

Federal Court



Cour fédérale

**Date: 20140610**

**Docket: T-1739-12**

**Citation: 2014 FC 555**

**Toronto, Ontario, June 10, 2014**

**PRESENT: Prothonotary Kevin R. Aalto**

**BETWEEN:**

**MIKE HENRY**

**Plaintiff**

**and**

**BELL MOBILITY**

**Defendant**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] In this action Mr. Henry seeks damages because Bell Mobility revealed certain information about Mr. Henry's mobile telephone account (Account) to an unauthorized third person. The release of the information amounted to a breach of the *Personal Information Protection and Electronic Documents Act*, (S.C. 2000, c. 5) (*PIPEDA*). Mr. Henry claims that he suffered losses arising from this information being divulged. The claimed damages amount to

\$49,500.00 including compensatory damages of \$35,500.00; punitive damages of \$5,000.00; general damages of \$5,000.00 and legal costs of \$4,000.00.

[2] Although damages for breach of privacy and breach of *PIPEDA* are usually assessed by way of application, this claim was commenced as a simplified action. While Bell Mobility defended the action, at the opening of trial, liability was conceded and the only issue for determination was the quantum of damages.

## **II. EVIDENCE**

[3] The evidence at trial consisted of Mr. Henry's affidavits sworn November 1, 2012 which included as an exhibit the report of findings of the Office of the Privacy Commissioner of Canada (Privacy Commissioner) and the cross-examination of Mr. Henry. The affidavit of an individual named Ray Beavis sworn May 1, 2013 had also been served and filed. However, at the opening of trial, Mr. Henry provided the Court with a copy of an email from Mr. Beavis advising that he would be unable to attend the hearing. Mr. Henry submitted that notwithstanding Mr. Beavis' unavailability his affidavit should be accepted. However, counsel for Bell Mobility objected to the affidavit as Mr. Beavis was not available for cross-examination and the evidence was therefore inadmissible.

[4] In large part the facts giving rise to this action are found in the report of findings of the Privacy Commissioner.

[5] In essence, a woman unrelated to Mr. Henry contacted Bell Mobility on October 14, 2010 and sought information regarding Mr. Henry's account. The woman placed the call to Bell Mobility and proceeded to persuade the Customer Service Representative (CSR) that she should have access to the Account. The call lasted approximately 10 minutes. The CSR allowed her access even though the woman did not know the PIN number nor other pertinent information relating to the Account. She said her name was Micheal Henry. She persuaded the CSR to change the PIN Number relating to the account and the name on the account to Micheal Henry. The woman knew the phone number and the address to which Mr. Henry's bills were sent but that is all. The transcript of the conversation between the woman and the CSR was also an exhibit to Mr. Henry's affidavit.

[6] During the call, the CSR provided the woman with the following information regarding the Account:

- (a) The correct PIN for the account;
- (b) The latest billing date;
- (c) The latest payment date;
- (d) The latest bill amounts;
- (e) The latest payment amounts;
- (f) The number of minutes used;
- (g) The type of cell phone plan Mr. Henry subscribed to;

- (h) The numbers for which Mr. Henry requested directory assistance; and,
- (i) The most recently dialled seven numbers.

[7] The Privacy Commissioner determined that the release of the information to the woman caller was a breach of *PIPEDA*. The Privacy Commissioner made the following findings regarding the disclosure of this personal information:

*Disclosure*

30. The complainant's [Mr. Henry] personal information was disclosed to the imposter who called Bell on October 14, 2010, and claimed to be the account holder. This event is not disputed by either the complainant or Bell. The personal information disclosed included the complainant's PIN as well as payment and calling history information for his cellular telephone account.

31. Principle 4.3 requires the knowledge and consent of the individual for the collection, use or disclosure of personal information, except where inappropriate. Since the complainant had not provided his consent for the disclosure of his information to the caller, Principle 4.3 was contravened.

[8] The Privacy Commissioner also made findings regarding Mr. Henry's complaint to Bell Mobility and the timing within which Bell Mobility responded to Mr. Henry. Those findings are as follows:

*Access*

32. At issue is also whether Bell provided the complainant with access to his personal information and, in so doing, respected its obligations under the *Act*.

