

[para 62] The Registrar states that the Commissioner does not have the inherent jurisdiction to extend the time limit. In support, the Registrar referred to several court decisions.

[para 63] After a review of the arguments and the decisions submitted by both parties, I find that I do not have the inherent jurisdiction to extend the time limit. In coming to this conclusion, I took into account two Alberta Court of Appeal decisions referred to by the Registrar: *Stuart Olson Construction Ltd. v. Edmonton (City)*, (1977), 3 Alta. L.R. (2d) 239 (Alta. S.C.A.D.) (*Stuart Olson Construction Ltd.*) and *Coventry Homes Inc. v. Beaumont (Town) Subdivision & Development Appeal Board* (2001), 277 A.R. 278 (Alta. C.A.) (*Coventry Homes Inc.*). I find that both of these decisions support the proposition that a tribunal does not have the authority to hear an appeal beyond a statutory time period.

[para 64] In particular, I find that the facts of the *Stuart Olson Construction Ltd.* decision are similar to those in this inquiry. In *Stuart Olson Construction Ltd.* a party filed a notice to appeal the decision of the Development Appeal Board one day past the statutory time limit found within section 128 of the *Planning Act*, R.S.A. 1970, c. 276. The party's delay in serving the notice was partly the result of the incorrect information it received from the Development Board Office. The Development Appeal Board decided to retain jurisdiction. The Alberta Court of Appeal held that the Development Appeal Board erred in deciding to hear the appeal. The Alberta Court of Appeal held that although the party was prejudiced in some measure by mistaken information given by board officials, the mistake did not frustrate the exercise of the party's right. The Court held that the mistake did not, in itself, result in the party being unable to serve the notice of appeal in due time. The party had sufficient time to file the appeal within the statutory time limit.

[para 65] In coming to this decision I also took into account two other decisions referred to by the Registrar: *Laurel Construction Ltd. v. St. John's (City)* (1997), 486 A.P.R. 343 (Nfld. S.C.T.D.) and *Carlin v. Registered Psychiatric Nurses Assn. (Alberta)* (1996), 186 A.R. 186 (Alta. Q.B.). Both of these decisions stand for the proposition that a statutory authority cannot waive a condition precedent to its jurisdiction. I find that both of these decisions are applicable to the fact situation before me.

[para 66] Contrary to the Applicant's submission, I find that sections 69(1) and 74.5(1) do not, in of themselves, give me the inherent authority to extend the 60-day time limit. Sections 69(1) and 74.5(1) of the FOIP Act state that I have the authority to decide all questions of fact and law arising in the course of an inquiry. However, I do not find that this power directly equates to the authority to extend a time limit. Rather, these

sections give me the authority to interpret statutes and other law and make a decision as to whether the law gives me the authority to extend the time limit.

[para 67] In addition, I do not find that the *University of Saskatchewan* or the *Lavallee* decisions cited by the Applicant are of great relevance to the issue before me. In *University of Saskatchewan*, the Court relied heavily on the fact that it had a statutory authority to extend the time. In the inquiry before me, section 74.3(2) of the FOIP Act does not provide me with a similar power. Furthermore, in both *University of Saskatchewan* and *Lavallee*, the Supreme Court of Canada limited its decision to the issue of whether a Court could extend a time limit. In those decisions, the Supreme Court of Canada did not specifically address whether a statutory tribunal has the inherent ability to extend a statutory time limit.

e) Does the doctrine of promissory estoppel apply in this inquiry?

[para 68] The Applicant states that the requirements of promissory estoppel are established in this inquiry. In support, the Applicant referred to the Supreme Court of Canada decision of *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)* (2001), 200 D.L.R. (4th) 193 (S.C.C.) (*Mount Sinai Hospital Center*).

[para 69] I find that the principle of promissory estoppel does not apply in this inquiry. In *Mount Sinai Hospital Centre*, the Court stated that there are four elements of promissory estoppel that must be fulfilled:

- (1) a party has by words or conduct, made a promise or assurance
- (2) the promise or assurance was intended to affect their legal relationship and to be acted on
- (3) the other party must have relied on the representation
- (4) the other party must have acted on it or in some way changed its position

[para 70] I do not find that the Registrar made a promise or assurance to the Applicant or the Applicant's agent. Mr. Sirbu, in evidence, stated that he may have mentioned the July 14, 2004 date to the Applicant's agent as an approximate time limit to deliver a request for a review to this Office. However, I do not find that Mr. Sirbu promised or assured the Applicant or the Applicant's agent that the Registrar would not oppose my jurisdiction if the request for review was filed outside of the 60-day time limit. This is a situation where Mr. Sirbu, acting on behalf of the Registrar, at worst, provided incorrect or inaccurate information to the Applicant. The Registrar did not provide a promise or assurance.

