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Civil Procedure: Prohibitory and Mandatory Injunctions

The Ontario Superior Court of Justice has delivered its ruling in *Look Communications Inc. v. Bell Canada*. In this case the plaintiff applies for an injunction to restrain the defendant from terminating the telecommunication services that it provided the plaintiff under a subsisting agreement pending the determination of the substantive action. The plaintiff is the defendant's customer. It uses the defendant's telecommunications services and infrastructure to provide some CRTC tariff and non-tariffed services including broadband and dial-up internet access, web-hosting, television programming services, etc. A dispute arose between the parties as to how much was owed by one to the other. While the plaintiff claimed that it was owed approximately $8m, the defendant alleges that the plaintiff owes it $13m. According to the plaintiff, there was a strategic relationship agreement between it and the defendant as a result of which it moved all its businesses to Bell in consideration of which Bell agreed to discount the costs of the plaintiff's telecommunications needs by 30%. The plaintiff claims that it complied with the terms of the alleged agreement and that within the period in dispute, if Bell had kept its own part of the bargain, the plaintiff could have saved over $17m. Because of this state of affairs, the plaintiff maintained that it was Bell that owed it. Attempts to reach a settlement between the parties failed. Consequently, Bell served the plaintiff a notice of disconnection of services unless the plaintiff made a part payment of $5m and agreed to a confidential A.D.R. process to settle all outstanding invoices. Look then applied to the court seeking an injunction to restrain Bell from withdrawing its services. Look relied mainly on the terms of the substantive services agreement between it and Bell. Specifically, it argues that in accordance with the agreement, Bell is prohibited from terminating its services where a dispute challenges the basis for the proposed termination of services in so far as payment is being made for an undisputed amount and that Bell does not have reasonable ground to believe the dispute is orchestrated as a strategy to evade or delay payment by the other party.

According to the court, the major issue for determination upon which all other issues rested was whether the application by the plaintiff was for a prohibitory or mandatory injunction. The former is an order that forbids a party from doing something that it was not legally permitted to do, while the latter entails requiring a party to do something. Often, mandatory injunction creates a new right that never existed; hence the test for a party seeking a mandatory injunction is more stringent than one seeking a prohibitory injunction. The court found that pursuant to the substantive service supply agreement between Look and Bell and in view of the fact that Look undertakes in its application as a term of the proposed injunction to pay a provisional monthly fee of $36,000 without prejudice, the injunction sought by Look was a prohibitory as opposed to a mandatory injunction. The test to be applied is one with low threshold. The court found that it was not required to go into the details of the parties' claims. It noted, however, that despite a strong and persuasive argument by Bell that there was no strategic relationship agreement between it and Look, such a threshold is satisfied in this case as there is a serious and not a frivolous case made out by the plaintiff. The court also found the plaintiff's undertaking to pay damages quite satisfactory. In regard to balance of convenience, the court held that assuming that Bell was right that the amount owed it was $13m, that amount was of no significance to Bell given regard to its $18b annual turn over. However, in regard to Look, there was incontrovertible

evidence that in the event of Bell disconnecting its services, Look "will lose substantially all of its 50,000 customers within one week" (¶30). By the time it arranged an alternative service its customer base would have been completely eroded. Finding the balance of convenience in favour of Look, the court noted that "[a]n internet and television signal provider who cannot deliver service to its customers will lose them to other providers. Customers who have lost their service will, quite understandably, be reluctant to return to Look" and this constitutes irreparable harm to the plaintiff (¶31). Finally, the court observed that "[o]nce the business reputation is destroyed no amount of money could restore it" and the computation of the value of a ruined business is an "almost impossible" exercise (*ibid*).

Use of a "Yield" from Wrongly Obtained *Anton Piller* Order

The British Columbia Court of Appeal had delivered its ruling in *Solara Technologies Inc. v. Beard*. The litigation arose over the terms of a contract between the appellant and respondent. The latter was hired by the plaintiff appellant to develop certain technology. Subsequently, the ownership of the resulting technology as between the parties became a matter of dispute. In May 2004, the appellant obtained an ex parte order by virtue of which it copied the content of the hard drive of the respondent's computer. In that same application, the appellant sought to have an order to enter the respondent's premises and to remove the disputed technology without putting respondent to notice. The chamber's judge turned down the application but granted leave to the applicant to re-apply if the respondent was put to notice. Only a copy of the first order was served on the respondent and he agreed to deliver to the plaintiff appellant "a DB30 controller board …" as ordered by the court a day after he was served the order. Apart from the controller board, the ex parte order inter alia required the respondent to disgorge and deliver to the plaintiff all software, code, electronic data … originals and copies of correspondence and communications whether electronic or paper, *made between or concerning Solara Technologies Inc. and third parties, relating in any way to the promotion and/or sale and/or leasing of the technology"* (¶40 emphasis added).

After the respondent failed to keep his promise, the next day, the appellant applied for a court order requiring the respondent to comply with the existing ex parte order, in addition it asked for an order for entry into the respondent's premises for the removal of the appellant's technology. The appellant did not, however, disclose to the new judge that heard this application that, earlier, the chamber's judge who issued the first ex parte order required it to put the respondent to notice in regard to the request to enter the latter's premises for purpose of impounding the technology. The second judge therefore granted the order. Consequently, the appellant entered into the respondent's premises, removed the hard drives from the respondent's computer and other documents. A year later, the respondent applied before the first judge to have the orders set aside. The judge refused to set aside the first order noting that it was too late and that the respondent's remedy, if any, was in damages. However, the judge set aside the order made by the second judge because the appellants did not advise the court of the earlier requirement that they put the respondent to notice. But he declined to set aside the order of the second judge to the extent that the respondent complained that it did not reflect the order granted in chambers, "because the second judge has signed the order and only she can speak to what her intensions were" (¶14). The chamber's judge declined to restrain the plaintiff from using materials that they obtained from the search in so far as that is consistent with the earlier order but he ruled that materials that do not fall within the terms of the order should be restrained. The judge specifically held that the plaintiff/applicant was restrained "from using the email of May 13, 2004 from Mr. Beard to his parents because that did not fall within the terms of my order of May 18, 2004 and was only in violation of my direction to give the defendant notice of an application to attend his residence"(¶15).

The email in question is a correspondence from the respondent to his parents in which he explained that if the appellant failed to make him a reasonable offer in respect of the technology, he would shop it around for potential buyers. The appellants appealed the judge's discretionary decision to exclude the email insisting that it was perfectly covered by the terms of the first order and that it was relevant to the present litigation and constituted part of the

document that the respondent was required to disclose in accordance with rules of court. The court of appeal notes that the central issue in this appeal is the discretion of a judge considering the remedy for an order obtained on the basis of non-disclosure and held, following authorities, that generally the "yield" from such an order should not be used in current or future proceedings. For the court the, immediate issue here was whether the judge properly exercised such discretion in this case. The court found that the order made by the second judge was an *Anton Piller* order and that a court making such order must exercise painstaking care because of its vulnerability to abuse. In this case, the plaintiff was not represented by counsel. Even though that does not excuse the plaintiff's failure to disclose the condition imposed by the chamber's judge earlier, the court would have to exercise extra care to ensure that the order is circumscribed by appropriate conditions. According to the court, "The extraordinary nature of an *Anton Piller* order is multiplied when the applicant is unrepresented by counsel. In that case, there is no one to carry out the supervisory role found to be crucial [in *Anton Piller* orders] by the Supreme Court of Canada …" (¶35).

The court of appeal found that the guiding principle in the exercise of discretion to exclude the yield of a wrongly-obtained order is the interest of justice and that the factors to be considered include "the ability of the court to do justice between the parties; the administration of justice; justice in relation to the public interest; and justice to the parties" (¶37). The court agreed with the appellant that the email is extremely significant to their case and that it is clearly a discoverable document. It also found that "it is not at all clear that the email was not included in the class of documents described in the May 18 order [first order] or that it would not have been obtained but for the May 20, 2004 order [second order]. I see no basis on which the respondent could seek to protect the email from disclosure in the litigation" (¶48). The court held further that it is the discretion of the court to restrain the use of information under an order granted on non-disclosure basis and this is a discretion that has to be exercised at all times balancing the interests of justice. On a parting note, the court remarked: "This case illustrates the necessity for extreme caution that must be exercised by a court in granting an ex parte order permitting an applicant to enter the premises of a person taking documents and other property, especially where the applicant is not represented by counsel" (¶51).

