

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**DECISION P2020-D-01**

October 13, 2020

**WEINRICH CONTRACTING LTD.**

Case File Number 002209

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Complainant and his brother were equal shareholders in Weinrich Contracting Ltd. (the Organization), and the Complainant was sole director. The brothers were involved a legal dispute relating to the business of the Organization. In January 2016, this Office received a complaint from the Complainant that in the course of the legal dispute, the brother collected the Complainant’s personal information from his work computer, and used and disclosed it, contrary to the *Personal Information Protection Act* (PIPA).

Subsequently, the legal action was settled. The Organization provides evidence that a condition of the “With Prejudice Offer to Purchase” which was made to further settlement of the legal dispute between the parties was that the Complainant would withdraw the complaint against the Organization made to this Office. This condition was accepted by the Complainant. As well, the “Mutual Release” agreement provided a complete and unconditional release by the Complainant of the Organization and the brother arising from or relating to allegations of breach of privacy.

In October 2016, this Office received a request for inquiry from the Complainant. The Commissioner agreed to conduct an inquiry, with the first issue being whether the complaint should be dismissed on the basis that the Complainant signed an agreement in which he agreed to withdraw his complaint against the Organization before this Office, and signed a Mutual Release in which he agreed to release the Organization and the Complainant’s brother from any claims, suits, etc. arising from, or in any way relating to, allegations of breach of privacy.

The Adjudicator determined that the agreement between the Complainant and the Organization does not preclude the Commissioner from conducting an inquiry into the issues raised by the Complainant.

**Statutes Cited: AB:** *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, s. 27, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 4, 52

**Authorities Cited: AB:** Order P2010-018

**Cases Cited:** *Chow v. Mobil Oil Canada Ltd.*, 1999 ABQB 1026

## **I. BACKGROUND**

[para 1] The Complainant and his brother were equal shareholders in Weinrich Contracting Ltd. (the Organization), and the Complainant was sole director. The brothers were involved a legal dispute relating to the business of the Organization. In January 2016, this Office received a complaint from the Complainant that in the course of the legal dispute, the brother collected the Complainant's personal information from his work computer, and used and disclosed it, contrary to the *Personal Information Protection Act* (PIPA).

[para 2] Subsequently, the legal action was settled, and the brother became the sole shareholder and director. The Organization provides evidence that a condition of the "With Prejudice Offer to Purchase" which was made to further settlement of the legal dispute between the parties was that the Complainant would withdraw the complaint against the Organization made to this Office. This condition was accepted by the Complainant. As well, the "Mutual Release" agreement provided a complete and unconditional release by the Complainant of the Organization and the brother arising from or relating to allegations of breach of privacy.

[para 3] In October 2016, this Office received a request for inquiry from the Complainant. The Commissioner agreed to conduct an inquiry, with the first issue being whether the complaint should be dismissed on the basis that the Complainant signed an agreement in which he agreed to withdraw his complaint against the Organization before this Office, and signed a Mutual Release in which he agreed to release the Organization and the Complainant's brother from any claims, suits, etc. arising from, or in any way relating to, allegations of breach of privacy.

[para 4] If it is determined that the complaint should not be dismissed, then the second part of the inquiry will address whether the Organization collected, used and/or disclosed the Complainant's personal information in contravention of the Act. Should the inquiry continue after the first issue is addressed, the parties will be provided with a new Notice of Inquiry that will set out the additional issues to be addressed in Part 2 and a new schedule for submissions.

## **II. ISSUES**

[para 5] The Notice of Inquiry, dated March 22, 2019, states the issues for inquiry as the following:

1. Should the complaint be dismissed on the basis of the contractual agreements? This question will be answered having regard to section 4(7) of the Act.

*Section 4(7) provides: This Act applies notwithstanding any agreement to the contrary, and any waiver or release given of the rights, benefits or protections provided under this Act is against public policy and void.*

### **III. DISCUSSION OF ISSUES**

[para 6] By letter dated March 22, 2018, the Commissioner informed the parties that she had “decided to conduct an inquiry in this case in spite of the existence of this release clause.”

