

In-House Counsel

Privacy commissioner appeals Facebook privacy practices decision

By **David Young**

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(May 23, 2023, 10:46 AM EDT) -- The Office of the Privacy Commissioner has appealed the Federal Court's decision, released last month (*Canada (Privacy Commissioner) v. Facebook, Inc.*, 2023 FC 533), denying its application to order Meta (formerly Facebook) to change its privacy policies and procedures — the policies and procedures that had resulted in the Cambridge Analytica data breach.

The proceedings arose out of a joint investigation by the commissioner and the B.C. information and privacy commissioner.

The court's decision contains some problematic determinations regarding interpretation of the current federal privacy law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), as well as the nature of evidence required on an application to enforce the commissioner's findings resulting from an investigation.

It will be remembered that the Cambridge Analytica scandal involved the unauthorized collection and sharing of the personal information of more than 50 million Facebook users worldwide, including over 600,000 in Canada, for the purposes of targeting political messages. The investigation concluded that that Facebook had allowed Cambridge Analytica and other organizations to use a social media app — "This Is Your Digital Life" — to access users' personal information and the information of their Facebook friends, and then share that information with third parties for purposes of U.S. and other political campaigns, without obtaining proper consent.

The investigation was highly critical of Facebook's policies and procedures regarding collection of personal information by social media apps and the sharing of that information. Specifically, it found that Facebook failed to obtain meaningful consent from app users and their friends for the purposes for which the information was used.

Facebook disagreed with the conclusions of the investigation and refused to change its privacy practices to address the deficiencies identified.

The two key issues before the court were (i) whether Facebook breached PIPEDA by not obtaining meaningful consent and (ii) whether it also breached the statute by not ensuring adequate safeguards for the users' data that was disclosed to the app (meaning due diligence to ensure that the data was not used improperly).

With respect to the consent issue, the court referred to PIPEDA's *Consent Principle* as well as s. 6.1 of the statute — which together require, for consent to be valid, that it is reasonable for individuals to understand the nature, purpose and consequences of the collection, use and disclosure of their personal information. The *Consent Principle* also includes a provision obliging an organization to make a "reasonable effort" to make sure an individual is advised of the purposes for which they are being asked to consent. This provision was interpreted by the court as an overarching qualification to the requirement to obtain meaningful consent; in other words, an organization needs only make a "reasonable effort" to confirm that meaningful consent has been obtained. I would argue that this is

a misinterpretation of the provision.

The court looked at Facebook's generally worded privacy policies and procedures, data permissions and educational resources, which included references to disclosure to app developers, and in effect concluded that they met its posited test of making reasonable efforts to inform individuals of the potential uses of their personal information, including for psychographic profiling and political targeting purposes — notwithstanding that no mention of such uses was made in those policies and procedures.

In coming to this conclusion, the court, I would argue, not only failed to apply the clear language of the statute — in s. 6.1 — but gave an incorrect interpretation of the requirement to make reasonable efforts, to the effect that making such reasonable efforts will fully satisfy PIPEDA's consent requirements.

Instead of focusing on whether the evidence provided to the court (primarily the relevant policies and procedures of both Facebook and the app) was sufficient to meet the test of whether it is reasonable for individuals to understand the nature, purpose and consequences of providing consent, the court interpreted the governing requirement to be whether Facebook had made a reasonable effort to obtain such consent. This is an incorrect reading of the statute; the reasonable effort requirement should be read merely as an additional obligation of organizations, supplemental to the key requirements for consent, not a limitation, or precondition, to whether those requirements have been met.

The court further determined that, notwithstanding the evidence of the policies and procedures which was before the court — and for which there was no disagreement among the parties, such evidence was insufficient for it to rule that the reasonable standard *had not been met*, indicating that it had no evidence before it to spell out what Facebook failed to do to demonstrate that it made a reasonable effort. A plain reading of Facebook's and the app's policies and procedures (reproduced in the court's reasons) apparently was not sufficient for the court to conclude that they failed to represent a reasonable effort to inform users of the potential uses of their data.

The court went on to suggest that such missing evidence could have addressed the characteristics of meaningful consent — in effect positing a standard of reasonableness based on user expectations.

Accepting that such a "reasonable person" standard is the benchmark by which the court would have been prepared to rule on as to whether Facebook had complied with PIPEDA, it is mystifying for it to conclude that it could not determine what that standard requires, without expert evidence or evidence of Facebook users' actual experience. This is a determination that has been made by the courts over many years in applying the misleading advertising rules under the *Competition Act* — without expert evidence, or evidence of actual consumer experience.

David Young is principal at David Young Law, a privacy and regulatory counsel practice in Toronto.

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