

IS NON-COMPLIANCE WITH STATUTORY TIMELINES FATAL?



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A recent Alberta Court of Appeal decision, *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26, may have consequences for all statutory decision makers subject to statutory timelines.

Individual complainants brought forward complaints to Alberta's Information and Privacy Commissioner that the Alberta Teachers' Association ("ATA") had breached their privacy in a publication called "ATA News". Although the complainants asked the Commissioner to proceed to formal inquiry in September 2006, the adjudicator's decision was not issued until March 13, 2008.

The ATA challenged the adjudicator's decision. The ATA argued that the Commissioner was precluded from proceeding with the inquiry because he had not met the statutory timeline set out in the *Personal Information Protection Act* ("PIPA"). At the time, PIPA set a time limit of 90 days for the completion of an inquiry, unless the Commissioner provided notice that the time was being extended. The judicial review judge agreed with the ATA and held that the inquiry timeline set out in PIPA was mandatory. A failure to comply with the timeline resulted in an automatic loss of jurisdiction by the Commissioner. The adjudicator's decision was quashed.

The Information and Privacy Commissioner appealed the judicial review decision to the Alberta Court of Appeal. A majority of the Court confirmed the decision to quash.

The majority of the Court held that PIPA required the Commissioner to extend the time limit before its expiry. The Commissioner had no power to extend the time limit after it had expired. Extensions needed to be justified in the specific circumstances of a case. The court stated that it was unlikely that blanket or routine extensions would be reasonable.

The Court did not agree with the judicial review judge that a breach of the time rules should

result in an automatic loss of jurisdiction. Rather, the Court held that a breach of the time rules would result in a presumptive termination of an inquiry. The presumption could be overcome by showing both of the following:

- Substantial consistency with the intent of the time rules having regard to:
 - The reason for the delay;
 - The responsibility for the delay;
 - Any waiver;
 - Any unusual complexity in the case; and
 - Whether the complaint can be or was resolved in a reasonably timely manner.
- That there was no prejudice to the parties or, alternatively, that any prejudice to the parties is outweighed by the prejudice to the values to be served by PIPA.

The Commissioner has expressed grave concerns over the Court of Appeal's decision and is appealing the decision to the Supreme Court of Canada. PIPA was recently amended to provide the Commissioner one year to complete an inquiry.

The Court of Appeal's decision can be interpreted as a radical shift in approach to statutory timelines. Historically courts have determined whether a particular time limit is "mandatory" or "directory". Failure to comply with a mandatory time limit would result in an automatic termination of the proceeding, the decision maker being found to have lost jurisdiction. Failure to comply with a directory time limit, however, was not fatal to a decision maker's jurisdiction. In *ATA News* the court introduced a third possibility – breach of a time limit results in a termination of proceedings unless there is substantial consistency with the intent of the timeline and no prejudice to the parties. It is unclear what impact this decision will have on the interpretation of other statutory time limits, including those found in professional regulatory legislation. The Supreme Court of Canada's decision will certainly be instructive.

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In the meantime, in the professional regulatory context, if a member argues that a professional discipline proceeding cannot proceed because the regulatory body has not complied with a statutory timeline, the hearing tribunal will need to consider whether the proceedings are terminated or whether they can continue. The tribunal will have to consider the factors set out by the Court of Appeal, being whether there was substantial consistency with the intent of the timeline and any prejudice as a result of the breach. ▲

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