FEDERAL COURT OF APPEAL
COUR D'APPEL FÉDÉRALE
FILED
12-MAY-2023
Elizabeth Silva
DEPOSÉE
OTTAWA, ON
1

Court File No.: A-129-23
(T-190-20)

FEDERAL COURT OF APPEAL

B E T W E E N:

PRIVACY COMMISSIONER OF CANADA

Appellant

- and -

FACEBOOK, INC.

Respondent

NOTICE OF APPEAL

(PURSUANT TO SECTION 27(1)(A) OF THE *FEDERAL COURTS ACT*)

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Ottawa.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

May 12, 2023

Issued by: Elizabeth Silva
Registry Officer

Address of Local office: Thomas D'Arcy
McGee Building
90 Sparks Street,
Main Floor
Ottawa, Ontario
K1A 0H9

TO: **MCCARTHY TÉTRAULT LLP**
2400 – 745 Thurlow Street
Vancouver, BC V6E 0C5

Michael A. Feder, K.C.
Tel.: 604-643-5983
Fax: 604-622-5614
Email: mfeder@mccarthy.ca

Gillian P. Kerr
Email: gkerr@mccarthy.ca

Barry Sookman
Email: bsookman@mccarthy.ca

Daniel G.C. Glover
Email: dglover@mccarthy.ca

Connor Bildfell
Email: cbildfell@mccarthy.ca

Lawyers for the Respondent,
Facebook, Inc.

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the judgment of The Honourable Mr. Justice Manson of the Federal Court (the "**Application Judge**") dated April 13, 2023 (the "**Decision**") dismissing the application brought by the Office of the Privacy Commissioner under paragraph 15(a) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*] (the "**Application**").

THE APPELLANT ASKS that the Court grant:

a. An Order setting aside the judgment of the Application Judge and making the order that the Federal Court should have made, that is allowing the Application under paragraph 15(a) of *PIPEDA*;

b. Alternatively, an order setting aside the judgment of the Application Judge and sending it back to the Federal Court to be redecided, with directions;

c. An order for costs for this appeal and the Federal Court Application below; and

d. Such further and other relief as counsel may advise and/or this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

Background to the Application

1. In 2018, the Appellant received a complaint alleging a violation of *PIPEDA* by Facebook in response to reports that an application operating on Facebook's platform, "This is Your Digital Life" (TYDL), had sold the profile information of Facebook users who installed TYDL, and of their Facebook friends, to Cambridge Analytica, a British consulting firm. Cambridge Analytica in turn used the

information to target political messages to Facebook users during the 2016 US election campaign.

2. The Appellant investigated and in 2019 issued its Report of Findings into the complaint, which concluded that Facebook had breached *PIPEDA*, including by failing to obtain meaningful consent from Facebook users and their Facebook friends, and by failing to safeguard the personal information in their care. In its report, the Appellant had made several recommendations, with a view to allowing Facebook to bring itself into compliance with *PIPEDA*, but Facebook did not agree to implement them. The Appellant then commenced the present application, pursuant to s. 15 of *PIPEDA*, in February 2020.

The Decision

3. The Application Judge dismissed the Application and found that Facebook had not breached *PIPEDA* by failing to obtain meaningful consent and that Facebook's safeguarding obligations end once information is disclosed to a third-party application. In the alternative, he concluded that there is insufficient evidence to conclude that Facebook's contractual agreements and enforcement policies do not constitute adequate safeguards in the circumstances.

Grounds of Appeal

4. The Appellant will advance the following grounds of appeal:

    a. The Application Judge erred in law and failed to interpret *PIPEDA* in a purposive manner and consistent with its quasi-constitutional nature, when he found that Facebook safeguarded information despite Facebook having admitted that it did not read the actual text of the privacy policies of third-party applications. This admission and failure to examine the TYDL application's privacy policy, despite evidence of warning signs that further monitoring, investigation and enforcement were necessary, is in and of itself *prima facie* evidence that Facebook failed to take appropriate steps to safeguard information. At that point,

the Application Judge should have shifted the evidentiary burden to Facebook. The Application Judge further erred when he required the Appellant to produce additional evidence to support this *prima facie* evidence of a failure by Facebook to safeguard information.

