

CROSS BORDER LITIGATION BULLETIN

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INTERNET JURISDICTION A "MINIMUM CONTACT" SPORT FOR FOREIGN DEFENDANTS

COURT ADOPTS U.S. APPROACH TO RESOLVE ISSUE OF INTERNET JURISDICTION

In a recent ruling, the Federal Court of Canada (the "Federal Court") considered the complex issue of Internet jurisdiction over a foreign defendant. The decision is notable in that the Federal Court acknowledged that the law in this area is still in the early stages of development in Canada, and thus looked to American case law for guidance. The court adopted the "minimum contact" test to determine whether it could assume jurisdiction over a foreign defendant operating on the Internet. The Federal Court concluded that Canadian Courts only have jurisdiction over foreign defendants operating websites which are accessed by Canadians if the defendant either: (i) has real and ongoing contacts to Canada, independent of the plaintiff's cause of action, or (ii) has "purposefully" directed activities toward Canada. The holding underscores the importance for website operators in the U.S. to ensure not only that they do not have operations or assets in Canada, but also that they do not target Canadian customers in any manner if they are to avoid being sued in Canadian Courts.

THE DECISION

In *Desjean v. Intermix Media, Inc.*, the Federal Court examined whether it could assume jurisdiction over a foreign defendant that offered free software downloads on various Internet websites. The defendant company was Intermix Media, Inc. ("Intermix"), a publicly-traded Delaware corporation with its principal offices in California.

The plaintiff, Patrick Desjean ("Desjean"), filed a statement of claim for a proposed class action, asserting that Intermix contravened the misleading representations provisions of the *Competition Act*. Specifically, Desjean alleged that Intermix bundled programs commonly known as "spyware" or "adware" with the free software programs it offered on its websites without providing adequate disclosure to consumers. In doing so, Desjean alleged that Intermix engaged in deceptive, fraudulent and illegal practices, as well as false advertising in the distribution of such spyware or adware programs.

Intermix rebutted these claims and moved for an order dismissing Desjean's statement of claim on a number of grounds, including that the Federal Court lacked jurisdiction over both Intermix and the matter. The Federal Court agreed that it was not the appropriate forum to deal with this case, and Desjean's statement of claim was consequently struck out on that basis.

In reaching this determination, the Federal Court noted that the issue of Internet jurisdiction has scarcely been addressed in Canadian case law. As a result, the court turned to U.S. jurisprudence for guidance and adopted the approach of the U.S. Courts, applying the "minimum contact" test to determine whether it could assume jurisdiction over Intermix.

Under the minimum contact test, a court can assume jurisdiction over a matter involving a foreign defendant operating Internet websites if the defendant has certain "minimum contacts" with the locale in which the claim is brought. These minimum contacts can be satisfied either through contacts that provide for general jurisdiction or specific jurisdiction. General jurisdiction arises where the defendant has real and ongoing contacts to the locale, independent of the plaintiff's cause of action. Specific jurisdiction, on the other hand, occurs when the defendant has "purposefully" directed activities toward the locale. This involves an examination of the level of interactivity and commercial nature of the exchange of information from the Internet website to the user.

Since the offices of Intermix were located in California and it had no operation or assets in Canada, the Federal Court found no general jurisdiction in this case. Therefore, the court was left to consider whether it could exercise specific jurisdiction over Intermix.

The Federal Court concluded that the websites operated by Intermix were not interactive in nature and that, even if they were, Intermix could not be found to have the requisite level of interactivity to justify minimum contact to Canada. The court came to this conclusion based on the fact that users could download the software programs from Intermix's websites for free, Intermix's advertising efforts and its websites did not directly target either the Canadian market or Canadian consumers, the content of the websites were not specifically tailored to a Canadian audience and Intermix never purposely benefited from Canada's laws. As a result, the Federal Court determined that it could not assume jurisdiction over Desjean's claim.

CONCLUSION

The decision highlights the approach a court will take in determining whether it has jurisdiction over a foreign defendant operating Internet websites. In the case where the defendant does not have real and ongoing contacts to a locale, the key consideration involves an examination of the level of interactivity and commercial nature of the exchange of information from the Internet website to the user.

Therefore, if website operators in the U.S. do not want to be caught by Canadian laws and sued in Canadian Courts, they must ensure that they not only do not have operations or assets in Canada, but that they are not targeting Canadian customers in any way.

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The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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