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Contract: Consumer Protection Trumps Arbitration Clause

The Ontario Court of Appeal has delivered its ruling in *Griffin v. Dell Canada*. In this case, Dell Canada appealed the dismissal of its two applications, i) for a stay of a proposed class action and, ii) for a reconsideration of the decision to deny its stay application. Dell sold a number of notebook computers over the internet and telephone. The terms of the sale provided for arbitration to be administered by Minnesota-based National Arbitration Forum (NAF). The plaintiff, Griffin, bought a specified number of those computers which later overheated. He sued Dell for selling defective computers and sought to have the action certified as a class action. Dell pleaded the arbitration clause. The motions judge declined to enforce the clause, holding that class proceeding was preferable in the circumstances. The court noted that the complex nature of a claim for computer product defect is ill-suited for individual consumers to prosecute via the arbitration process. Given that Griffin purchased his computers for business purposes, the court certified the class proceeding conditionally and granted Griffin leave to enlist an additional representative plaintiff who would fit the status of a consumer pursuant to the Ontario Consumer Protection Act. Consequently, Griffin enlisted Ian Andrews, a student who purchased Dell Inspiron 5160 notebook computer in November 2004 online. Andrews' computer failed in January 2007. After the certification of the class proceeding and the approval of the plaintiff's revised litigation plan, Dell's motion for leave to appeal the decision was dismissed.

In the meantime, in July 31, 2005, a new *Consumer Protection Act* (*CPA*) came into effect in Ontario, the provisions of which, the court found, "resolve the tension between the *Arbitration Act* and *Class Proceedings Act* in favour of class proceedings" (para 33). According to the court, the *CPA* completely refutes Dell's insistence that the Arbitration Act is sacrosanct. Dell argues that since the *CPA* came into effect after the plaintiffs purchased the computer and, in the absence of retroactive provision, the plaintiffs are not protected. The court found that the claim arose following the failure of the computer which happened in 2007 after the *CPA* came into effect. Consequently, the plaintiffs' claim came within the new *CPA* regime. On the option of granting a partial stay targeted at non-consumer claim (to which Griffin's belonged) the court found that "[t]he evidence before the motions judge was that approximately 70% of the purchasers of the Dell Inspiron laptops were "consumers" (para 44). The court then held that, it would be unreasonable to separate the consumer from the non-consumer claims and insisted that "[w]e should, therefore, refuse a partial stay and [allow] all the claims to proceed under the umbrella of the class proceeding" (para 46). The court noted that "[a]s the consumer claims dominate, it is reasonable that the remaining claims should follow the procedural route that the consumer claims must take" (para 50).

In dismissing Dell's appeals, the court observed that NAF has, in the meantime, been barred from administering consumer arbitration because of allegations of impropriety. This development "adds another layer of complexity standing in the way of a customer wishing to assert a claim for a defective laptop" (para 58). The appeal court endorsed the motion judge's observation that: "there is a lack of reality to Dell's argument that the claim should proceed by way of arbitration ... The choice is not between arbitration and class proceeding; the real choice is between clothing Dell with immunity from liability for defective products sold to non-consumers and giving those purchasers the same day in court

afforded to consumers by way of class proceeding" (para. 58).

Unlawful Search and Detention: Reasonable Expectation of Privacy

The British Columbia Court of Appeal has delivered its decision in *R v. Reddy*. On June 30, 2005, a police constable with the Vancouver Police Department received a radio dispatch in his marked police vehicle. Someone has called 9-1-1 and reported that "two suspicious males" suspected to be selling drugs had been sitting in a parked vehicle for several hours in a neighbourhood. Following additional description contained in the dispatch, the officer arrived the scene and was shortly joined by another uniformed officer. The first officer approached the vehicle from the driver's side and noticed that a male (Mr. Reddy) wearing a red jack was lying on the reclined driver's seat. The other male sat on the passenger's seat. The officer asked Reddy for identification. Reddy provided his name, address and DOB. Without recognizing Reddy immediately, the officer recalled his name in relation to an incident in 2004 when Reddy was a passenger in a car driven by someone prohibited from driving. Inside the car, under the driver's seat, was found six machetes. After inquiring and receiving answers from Reddy regarding why he was at the present venue, the constable did a computer check on the police vehicle, which revealed that Reddy was subject of a probation order requiring him to not possess any cellular phones or pagers or being in vehicle containing those. He then determined to detain Reddy for investigation. He directed him to step outside the vehicle and stands near a curb. The officer indicated he was going to check the vehicle for cell phone or pagers. While he looked under the vehicle seat, Reddy bolted. Even though he was asked to stop (and pursued briefly by the officer) Reddy did not. Meanwhile, Reddy abandoned his red jacked on the vehicle seat. The officer picked up the jacket and felt the weight of something inside its pockets. They turned out to be .380 pistol and a Colt .45 pistol. Both handguns were loaded.

Subsequently, Reddy was convicted for two charges of carrying concealed weapon and two charges of carrying a firearm in a careless manner. In his appeal against his conviction, Reddy contended, inter alia, that the handguns should have been excluded under s.24(2) of the *Charter* given regard that they were discovered by a police in a manner that infringed his rights under ss.8 and 9 of the *Charter*. In allowing the appeal, and overturning the convictions, the court held that on the facts, there was no reasonable basis for the officer's suspicion that Reddy was in breach of the terms of his probation. This is notwithstanding that Reddy was outside the home of a known drug dealer, that he ran away from the scene, and was a passenger in a car in which machetes were discovered in 2004. The Court also found that Reddy was subjected to arbitrary detention and his freedom unjustly compromised when the officer directed him get out of the car and stand near a curb. The court rejected the suggestion that Reddy deliberated absented himself at the time of the search or that he abandoned his jacket and renounced ownership thereof. In the court's opinion, despite not testifying, on *voir dire*, regarding a subjective expectation of privacy, "an expectation of privacy can be assumed with respect to the content of an item of clothing a person is wearing" (para 85). The flight of Reddy from an unlawful detention should not be used against him. "What occurred is comparable to a situation in which someone refuses to comply with an order that the police officer has no authority to give is arrested for obstruction, and then searched incidental to arrest. As the officer was not in the execution of his duty, when he gave the direction, the arrest would be unlawful, and so would the search" (para 78).

