Date: 20070129

Docket: A-639-05

Citation: 2007 FCA 21

CORAM: **DESJARDINS J.A.**
DÉCARY J.A.
MALONE J.A.

BETWEEN:

PAUL WANSINK, PAUL BERNAT AND HENRY FENSKE

Appellants

and

TELUS COMMUNICATIONS INC.

Respondent

and

THE PRIVACY COMMISSIONER OF CANADA

Respondent

Heard at Vancouver, British Columbia, on December 12, 2006.

Judgment delivered at Ottawa, Ontario, on January 29, 2007.

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: DESJARDINS J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] This appeal deals with the introduction by Telus, in 2003, of a new technology called "e.Speak" to its operational practices. e.Speak uses voice recognition technology to allow employees of Telus to access and use Telus' internal computer network by speaking commands through a telephone, as opposed to using a designated computer terminal or having another employee access the network on their behalf. Using e.Speak, Telus employees working in the field

can execute various network operations by using any available telephone, including a cellular telephone.

[2] When employees attempt to access e.Speak by telephone, their identity must be verified so that confidential information held within the data stores of the network is protected. The identity verification system used by Telus is a computer program known as Nuance Verifier which uses speaker verification technology to confirm the identity of persons seeking to access e.Speak.

[3] In order for an employee to use the Nuance Verifier speaker verification technology, the employee must initially participate in an "enrolment process" that results in the generation of a "voice template" (or "voiceprint"). The employee goes through a one-time voice enrolment process where a sample of the voice is taken and a voiceprint is created and stored. Voiceprints are not audio samples, but a matrix of numbers that represent the characteristics of the employee's voice and vocal tract. These enrolment voice templates are stored, according to Telus evidence, under substantial security for as long as the provider remains an employee of Telus. Access to e.Speak then requires production of a second voice template which in turn is digitalized and matched against the caller's enrolment voice template. If a match is not obtained, access is denied. This access voice template is destroyed in one or two months.

[4] Telus has identified certain of its employees as employees who are expected to undergo the enrolment process. Telus sought their consent to the collection of their voiceprints. Three employees, Randy Turner, Paul Wansink and Paul Bernat have refused. A fourth employee, Henry

Fenske, did submit to the collection of his voiceprint, but, he says, under coercion. He subsequently withdrew his consent and his voiceprint has not been used by Telus. Randy Turner has recently discontinued his appeal, hence the change in the style of cause, but by common agreement his affidavit remains as part of the file.

[5] The four employees contend that Telus was threatening them with disciplinary measures for their refusal to submit to voiceprint collection. Telus has made it known that, for those who fail to enrol, an as yet unspecified form of "progressive discipline" may be invoked. No disciplinary measure has been taken pending the outcome of these proceedings.

[6] In February 2004, these four employees filed a complaint about Telus voiceprint practices to the Privacy Commissioner of Canada pursuant to section 11 of the *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5) (PIPEDA). The Commissioner conducted an investigation and prepared a report which is dated September 3, 2004. In her report, the Commissioner found Telus to be in compliance with subsection 5(3) of PIPEDA and clauses 4.2 (principle 2) and 4.7 (principle 7) of Schedule 1: the purposes for which the personal information was collected were appropriate in the circumstances, the employees were informed of these purposes and appropriate safeguards were in place to protect the voiceprint information. The Commissioner went on to find, without much elaboration, that the consent requirements set out in clause 4.3 (principle 3) had been met.

[7] The complainants then applied, pursuant to section 14 of PIPEDA, for a hearing in the Federal Court. The Commissioner obtained leave, under subsection 15(2), to appear as a party.

[8] On November 29, 2005, Gibson J. (2005 FC 1601) dismissed the four applications without costs. He found that the purpose for which the collection was made would be considered by a reasonable person to be appropriate (subsection 5(3) of the Act). He then found that the employees' consents need not be obtained because, in his view, the exception contained in paragraph 7(1)*(a)* of the Act applied, viz, the collection was clearly in the interests of the employees and their consent could not be obtained in a timely way. He expressly refrained from deciding what would be the respective rights of Telus and of employees who refused to consent in a labour law context.