33. Principle 4.9 of the *Act* requires that individuals be given access to their personal information. Subsequent 8(3) specifies that an organization shall respond to a request for access to personal information with due diligence and in any case not later

than thirty days after receipt of the request. Subsequent 8(4) provides for the possibility of an extension under certain circumstances. Subsequent 8(5) adds that if the organization fails to respond within the time limit, the organization is deemed to have refused the request.

34. The complainant's request for access to his personal information was dated November 8, 2010. However, he did not receive a response from Bell until December 21, 2010. The intervening period is more than thirty days, longer than that allowed by subsection 8(3) to respond. The organization did not attempt to extend the time limit by invoking any of the reasons from subsection 8(4). Therefore, pursuant to subsection 8(5), we are of the view that Bell refused the request since it did not respect the thirty-day limit allowed. The organization, by not providing access within the time limit, was thus in contravention of Principle 4.9.

[9] In his evidence, apart from his references to the findings of the Privacy Commissioner, Mr. Henry gave evidence regarding a business opportunity which he alleged he lost. The business opportunity related to the production of a documentary film on the environment. Mr. Henry described himself as being involved in a number of occupations although most recently in the construction/oil industry in Northern Alberta. He indicated he had a number of other occupations but conceded he had not previously been involved in film production.

[10] Apparently, Mr. Henry tried to produce a documentary dealing with oil/water/air pollution of the "Michael Moore" type to quote Mr. Henry. His evidence is that he was in the course of producing and preparing the documentary and had obtained financing from Ray Beavis. He says that Ray Beavis withdrew the financing because an unidentified woman called him and suggested that Mr. Henry was unreliable and untrustworthy. All of the evidence relating to the alleged phone call to Mr. Beavis was hearsay. I give it little weight.

[11] While Mr. Henry may believe that Mr. Beavis declined to finance the documentary because of some phone call from a woman, there is no direct, compelling nor admissible evidence before the Court regarding any call to Mr. Beavis which resulted in putting the financing of Mr. Henry's documentary in jeopardy. There is no direct evidence which correlates the divulging of Mr. Henry's Account to any phone call to Mr. Beavis.

[12] When asked in cross-examination what amounts of money had been spent in respect of the documentary and whether there was any paper work regarding the documentary, Mr. Henry admitted there was nothing. He had no receipts, no invoices, no business plan, no financing agreement nor anything else which would indicate that any form of financing was in place. There was in evidence a DVD which Mr. Henry said was the opening sequence of the documentary. The Court has reviewed this DVD and while there are some opening credits referring to Mr. Henry as being the producer and others as being involved in the production, the thrust of the documentary relates to Mr. Henry trying to gain access to some facility to take photographs of alleged environmental infractions. While Mr. Henry's efforts to develop a documentary regarding the environment is laudable, unfortunately the evidence before the Court is scant at best that a real documentary which would be distributed commercially was being made.

[13] No evidence was led by Mr. Henry relating to any medical issues, including stress, which he says he suffered arising from the release of his private information.

### **III. POSITIONS OF THE PARTIES**

[14] Mr. Henry argues that his privacy has been invaded by the release of private information to the unknown woman. He argues that the release of the information has caused him stress, consumed a substantial amount of his time, and resulted in the loss of his business opportunity relating to his documentary. He seeks damages of \$49,500.00.

[15] Bell Mobility, for its part, does not dispute that Mr. Henry's privacy was invaded by a woman who had no authority to access his Account. It argues that damages, however, at best, fall within a limited range and that there is no evidence to support the claim for compensatory damages asserted by Mr. Henry relating to the documentary. It argues that the damages claimed relating to the documentary is neither foreseeable nor is there any causal connection that has been proved between the breach of privacy and the alleged interference with the financing of the documentary.

### **IV. ANALYSIS**

[16] Based on the evidence of Mr. Henry and the positions taken at the outset at trial, I find that there has been an infringement of Mr. Henry's privacy rights relating to his Account. This finding is in accord with the findings of the Privacy Commissioner and is based primarily on the Privacy Commissioner's Report and the recognition by Bell Mobility that an unwarranted invasion of privacy took occurred.

