

Federal Court



Cour fédérale

Date: 20131029

Docket: T-358-13

Citation: 2013 FC 1103

Ottawa, Ontario, October 29, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

RABI CHITRAKAR

Applicant

and

BELL TV

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is an application and claim for damages made pursuant to subsection 14(1) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA]. The Applicant, Mr. Chitrakar, claimed \$20,000 for breach of privacy and *Charter* rights; aggravated damages for emotional pain, anguish, anxiety and humiliation; and punitive damages in the amount of \$15,000 for Bell TV's malicious and high-handed conduct and negligence.

In this proceeding, Mr. Chitrakar acted on his own behalf. Bell TV never responded to this proceeding.

II. BACKGROUND

[2] The scheme of PIPEDA establishes a form of statutory test for breach of privacy. The Court can order certain remedial action as well as award damages.

14. (1) A complainant may, after receiving the Commissioner's report or being notified under subsection 12.2(3) that the investigation of the complaint has been discontinued, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Schedule 1, in clause 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1, in subsection 5(3) or 8(6) or (7) or in section 10.

16. The Court may, in addition to any other remedies it may give,

(a) order an organization to correct its practices in order to comply with sections 5 to 10;

(b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or

14. (1) Après avoir reçu le rapport du commissaire ou l'avis l'informant de la fin de l'examen de la plainte au titre du paragraphe 12.2(3), le plaignant peut demander que la Cour entende toute question qui a fait l'objet de la plainte — ou qui est mentionnée dans le rapport — et qui est visée aux articles 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 ou 4.8 de l'annexe 1, aux articles 4.3, 4.5 ou 4.9 de cette annexe tels qu'ils sont modifiés ou clarifiés par la section 1, aux paragraphes 5(3) ou 8(6) ou (7) ou à l'article 10.

16. La Cour peut, en sus de toute autre réparation qu'elle accorde :

a) ordonner à l'organisation de revoir ses pratiques de façon à se conformer aux articles 5 à 10;

b) lui ordonner de publier un avis énonçant les mesures prises ou envisagées pour corriger ses pratiques, que ces dernières

not ordered to correct them under paragraph (a); and

aient ou non fait l'objet d'une ordonnance visée à l'alinéa a);

(c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.

c) accorder au plaignant des dommages-intérêts, notamment en réparation de l'humiliation subie.

(Court's underlining)

[3] Schedule 1 to PIPEDA sets forth a number of principles. Pursuant to s 5, compliance with the Schedule is mandatory. The pertinent provisions are as follows:

4.3 Principle 3 – Consent

4.3 Troisième principe — Consentement

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

Toute personne doit être informée de toute collecte, utilisation ou communication de renseignements personnels qui la concernent et y consentir, à moins qu'il ne soit pas approprié de le faire.

4.3.1

4.3.1

Consent is required for the collection of personal information and the subsequent use or disclosure of this information. Typically, an organization will seek consent for the use or disclosure of the information at the time of collection. In certain circumstances, consent with respect to use or disclosure may be sought after the information has been collected but before use (for example, when an organization wants to use information for a purpose not

Il faut obtenir le consentement de la personne concernée avant de recueillir des renseignements personnels à son sujet et d'utiliser ou de communiquer les renseignements recueillis. Généralement, une organisation obtient le consentement des personnes concernées relativement à l'utilisation et à la communication des renseignements personnels au moment de la collecte. Dans certains cas, une organisation peut obtenir le consentement concernant l'utilisation ou la

previously identified).

communication des renseignements après avoir recueilli ces renseignements, mais avant de s'en servir, par exemple, quand elle veut les utiliser à des fins non précisées antérieurement.

[4] On December 1, 2010, Chitrakar ordered satellite television service from Bell. He was a first-time Bell customer and had no credit history with Bell.

[5] The service was installed on December 31, 2010. At that time Chitrakar was required to provide his signature on what is known as a POD Machine (Proof of Delivery Device). A photo of a similar type machine was entered as an exhibit. It is a 3" x 3" digital box which allows only for a signature. Chitrakar believed that he was simply confirming delivery of the satellite system.

[6] What Bell did with the signature was to embed it on its Bell TV Rental Agreement – a multi-page document in small print - and to then use the Rental Agreement. Chitrakar was not given a copy of the Rental Agreement at that time.

[7] This dubious contracting process was compounded by the provision in the Rental Agreement (Clause 5) which authorizes Bell to perform credit checks on a customer.

[8] After service was installed, Chitrakar ordered his credit report at which time he learned that Bell had accessed his credit history on December 1, 2010. It was not until December 31, 2010 that the service was installed at Chitrakar's home and he signed the POD Machine. Leaving aside concerns with the validity of Bell transferring Chitrakar's signature from the POD Machine to the

Rental Agreement, the credit check was conducted one month before Mr. Chitrakar signed anything.

[9] As the Privacy Commissioner learned while investigating Chitrakar's complaint, the type of credit check in this case was a "hard pull" where credit information is revealed. A concentration of a number of "hard pulls" within a certain time frame negatively affects the individual's credit score.

[10] Chitrakar called Bell in March 2011 to obtain clarification of the credit check and filed a complaint with Bell's privacy officer. A Bell customer service representative [CSR] in a voicemail message apologized on behalf of Bell for failing to inform Chitrakar at the time he ordered the satellite service that a credit check would be performed.

[11] Not satisfied with a voicemail apology, Chitrakar began a process of phone calls between March and May which engaged several Bell employees including managers. Chitrakar informed the Court that at some point the Bell representative advised that he/she would not speak further with him. The description of the interplay is best described as the "royal runaround".

[12] In May, Bell agreed to release Chitrakar from his contract but there was no resolution of his privacy concerns. He filed a complaint with the Privacy Commissioner.

[13] The Privacy Commissioner learned that what happened to Chitrakar was contrary to policy but that Bell could not locate any relevant records concerning this case. Bell could not confirm the identity of the CSR who took Chitrakar's order, nor whether the CSR had taken the training that

dealt with Bell's policies and procedures or whether any remedial steps were taken. However, Bell was able to assert that the CSR was no longer in its employ.

[14] The Privacy Commissioner noted politely that these circumstances were "troubling". Bell's response was disingenuous in denying the identity of the CSR and yet asserting that the CSR was no longer employed with Bell.

[15] The Privacy Commissioner found that Chitrakar's complaint was well founded. There were a few recommendations to Bell but because Bell did not appear (despite having been served with these proceedings), its response to these recommendations is unknown.

III. ANALYSIS

[16] While it is not a precondition to the right for damage that the Privacy Commissioner conclude the complaint is "well founded", the Commissioner did so.

[17] I accept the Commissioner's Report as an accurate reflection of events.

[18] Bell's conduct in this matter is reprehensible in respect to Chitrakar's privacy rights. Not only did Bell violate those rights, it has shown no interest in compensation or apparently any interest in addressing the CSR's actions nor in following the Privacy Commissioner's remedial recommendations. Its failure to appear in this Court is consistent with its disregard of Chitrakar's privacy rights.

[19] I conclude that Bell has violated Chitrakar's privacy rights under PIPEDA, particularly Article 4.3, by conducting a credit check without his prior consent.

[20] In terms of the effect of this violation, a "hard check" has adverse consequences as it begins a route to lowering a person's credit score.

[21] Chitrakar also pointed out that subsequent to these events, he was denied a student loan – the first time a loan request was denied in 10 years. However, there is no direct evidence that Bell's actions had any influence on this loan refusal.

[22] As noted earlier, Bell has taken no steps to compensate for breach of Chitrakar's privacy rights. The termination of the Rental Agreement simply addresses the legal infirmities of the manner in the Rental Agreement's execution.

[23] Chitrakar asks for damages in respect of breach of privacy and *Charter* rights. Damages for *Charter* rights' violations are not covered under PIPEDA.

[24] The fixing of damages for privacy rights' violations is a difficult matter absent evidence of direct loss. However, there is no reason to require that the violation be egregious before damages will be awarded. To do so would undermine the legislative intent of paragraph 16(c) which provides that damages be awarded for privacy violations including but not limited to damages for humiliation.

[25] Privacy rights are being more broadly recognized as important rights in an era where information on an individual is so readily available even without consent. It is important that violations of those rights be recognized as properly compensable.

[26] The Court must bear in mind such factors as meaningful compensation, deterrence and vindication (see *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28).

[27] In this case, Chitrakar had his rights violated in a real sense with potentially adverse consequences. Bell is a large company for whom a small damages award would have little material impact. Chitrakar spent a considerable period dealing with the Bell bureaucracy and in pursuing his claim. These factors suggest that a damages award should not be minimalistic.

IV. CONCLUSION

[28] Therefore, I would award Chitrakar damages of \$10,000. I would also award exemplary damages of \$10,000 for Bell's conduct at the time of the breach of the privacy rights and thereafter. I take account of Bell's dealings with Chitrakar as well as its reactions to the Privacy Commissioner and her recommendations and its failure to take these proceedings seriously.

[29] I would also award \$1,000 for disbursements and other costs.

JUDGMENT

THIS COURT'S JUDGMENT is that Mr. Chitrakar is awarded damages of \$10,000 and exemplary damages of \$10,000 for Bell's conduct at the time of the breach of the privacy rights and thereafter. Mr. Chitrakar is also awarded \$1,000 for disbursements and other costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-358-13

STYLE OF CAUSE: RABI CHITRAKAR v BELL TV

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: OCTOBER 17, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** PHELAN J.

DATED: OCTOBER 29, 2013

APPEARANCES:

Rabi Chitrakar

FOR THE APPLICANT
(ON HIS OWN BEHALF)

N/A

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rabi Chitrakar
Beechville, Nova Scotia

FOR THE APPLICANT
(ON HIS OWN BEHALF)

N/A

FOR THE RESPONDENT