Relevant Legislative Provisions

Personal Information Protection and Electronic Documents Act	***Loi sur la protection des renseignements personnels et les documents électroniques***
2. (2) In this Part, a reference to clause 4.3 or 4.9 of Schedule 1 does not include a reference to the note that accompanies that clause.	**2.** (2) Dans la présente partie, la mention des articles 4.3 ou 4.9 de l'annexe 1 ne vise pas les notes afférentes.
5. (3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.	**5.** (3) L'organisation ne peut recueillir, utiliser ou communiquer des renseignements personnels qu'à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.
7. (1) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the	**7.** (1) Pour l'application de l'article 4.3 de l'annexe 1 et malgré la note afférente, l'organisation ne peut recueillir de renseignement personnel à l'insu de l'intéressé et sans son

individual only if

(*a*) the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way;

(*b*) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province;

consentement que dans les cas suivants :

a) la collecte du renseignement est manifestement dans l'intérêt de l'intéressé et le consentement ne peut être obtenu auprès de celui-ci en temps opportun;

b) il est raisonnable de s'attendre à ce que la collecte effectuée au su ou avec le consentement de l'intéressé puisse compromettre l'exactitude du renseignement ou l'accès à celui-ci, et la collecte est raisonnable à des fins liées à une enquête sur la violation d'un accord ou la contravention du droit fédéral ou provincial;

27.1 (1) No employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that

…

(*b*) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is a contravention of a provision of Division 1; …

27.1 (1) Il est interdit à l'employeur de congédier un employé, de le suspendre, de le rétrograder, de le punir, de le harceler ou de lui faire subir tout autre inconvénient, ou de le priver d'un avantage lié à son emploi parce que :

[…]

b) l'employé, agissant de bonne foi et se fondant sur des motifs raisonnables, a refusé ou a fait part de son intention de refuser d'accomplir un acte qui constitue une contravention à l'une des dispositions de la section 1;[…]

SCHEDULE 1

(Section 5)

PRINCIPLES SET OUT IN THE NATIONAL STANDARD OF CANADA ENTITLED MODEL

ANNEXE 1

(article 5)

PRINCIPES ÉNONCÉS DANS LA NORME NATIONALE DU CANADA INTITULÉE CODE

CODE FOR THE PROTECTION OF PERSONAL INFORMATION, CAN/CSA-Q830-96	*TYPE SUR LA PROTECTION DES RENSEIGNEMENTS PERSONNELS, CAN/CSA-Q830-96*
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. 4.3.8 An individual may withdraw consent at any time, subject to legal or contractual restrictions and reasonable notice. The organization shall inform the individual of the implications of such withdrawal.	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. 4.3.8 Une personne peut retirer son consentement en tout temps, sous réserve de restrictions prévues par une loi ou un contrat et d'un préavis raisonnable. L'organisation doit informer la personne des conséquences d'un tel retrait.

Analysis

[9] It is common ground that the voice recognition technology used by Telus requires the collection of "personal information" within the meaning of PIPEDA. Characteristics of a person's voice are personal information.

[10] It is also trite law that privacy rights under PIPEDA are not absolute. Their amplitude is to be determined through a balancing process whereby, in a case such as this one, the private interests of the employees and the business interests of the employer are to be considered in order to define the permissible limits of intrusion in an employee's privacy. As noted by Gibson J. at paragraph 41 of his reasons:

> … "Privacy rights are neither absolute at one extreme nor insignificant at the other. Their location on the spectrum between these two extremes is variable, depending upon the totality of the factual situation in which they are being examined."

[11] The learned judge went on to find that voice characteristics, in the case at bar, are toward the lower end of the spectrum. He adopted, as his own and on the evidence before him, the Commissioner's conclusion in that regard. In her report, the Commissioner had stated:

> There is no question that a voice print is an encroachment upon your person. TELUS is collecting the behavioural and physical characteristics that make your voice unique. But how much does it tell about you? Can a voice print – in and of itself – reveal, for example, your work history, the state of your health or any possible criminal record? In my view, the voice print does not tell much about the individual so the issue to consider is could it be used to find out more about the individual or misused in some other way? Indeed, you expressed concern about the various uses to which your voice print could be subjected, such as spying on employees or identifying an employee who calls into a radio talk show to criticize the employer. But those who know you also know your voice. If an employee was publicly critical of his or her employer on a talk show, and the individual's supervisor happened to hear it, the fact that the employer has a voice print on file has no effect on the likelihood of the employee being recognized. Moreover, TELUS has demonstrated to our satisfaction that, technically speaking, it can only use the voice print for authentication purposes in its current setup, and cannot use it for spying or other nefarious purposes. In the circumstances of this complaint, therefore, a voice print that is used solely for one-to-one authentication purposes seems to be fairly benign.

[12] I agree. To the reasons expressed by the Commissioner, I would add the following one: while it is true that what is collected is the voice, the fact is that what is used by Telus is not the voice itself, but the voiceprint, which is a matrix of numbers.

[13] This appeal raises essentially three issues:

1) whether the collection, use or disclosure of the voice characteristics was "only for purposes that a reasonable person would consider are appropriate in the circumstances" within the meaning of subsection 5(3) of PIPEDA.
2) whether Telus has met its obligations under Principle 3 (clause 4.3 of Schedule 1) with respect to obtaining its employees' consent.
3) whether PIPEDA prohibits an employer from disciplining employees who withhold their consent to the collection of personal information?