[para 71] In the alternative, even if all of the elements of promissory estoppel were fulfilled, I do not find that the doctrine of promissory estoppel is relevant to my determination of whether I have jurisdiction under the Act to proceed with an inquiry.

As a statutory tribunal, I can only decide matters over which I have jurisdiction. I cannot assert jurisdiction simply because one party made a promise or assurance to the other that it would not oppose my jurisdiction.

f) Does the doctrine of legitimate expectations apply in this inquiry?

[para 72] The Applicant states that the doctrine of legitimate expectations applies in this inquiry. In support, the Applicant referred to the *Mount Sinai Hospital Center* decision.

[para 73] I find that the principle of legitimate expectations as outlined in the above decision does not apply in this inquiry. In *Mount Sinai Hospital Center*, the Supreme Court of Canada cited an earlier Supreme Court of Canada decision of *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (*Old St. Boniface Assn. Inc.*) which described the principle of legitimate expectations at paragraph 74 as follows:

The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation.

[para 74] In *Mount Sinai Hospital Center*, the Court indicated that the doctrine of legitimate expectations applies to situations where a party has been led to believe that his/her rights would not be affected without further consultation. In this inquiry the Applicant is not requesting further consultation with the Registrar but, rather, a decision which would permit the Applicant to deliver the Request for Review outside the 60-day time limit outlined in the FOIP Act.

[para 75] In addition, even if the doctrine of legitimate expectations applies in the manner suggested by the Applicant, I do not find that the Registrar gave the Applicant a legitimate expectation that it would not oppose my jurisdiction to review the Request for Review. Mr. Sirbu, in evidence, stated that he may have mentioned to the Applicant's employee that the deadline to deliver a request for review to this Office was July 14, 2004. However, I do not find that Mr. Sirbu gave the Applicant the expectation that the Registrar would not oppose my jurisdiction if the request for review was delivered outside the 60-day time limit. At worst, Mr. Sirbu gave the Applicant incorrect or inaccurate information. I do not find that the Registrar's actions resulted in a legitimate expectation.

[para 76] In the alternative, even if the Registrar's actions gave the Applicant an "expectation" that the Registrar would not oppose my jurisdiction, I do not find that this expectation is relevant to my determination of whether I have the jurisdiction to hear the inquiry. As a statutory tribunal, I can only decide matters over which I have jurisdiction.

I cannot assert my jurisdiction over a matter simply because one party gave the other party an “expectation” that they would not oppose my jurisdiction.

3. Does the Adjudicator have the jurisdiction, in this inquiry, to address all of the decisions of the Registrar contained in Notification 01/2004, or is he confined to the specific request made by the Applicant?

[para 77] I do not have the jurisdiction to review the Registrar’s decision in this inquiry. As such, I will not address whether I have the jurisdiction to review all of the decisions of the Registrar contained in the Notification or whether I am confined to the specific request made by the Applicant.

IV. ORDER

[para 78] I make the following Order under section 74.7 of the FOIP Act:

1. Was the Applicant’s request for review received by the Office of the Information and Privacy Commissioner within the time period specified in section 74.3 of the *Freedom of Information and Protection of Privacy Act*?

[para 79] I find that the Applicant’s request for review was not delivered to this Office within the time period set out in section 74.3(2) of the FOIP Act.

2. If the Applicant’s request for review was not received within that specified time period, does the Adjudicator nevertheless have the jurisdiction to review the Registrar’s decision?

[para 80] I find that I do not have the jurisdiction to review the Registrar’s decision.

3. Does the Adjudicator have the jurisdiction, in this inquiry, to address all of the decisions of the Registrar contained in Notification 01/2004, or is he confined to the specific request made by the Applicant?

[para 81] As I do not have the jurisdiction to review the Registrar’s decision in this inquiry, I will not address whether I have the jurisdiction to review all of the decisions of the Registrar contained in the Notification or whether I am confined to the specific request made by the Applicant.

Dave Bell
Adjudicator