[para 7] Under section 50(1) of the Act, the Commissioner has discretion to conduct an inquiry unless certain conditions are met. This provision states:

*50(1) If a matter under review or relating to a complaint*

- (a) is not referred to mediation,*
- (b) is not settled pursuant to mediation under section 49,*
- (c) is not resolved, or*
- (d) is not the subject of a notice under section 49.1(2),*

*the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.*

[para 8] The decision to conduct an inquiry has two parts:

- whether the Commissioner *can* conduct an inquiry, with a view to the limits in section 50(1) and the Commissioner’s jurisdiction under the Act more generally; and
- if the Commissioner can conduct an inquiry, whether she *ought to* conduct an inquiry in the circumstances.

[para 9] By confirming this inquiry, the Commissioner has determined that she will conduct an inquiry into the substance of the Complainant’s complaint – the collection, use and disclosure of his personal information by the Organization – provided she has authority to do so.

[para 10] Therefore, the issue in this inquiry is whether the Commissioner has authority to conduct an inquiry, given the agreements signed by the Complainant and the wording of section 4(7) of the Act.

[para 11] If I determine that the agreement signed between the Complainant and the Organization is such that one of the conditions in section 50(1)(a)-(d) is met, then an inquiry into the substance of the Complainant’s complaint cannot be conducted. That will end the matter.

[para 12] If I determine that the agreement signed between the Complainant and the Organization does not preclude an inquiry into the substance of the Complainant’s complaint,

then I will conduct the second part of the inquiry addressing whether the Organization collected, used and/or disclosed the Complainant's "personal information" in contravention of the Act.

[para 13] The parties' submissions to this inquiry focus largely on whether the Commissioner should exercise her discretion to conduct an inquiry into the Complainant's complaint, given the signed agreement. As stated, that decision has been made, subject to my finding regarding the Commissioner's authority to conduct the inquiry into the complaint.

[para 14] These submissions of the parties are also relevant to whether the Commissioner can conduct an inquiry into the Complainant's complaint, or whether an inquiry is prohibited by section 50(1)(c) (where the matter has been resolved).

[para 15] The Organization has provided copies of the "With Prejudice" Offer to Purchase Agreement (Agreement) and attached Mutual Release, signed May 12, 2016. The terms and conditions of the Agreement state that the Complainant will withdraw his complaint made to this Office against the Organization. The Release includes a "complete and unconditional release by [the Complainant] of [the Organization] and [the brother] arising from, or in any way related to, allegations of breach of privacy." The Complainant's signature is present on both the Agreement and the Release.

[para 16] In its letter dated October 12, 2016, the Organization argues that the Complainant's request for inquiry is in breach of the settlement agreement and terms of the Mutual Release. The Organization asked that the Commissioner refuse to conduct an inquiry on these grounds.

[para 17] In its submission, the Organization points out that:

Section 50(1) of the Act provides that "If a matter under review or relating to a complaint (a) is not referred to mediation, (b) is not settled pursuant to mediation under section 49, (c) is not resolved, or (d) is not the subject of a notice under section 49.1(2), the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry."

...under section 50(1)(c), it is possible for a complainant to resolve a complaint without going through the mediation process, and that is exactly what happened in the present case. If the Commissioner finds that such resolution is invalidated by section 4(7), it would become impossible for parties to resolve complaints other than by a hearing by the Commissioner, and the above sections of the Act would be rendered meaningless.

[para 18] Section 4(7) of the Act states:

*4(7) This Act applies notwithstanding any agreement to the contrary, and any waiver or release given of the rights, benefits or protections provided under this act is against public policy and void.*

[para 19] Section 50(1), produced above, basically states that the Commissioner cannot conduct an inquiry into a matter if that matter is at the mediation stage authorized under section 49 of the Act (section 50(1)(a)); if the parties are satisfied with the outcome of that mediation process (section 50(1)(b)); if the matter is otherwise resolved (section 50(1)(c)); or if the Commissioner refused to conduct or continue a review into the matter under section 49.1.