[14] A fourth issue was raised with respect to the appellant Fenske. It is alleged that Gibson J. erred in finding that he had properly consented. This is a finding of fact which does not warrant the intervention of this Court. I have reviewed the affidavit material submitted by Mr. Fenske, including an email he suggests indicates that he would be fired and/or disciplined for failing to participate in e.Speak. The letter is a direction to participate in the program; no more, no less. It contains no threats of discipline and certainly does not make threats that Mr. Fenske's job was in jeopardy. In any event Mr. Fenske has withdrawn his consent, as he is entitled to under clause 4.3.8. He ends up being in the same position as the three other complainants for the purposes of this appeal.

First Issue:

Whether the collection, use or disclosure of the voice characteristics was "only for purposes that a reasonable person would consider are appropriate in the circumstances" within the meaning of subsection 5(3) of PIPEDA.

[15] Gibson J. held that the “circumstances” referred to in subsection 5(3) are those that exist at the time the collection, use or disclosure of personal information is made. This interpretation of subsection 5(3) is the correct one and I entirely agree with what he states in paragraph 45:

> I am satisfied that the test of what a reasonable person would consider to be appropriate in the circumstances must be applied against the circumstances as they exist. I accept that circumstances can change, that new uses and applications can be contemplated and adopted, and that new technologies to breach security can be developed. I am satisfied that those new uses and applications, and changes in technology that might render Telus' security precautions inadequate, are to be tested only when they are real and meaningful, not when they are hypothetical.

[16] The judge went on to find, on the facts, that a reasonable person would find the use of that new technology to be reasonable in the circumstances. His finding at paragraph 48 is supported by the evidence and discloses no palpable or overriding error. I endorse it in its entirety:

> Taking into account the foregoing, and against the above brief analysis of: the degree of sensitivity associated with voice prints as personal information; the security measures implemented by Telus; the *bona fide* business interests of Telus as established on the evidence before the Court and to which the collection of voice prints is directed; the effectiveness of the use of voice prints to meet those objectives; the reasonableness of the collection of voice prints against alternative methods of achieving the same levels of security at comparable cost and with comparable operational benefits; and the proportionality of the loss of privacy as against the costs and operational benefits in the light of the security that Telus provides; I conclude that the collection of the voice print information here at issue would be seen by a reasonable person to be appropriate in the circumstances, as they existed at all times relevant to this matter, and against the security measures adopted by Telus.

Second Issue:

Whether Telus has met its obligations under Principle 3 (clause 4.3 of Schedule 1) with respect to obtaining its employees' consent.

[17] This issue brings into play the interaction of Principle 3 (Consent) (clause 4.3 of Schedule 1) and subsection 7(1) of the Act.

[18] This Court has stated, in *Englander v. Telus Communication Inc.*, 2004 FCA 387, at paragraph 46, that:

> "…because of its non-legal drafting, Schedule 1 does not lend itself to typical rigorous construction. In these circumstances, flexibility, common sense and pragmatism will best guide the Court."

[19] While the same cannot, properly speaking, be said to apply to the interpretation of the Act itself, the fact that the Act time and time again refers to schedule 1 and provides in subsection 5(1) that "every organisation shall comply with the obligations set out in Schedule 1", invites the Court to approach the Act itself in a less rigorous way as it would normally approach a statute.

[20] In *Englander*, at paragraph 59, I expressed the view that the concept of "inappropriateness" in clause 4.3 "may refer at least to section 7 of the Act which authorizes collection without knowledge or consent in some circumstances". In the case at bar, it is not suggested that Telus could rely on any other section (in the Act) or clause (in Schedule 1) than paragraph 7(1)*(a)* of the Act to relieve itself from the obligation to obtain consent.

[21] Consent to collection of personal information is so much a cornerstone of the Act that subsections 2(2) and 7(1) expressly require that the note to clause 4.3 be disregarded when interpreting a reference to that clause. Considering that the note to clause 4.3 states that "In certain circumstances personal information can be collected…without the knowledge and consent of the individual", the very fact that Parliament has expressly asked that the note be ignored is a significant indication of its desire to limit the circumstances in which consent to collection of personal information is not required to those it describes in subsection 7(1).

[22] This strong desire is further confirmed by the use of the word "only" in subsection 7(1): personal information may be collected without the knowledge or consent of the individual only if one of the five exceptions described in paragraph *(a)* to *(e)* applies.

[23] I respectfully disagree with the Judge's finding, at paragraphs 49 and 50, that subsection 7(1) of the Act enumerates further exceptions to the general principle set out in clause 4.3 that consent may not be required in appropriate circumstances. In my view, the exceptions to the obligation to obtain consent referred to in clause 4.3 are exhaustively set out in subsection 7(1) of the Act. That subsection provides the exhaustive list of circumstances where knowledge and consent are not required and which are not "inappropriate" within the meaning of clause 4.3. (see Lemieux J. in *Eastmond v. Canadian Pacific Railway*, 2004 FC 852 at para. 86)

[24] I also disagree with the Judge's finding that the exception set out in paragraph 7(1)*(a)* of the Act can be applied in the circumstances.

[25] First, the exception applies only where consent cannot be obtained. In the case at bar, consent was refused by three of the complainants and given by the fourth complainant. Clearly, if consent could be refused or given, it cannot be said that there could have been no attempt made to obtain it. The exception applies where consent cannot be obtained, not where consent is not obtained.

[26] Second, as consent was refused by three of the complainants and is now questioned by the fourth complainant, it cannot be said that they considered the collection of their voice characteristics as being clearly in their interest.

[27] Third, the use of the words "in a timely way" makes it clear that the exception is aimed at permitting an organization to go ahead without the consent of an individual only in exceptional and temporary circumstances, such as where the individual cannot be contacted before the collection of the personal information has to be done.

[28] I reach the conclusion that Telus was under the obligation to obtain consent before collecting the voice characteristics of the complainants. In this case the design of the e.Speak system ensures that individual consent is provided prior to the collection of a biometric voiceprint. As Gibson J. noted at paragraph 65 of his decision, e.Speak is applicable only to those who consent to enrolment. Because voice samples are provided via each employee's interaction with the e.Speak system, it is not possible to create a voiceprint without an individual's knowledge and participation,

and therefore consent. Finally, the exception set out in subsection 7(1)*(a)* of the Act does not apply in the circumstances.

[29] This leaves the issue of whether the alleged threats of disciplinary measures vitiated consent. Normally, I would agree that threats of disciplinary measures such as suspension or firing would vitiate consent. However, what is meant by disciplinary measures is not clear from any of the evidence placed before this Court. The affidavits of Randy Turner, Paul Bernat, and Paul Wansink contain the exact same statement that progressive discipline was threatened by a Telus supervisor at a belated Christmas party. There is no mention of what these allegations of progressive discipline involved and since no measure of any sort has yet been taken by Telus, nothing meaningful can be said about the alleged threats. Counsel for the appellants recognized at the hearing that in order for an employee to give an informed consent under the Act, the employer had the duty to inform the employee that a refusal to consent could lead to some consequences on the employee's tenure of office. In fulfilling its duty the employer would not be making threats of disciplinary measures.

[30] In these circumstances, it is not possible to conclude at this stage that Telus has not met its obligations under Principle 3.

Third Issue:

Whether PIPEDA prohibits an employer from disciplining employees who withhold their consent to the collection of personal information.

[31] The appellants argue that paragraph 27.1(1)*(b)* of the Act prohibits an employer from disciplining employees. That paragraph, clearly, does not support their proposition. It was intended, on its face, to protect employees from reprisals that could arise from an employee's refusal to comply with an employer's direction to perform job functions that would result in a violation of the privacy rights of others as protected by Division 1 of PIPEDA. In other words, paragraph 27.1(1)*(b)* protects employees from being disciplined for refusing to breach PIPEDA. Consenting to a request for collection of personal information is not a breach of the Act, nor is a refusal to consent a breach of the Act, quite to the contrary.

Disposition

[32] The implementation of e.Speak by Telus did not violate the provisions of PIPEDA in view of the fact that consent to the collection of voice characteristics was actually sought by Telus and that no disciplinary measure has yet been taken by Telus. Given this, and albeit on partially different grounds, I have reached the conclusion that the application was properly dismissed by Gibson J., and that the appeal should be dismissed.

[33] The appellants would like this Court to decide whether Telus' management rights allow it to discipline an employee who refuses to submit personal information protected by PIPEDA.

[34] I will not address this issue. First, Telus has not taken disciplinary measures which makes answering this question hypothetical. Second, the issue, to use the words of Gibson J. at paragraph 65, "is for another day and for another forum". Labour law disputes should be settled in a labour law forum. Once it is found that e.Speak is permissible under PIPEDA and that Telus applies this

new technology only to the employees who consent to the collection of their voice characteristics, the employment consequences flowing from the refusal to consent to the reasonable collection of personal information are nowhere to be found in PIPEDA.

[35] In the same vein, and on the facts of this case, I need not determine whether, under the terms of a collective agreement, consent may be given by a trade union on an individual employee's behalf.

[36] In light of the divided success on the determination of the questions of law, I would make no order as to costs against the appellants.

"Robert Décary)
J.A.

"I agree.
Alice Desjardins J.A."

"I agree.
B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-639-05
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DATED:	January 29, 2007

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Privacy Commissioner of Canada