[17] I also find that there is no basis to award compensatory damages. I make this finding for several reasons. First, there is a complete paucity of evidence as to the development and funding for the documentary. Second, there is no basis on the scant evidence before me, to demonstrate a causal connection between the alleged loss of financing of the documentary and the release of the private information of Mr. Henry. Third, the unknown woman who called Bell Mobility obtained the last seven phone numbers which Mr. Henry had called. Mr. Henry admits that none of them were the phone number of Mr. Beavis. Mr. Henry did give some evidence about somebody being able to find Mr. Beavis' phone number but it was mere speculation that it was the same woman and there was no evidence that the two women were the same person. Fourth, Mr. Henry did not have a single cheque, invoice, exchange of e-mails, a business plan or any other document relating to his documentary. Fifth, the DVD containing a portion of the documentary is insufficient to support a claim of the magnitude made by Mr. Henry. Sixth, the evidence of Mr. Beavis regarding the phone call and his refusal to fund the documentary is hearsay for purposes of this trial as he was not available for cross-examination and is inadmissible and is given no weight. Even if one were to accept Mr. Beavis' affidavit in evidence, it does not provide a sufficient nexus between the woman who obtained Mr. Henry's information and the allegations made on the phone call. Thus, no compensatory damages can be awarded for the documentary.

[18] However, damages are an appropriate remedy for breach of privacy as contemplated by *PIPEDA*. There are a series of cases in this Court which have dealt with the issue of awarding damages for breach of privacy. In particular, in *Nammo v. TransUnion of Canada*, 2010 FC 1284, Justice Russell Zinn set out certain non-exhaustive factors to be considered in assessing



damages in cases such as this. Those principles are usefully summarized in *Girao v. Zarek Taylor Grossman Hanrahan LLP*, 2011 FC 1070 by Justice Richard Mosley at paragraph 46 and following as follows:

46. At paragraph 76 of *Nammo* Justice Zinn sets out certain non-exhaustive factors that could be applied to *PIPEDA* applications for damages before this Court:

- Whether awarding damages would further the general objects of *PIPEDA* and uphold the values it embodies;
- Whether damages should be awarded to deter future breaches; and
- The seriousness or egregious of the breach.

47. In assessing the seriousness of the breach in question, Justice Zinn took into account the following considerations in his analysis at paragraphs 68-78 of *Nammo*:

- The impact of the breach on the health, welfare, social, business or financial position of the applicant;
- The conduct of the respondent before and after the breach;
- Whether the respondent benefited from the breach.

48. Other factors that may be relevant to the seriousness of the breach include:

- The nature of the information at stake;
- The nature of the relationship between the parties;
- Prior breaches by the respondent indicating a lack of respect for privacy interests.

49. In the case, the information was personal but not highly sensitive. I accept that the breach here was an isolated incident. There is nothing on the record that suggests the documents were posted maliciously or with the intent to cause harm. See *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196. Nor is there any evidence of repeated violations of privacy

interests by the respondents. However, the disclosure was in a form that implicates the statutory scheme itself in that it related to a PCC investigation and report of findings.

[19] In considering these various factors, damages should be awarded to Mr. Henry to further the general objects of *PIPEDA*. However, the evidence was scant at best regarding any adverse effects on Mr. Henry's health, welfare, social, business or financial position. There was no medical evidence regarding any stress or health issues suffered by Mr. Henry. In addition, as noted, the evidence regarding the financial position of Mr. Henry and the documentary is simply not persuasive nor supportive of any losses. Further, this was a case where Bell Mobility did not benefit from the breach and tried to make reparation to Mr. Henry by way of adjustments to the Account. Finally, the nature of the information released is not as significant as medical information or specific financial information which may adversely affect a person's credit.

[20] In response to the findings of the Privacy Commissioner, Bell Mobility took remedial action with respect to the CSR involved and has implemented better training. The objectives of *PIPEDA* have been met.

[21] In general, damages for breach of the provisions of *PIPEDA* range on average from zero to \$5,000.00. There is one case, discussed further below, which is an anomaly as damages of \$21,000 were awarded.

