ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2007-010

March 31, 2008

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 401

Case File Number P0564

Office URL: www.oipc.ab.ca

Summary: The Organization raised an objection to the jurisdiction of the Adjudicator on the basis of its allegation that the timelines set out in section 50(5) of the Act had not been met.

The Adjudicator found that the timelines had been met in this case. She held that even had they not been, in the circumstances of the present case, the legislature would not have intended that a loss of jurisdiction should result. These circumstances were that there would be no alternative remedy for the complainants for breach of their privacy rights, any breach of the timelines by the Office was trivial, and as the Organization had participated in setting the dates for completion of the inquiry, it was not prejudiced by the Adjudicator's failure to precisely anticipate the date of completion.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 48, 50, 50(5), 50(5)(b), 52.

Cases Cited: *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003) 228 DLR (4th) 693 (FCA); *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)* [2007] A.J. No. 896.

I. BACKGROUND

[para 1] I begin by setting out the chronology of events relating to the filing of complaints and the setting of dates in this matter.

[para 2] The complainants in this case signed complaint forms on various dates during mid-to-late October, and November, 2006. This Office received the complaints on

various dates in October and November. The earliest complaint from a named complainant is dated October 15, but was not received until October 19. Another named complainant signed the form on October 19, and it is not possible to ascertain from materials available to me the date on which it was received. One unnamed complainant signed his complaint form on October 18, and it was received on October 19, and another signed on October 15 and it was received on October 24. The remaining complaints were all received on or after October 30. The final one, by a named complainant, was received by this Office on November 27, 2006.

[para 3] This Office issued Notices of Inquiry on December 1, 2006, stating the inquiry would be held on December 20, 2006. The Organization requested an adjournment, which was not opposed. I granted the adjournment on December 14, and the hearing date was rescheduled for January 17, with a possible second date of January 18. On January 15, 2007, counsel acting for one of the complainants and for the Intervenor requested an adjournment. Counsel for the respondent Organization advised that she did not oppose the request, and asked that her assistant be contacted to confirm new hearing dates. I granted this adjournment on January 16, 2007. I sent a letter to the parties on that day that advised them of the adjournment, stated that advance submissions would be required for a preliminary issue that the Organization's counsel had raised on January 9, and indicated that another date would be set for the oral inquiry. On January 22, the Inquiries Clerk sent an e-mail to the parties that stated: "Could I please get a selection of possible dates for this inquiry to be rescheduled? Now that the Adjudicator is planning to ask for advance written submissions, let's look at new dates for March and April".

[para 4] On January 25, 2007, counsel for the Organization advised as to her availability on a series of dates in March. On February 26, after receiving further communications from the Inquiries Clerk, she advised of her availability on a series of dates in April.

[para 5] On March 13, 2007, the Inquiries Clerk contacted the parties by e-mail advising of a new hearing date of April 5, 2007. On March 14 she wrote to the parties to confirm the date and to indicate that rebuttals would be done orally at the inquiry.

[para 6] On March 16, 2007, counsel for the Organization requested a further adjournment, and advised the counsel for the complainant and Intervenor. The latter counsel responded on the same day setting out conditions for agreeing to the adjournment. On March 19, counsel for the Organization advised this office that she did not agree with the conditions, and asked that she be advised of the outcome of her adjournment request.

[para 7] On March 19, 2007, the Inquiries Clerk wrote to counsel for the Organization, asking for clarification as to the reason for the adjournment request. Counsel responded on the same date.

[para 8] On March 20, 2007, I wrote to the parties granting the adjournment. I asked for submissions on the preliminary issue (raised by the Organization's counsel on January 9) by March 23, and indicated that I would provide 10 days for the parties to provide

rebuttals. I indicated further that if I decided to proceed despite the preliminary objection, I would schedule a single day for an oral hearing prior to the end of April, and that at the conclusion of the oral part of the hearing, I would require that written submissions as to the issues stated in the Notice of Inquiry be provided by a specified date. I stated that I would try to accommodate the schedules of the parties, but that if this were not possible, I would choose the date that appeared to be most convenient.

[para 9] On April 25, 2007, I made a decision on the preliminary issue (that I would assume jurisdiction in the matter). In the letter conveying my decision, I advised that the inquiry would be held partly in written and partly in oral form, and that I would set a date for the oral part "in the near future".

[para 10] After further communications with the parties, May 30, 2007 was chosen as the new date for the hearing, and the hearing in fact commenced on that day. Oral evidence was presented by the complainants and Intervenor. There was insufficient time to hear the evidence of the Organization, and the matter was adjourned until another date could be found for concluding the hearing.

[para 11] After further events that affected the relations between some of the parties in another context (labour relations), and numerous communications with the parties via e-mail to try to find times when all parties were available, a new hearing date was set for November 30, 2007. In the meantime, the Commissioner issued a letter to the parties on August 17, 2007. This letter stated that he was extending the time for completing the review in this matter, and that the anticipated date for completion of the review was December 31, 2008. A similar letter extending dates was sent to the parties in all matters currently at inquiry. It was prompted by a decision of the Court of Queen's Bench in *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)* [2007] A.J. No. 896 (the "*Kellogg*" case) to the effect that section 50(5) was to be treated as a mandatory provision in that case.

[para 12] The oral hearing recommenced on November 30. At that time, counsel for the Respondent Organization made the objection to my jurisdiction, based on the *Kellogg* case, that is the subject of this preliminary ruling.

II. ISSUE

Did the Commissioner's Delegate lose jurisdiction on the basis of the alleged non-compliance with section 50(5) of the *Personal Information Protection Act* ("PIPA")?

II. DISCUSSION OF THE ISSUE

[para 13] In my view, section 50(5) does not operate to deprive me of jurisdiction in this case, for the following reasons.

Was section 50(5) complied with in this case?
[para 14] First, I believe the requirements of the legislation have been met.

[para 15] Section 50(5) provides:

> *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*
>
> *(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.*

[para 16] I begin by noting that on its face, in isolation, section 50(5) is ambiguous as to whether an order is to issue within the time limit. The decision of the Court in the *Kellogg* case does not comment on this question. However, in my view, the provision does not require issuance of an order. This conclusion is suggested by the wording of section 52. The latter provision requires the Commissioner to issue an order on completion of an inquiry under section 50. I interpret "on completing" in this provision to mean "after having completed" rather than "contemporaneously with completing", since that is the way "on" is used in section 48, which is in the same Part of the Act. Thus 'completion of the inquiry' under section 50(5) is not to be taken as referring to completion of both the inquiry into the matter and the resulting decision and order. I am supported in this conclusion by a decision of the British Columbia Information and Privacy Commissioner. In Order P07-01, the Commissioner said: "The OIPC interprets completion of the inquiry and the time requirement associated with that as being the close of evidence and submissions and not as the issuance of an order under s. 50. This is because it is a reasonable interpretation of the words "[o]n completing an inquiry" and one that is the only practicably feasible interpretation in terms of the administration of the inquiry process." It would be equally unfeasible to interpret section 50(5) as requiring issuance of an order within 90 days, as this is not possible as a practical matter in the normal case.

[para 17] I find, as well, that "inquiry" and "review" as they appear in section 50 are to be read as synonymous. There is some inconsistency in the Act as to what is covered by the term "review". However, as section 50 talks about an extension of time outside the time limit for completion of the *inquiry*, it makes most sense to regard the anticipated date in section 50(5)(b) as denoting the period for which this extension is made, as opposed to some other period.

[para 18] I also note that my delegation from the Commissioner grants me his powers to conduct reviews and inquiries and to issue orders, and any other powers necessary and incidental to these powers. This includes the power to extend the time in a given inquiry.

[para 19] I turn to the facts. The first date that was set for the hearing – December 30, 2006 - was within the 90-day time limit. This date was changed on the request for an adjournment by counsel for the Organization. The next date that was set was January 17, with a possible second day of January 18. A letter of December 14 written by the Inquiries Clerk on my behalf notified the parties of the new dates that had been set. This met the terms of section 50(5) with respect to the complaints received on October 19. It extended the 90-day time period and provided an anticipated date for completion of the hearing. (For complaints received on October 19, the 90-day period expired on January 17, but the letter indicated a possible further date of the 18, which moved the anticipated completion outside the 90-day period.)

[para 20] On January 15, counsel for one of the complainants and the Intervenor requested an adjournment. On January 16 counsel for the Respondent Organization acceded to this request, and asked that her assistant be contacted to confirm new hearing dates.

[para 21] I granted the adjournment on January 16. I sent a letter to the parties on that day that advised them of the adjournment, stated that advance submissions would be required for a preliminary issue raised by the Organization's counsel, and indicated that another date would be set for the oral inquiry. On January 22, still within the 90-day time limit for all the complaints except those received on October 19, the Inquiries Clerk sent an e-mail to the parties that stated:

> Could I please get a selection of possible dates for this inquiry to be rescheduled? Now that the Adjudicator is planning to ask for advance written submissions, let's look at new dates for March and April.

The January 25 letter from the Organization's counsel advising of her dates of availability in March, and the subsequent (February 26) letter advising of her availability in April, confirm her understanding that the inquiry would not be completed until either March or April – outside the 90-day time limit. (The time limit expired on various dates in January (after the 22) or in February for the remaining complainants, depending on the dates their complaints were received.)