Comment on the issues raised in this case at the It.Can Blog.

Evidence: Inconsistency of Trial Testimony and Email Evidence

The Northwest Territories Supreme Court has delivered its ruling in *R. v. Nitsiza*. In that case, the appellant appealed his conviction for sexual assault by a trial judge on a number of grounds. Of specific interest for the purpose of this report is the appellant's claims that the respondent's earlier email to a third party in which she allegedly reported the sexual assault incident was inconsistent with her allegations at the trial. The complainant had a contract under which terms the appellant and others, who were construction workers, lived in her house in Gameti while they carried out a construction project. In accordance with the contract, the complainant prepared meals for the appellant and his colleagues. The complainant alleged that in the afternoon of September 22, 2006, the appellant attended the house to obtain some tools and started talking to her about having sex. He approached her by grabbing her and accessed her pants and pubic region. Subsequently, the complainant stopped cooking for the construction workers. She sent an email to a third party one month after the incident in which she complained about what the appellant had done to her referring to it in lesser detail as making a move, talking dirty and trying to flirt and making her uncomfortable. The appellant flatly denies that any such incident took place. He argued that there is a significant discrepancy in the complainant's email story in relation to her more detailed allegation at the trial and noted that the trial judge erred in her treatment of the email evidence. Specifically, the appellant's case is that the judge erred in finding that "the email was not a statement and she erred in finding that there was no inconsistency between the email and the complainant's testimony" (¶32) and as such ought to have rejected the testimony on grounds of credibility.

The court held that while it may have been an unfortunate choice of words for the trial judge to

hold that the email was not a statement, in actual fact, she did treat the email as a statement by among other things permitting cross-examination on it. Further, she did not hold that the email was completely irrelevant on the basis of form. Also, the court found that "it may not have been entirely accurate to hold that there was no inconsistency because there were clearly differences between the email and the testimony" (¶39) regarding the nature of what transpired between the complainant and the appellant. Nonetheless, the trial judge was conscious of the existence of difference between the complainant's testimony and the content of her email. The issue is not whether an appellate authority could have made the same finding as the trial judge but "whether the Trial Judge made an overriding and palpable error, or was clearly wrong in making those findings" (¶41). Relying on the context in which the email was sent the trial formed the view that the email represented a general complaint and she noted that the description of events would lack the details in an email in comparison to presenting evidence at a trial. In upholding the trial judge's finding and assessment of the email evidence to the effect that it did not affect the reliability and credibility of the complainant's testimony, the court held that "[i]t is not unheard of to have a complainant make a partial disclosure to someone about an event, and provide a fuller disclosure, and more specific details, at some later point" (¶42).

Privacy and Software Use Restriction in Franchise Agreement

The British Columbia Supreme Court had delivered its ruling in *Morton v. H & R Block Canada Inc.* Pursuant to both BC Commercial Arbitration and Judicial Review Procedure Acts, the Petitioner seeks leave of the court to appeal the decisions of an Arbitration Panel against the Petitioner arising from a dispute over the Petitioner's subsisting Satellite Franchise Agreement with the Respondent. While that franchise agreement between the parties subsisted, the Respondent entered into a distribution agreement with a third party, Allianz Education Fund Inc., for the distribution of Allianz's individual scholarship plans or registered education scholarship plans through the Respondents' existing franchises. The Respondents, however, advised that the Petitioner was not eligible to partake in this deal pursuant to the terms of the Satellite Franchise Agreement between them. The respondent then approached Allianz directly and was granted licence to sell the scholarship plans. The Petitioner informed the Respondent of this arrangement. Consequently, the Respondent demanded that Allianz cancel the arrangement with the Petitioner as soon as possible or in the alternative have the Petitioner transfer her licence to Allianz. To have the petitioner deal with the scholarships would expose the Respondent to a potential breach of securities regulation. Allianz revoked its agreement with the Petitioner when the latter failed to transfer her licence. Subsequently, an Arbitration Panel constituted pursuant to the Satellite Franchise Agreement between the Petitioner and the Respondent found for the Respondent on all grounds canvassed by the Petitioner. That decision resulted in the application by the Petitioner for leave to appeal.