Solicitor-Client Privilege Over E-mails

In *Lo v. Mang*, Justice B. Allen of the Ontario SCJ heard a motion by a husband in a custody and divorce proceeding to admit into evidence a copy of an e-mail from the wife's counsel to the wife, which had inadvertently been attached to an e-mail sent by the wife's counsel to the husband's counsel. The parties had a dispute about the arrangements for when and by whom their children would be picked up at Chinese school on Fridays, during the husband's access weekends. The wife's counsel had written in an e-mail to the wife, *inter alia,* "Do

not make any changes in Chinese school until we take out the Order." This e-mail was inadvertently sent to the husband's counsel, and the husband's counsel had in turn accidentally sent the e-mail to the husband. The husband refused to approve the form and content of an order regarding the pickup arrangement, as he suspected that the wife had "secret intentions of changing the arrangements" after the order was entered (para. 5), and wished to prove this to the court via the e-mail.

Allen J. began by noting the importance of solicitor-client privilege and that the burden lay on the person seeking to overcome the privilege to demonstrate why it should either be pierced or found to have been waived. The court held that the husband could not prove waiver, as there was no evidence of any intention or consent on the wife's part to disclose the communication; rather, it was done through the inadvertence of counsel. Moving to whether the privilege could be overridden, the court drew on recent Ontario SCJ jurisprudence to lay out three factors to be considered: 1) the threshold relevance of the evidence; 2) the operation of any of the substantive exceptions to the privilege; and 3) the ultimate relevance of the evidence. On the first point, Allen J. found that the possible relevance of the impugned words to the husband's case was, at best, "doubtful." In the context of the case, the words were capable of supporting any number of inferences and "simply do not support an allegation such as this that smacks of bad faith" (para. 14). The court went on to find, in the alternative, that none of the exceptions to solicitor-client privilege (identified as: criminal communications; public safety; innocence at stake; and obtaining of communication by third party) applied, despite the husband's argument that his own solicitor was a "third party." Nor was the ultimate relevance factor of any assistance, as the child care arrangements were only one issue among several in the proceeding. Accordingly, the privilege was held to be intact and the husband's motion was denied.

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In a recent American decision, *Convertino v. United States Department of Justice, et al.*, the United States District Court (D.C.) dealt with the issue of whether solicitor-client privilege attaches to private e-mails sent by an employee to his counsel from his work e-mail account. The decision was on a motion which arose as part of an action brought by Richard Convertino, an Assistant District Attorney in the Eastern District of Michigan, against the U.S. Department of Justice (DOJ). Convertino claims that documents from an internal investigation of alleged prosecutorial misconduct on his part were leaked to the Michigan press by DOJ personnel, in violation of the federal *Privacy Act*. He applied to compel various documents from DOJ. A DOJ employee, First Assistant District Attorney Jonathan Tukel, had been involved in the investigation process. He intervened in the motion to claim solicitor-client privilege over e-mails he had sent to his personal counsel from his DOJ account, which unknown to him had been copied from his account by other DOJ personnel.

The court began by noting that, under the *Federal Rules of Evidence*, waiver of solicitor-client privilege by disclosure is possible, but will not be found where the waiver is inadvertent and where "the holder of the privilege or protection took reasonable steps to prevent disclosure" (p. 18). The court found that both of these conditions were satisfied. Tukel had no intention of sharing the e-mails with his employer, and had in fact been actively deleting the e-mails and replies from his account. He had been unaware that DOJ had the e-mails, and when he had discovered this he had sought legal protection of the privilege in a timely way. Therefore, waiver was not made out. The court then turned to whether the privilege had even attached to the e-mails, noting that this requires "a subjective expectation of confidentiality that is found to be objectively reasonable" (p. 19). Drawing on New York caselaw they applied four factors to make this determination: "(1) does the corporation maintain a policy banning personal or other objectionable use; (2) does the company monitor the use of the employee's computer or e-mail; (3) do third parties have a right of access to the computer or e-mails; and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?" (p. 19). In the case, the court found that Tukel's expectation of privacy was reasonable. DOJ's e-mail policy did not ban the personal use of employees' e-mail accounts, and while DOJ did have access to these e-mails, Tukel was unaware that they would be regularly accessing and saving them from his account. Accordingly, the documents were found to be covered by solicitor-

client privilege and Convertino's motion was denied as regarded Tukel's e-mails.

International Cases: File-Sharing Verdict Reduced

The media have recently reported that the jury verdict in the case of perhaps the world's most famous music file-sharer, Jammie Thomas-Rasset of Brainerd, Minnesota, USA, has been reduced by a federal judge. Judge Michael J. Davis reduced the $1.9 million jury verdict in the Thomas-Rasset case to the amount of $2,250 per song, for a total of $54,000. While noting that deterrent effect was properly implemented by way of the verdict, given Thomas-Rasset's "refusal to accept responsibility for her own actions," Judge Davis also called the jury verdict "monstrous and shocking."

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Robert Currie, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.

Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Robert Currie, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca