Signing Away Rights: Should Private Contracts Trump the *Charter*?

In *R. v. Godbout* (*ante*), the British Columbia Court of Appeal concludes that the recipient of a package delivered by courier did not have his section 8 rights violated when the police, without a warrant, opened that package before it was delivered to him. There was no unreasonable search because there was no "search" at all: the accused had not had a reasonable expectation of privacy in the package at the relevant time. In reaching this conclusion, they note the long-established rule that a reasonable expectation of privacy must be determined based on the "totality of the circumstances", but unfortunately does not in fact determine the issue on that basis. Rather, they rely on a single circumstance: a term in a contract between someone other than the accused and a private corporation. The accused here might well not have had a reasonable expectation of privacy, but if that is the case it is not for that reason.

It is of course true that if a person is explicitly told "this package might be searched without notice or legal authority" he or she ought not to be surprised if it is searched: just as a person who is told "I am going to hit you" ought not to be surprised if he or she is assaulted. The Supreme Court of Canada has repeatedly held, however, that that factual determination is not the question: instead, reasonable expectation of privacy is a matter of entitlement. Most recently, for example, the Court held in *Spencer* that reasonable expectation of privacy:

> is not a purely factual inquiry. The reasonable expectation of privacy standard is normative rather than simply descriptive: *Tessling*, at para. 42. Thus, while the analysis is sensitive to the factual context, it is inevitably "laden with value judgments which are made from the independent perspective of the reasonable and informed person who is concerned about the long-term consequences of government action for the protection of privacy": *Patrick*, at para. 14.[1]

In this context this means that the relevant question is not whether the contract said packages might be searched without notice, but whether it was reasonable for the contract to unilaterally provide for searches of private property by government authorities without notice.

Spencer was decided only ten days before *Godbout* was argued, and it is unfortunate that it is not discussed: it is directly on point on the question of whether a contract can settle the reasonable expectation of privacy question. The Court there specifically noted that such a contract might be relevant but was not sufficient on its own to settle the question. They observed:

> There is no doubt that the contractual and statutory framework may be relevant to, but not necessarily determinative of whether there is a reasonable expectation of privacy. So, for example in *Gomboc*, Deschamps J. writing for four members of the Court, found that the terms governing the relationship between the electricity provider and its customer were "highly significant" to Mr Gomboc's reasonable expectation of privacy, but treated it as "one factor amongst many others which must be weighed in assessing the totality of the circumstances": paras. 31-32. She also emphasized that when dealing with contracts of adhesion in the context of a consumer relationship, it was necessary to "procee[d] with

[1] *R. v. Spencer*, 2014 SCC 43 at para 18.

> caution" when determining the impact that such provision would have on the reasonableness of an expectation of privacy: para. 33. The need for caution in this context was pointedly underlined in the dissenting reasons of the Chief Justice and Fish J. in that case: paras. 138-42.[2]

The British Columbia Court of Appeal refers to its own recent decision in *Felger*,[3] in which the accused had posted a sign on the door of his store purporting to forbid police officers from entering. They held in that case that, objectively based on the totality of the circumstances, the accused did not have a reasonable expectation of: the fact that he had unilaterally written something claiming to change the nature of his privacy right did not change the result of the analysis. One might argue that exactly the same result should follow here: the accused's privacy right needs to be determined based on the circumstances, and the words written in the contract of adhesion do not change it.

Spencer held at para 18 that the reasonable expectation of privacy issue should be determined by considering: (1) the subject matter of the alleged search; (2) the claimant's interest in the subject matter; (3) the claimant's subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable, having regard to the totality of the circumstances. Here the subject matter of the search was the physical contents of the package and the claimant's interest in that was that it was being delivered to him. It seems likely that a person subjectively expects that parcels entrusted to a courier will be delivered without being opened, though there was seemingly no evidence about the accused's subjective expectation. Those factors favour a reasonable expectation of privacy.

The big issue, as is often the case, is whether an expectation of privacy would be objectively reasonable. The Supreme Court has held that the exact factors to be taken into account in making that assessment must be tailored to the particular circumstances of the case. Where territorial privacy issues are at stake, for example, *Edwards*[4] set out a number of relevant considerations including ownership of the property or place, historical use of the property or item, the ability to regulate access or exclude others from the place, and others. In *Tessling*[5] and *Patrick*[6] the Supreme Court enumerated factors going to the totality of the circumstances when informational privacy is at issue, such as whether the informational content of the subject matter was in public view, whether the informational content of the subject matter had been abandoned, whether such information was already in the hands of third parties and if so whether it was subject to an obligation of confidentiality, and so on. Many of those factors would likely count against Godbout: he did not own and had no control over the package or its contents at the point it was opened, had no ability to regulate access, and the contractual provision suggests that it was not subject to an obligation of confidentiality. On the other hand steps had been taken to disguise the nature of the package, the contents were not in public view and it had not been abandoned.

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[2] *Ibid.* at para 54.
[3] *R. v. Felger*, 2014 BCCA 34.
[4] *R. v. Edwards*, [1996] 1 S.C.R. 128.
[5] *R. v. Tessling*, 2004 SCC 67.
[6] *R. v. Patrick*, 2009 SCC 17.

The central point here is not whether this accused in fact had a reasonable expectation of privacy or not. The crucial issue is that contracts between private individuals, particularly contracts of adhesion, ought not to be permitted to determine, all by themselves, whether an accused has a *Charter* right. To allow that single factor to be controlling would be inconsistent with the "totality of circumstances" test. More importantly, to focus on the purely factual question of what a contract says is to miss the key point about "reasonableness" in the reasonable expectation of privacy analysis: that it is a normative, not a factual, question. A free and democratic society ought not to require individuals to sign away their constitutional protections in order to obtain routine private services.

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