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This release features updates to Chapter 16. Privacy including updates to § 16:1 Personal Information Protection and Electronic Documents Act: 2015, c. 32, [ss. 10, 11, 14, 17(1), (4), 19, 22-24 now in force and s. 26(3) conditions satisfied.]; also amended by 2015, c. 36, ss. 164-166; SOR/2019-84; 2019, c. 18, s. 61; 2024, c. 16, s. 93; 2024, c. 17, ss. 347, 350(2)(a) [s. 347 not in force at date of publication; s. 350(2)(a) conditions not yet satisfied.]; and updates to the case law annotations in § 16:1 Personal Information Protection and Electronic Documents Act. This release also features updates to Appendix 17B. Remedies Table - Violation of General Administrative Monetary Penalties Scheme under the Telecommunications in Chapter 17. Telemarketing.

Highlights:

- ***Personal Information Protection and Electronic Documents Act* – Schedule 1 – 4.3 – Principle 3 – Consent – Case Law** – The Federal Court erred when it premised its conclusion exclusively or in large part on the absence of expert and subjective evidence given the objective inquiry. The Federal Court failed to inquire into the existence or adequacy of the consent given by friends of users who downloaded third-party apps, separate from the installing users of those apps. Consequently, the Court did not ask itself the question required by PIPEDA: whether each user who had their data disclosed consented to that disclosure. Those were overarching errors which permeated the analysis with the result that the appeal should be allowed. Justice Rennie noted that there was considerable probative evidence that bore on the questions before the Federal Court, including; the Terms of Service and Data Policy, the transcript of Facebook's Chief Executive Officer, Mark Zuckerberg's testimony that he "imagine[d] that probably most people do not" read or understand the entire Terms of Service or Data Policy, that 46 % of app developers had not read the Platform Policy or the Terms of Service since launching their apps, that TYDL's request for information was beyond what the app required to function, and the decision to allow TYDL to continue accessing installing users' friends' data for one year in the face of "red flags" regarding its noncompliance with Facebook's policies. Justice Rennie explained that subjective evidence does not play a role in an analysis focused on the perspective of the reasonable person. The meaningful consent clauses of PIPEDA, along with PIPEDA's purpose, pivot on the perspective of the reasonable person. Section 6.1 of PIPEDA protects an organization's collection, use, or disclosure of information only to the extent that a reasonable person would consider appropriate in the circumstances. Clause 4.3.2 of PIPEDA asks whether an individual could have "reasonably underst[ood]" how their information would be used or disclosed. (Reference also made to section 3 and clause 4.3.5 of PIPEDA). Importantly Justice Rennie noted that the perspective of the reasonable person is framed by the legislation, which speaks of a corporation's need for information. It does not speak of a corporation's right to information. This is critical. The legislation requires a balance, not between competing rights, but between a need and a right. Justice Rennie explained that the reasonable person is a fictional person. They do not exist as a matter of fact. The reasonable person is a construct of the judicial mind, representing an objective standard, not a subjective standard. Accordingly, a court cannot arbitrarily ascribe the status of "reasonable person" to one or two individuals who testify as to their particular,

subjective perspective on the question. Justice Rennie noted that whether the Court should issue a remedial order in light of the assertion that the evidentiary record has shifted since the filing of the application is a different question, potentially one of mootness. The Court will not issue orders which would be of no force or effect. The events that gave rise to this application transpired a decade ago. Facebook claimed that there had been many changes in its privacy practices since then, such that there may no longer be any nexus between the underlying breaches and the question of remedies sought. Absent further submissions or potentially, fresh evidence, the Court was not in a position to decide whether any of the Commissioner's requests related to Facebook's current conduct were reasonable, useful, and legally warranted. Justice Rennie would allow the appeal with costs, declare that Facebook's practices between 2013 and 2015 breached Principle 3 as set out in clause 4.3, Principle 7 as set out in in clause 4.7, and once in force, section 6.1 of PIPEDA. The Court would remain seized of the matter and require the parties to report within 90 days of the date of the reason as to whether there was agreement on the terms of a consent remedial order. Should no agreement be reached, further submissions would be invited on the question of remedy: *Privacy Commissioner of Canada v. Facebook Inc.*, 2024 FCA 140 (F.C.A.).