Of interest for the purpose of this report is the petitioner's case against the privacy provisions of the franchise agreement during the Panel proceedings. The operational manual for the franchise requires the Petitioner as franchisee to obtain signatures of her clients on the form on which the privacy policy of the Respondent is outlined. The Petitioner argues that this requirement had a counter-productive effect in that it allows the Respondent access to and use of the Petitioner's clients' private information leaving the Respondent open to directly solicit the business of the Petitioner's clients. The panel held that since the Petitioner has agreed to operate her business in accordance with the manual, she was bound by the privacy policy in the franchise manual.

Similarly, the petitioner also challenged the provision of the franchise agreement that restricts the use of software on a franchisee's personal computer in which the Respondents' tax preparation software is applied. According to the franchise agreement, the Respondents undertake to supply this software at no cost if the franchisee signed a software licence agreement. That agreement requires franchisees to provide the Respondents with a list of software other than those owned by the Respondents being used by the franchisees and also not to use non-business software on computers in which the Respondents' software is used. Again, the Panel found that since the Petitioner was not under obligation to use the

software provided by the Respondent, when she elected to use the software, she was bound by the term of its procurement and was required to supply list of programs on a personally owned computer to which she has applied the Respondent's tax preparation software.

In declining to grant leave to the Petitioner to appeal the Panel's decisions against her, the court relied, inter alia, on *Domtar Inc. v. Belkin Inc.* and held that there must be a specific question of law arising out of the award of the Arbitration Panel in which the leave to appeal is requested. Also, the result of the Panel decision must be of such importance to the parties in a way that justifies the intervention of the court. In addition, the court's decision to determine the question of law may be necessary to prevent a miscarriage of justice by the Panel and the court's decision to grant leave must be tantamount to appropriate exercise of judicial discretion. For the most part, the court found that the way in which the Petitioner formulated the relevant issues did not demonstrate that that they were unequivocal questions of law. It also held that in regard to privacy and the personal computer arguments, the Petitioner had deliberately entered into the agreements and in each case there were alternative options on how the agreement could be applied. Perhaps, most important, this Satellite Franchise Agreement was peculiar in that there are not many franchisees in the category of the Petitioner who were affected to create a sense of importance (¶36). Regarding specifically to the privacy argument, the court held that there is alternative and more appropriate locus or opportunity to challenge the alleged potential abuse of the privacy of the Petitioner's clients' information. According to the court, "The question of whether the Block [Respondent] Privacy Agreement complies with the provisions of the Personal Information Protection Act, RSBC 2003, c. 63 lies with the Commissioner appointed under the (sic) Freedom Information Protection of Privacy Act or under the Federal Personal Information Protection Electronic Documents Act (Canada). If [the Petitioner] is concerned that what she is required to have her clients sign is not in accordance with the legislation, then she can follow up with a complaint regarding the [Respondents'] Privacy Agreement" (¶24).

Telecommunications: Regulation Freeze for Home Telephone Rates

In July, the Canadian Radio and Telecommunications Commission (CRTC) released its decision 2007-59. This decision, which has drawn mixed reactions across Canada, was a response approving, in part, an April request by Canada's biggest phone companies Bell Aliant Regional Communications Limited Partnership (Bell Aliant) to be freed from regulations in some markets covering residential local exchange services in 80 exchanges in New Brunswick, Nova Scotia, and Prince Edward Island. In the decision, the Commission approved 72 of the 80 requested exchanges and denied Bell Aliant's request for forbearance in 8 exchanges. By this decision, telecommunication companies Bell Aliant and Telus Corporation are free to set telephone rates in several municipalities, including Fort McMurray, Alta.; Fredericton; Charlottetown; and Halifax. Also, they will no longer require CRTC approval to introduce new services and service packages. According to CRTC, this decision was rendered pursuant to "the local forbearance test set out in Telecom Decision 2006-15, as amended by the Governor in Council's *Order Varying Telecom Decision CRTC 2006-15*, P.C. 2007-532, 4 April 2007 (modified Telecom Decision 2006-15)". Similar applications are pending for home phone markets cities across Canada, including Victoria, Calgary, Edmonton, Rimouski, Que., They are expected to succeed.

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 Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.

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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 Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca

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