[para 22] Given the consensual process by which the hearing dates were being set, it was not possible for me to anticipate the exact date the inquiry would be completed. While there may have been a possibility that if mutually acceptable dates could not be found, I would unilaterally schedule a date, it was evident that such a step was not in contemplation at the time of the referenced correspondence. It was with knowledge of the consensual nature of this process that the Organization's counsel offered, in January and February, the lists of dates in March and April on which she would be available. The next date that was set (April 5) was one for which she had indicated her availability. I find, therefore, that my letter of January 16 granting the adjournment request of January 15, coupled with the e-mail communication to the parties of January 22 made on my behalf by the Inquiries Clerk, met the terms of section 50(5). It extended the time limit to the first date, in March or April, when the parties would be available to conclude the hearing.

[para 23] As noted in the chronicle of events in the preceding section, there were subsequent adjournment requests and delays, and the hearing was not in fact concluded until November. However, I note first that the legislation speaks to only a single period of 90 days, and imposes no requirements if this is extended and further delays are necessitated beyond the original anticipated date. I note as well that the parties were continuously invited to participate in setting new dates, and kept advised in an ongoing way as these dates were set and changed. This meant that the spirit of the provision – of adjusting the parties' expectations as the circumstances required - continued to be met throughout.

[para 24] Counsel for the Organization asserted at para 14 of her initial submission that the Commissioner did not extend the time under section 50(5) until August 17, 2007. The August 17 letter was the only correspondence that explicitly used the language of the Act in extending the time. (The letter was sent as part of the effort of this Office to take all possible steps to meet any potential consequence that could arise from the *Kellogg* decision for all current files, as quickly as possible, - i.e., without taking the time to review the history of each individual file.) It would be an unduly restrictive interpretation of section 50(5) that particular words must be used to extend time. Where, as in this case, other correspondence and communications clearly communicated to the parties that the time would be extended, the requirement of the provision was met.

How does the Kellogg decision apply in this case?
[para 25] I turn next to the applicability of the *Kellogg* case to this fact situation. Had the requirements of section 50(5) not been met in this case, I would still conclude that I have maintained jurisdiction.

[para 26] The reasoning in the *Kellogg* decision makes it clear the court thought that the consequence that is to flow from non-compliance with a statutory requirement *depends on the circumstances of the particular case and the particular applicant and respondent*. In deciding to invalidate the actions of this Office, it took into account circumstances that existed in the particular case before it. If I am to apply the *Kellogg* decision, I am also to apply this aspect of its reasoning.

[para 27] The court in *Kellogg* said "there is no uniform test to determine whether legislation is mandatory or directory, but, rather, one must consider all of the circumstances in deciding this issue." Among the questions asked by the court was "what the practical effect of non-compliance is on the complainant or any other person". One of the five circumstances which the court took into account to decide if the provision is mandatory was "Are there alternative remedies available to the Complainant and Affected Organizations?" The court's finding that alternate remedies were available informed its conclusion that the provision is mandatory. (See paragraph 82 of the decision.)

[para 28] Whether alternate remedies are available varies from case to case, depending on the complainant and the nature of the complaint. In some of the complaints made under the legislation, there are no alternate remedies. It is not clear to me how the

presence of an alternate remedy can help the court to decide that the provision is mandatory, where, for other complainants under the same legislation, there are no such alternatives.

[para 29] The *Kellogg* decision is under appeal. Whether or not the appeal will succeed, the court's conclusions are the law at present. Despite my failure to fully grasp how the court regarded the particular circumstances of the case as relevant to its conclusion, I will also consider the particular circumstances of this case to decide the issue presently before me. A decision of the Federal Court of Appeal supports me in taking this approach.

[para 30] In *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003) 228 DLR (4th) 693, the Federal Court dealt with a failure to comply with a statutory provision that required notices to objectors (to expropriation) to be provided within a specified time. The court found that the provision was obligatory rather than permissive. According to the court, this is a question of statutory interpretation that does not depend on the facts of any given case, but rather depends on the usual principles of statutory interpretation. The court continued by considering the position if compliance with a statutory provision is obligatory, and an administrative action has been taken in breach of the duty. It said that in such a case, the court may declare the action invalid, but whether it is to do so is a matter of legislative intent. The court then stated that "since the factual circumstances of non-compliance are infinitely variable, legislative intent regarding the consequences of non-compliance must be determined *in light of all the relevant circumstances of the particular case*"[emphasis added].

[para 31] The court went on (at para 35) to set out a non-exhaustive list of factors to be considered in determining whether non-compliance with an obligatory provision invalidates administrative action. Among these, the following factors are relevant in the present case:

(ii) The seriousness of the breach of the statutory duty: a technical violation is an indicator that the court should not intervene, while a public authority that flouts the statutory requirement can expect judicial intervention.

(iv)…, the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity.