Sections 50(1)(b) and (c) both refer to a matter being settled or resolved, either via this Office's mediation process or otherwise.

[para 20] I understand the Organization to be saying that if section 4(7) invalidates settlement agreements such as the one signed between the Organization and the Complainant, then section 4(7) would also invalidate settlements reached by way of mediation by this Office.

[para 21] A mediation or investigation has not settled the matter under section 50(1)(b) if one party still believes that issues under the Act are not resolved (i.e. if one party requests an inquiry). More importantly, a matter settled between parties by way of mediation by this Office (or an investigation, as that process is also called) generally does not include a waiver of one party's rights under the Act. The agreements referred to in section 4(7) are agreements that are contrary to the Act or waive rights, benefits or protections under the Act. For these reasons, the Organization's settlement with the Complainant, made outside the Act, and matters being 'settled' by way of mediation or investigation by this Office, are not the same.

[para 22] The question remains whether the matter at issue has been resolved under section 50(1)(c). In his submission, the Complainant states that the personal information collected by his brother and the Organization "has not been deleted or destroyed, and, if it has, I have not been provided with confirmation of the same." As such, the Complainant believes the issue is ongoing and not settled or resolved.

[para 23] The Organization argues that the signed settlement agreement resolves the matter. With respect to section 4(7), it draws a parallel between this provision in PIPA and human rights legislation. The Organization cites the general principle upheld by courts that it is against public policy to contract out of human rights legislation, but notes exceptions to this general principle. It cites *Chow v. Mobil Oil Canada Ltd.*, 1999 ABQB 1026 (*Chow*), stating:

However, it has been held that the release of past complaints and complaints arising out of past breaches are valid, provided that the contract in question is fair: *Chow v. Mobil Oil Canada Ltd.*, 1999 CarswellAlta 765 [reference omitted]. Even if section 4(7) were intended to invalidate settlement agreements, then by analogy to *Chow*, the only settlement agreements potentially invalidated should be those in which unsophisticated parties with unequal bargaining power need to be protected from giving up their future rights to privacy to sophisticated and powerful parties.

[para 24] *Chow* is an opinion provided by the Alberta Court of Queen's Bench, requested by the Alberta Human Rights Panel by way of a special case stated under section 27 of the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7. The issues are defined as follows (at para. 39):

1. Does the Human Rights, Citizenship and Multiculturalism Commission (the "Commission") have jurisdiction to deal with a complaint brought by an employee alleging discrimination in employment who, following his or her dismissal from employment, executes a valid and enforceable release as part of a severance package, which releases the employer from further liability?

2. In the event of a dispute over the validity or enforceability of such a release, does the Commission have jurisdiction to determine whether the release is valid and enforceable? If so, what guidelines or criteria should be followed by the Commission in determining the validity and enforceability of the release? In particular, do issues of duress, prior legal advice, quantum of consideration, the precise language of the release or the timing of the Human Rights complaint form part of the considerations for the Commission in the determination of the validity and enforceability of the release?
3. If the signing of a valid and enforceable release does not oust the jurisdiction of the Commission, and assuming a meritorious complaint, should the terms of the release be considered by the Commission in determining its remedy?
4. Such further and other questions as the Court finds prudent to be answered arising from the aforementioned questions or the submissions of the parties.

[para 25] The Court's answers in short are: (1) no; (2) yes; (3) given the answer to the first question, the Commission and Panel lack jurisdiction to consider the terms; (4) no other questions arise (see para. 40). The Court states (at paras. 41-43):

The simple reason for my opinion on question #1 is that the whole Act is premised around the settlement of issues of alleged discrimination and the right of a complainant to unilaterally stop the process under the Act where there has been a settlement. Thus, a settlement that includes a matter of alleged discrimination and a continuing complaint are incompatible.

In answering question #2, issues of duress, prior legal advice, the precise language of the release, the timing of the complaint, and others, may be considered by the Panel in determining the validity and enforceability of a release. While I will list some of the elements that might be considered, I will not set out an exhaustive or definitive set of applicable criteria and guidelines, as those may differ based upon findings of fact and law which will be specific to each case.

