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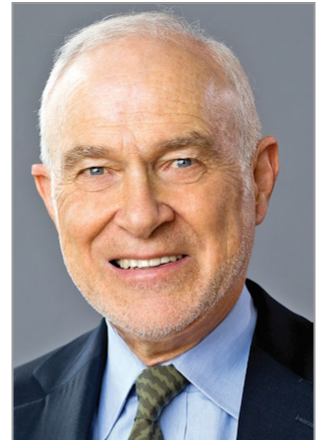
Federal Court of Appeal: Errors in trial court's Facebook/Cambridge Analytica decision

By **David Young**

Law360 Canada (September 25, 2024, 1:22 PM EDT) -- In *Canada (Privacy Commissioner) v. Facebook, Inc.*, 2024 FCA 140, the Federal Court of Appeal overturned a Federal Court's trial ruling denying the Privacy Commissioner of Canada's application to order Facebook (now Meta) to rectify the privacy practices that led to the Cambridge Analytica scandal. In a decision released April 13, 2023, the trial court dismissed the application, finding that the Commissioner failed to show that Facebook did not obtain meaningful consent from users for disclosure of their data to Cambridge Analytica.



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The Court of Appeal ruled that the trial judge erred in his analysis of the relevant provisions of the federal privacy law, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), specifically, the provisions addressing meaningful consent and safeguarding data.

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The proceedings arose out of the joint investigation by the Commissioner and the B.C. Information and Privacy Commissioner into the Facebook/Cambridge Analytica scandal. That investigation focused on the unauthorized collection and sharing of the personal information of more than 50 million users worldwide, including over 600,000 in Canada, for purposes that included targeting political messages.

The trial court's decision contained some problematic determinations regarding the interpretation of PIPEDA as well as the nature of evidence required on a court application to enforce the Commissioner's findings in any investigation under PIPEDA.

The Commissioner's investigation was highly critical of Facebook's policies and procedures regarding the collection of personal information by social media apps and the sharing of that information. In particular, it found that Facebook did not obtain meaningful consent from app users and their friends for the purposes for which the information was used.

Significantly, the Federal Court concluded that the Commissioner failed to adduce sufficient evidence

supporting the determination that Facebook had not obtained meaningful consent and, in particular, any subjective evidence of users regarding their privacy expectations and, furthermore, had not provided any expert evidence as to what Facebook could have done differently.

In the absence of such evidence, the Court determined that the Commissioner failed to prove that Facebook had not obtained meaningful consent — suggesting that the Commissioner had based his case on "speculation and inferences derived from a paucity of material facts."

With respect to Facebook's safeguarding obligation, the Court held that the Commissioner also failed to discharge the burden of showing that Facebook had not adequately protected user information, in particular relying on the proposition that its safeguarding obligations end once information is disclosed to third-party apps.

The most significant aspect of the Court of Appeal's ruling focuses on the requirements for meaningful consent. Correctly, it ruled that determining whether there was meaningful consent must be based on the standard of a reasonable person, not the subjective evidence of individual app users as ruled by the trial court.

The Court of Appeal cited s. 6.1 of PIPEDA, which stipulates that organizations may collect, use or disclosure personal information only to the extent that a reasonable person would consider appropriate in the circumstances and section 4.3.2 of Principle 3, which requires that an individual "reasonably understand[s]" how their information would be used or disclosed if consented to.

The court posited that the reasonable person is a fictional person who does not exist as a matter of fact. They are a construct of the judicial mind, representing an objective standard, not a subjective standard. Accordingly, it is not appropriate for a court to arbitrarily ascribe the status of "reasonable person" to the evidence of actual individuals who testify as to their particular, subjective perspective on the question.

The court went on to explain that in developing the perspective of a reasonable person a court benefits from evidence of the surrounding circumstances. In the case at hand, there was evidence of surrounding circumstances — from the facts of the Cambridge Analytica disclosure itself and in Facebook's policies and practices — evidence that enabled determination of whether Facebook's obligations under PIPEDA had been met.

The Court of Appeal also addressed what it characterized as the "double reasonableness" test in PIPEDA — the additional requirement under s. 4.3.2 of Principle 3 that, in seeking consent, an organization must make a reasonable effort to ensure that an individual is advised of the purposes for which the information will be used.

This provision was interpreted by the trial judge as an over-arching qualification to the requirement to obtain meaningful consent — in effect, an organization needs only to make a "reasonable effort" to confirm that meaningful consent has been obtained, irrespective of whether the reasonable person standard has been met. If it meets that threshold, no further analysis is required.

The Court of Appeal rejected this interpretation, stating that if the reasonable efforts of an organization could trump the reasonable person's ability to understand what they are consenting to, the requirement for knowledge and consent would be meaningless.

The trial judge had found that, in the absence of subjective evidence of actual user experience or expert evidence as to what Facebook could do differently, he could not conclude that Facebook failed to obtain meaningful consent. Instead, relying on Facebook's generally worded privacy policies and procedures, the Federal Court in effect concluded that it met the posited over-arching test of making reasonable efforts to inform individuals of the potential uses of their personal information.

The Court of Appeal disagreed, stating that it was the responsibility of the court to define an objective, reasonable expectation of meaningful consent. To decline to do so on the basis of the absence of subjective and expert evidence was an error.

With respect to its safeguarding obligation, Facebook argued that once a user authorizes Facebook to disclose information to an app, its duties are at an end — that PIPEDA does not require Facebook to

ensure an app's later use of that information is lawful. The trial court agreed with Facebook.

The Court of Appeal again disagreed, stating that the trial court failed to engage with the relevant evidence on this point. Facebook did not review the content of third-party apps' privacy policies, despite those apps having access to downloading users' data and the data of their friends — which constituted a failure to take sufficient preventative action against unauthorized disclosure of user data.

While there was no obligation to monitor the apps' use of data subsequent to disclosure, Facebook breached its safeguarding obligations by failing to adequately monitor and enforce the contractual compliance and privacy practices of apps operating on its platform.

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