January 31, 2014

Supreme Court Denies Leave to Appeal in Alberta Cases

Written by: Admin

Cases commented on: *R v Alcantara*, 2013 ABCA 163; *R v Hanna*, 2013 ABCA 134; *Young v National Money Mart Company*, 2013 ABCA 264

On January 30, 2014 the Supreme Court denied leave to appeal in three Alberta cases that gave rise to four separate leave applications. The Court's summaries of the cases, and their dispositions, are below. Jonnette Watson Hamilton posted a comment on the Money Mart decision here.

35580 John Reginald Alcantara v. Her Majesty the Queen (Alta.) (Criminal) (By Leave)

Charter of Rights – Remedy – Criminal law – Evidence – Disclosure – Can a court of appeal decline to order a new trial under s. 24(1) of the *Charter* when the Crown has failed to provide timely disclosure that affected trial fairness and violated the applicant's right to make full answer and defence – Does the three-part framework in *R. v. Grant* for the exclusion of evidence under s. 24(2) of the *Charter* apply to an application for a stay of proceedings under s. 24(1) – s. 24(1) of the *Charter*.

The evidence at trial included a number of intercepted communications which were recorded pursuant to judicially approved authorizations. It was a term of the authorizations that certain classes of intercepted conversations be "live audio monitored". After the applicant was convicted, the Crown disclosed that the intercepted conversations had not all been "live monitored" and that a "put away" feature had also been used. The applicant appealed his conviction and argued that his *Charter* rights were violated by the failure to continuously "live monitor" the interceptions, and by the failure of the Crown to disclose in a timely way the use of the "put away" feature. The applicant's appeal from conviction was dismissed.

Coram: McLachlin / Cromwell / Wagner: The motion for an extension of time to serve and file the application for leave to appeal is granted. The application for leave to appeal is dismissed without costs.

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35615 Dwayne Daryl Hanna v. Her Majesty the Queen (Alta.) (Criminal) (By Leave)

Criminal law — Sentencing — Fitness of sentence — Accused guilty of dangerous driving, driving while disqualified and breaching two recognizances — Accused alleged police used excessive force during arrest but trial judge found no police misconduct — Accused sentenced to five years and six months incarceration — On appeal, sentenced varied to four years and nine months — Whether Court of Appeal erred in declining to further reduce sentence? — Whether Court of Appeal erred in limiting itself to sentencing judge's analytical approach, having found palpable and overriding error in portion of judge's analysis? — Whether Court of Appeal erred in considering effect of police misconduct, which trial judge failed to identify, when Court of Appeal deemed itself otherwise bound by judge's analysis of totality principle? — Whether five year sentence for driving while disqualified unduly excessive and harsh where court deducts only nine months for police misconduct?

The applicant, Mr. Hanna, was charged with dangerous driving, driving while disqualified, assault with a weapon and breaching two recognizances. After observing Mr. Hanna driving in excess of the speed limit, a sheriff followed Mr. Hanna's vehicle to a farmyard. Just as the sheriff was preparing to exit his vehicle, Mr. Hanna gunned his engine and sped by the sheriff's vehicle, clipping the driver's side door with his mirror. Following a spin-out, Mr. Hanna's vehicle came to rest in a ditch. A police dog was used to apprehend Mr. Hanna. Mr. Hanna took the position that the charges should be stayed because the police used excessive force during the course of his arrest. The trial judge found Mr. Hanna guilty of dangerous driving, driving while disqualified and breaching two recognizances, but not guilty of assault with a weapon because the Crown failed to establish that Mr. Hanna intended to hit the sheriff's vehicle or to threaten the sheriff. Considering the circumstances, releasing the police dog without warning Mr. Hanna first was not excessive, nor were the punches administered by the police. Mr. Hanna was sentenced to five years and six months incarceration and a seven year driving prohibition. A majority of the Court of Appeal, however, found that Mr. Hana should receive a sentence of three years and six months on the offence of driving while disqualified. On the offence of dangerous driving, the majority concluded that the trial judge's consecutive sentence of two years should be subject to a deduction of nine months for the police's misconduct. Therefore, the majority concluded that the final sentence was four years and nine months, less the 382 days credit for pretrial custody and the seven year licence suspension would remain as imposed. Berger J.A. (dissenting) would have allowed the appeal and substituted a sentence of three years and three months imprisonment less the 382 days credit for pretrial custody.

Coram: Abella / Rothstein / Moldaver: The motion for an extension of time to serve and file the application for leave to appeal is granted. The application for leave to appeal is dismissed without costs.

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35564 **National Money Mart Company carrying on business under the name and style "Money Mart" v. Gareth Young, as representative Plaintiff, H. Craig Day, as representative Plaintiff** (Alta.) (Civil) (By Leave)

Contracts – Class actions – Stay of proceedings – Are class action waiver clauses in consumer contracts enforceable if they operate independently of any arbitration provision? – If the language of a class action waiver clause is clear and unambiguous, on what grounds or in what circumstances should a court decline to enforce a class action waiver clause? – Are class action waiver clauses in consumer contracts are unconscionable *per se*, or presumed to be unconscionable, or must be proven to be unconscionable, or contrary to public policy, or inconsistent with the scheme and purpose of class action statutes.

As representative plaintiffs, Day and Young claim that the fees charged by the applicant Money Mart for short term or "payday" loans are unlawful. The written loan documentation contained clauses requiring the arbitration of any disputes relating to the loan contract. There were separate clauses with respect to class action litigation. The most recent version reads in part:

> Each party also agrees not to commence or participate in any class action either as a representative Plaintiff or as a member of a Plaintiff class, and to opt out of any class action, if the class action involves, directly or indirectly, any Claim.

The applicants brought a motion to dismiss or stay the proceedings on the grounds that the representative plaintiffs had agreed in writing to proceed with mediation or arbitration of the disputes against Money Mart, and that they had also agreed in writing not to participate in class actions. These motions to stay were dismissed, as were the subsequent appeals to the Court of Appeal for Alberta.

Coram: Abella / Rothstein / Moldaver: Dismissed with Costs

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35565 1008485 Alberta Ltd., 815028 Alberta Ltd., and 632758 Alberta Ltd. v. H. Craig Day, as representative Plaintiff (Alta.) (Civil) (By Leave)

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