Question #3 is premised upon the Commission retaining its jurisdiction where a valid and enforceable release has been executed. As I do not accept that presumption, and given my opinion on question #1, question #3 must be answered in the negative. However, if there is not a valid and enforceable release and there is a meritorious complaint, any terms of severance must be considered by the Panel in determining an appropriate remedy.

[para 26] In my view, the Court's opinion in *Chow* is distinguishable from this case based on the differences between the *Human Rights, Citizenship and Multiculturalism Act* (HRCMA) discussed in *Chow*, and PIPA. In its opinion in *Chow*, the Court references the Commission or Panels' ability to assess the validity of a release/settlement. The Court notes that the HRCMA obliges the director of the Commission to attempt to settle a complaint made to the Commission (see para. 53). The director may also discontinue proceedings where the complainant has refused a proposed settlement that is fair and reasonable (see para. 69). The Court also finds that the director of the Commission has no authority to continue proceedings if a complainant withdraws or settles the complaint (see para. 78).

[para 27] The HRCMA discussed in *Chow* does not contain a provision similar to section 4(7) of PIPA, which renders void any settlement that purports to waive the rights, benefits or protections provided under PIPA (as the Agreement and Release the Complainant entered into

purport to do). In addition, the provisions in the HRCMA regarding the Commission's authority to assess settlements between parties, and the limits of the Commission's powers when there is a fair and reasonable settlement, are not found in PIPA.

[para 28] In my view, section 4(7) is determinative of the matter: the Agreement between the Organization and Complainant cannot stand insofar as it purports to preclude an inquiry by the Commissioner. The matter cannot be considered 'resolved' within the terms of section 50(1)(c).

[para 29] There is also the possibility that the Agreement or Release did not deal with all of the issues that can be addressed in an inquiry under the Act. I have noted the Complainant's concern that the personal information collected by the Organization was not destroyed. In some cases where personal information has been collected in contravention of the Act, an appropriate remedy is to order the destruction of that personal information; namely where the organization does not have a valid requirement to maintain the information (see Order P2010-018, at para. 83).

[para 30] Therefore, there may be benefits available to the Complainant in relation his complaint that are not addressed by the Agreement or Release. At this point, I do not know if the Organization collected, used and/or disclosed the Complainant's personal information. If it did, I do not know whether the collection, use and/or disclosure were authorized under the Act, or whether the Organization continues to possess the information. If it does, I do not know whether it would be an appropriate remedy to order the Organization to destroy that information. These are issues that would have to be considered in a subsequent part to this inquiry.

[para 31] The Organization has argued that permitting inquiries where the parties have reached a settlement would have a chilling effect on any willingness to come to an agreement. It also points to section 46(3), which permits the Commissioner to require a complainant (or applicant) to pursue other grievance, complaint or review processes available to resolve a complete, before initiating a complaint under PIPA. The Organization argues that if section 4(7) invalidates settlements, then there is little point to pursuing other avenues to settle matters. It states:

A finding that section 4(7) of the Act invalidates contracts that resolve complaints would render the following sections of the Act meaningless, because the complainant could simply claim that such resolutions are void and against public policy — even after receiving consideration for the promised withdrawal of the complaint, as the complainant here has done. It would become impossible to resolve complaints except by a hearing.

[para 32] I understand the Organization's point about discouraging settlements; however, the Legislature made its intentions known in section 4(7) of the Act.

[para 33] In any event, I am satisfied that the Agreement and Release signed between the Complainant and Organization does not preclude the Commissioner from conducting an inquiry into the Complainant's complaint, which is the question before me.

#### **IV. INTERIM DECISION**

[para 34] I have determined that this Office is not precluded from continuing an inquiry into the issues raised by the Complainant, despite the Agreement and Release signed between the Complainant and the Organization.

[para 35] I will issue a Notice of Inquiry to the parties for the second part of this inquiry in due course.

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Amanda Swanek  
Adjudicator