[22] The following chart provides a summary of the cases decided in this Court dealing with breach of privacy:

AUTHORITY	NATURE OF BREACH	DAMAGES
<i>Stevens v. SNF Maritime Metal Inc.</i> , 2010 FC 1137	Disclosure of financial information	NIL
<i>Randall v. Nubodys Fitness Centres</i> , 2010 FC 681	Disclosure of usage of fitness facility to employer	NIL
<i>Biron v. RBC Royal Bank</i> , 2012 FC 1095	Disclosure of credit card statements in divorce proceeding	\$2,500 + costs
<i>Townsend v. SunLife Financial</i> , 2012 FC 550	Disclosure of medical information to a third party	NIL
<i>Girao v Zarek Taylor Grossman Hanrahan LLP</i> , 2011 FC 1070	Disclosure of personal information relating to medical conditions	\$1,500 + \$500 for costs
<i>Landry v. Royal Bank of Canada</i> , 2011 FC 687	Disclosure of financial information in a divorce proceeding	\$4,500 + costs
<i>Nammo v. TransUnion of Canada Inc.</i> , 2010 FC 1284	Disclosure of inaccurate personal information to a bank causing credit issues	\$5,000 + \$1,000 for costs

[23] The one case which is significantly outside of this range of damages is *Chitrakar v. Bell TV*, 2013 FC 1103. Mr. Henry argues that this case should be followed in assessing his damages.

[24] *Chitrakar* was a claim of damages for breach of privacy. In that case, Bell TV had made a “hard check” on the Mr. Chitrakar’s credit prior to installing satellite service. One month later when the service was installed Mr. Chitrakar was required to provide his signature on a “POD Machine” (proof of delivery device). This document was not simply a confirmation of delivery of the satellite system but was in fact the Bell TV rental agreement which had an authorization to conduct a credit check. The Privacy Commissioner found there to be a breach of the Applicant’s privacy rights.

[25] Surprisingly, Bell TV, for unknown reasons, did not defend the action. At trial it was found that Bell TV’s failure to appear in Court was consistent with its disregard of Mr. Chitrakar’s privacy rights. It was also found that the “hard check” on Mr. Chitrakar’s credit had adverse consequences as it can result in lowering a person’s credit score. There was evidence that Mr. Chitrakar was denied a student loan request but there was a finding that there was no direct connection between the Bell TV credit check and Mr. Chitrakar’s failure to be approved for his student loan. In the specific circumstances of that case there was no evidence that Bell TV had changed its contracting policies in light of the Privacy Commissioner’s report; no evidence of Bell TV acknowledging the breach; nor any evidence of Bell TV. General damages were therefore awarded in the amount of \$10,000.00 plus exemplary damages of \$10,000.00 and \$1,000.00 for disbursements.

[26] *Chitrakar* is distinguishable from the current case in that here Bell Mobility has taken responsibility for the breach of Mr. Henry’s privacy rights; it has put in place steps to better train CSRs; it has not in any way benefited from the breach; and, has acknowledged that Mr. Henry is

entitled to damages in keeping with the jurisprudence of this Court. Bell Mobility argued that damages in the range of \$1,500 - \$2,000 was more than adequate to compensate Mr. Henry in these circumstances.

[27] Having considered all of the evidence and the jurisprudence and given the circumstances under which the woman cajoled the Bell representative to make the changes to the account and the breadth of the information disclosed it is my view that an award of \$2,500.00 is appropriate. Mr. Henry was self-represented at trial although he had counsel on record assisting him earlier in the case. In all of the circumstances, costs in the amount of \$1,000.00 will cover disbursements and legal costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The Plaintiff is entitled to a payment of \$2,500.00 plus pre-judgment and post-judgment interest from the Defendant.
  
2. The Plaintiff is entitled to costs fixed and payable in the amount of \$1,000.00 inclusive of disbursements and HST.

“Kevin R. Aalto”

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Prothonotary

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1739-12

**STYLE OF CAUSE:** MIKE HENRY v BELL MOBILITY

**PLACE OF HEARING:** WINNIPEG, MANITOBA

**DATE OF HEARING:** MAY 7, 2014

**REASONS FOR JUDGMENT  
AND JUDGMENT:** AALTO P.

**DATED:** JUNE 10, 2014

**APPEARANCES:**

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NOEL PEACOCK FOR THE DEFENDANT

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