The court also noted that some of these same factors (as well as others) can be considered as grounds for withholding a discretionary remedy on judicial review.

[para 32] I return to the *Kellogg* decision. After stating that it is necessary to consider all relevant circumstances, one of the five circumstances which the court took into account

was, as noted above, "Are there alternative remedies available to the Complainant and Affected Organizations?" In the court's view, the complainant in that case could find a remedy relative to the issue in that case (the drug and alcohol testing practices of the respondent) in another forum. The court said:

> It is also necessary to inquire as to whether alternative remedies are available to the complainant and affected organizations if the provision is interpreted to be mandatory.
>
> While the complainant would lose his right under P.I.P.A. to have an inquiry proceed, it must not be overlooked that the complainant originally raised this issue as a human rights complaint, which can still be pursued. Moreover, as a union member, this matter could be pursued through grievance proceedings.

[para 33] This factor argues for the opposite conclusion in the present case. Assuming there had been a violation of their privacy, there would be no alternative remedy for the private complainants in this matter. I am not aware that even the complainants who were employees of the Casino would have any alternative remedy for their complaint of violation of their privacy rights in another forum. No alternative remedy for the complainants in this case was suggested by counsel for the Organization in the course of her argument that the *Kellogg* decision is to be applied so as to deprive me of jurisdiction. (In an earlier preliminary application, she suggested that I should defer to the Labour Relations Board, but I have no information as to whether that would be possible now that the labour relations issues have been resolved, and in any event, I do not see how the complainants could seek a remedy in that forum for breach of their privacy rights, or ask for the same kind of remedies that are available to them under PIPA.) Thus one of the key reasons for the *Kellogg* ruling does not apply.

[para 34] Another factor suggested by the Federal Court of Appeal that is relevant in this particular case is the degree of seriousness of the breach. If there was a departure from the terms of the Act, it was trivial and merely technical. It is clear that I extended the time for all the complaints beyond 90 days. With regard to the requirement to provide anticipated dates, for some of the complaints, I have found that the terms of the provision were met because the anticipated dates were the first date (in particular months) when the parties would be available. An argument might be made that this was insufficiently precise to meet the terms of the provision. However, it was largely accidental whether a particular piece of correspondence from this Office that was issued within the timeline specified a *particular* anticipated date for completion of the inquiry outside the timeline. (This happened for some of the complaints but not for others). Circumstances that were merely fortuitous in this way should not be permitted to dictate an outcome that could deprive a complainant of a remedy. If my failure - within the 90-day period – to provide a *particular* date outside that period was a breach of section 50(5), it was not significant enough to cause me to lose jurisdiction.

[para 35] A third factor relevant to the issue before me, as identified in the *Kellogg* decision at paras 73 to 75, is the degree of prejudice to the parties. I accept the submission of counsel for the Organization that in requesting and consenting to

adjournments, she gave no undertaking not to stand on her client's statutory rights. However, the fact she participated in a process to select dates for completing the inquiry that depended on the availability of herself and her client suggests that the Organization was not prejudiced by my inability to anticipate a particular date precisely. In this case, I believe my willingness to permit a consensual process, rather than setting dates unilaterally, benefitted rather than prejudiced the client Organization.

[para 36] Thus if, contrary to my finding, the terms of section 50(5) were not met, I find that in view of all the circumstances of the present case, I have not lost jurisdiction. A key factor is, in my view, the absence of an alternate remedy for the complaints of breach of privacy in this case. Having regard to this, together with the trivial or merely technical nature of the breach (if any), and the absence of prejudice to a respondent that actively participated in a process to extend timelines and set dates, it cannot be said that there was a legislative intention that a loss of jurisdiction was to result in these circumstances.

Is the Kellogg ruling retrospective/retroactive?

[para 37] The parties made representations as to whether the *Kellogg* decision has a retrospective or retroactive effect. The Organization argued that it does, or that it applies at a minimum to all cases that are still in the inquiry process or under appeal. One of the complainants argued that the ruling applies only to cases or events arising after the date of the judgment. Belzil, J. did not address this question in his decision. As the jurisdictional challenge relates to events that largely transpired before *Kellogg* was decided (in July, 2007), arguably, the *Kellogg* decision does not apply to this case. However, because I have decided that section 50(5) was met, and that I would not lose jurisdiction even if it had not been met and if the reasoning in the *Kellogg* decision were applied, it is not necessary for me to decide this question.

IV. DECISION AND ORDER

[para 39] On the basis of my conclusion that I have not lost jurisdiction in this case, I will conclude this inquiry and issue a decision relative to the issues as stated in the Notice of Inquiry. Accordingly, I ask that the parties provide any concluding submissions and arguments, in written form, by April 21, 2008.

Christina Gauk, Ph.D.
Director of Adjudication