

## Leon's Furniture and Privacy: When is it Unreasonable to be Reasonable?

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### Cases Considered:

[\*Leon's Furniture Limited v Alberta \(Information and Privacy Commissioner\)\*](#), 2011 ABCA 94

This significant privacy case illustrates some of the difficulties courts (and many lawyers and law students) experience with the appropriate legal tests for judicial review of administrative decisions. Generally, on judicial review, courts will apply a high level of deference for the decisions of tribunals, and will examine whether the decision was “reasonable.” Over the course of several years, the courts have determined that when reviewing a decision of an administrative tribunal, where that tribunal has expertise in the area, or the review involves a question that is within the core function of the tribunal, the standard of review is “reasonableness.” On the other hand, the reviewing court will employ the standard of “correctness” when the situation calls for the interpretation of a question of law that is not specifically within the area of expertise of the tribunal. One of the key issues in this case is whether the Information and Privacy Commissioner’s interpretation of the reasonableness standard provided under the *Personal Information Protection Act*, RSA 2000, c P-6.5 [“*PIPA*”] was reasonable.

The test for reasonableness in the context of judicial review has been set out in the case of *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

In the *Leon's Furniture* case, the administrative tribunal (an adjudicator from the office of the Information and Privacy Commissioner) was asked to determine whether driver’s licence and licence plate numbers are “personal information” under the legislation, and whether *Leon's Furniture* was “reasonable” in its practices of collecting this information. “Reasonable” is defined under section 2 of the *PIPA* as follows:

Standard as to what is reasonable

2 Where in this Act anything or any matter

(a) is described, characterized or referred to as reasonable or unreasonable, or

(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,

the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

What may cause confusion in this case is that the reviewing court actually had to decide whether the adjudicator was reasonable (in the *Dunsmuir* sense) when determining that Leon's Furniture was unreasonable (in the *PIPA* section 2 sense) in its privacy practices.

Leon's Furniture collected the driver's licence and licence plate numbers of people who purchase furniture and then later pick up the furniture from the store. Leon's Furniture claimed that this policy is necessary in order to deter, prevent and detect fraud. In particular, when furniture is purchased and then later picked up from the store, fraud may occur when a stranger picks up the furniture without the customer's authority. Also, fraud may occur when the customer picks up the furniture but later denies receiving the furniture, or refuses to pay for the furniture based on an allegation that it was never received.

Leon's Furniture argued that this information collection policy protects the store and the customer, and also assists the police when they are later investigating fraud. Leon's indicated that it stored the numbers separately from the names and addresses of the customers, thereby limiting the potential that the information could be misused. There was no evidence that the personal information was shared with third parties or used for marketing or other purposes (*Leon's Furniture* at para. 7).

Leon's customer Sharon Curtis complained to the Information and Privacy Commissioner about Leon's Furniture's policy of collecting driver's licence and licence plate numbers from people picking up furniture. The Information and Privacy Commissioner assigned the matter to an adjudicator (see Office of the Information and Privacy Commissioner, Order P2008-004). First, the adjudicator held that the driver's licence and licence plate numbers are "personal information" under the *PIPA*. Second, the adjudicator accepted that preventing fraud and theft is a reasonable purpose for collecting personal information. The adjudicator concluded, however, that recording the driver's licence and licence plate numbers was not reasonable in preventing the fraudulent pickup of furniture. The adjudicator concluded that it was reasonable to only collect the name and address of the purchaser and then to examine his or her identification for verification purposes. (*Leon's Furniture* at para. 10).

The adjudicator concluded that Leon's Furniture was in violation of *PIPA* section 7(2), which states:

7(2) An organization shall not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information about an individual beyond what is necessary to provide the product or service.

The adjudicator held that picking up the furniture after the sale was a "service" that Leon's Furniture would not provide unless identification was produced.

The adjudicator also concluded that Leon's Furniture was in violation of *PIPA* section 13, which states:

13(1) Before or at the time of collecting personal information about an individual from the individual, an organization must notify that individual in writing or orally

(a) as to the purposes for which the information is collected

....

The adjudicator opined that this section was violated because Leon's Furniture did not explain the reason for the collection of the personal information, except that it was "store policy" (*Leon's Furniture* at para. 12).

The adjudicator ordered that Leon's Furniture cease recording driver's licence and licence plate numbers when an individual picks up furniture. The adjudicator also ordered that Leon's Furniture destroy all existing records of driver's licence and licence plate numbers.

Leon's Furniture applied to the Alberta Court of Queen's Bench for judicial review of the adjudicator's decision. The application was dismissed (see *Leon's Furniture Limited v Curtis* - June 18, 2009 (Oral Decision) Action No. 0801-12471, Calgary Court of Queen's Bench (Justice R. Nation)).

Leon's Furniture further appealed to the Alberta Court of Appeal (per Justices Ronald Berger and Frans Slatter, with Justice Carole Conrad dissenting), and the majority allowed Leon's Furniture's appeal. In the majority judgment, a fair bit of time is spent dealing with the application of the Information and Privacy Commissioner to make submissions on the merits of the appeal. The majority concluded that the Commissioner should be afforded some latitude in the submissions he could make to the Court, because the Commissioner is not merely an adjudicator detached from the dispute itself, but is very close to being a true party (*Leon's Furniture* at para. 30). Madam Justice Conrad agreed with the majority on this point.

The majority held that section 3 of the *PIPA* recognizes two competing values: the right to protect information and the need to use it. The *PIPA* does not express that one value takes priority over the other, and the Court held that any interpretation that holds that one must always prevail over the other is likely to be found unreasonable (in the *Dunsmuir* sense) (*Leon's Furniture* at para. 34).

In addition, the majority held that the balance called for under section 3 of the *PIPA* must also be maintained by the Commissioner when assessing what is "reasonable" under the *PIPA*. This is because a number of provisions in *PIPA* require that information be used, or the right to use

information be exercised, in a “reasonable” manner. However, the approach of the adjudicator was in several respects not in accord with these provisions and was thus “unreasonable” (in the *Dunsmuir* sense) (*Leon’s Furniture* at para. 39). Some examples of the approach of the adjudicator that were unreasonable were set out by the majority at para. 39:

- the argument that under *PIPA* section 11 (limitations on collection of information) the balancing to be conducted recognizes the individual’s right to privacy is paramount to an organization’s need to collect information— this is not a reasonable interpretation of *PIPA* sections 3 and 11;
- the argument that most Privacy Commissioners agree that collecting driver’s licence numbers is excessive; while they understand an organization’s goal of due diligence, it can be accomplished in less privacy-invasive ways—the *PIPA* does not require that an organization prove it has adopted a minimalist approach to the collection of data, but only that it has acted reasonably and thus this argument is unreasonable;
- the conclusion that ensuring that the person picking up the item is either the customer that purchased the item or someone authorized by the customer is the best way to prevent fraud in these circumstances—the *PIPA* does not require the organization to prove it has adopted the “best” way, only that the way it has chosen is reasonable;
- the conclusion that recording driver’s licence numbers goes beyond what is necessary for the purpose of preventing fraudulent pick-ups, or confirming the identity of the person picking up the merchandise was unreasonable. Further, the conclusion that organizations should ensure that they are not collecting identity information unless it is necessary for the transaction was unreasonable—*Leon’s Furniture* does not have to prove necessity, only reasonableness.

Justice Conrad, in dissent, held that the Legislature chose to balance the interests mentioned in *PIPA* section 3 (privacy vs. use of information for reasonable purposes) by proscribing the collection of personal information without consent, subject to certain specified exceptions. She also noted that section 7(2) of *PIPA* had been found to have been breached in this case (this section provided that an organization cannot require personal information as a condition of supplying a service beyond what is necessary to provide the service) (*Leon’s Furniture* at para. 128). Justice Conrad also held that section 11 of *PIPA* creates a further limitation on the collection of personal information; requiring its collection to be only to the extent that is reasonable. She held that the adjudicator was reasonable when finding that *Leon’s Furniture* went beyond the statutory limitation in section 11(2) by collecting personal information to an unreasonable extent (*Leon’s Furniture* at para. 131). She noted that the goal of preventing fraud or catching fraudsters could be met by collecting other information from the pick up person. Asking to see a driver’s licence and collecting the name and address on it but not collecting and storing the driver’s licence number would have fulfilled *Leon’s* purposes (*Leon’s Furniture* at para. 141).

Both the majority and the dissenting justice agreed that a driver’s licence number is personal information. On the other hand, the majority held that the driver’s vehicle plate number is not personal information, while the dissenting justice held that the vehicle licence number is a conduit to other personal information about the owner that is not publicly available, and that the adjudicator’s conclusion that this is personal information was reasonable (*Leon’s Furniture* at paras. 121-123).

The majority concluded that the decisions of the adjudicator were unreasonable. The decisions of the adjudicator did not fall within a range of possible, acceptable outcomes which are defensible on the facts and law. The statute calls for a balancing of interests and the adjudicator did no balancing. The fact that there are other reasonable methods of conducting Leon's Furniture's business does not mean that their chosen method is unreasonable (*Leon's Furniture* at para. 65).

Justice Conrad would have dismissed the appeal, indicating that the reviewing judge did not err and that the adjudicator's decision was reasonable and was owed deference (*Leon's Furniture* at para. 70).

This case is significant, not for the confusing use of "reasonableness" and "unreasonableness", but for the notion that an organization must implement a reasonable approach towards the collection of personal information and not the least intrusive approach. Also, it has implications for privacy protections for online activities. As noted by Michael Geist in "[The Boxing Day Shopper who Upended Privacy Laws](#)" (April 10, 2011), privacy rights associated with use of the internet often link back to a single IP address. While the Privacy Commissioner of Canada has found that IP addresses are personally identifiable information and thus covered by privacy legislation, they are very similar to licence plate information. Although they are openly available for the public, they link not to a particular person but to a particular subscriber (who could be a different person). Thus, the privacy protections associated with IP addresses could be lost, allowing organizations to collect, use and disclose IP addresses without regard for Canadians' privacy rights.

Although there is not yet any indication that the Information and Privacy Commissioner has appealed this case to the Supreme Court of Canada, perhaps he will, in light of its implications.