In the Court of Appeal of Alberta

Citation: Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner), 2008 ABCA 384

Date: 20081114
Docket: 0703-0316-AC
Registry: Edmonton

Between:

Kellogg Brown and Root Canada

Respondent (Applicant)

- and -

The Information and Privacy Commissioner

Appellant (Respondent)

And Between:

Syncrude Canada Limited

Respondent (Applicant)

- and -

The Information and Privacy Commissioner

Appellant (Respondent)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Donna Read

Memorandum of Judgment
Delivered from the Bench

Appeal from the Judgment by
The Honourable Mr. Justice R. Paul Belzil
Dated the 30th day of July, 2007
Filed on the 30th day of July, 2007
(2007 ABQB 499; Docket: 0603 12633; 0603 12002)

Memorandum of Judgment
Delivered from the Bench

Berger J.A. (for the Court):

[1] At the outset, I should indicate that we are all agreed that the application to adduce fresh evidence is allowed.

[2] This appeal arises in consequence of a formal written complaint brought pursuant to s. 46(2) of the ***Personal Information Protection Act***, S.A. 2003, c. P-6.5 ("PIPA") on September 13, 2004. A prohibition order was granted in the court below on the basis that the Commissioner failed to complete an inquiry within 90 days from the date that he received the written request to initiate a complaint, did not extend the period for completion of the inquiry, and did not provide an anticipated date for its completion.

[3] The complainant died on July 24, 2007. The Respondents maintain that the appeal should be dismissed because the appeal is moot. The governing case is ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342. A two-step analysis is mandated:

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?

[4] Both ss. 46(2) and 36(2)(f) of the Act give the Commissioner the authority to investigate a complaint that an organization is not in compliance with PIPA. The Commissioner has the authority to investigate an organization's compliance with PIPA of his own initiative. Sections 36(1) and (2) read, in part, as follows:

> "36(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved and may:
>
> a) conduct investigations to ensure compliance with any provision of this Act;
>
> b) make an order described in section 52 whether or not a review is requested;
>
> c) inform the public about this Act;

d) receive comments from the public concerning the administration of this Act;

e) engage in or commission research into anything affecting the achievement of the purposes of this Act;

f) comment on the implications for protection of personal information in relation to existing or proposed programs of organizations;

g) bring to the attention of an organization any failure by the organization to assist applicants as required under section 27;

h) give advice and recommendations of general application to an organization on matters respecting the rights or obligations of an organization under this Act.

36(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that:

a) a duty imposed by section 27 has not been performed;
...

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;

f) an organization is not in compliance with this Act."

[5] The following passages in ***Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown and Root (Canada) Company***, 2007 ABCA 426 at paras. 39 and 41, albeit under the Human Rights Act, are instructive:

"[39] Section 20 does not result in a general complaint automatically arising every time a complaint is lodged. The Director argues against strict interpretation of complaints, so that if a complaint, while not in perfect technical language, can reasonably be interpreted as raising the issue of general discrimination, that issue will be before the panel. We agree with that proposition. However, in this case, there is nothing in Chiasson's complaint that raises the issue of KBR's drug

> policy as it pertains to anyone other than Chiasson. Nor is there anything in Chiasson's complaint to suggest it was made on behalf of drug-addicted persons.
>
> ...
>
> [41] In advance of any hearing, the party complained against must know who it has to defend its actions against. Thus, if a complaint is meant to represent a broad class of individuals, that must be made reasonably clear in the complaint. In this case, KBR could only reasonably conclude that it was defending its actions as they related to Chiasson and not to drug-dependent persons generally. Had it been otherwise, KBR would have structured its defences accordingly."

[6] The Respondents' submission is that the complaint here was brought on behalf of the complainant alone and that the Office of the Commissioner used the letter of complaint to refer the complaint to the inquiry stage.

[7] We think there is merit to that argument. The inquiry fact sheet which is reproduced at A.B. Vol. 2A at p. 146 sets out the issues that the inquiry had identified. They include the following:

> "1. Is Syncrude or KBR responsible for complying with PIPA when collecting and using <u>the complainant's personal information</u> [sections 5(2) and 5(6)]?
>
> 2. Is the collection and use of <u>the complainant's personal information</u> necessary to comply with the collective agreement [section 14(b) and 17(b) of PIPA; section 19 of PIPA reg.]?
>
> 3. Is the information at issue 'personal information' or 'personal employee information' under the Act [sections 1(k) and 1(j)]?
>
> 4. If 'personal information' under the Act, was <u>the complainant's personal information</u> collected and used for a 'reasonable purpose' [sections 11 and 16]?
>
> 5. If "personal employee information" [was collected], was collection and use in compliance with sections 15 and 18 of PIPA?" [emphasis added]

[8] It is apparent that there is an informational requirement accruing to the benefit of a complainant inherent in the legislation. The questions put rhetorically in argument by counsel for the Respondents were: "What was the complainant told? What did *he* understand?"

[9] The thrust of the Appellant's argument is that the Commissioner's concern for the "public interest" issue that the appeal engages warrants hearing his appeal. The Respondent Kellogg Brown points out that the Commissioner's own investigation, as already indicated, can be initiated at any time on the issue of alcohol and drug testing pursuant to s. 36 of PIPA.

[10] Kellogg further points out that the investigation of the complaint in this case was not completed. There was no input with respect to the specific issues under investigation from either Syncrude or Kellogg and no investigation report was issued. In the result, to quote from the Respondent Kellogg Brown's factum: "[T]he Commissioner is no further ahead with this case than he would be if he initiated his own investigation."

[11] In addition, we note counsel's advice that the recently decided case of the ***Alberta Teachers' Association and the Information and Privacy Commissioner***, Action No. 0803-05729, a decision of Marshall J. on the very issue at the heart of this appeal, will be appealed to this Court.

[12] Lastly, for reasons already mentioned, we are also mindful that the underlying factual underpinnings, peculiar to the complainant's personal circumstances, are critical to the resolution of the legal dispute. The complaint giving rise to this appeal is, in our view, not a broad-based complaint.

[13] For these reasons, we declare the appeal to be moot and decline to exercise our discretion to hear it. The appeal is dismissed.

Submissions by counsel regarding costs.

[14] We are all agreed that the default rule should apply in this case. The Respondents are entitled to their costs on appeal.

Appeal heard on October 30, 2008

Memorandum filed at Edmonton, Alberta
this 14th day of November, 2008

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Berger J.A.

Appearances:

V.L. Giles
for the Respondent (Applicant) - Kellogg Brown and Root Canada

R.W. Armstrong
E. Aspinall
for the Appellant (Respondent)

B.B. Johnston
for the Respondent (Applicant) - Syncrude Canada Limited