b. The Application Judge erred in law and failed to interpret *PIPEDA* in a purposive manner and consistent with its quasi-constitutional nature, when he found that Facebook had met its safeguarding obligations pursuant to s. 4.7.1 of Schedule 1 of *PIPEDA vis-a-vis* the personal information of Facebook users who had installed the application and that of their Facebook friends. The Application Judge erred by failing to examine Facebook's safeguarding obligations prior to sharing personal information with a third-party. Once again, Facebook's failure to examine the third-party's privacy policy prior to sharing user information with them was *prima facie* evidence that Facebook had failed to safeguard information. This failure to safeguard information happened when the information was in Facebook's possession, and despite evidence of warning signs that further monitoring, investigation and enforcement were necessary.

c. The Application Judge erred in law and failed to interpret *PIPEDA* in a purposive manner and consistent with its quasi-constitutional nature, when he found that Facebook made a reasonable effort to obtain meaningful consent despite Facebook having admitted that it did not read the actual text of the privacy policies of applications. This admission and failure to examine a third-party application's privacy policy is in and of itself *prima facie* evidence that Facebook failed to obtain meaningful consent. At that point, the Application Judge should have shifted the evidentiary burden to Facebook. The Application Judge further erred when he required the Appellant to produce additional evidence to support this *prima facie* evidence of a failure by Facebook to obtain meaningful consent.

d. The Application Judge erred in law and failed to interpret *PIPEDA* in a purposive manner and consistent with its quasi-constitutional nature, when he failed to analyze the question of meaningful consent separately for installing users from that of the Facebook friends of installing users. As a general proposition, the duty to assess meaningful consent must be considered separately for different types of users. This failure to determine whether meaningful consent had been provided by installing users separately from that of their Facebook friends was particularly problematic in this case in light of the distinct and different evidence as to what allegedly constituted meaningful consent for installing users, who chose to install the third-party application, and for their Facebook friends, who had not.

e. The Application Judge erred in fact and law when he failed to consider all of the evidence before him, finding instead an evidentiary vacuum despite clear evidence in the record to the contrary, including but not limited to:

    i) evidence that Facebook could not rely on its contractual agreements with third party application developers, including, for example Facebook's own admission that there were "bad actors" amongst the millions of applications Facebook allowed to operate, and Facebook's own data that a segment of app developers did not read Facebook's Platform Policy, which sets the terms of apps' access to user information.

    ii) evidence regarding the lack of meaningful consent, including but not limited to evidence that Facebook had failed to provide adequate information to installing users to properly inform their decisions and Facebook's own admissions that their privacy tools were hard to find and

that users were complaining that Facebook had failed to do enough to keep people informed of their privacy rights on Facebook; and

iii) evidence regarding Facebook's failure to meet its safeguarding obligations before disclosure to a third-party application, including but not limited to ongoing disclosures of personal information to the same third-party application, and evidence on the record of Facebook's failure to act on red flags.

f. The Application Judge erred in law when he found that the Appellant ought to have provided subjective evidence of users' expectations or consent, which is contrary to the requirement in *PIPEDA* that consent is to be measured on an objective, reasonable person standard.

THE FOLLOWING LEGISLATIVE PROVISIONS will be relied on at the hearing of the

appeal:

a. the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5;

b. the *Federal Courts Act*, RSC, 1985, c. F-7;

c. the *Federal Courts Rules*, SOR/98-106; and

d. such further and other legislative provisions as counsel may advise and this Honourable Court may permit.

Date: May 12, 2023

Garib, Louisa Digitally signed by Garib, Louisa Date: 2023.05.12 10:58:18 -04'00'

GOLDBLATT PARTNERS LLP
Barristers and Solicitors
500 - 30 Metcalfe Street
Ottawa ON K1P 5L4
Tel.: 613-235-5237
Fax: 613-235-3041

Peter Engelmann
Email: pengelmann@goldblattpartners.com

Colleen Bauman
Email: cbauman@goldblattpartners.com

OFFICE OF THE PRIVACY COMMISSIONER OF CANADA
Legal Services
30 Victoria Street
Gatineau, Québec, K1A 1H3
Tel: (819) 664-4731
Fax: (819) 994-5424

Louisa Garib
Email: louisa.garib@priv.gc.ca

Lucia Shatat
Email: lucia.shatat@priv.gc.ca

Lawyers for the Appellant