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EDITOR'S NOTE

Welcome to the inaugural edition of the *Commercial Litigation and Arbitration Review*. This is both a rebranding and a reimagining of the *Commercial Litigation Review*.

Since 2004, the *Review* has drawn on the leadership of Louis A. Frapporti and then of Heather C. Devine to publish quality and timely articles covering the vast domain of Canadian commercial litigation. We will endeavour to stay true to the path they carved.

Our ambition is for the *Review* to be essential reading for a thoughtful litigator. To that end, over the next few issues we will reinvigorate the *Review* in form and substance. We will continue to publish articles that cover the breadth of commercial litigation, raise innovative issues and approaches, identify pressing, current, and difficult problems, and that are, above all, of the highest calibre. At the same time, we will constantly seek better ways to deliver that content so that we may intrigue and inform our readers.

The rebrand is the first step in the next stage of the *Review*'s evolution.

Arbitration has of course long been a part of the *Review*. The new title simply reflects this reality.

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But arbitration is too often misconceived as a form of alternative dispute resolution akin to mediation and conciliation. To these forms of ADR modern-day commercial arbitration is a cousin generations apart and many times removed. In the words of one commentator, arbitration "is 'alternative' only insofar as the judge is not a representative of the State."[1] The *Review*'s rebrand is thus to ensure that arbitration is accorded its proper place in the realm of commercial disputes.

The current issue is both an introduction and a bridge. We lead with an article on the reasoning and implications of the *Securities Act Reference*, followed by a discussion of a B.C. decision that may have significant ramifications for the development of internet-related contract law. The final piece raises a question—where in the world is Canadian international arbitration?—which the *Review* will aspire to answer in future issues.

I am also thrilled to introduce the esteemed litigation and arbitration lawyers from across the country who have joined the Board of Editors and will guide the *Review*'s rebrand and revitalization. We hope for it to be a collaborative and interactive endeavour. Please feel free to reach out to any of us with questions, comments, ideas, and submissions.

Yousuf Aftab, National Editor

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[1] J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, *2nd ed.* (Huntington, NY: Juris, 2011) at p. 7.

[50] <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf>.
[51] <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD347.pdf>.
[52] <http://www.bankofcanada.ca/about/what-we-do/>; <http://www.osfi-bsif.gc.ca/osfi/index_e.aspx?DetailID=2>; <http://www.fin.gc.ca/afc/index-eng.asp>; <http://www.cdic.ca/e/whoisCDIC/whoisCDIC.html>.
[53] S.C. 1996, c. 6, Sch.
[54] *P.E.I. Potato Marketing Board v. Willis*, [1952] S.C.J. No. 31, [1952] 2 S.C.R. 392.
[55] *Agricultural Products Marketing Act*, R.S.C., 1985, c. A-6 at s. 2(1).

I BROWSE THEREFORE I ACCEPT: RECENT DEVELOPMENTS IN THE ENFORCEABILITY OF WEBSITE TERMS OF USE AGREEMENTS

MATTHEW NIED

Introduction

The British Columbia Supreme Court recently considered a claim for breach of contract arising from a terms of use agreement contained on a website in *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*[1] The central issue was whether the terms of use gave rise to a binding contract between the owner of the website and its user in the absence of an affirmative act on the part of the user expressing assent to the terms. The case challenged the Court to consider the evolving nature of "offer" and "acceptance" in the new context of internet contracting. In a precedent-setting decision, the Court held that the act of accessing a website containing terms of use may give rise to an enforceable contract. The decision has significant implications for internet users and businesses that engage in internet commerce. This article discusses the decision's background, reasoning, and implications.

Background

The plaintiff was a franchisor of real estate brokerage offices. The dispute concerned the plaintiff's website, which featured its brokers' property listings. The website displayed photographs and other information about the properties.

The defendant operated a website which provided consumers with the ability to search for property listings by reference to various attributes, such as proximity to amenities. Users could view matching listings and proceed to the originating website for more information. In order to provide this service, the defendant's website indexed property listings advertised on other websites, including the plaintiff's. In the course of the indexing process, the defendant's website copied photographs and information from the originating websites.

When the plaintiff learned that the defendant was indexing its website, it advised the defendant that it did not consent to the indexing. The plaintiff also placed terms of use on its website, providing that users could only use the website's content for "personal and non-commercial" purposes. When the defendant continued to index the plaintiff's website, the plaintiff commenced an action seeking an injunction and damages against the defendant.

The terms of use were not prominently displayed. They were located at the bottom of the home page of the plaintiff's website and were not drawn to the attention of users. Users were not required to acknowledge reading or agreeing to the terms of use before accessing the website. Significantly, the terms of use stated that users were bound by them simply by browsing or searching the website.

The terms of use at issue constituted what is commonly known as a "browse-wrap" agreement. Enforceability of a "browse-wrap" agreement is premised on the user taking an action, such as browsing the website that manifests assent to the terms of the agreement. This is distinguishable

from a "click-wrap" agreement, which arises when a person manifests assent to the terms of the agreement by "clicking" on an acceptance button on the website.[2]

Canadian courts have recognized the validity of "click-wrap" agreements.[3] However, prior to *Century 21*, no Canadian court had directly considered the enforceability of "browse-wrap" agreements.

Decision

The Court began by observing that the determination of what constitutes an offer, acceptance, and consideration has evolved in tandem with the evolution of business practices. After engaging in a lengthy analysis of general principles and Canadian and American cases involving contracts created over the internet, the Court concluded that the law of contract requires that an "offer and its terms be brought to the attention of the user, be available for review and be in some manner accepted by the user."[4]

In applying these requirements to the case at bar, the Court held that the question of whether a user has received sufficient notice of terms of use will depend on the "prominence the site gives to the proposed [t]erms of [u]se and the notice that the user has respecting what they are agreeing to once they have accepted the offer."[5] If terms of use are provided "with sufficient notice, are available for review prior to acceptance, and clearly state that proceeding further is acceptance of the terms",[6] then a user's act of browsing or searching a website past its initial page will constitute conduct indicating deemed agreement with the terms of use "sufficient to form a contract."[7] The Court stated that consideration will also be given to whether "the user is an individual consumer or a commercial entity" and whether they are "a one-time user or a frequent user of the site."[8]

The defendant argued that enforcing terms of use would have a "chilling effect" on the development of the internet as an "open" medium of communication. The Court rejected this argument and concluded that declining to enforce terms of use would, instead, "impair the utility and health of the Internet" by precluding website operators from contractually protecting information made available on their websites.[9] In the absence of such protection, website operators might be less likely to create and operate websites.

The Court applied this legal framework to determine that a contract had been formed. Significantly, the Court held that the sufficiency of notice and reasonableness of the terms of use were not in dispute because the defendant was a sophisticated commercial entity, received actual notice of the terms of use, conceded that they were reasonable, and had posted similar terms of use on its own website. Accordingly, the defendant's act of browsing the website was conduct indicating deemed agreement with the terms of use sufficient to form a contract.

Implications

The decision in *Century 21* represents an important recognition of the right of website operators contractually to protect the information made available on their websites. Nevertheless, the decision, which has been appealed, leaves considerable uncertainty in its wake with respect to the circumstances in which terms of use will be enforceable.

First, it remains unclear when notice will be sufficient to bind users to terms of use. The legal framework established in *Century 21* mandates a focus on the prominence that the website gives to terms of use, but provides no further guidance. In applying this framework, courts will likely consider whether the notice was sufficiently conspicuous to alert a reasonable internet user that the act of browsing the website was subject to terms of use.[10] Canadian courts may also draw upon the reasoning of American courts, which have held that notice is insufficient if a user could proceed to browse a

website without being put on immediate notice of the terms of use.[11] Accordingly, notice of terms of use may not be sufficient if a user must scroll down to the bottom of a webpage to find and read them.

Second, it is uncertain how the reasonableness of terms of use will impact a court's analysis of their enforceability. It may be that the assessment of whether notice is sufficient will depend, in part, on the reasonableness of the terms of use. Courts in traditional breach of contract cases have declined to enforce standard form contracts where a party was "unaware of the stringent and onerous provisions", unless "reasonable measures" were taken to "draw such terms to the attention" of the party.[12] Similar reasoning may apply in the internet context to require website operators to display more prominently terms of use that are unusual, onerous, or sufficiently distinct from those that a reasonable user would expect in the circumstances.

Third, questions remain about the Court's statement that the determination of whether terms of use are enforceable will involve consideration of whether the user is an individual consumer or a commercial entity, and whether the user is a one-time user or a frequent user of the website. The sophistication and behavior of users are subjective factors that lie beyond the control of website operators. If the enforceability of terms of use hinges on an assessment of these factors, then courts arguably risk undermining the contractual certainty required to support the growth of internet commerce.

Fourth, it remains unclear whether the certainty of terms required to form a contract on the internet can exist in circumstances where the terms of use purport to allow their creator, in its sole discretion, unilaterally to amend them from time to time. Although this issue arose in *Century 21,* the Court decided that it did not need to consider the issue because there had been no changes to the terms of use since they were posted on the website.[13]

[*Editor's note*: Matthew Nied, B.Comm. (Alberta), LL.B. (Victoria), clerked at the Supreme Court of British Columbia in 2010-2011 and is articling in Vancouver. The author had no involvement with the case while he was a clerk of the Court. The views expressed are the personal opinions of the author and not those of his employer.]

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1 [2011] B.C.J. No. 1679, 2011 BCSC 1196 [*Century 21*].
2 Barry B. Sookman, *Computer, Internet and Electronic Commerce Law* (Toronto: Carswell, 1989) at 10-17.
3 See *e.g.*, *Rudder v. Microsoft Corp.,* [1999] O.J. No. 3778, 2 C.P.R. (4th) 474 (S.C.J.).
4 *Century 21*, *supra* note 1 at para. 107.
5 *Ibid*.
6 *Ibid*. at para. 119.
7 *Ibid*.
8 *Ibid.* at paras. 107, 125.
9 *Ibid.* at para. 117.
10 See *e.g.*, *Hubbert v. Dell Corp.,* 835 N.E. 2d 113 (Ill. App. 5 Dist. 2005), appeal denied, 844 N.E. 2d 965. See also *Major v. McCallister,* (Miss. CT.App. Dec 23, 2009).
11 *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 U.S. Dist. Lexis 4553 (C.D. Cal. 2000); *Pollstar v. Gigmania Ltd.,* 2000 W.L. 33266437 (E.D. Cal. 2000); *Hines v. Overstock.com, Inc.,* 668 F.Supp.2d 362 (E.D.N.Y. 2009); *Hoffman v. Supplements Togo Management Company, LLC,* 2011 WL 1885675 (N.J. Super.A.D. 2011); *Specht v. Netscape Communications Corp.,* 206 F.3d 17 (S.D. N.Y. 2001) affirmed 306 F.3d 17 (2d Cir. 2002).
12 *Tilden Rent-a-Car Co. v. Clendenning,* [1978] O.J. No. 3260, 83 D.L.R. (3d) 400 (C.A.) at para. 32. See also *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd*., [1989] 1 Q.B. 433.
13 *Century 21, supra* note 1 at para. 136.