

SPYWARE/ADWARE ACTION DISMISSED FOR LACK OF JURISDICTION OF THE CANADIAN COURTS

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A proposed class action suit was recently dismissed due to the fact that the Statement of Claim failed to establish the Federal Court of Canada's jurisdiction over the matter and over the defendant. (*Desjeans v. Intermix Media, Inc.*, 2006 FC 1395 (de Montigny J., November 17, 2006)).

THE FACTS

Mr. Desjeans brought an action before the Federal Court of Canada against the Defendant Intermix Media, Inc. (hereinafter "Intermix").

In his Statement of Claim, Mr. Desjeans alleged that Intermix offers software programs such as screensavers and games, from its website. Intermix's programs appear to be free. Mr. Desjeans downloaded such a program on his computer and, according to him, also unknowingly downloaded spyware/adware programs by which Intermix was then able to continue, amongst others, to advertise its products and services, to redirect web addresses to Intermix's web site and to report information, and all this long after the user, such as Mr. Desjeans, had left Intermix's web site. According to Mr. Desjeans, the installation of the unwanted spyware/adware programs is not disclosed by Intermix when a customer downloads the free programs from Intermix's website. In his Statement of Claim, Mr. Desjeans claimed that Intermix uses deceptive business methods, contrary to the provisions of the *Competition Act* (R.S.C. 1985 c. C-34). Mr. Desjeans also petitioned the Court to have the action certified as a class action suit.

Intermix filed a motion to dismiss the Statement of Claim on the basis, amongst others, that the Court had no jurisdiction over the matter. Intermix's

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motion to dismiss was supported by several detailed affidavits, including those of its President and of its Director of Human Resources. These affidavits stated that Intermix:

- a) was a publicly traded company with its principal offices in Los Angeles, California;
- b) never had any employees in Canada;
- c) never any bank account in Canada
- d) did not pay taxes in Canada
- e) was not a registered business in Canada;
- f) had no direct or indirect promotion, advertising, marketing or solicitation directed at Canadians;
- g) had no servers in Canada;
- h) had chosen the laws of the State of California to govern the License Agreement which users of its website adhered to before downloading any materials from the Intermix site.

THE FEDERAL COURT JUDGEMENT

The principal determination the Court needed to make was if it had jurisdiction over Intermix and Mr. Desjean's claim. Jurisdiction can usually be asserted if the defendant is physically present in the Court's territory, or if the foreign defendant consents to the Court's jurisdiction, or if the Court declares itself competent to hear the case.

Ruling that the present case was one where the Federal Court of Canada would need to declare itself competent to hear the case, Justice de Montigny referred to several Supreme Court of Canada decisions where it was decided that there needed to be a "real and substantial connection" between a foreign defendant and the forum elected by the plaintiff for jurisdiction to arise. Justice de Montigny also referred to the doctrine of *forum non conveniens* whereby a Canadian Court can decline jurisdiction if it deems that the case would be more appropriately dealt with in another jurisdiction. Guidelines were developed to assist the Courts in its decision making process, namely¹:

1. the connection between the forum and the plaintiff's claim;
2. the connection between the forum and the defendant;
3. unfairness to the defendant in assuming jurisdiction;
4. unfairness to the plaintiff in not assuming jurisdiction;
5. involvement of other parties to the suit;

¹ *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.).

6. the Court's willingness to recognize and enforce an extra-provincial judgement rendered on the same jurisdictional basis;
7. whether the case is interprovincial or international in nature; and
8. comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

After considering of the facts contained in Intermix's detailed affidavits and concluding that these facts militate in favour of the Federal Court of Canada declining jurisdiction, Justice de Montigny writes:

(29) While the plaintiff allegedly suffered damages to a computer located in Canada, this is not enough to confirm the Court's jurisdiction. (...)

(36) (...) Jurisdiction cannot be founded simply upon the fact that the plaintiff was in Canada when he downloaded the foreign content. (...)

The Court noted that despite the fact that we are in an era of substantial Internet transactions, there is a paucity of jurisprudence on the question of Internet jurisdiction. The principal Canadian decision on the topic is *Braintech, Inc. v. Kostiuik* (1999) D.L.R. (4th) 46 (B.C.C.A.) where it was decided that determining that there is a "real and substantial connection" between a foreign defendant and a Canadian forum depends on the character of the website, i.e. if the site is passive, or if it is used to interact with Canadian residents, or if it used to conduct business with Canadian residents. In view of the lack of precedents in the Canadian Courts, Justice de Montigny referred to the "minimum contacts" theory developed by the American Courts, which he summarized as follows:

(40) (...) It is now well established that the due process clause requires that a defendant, if not present in the state, have certain minimum contacts with it such as that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The "minimum contacts" required can be satisfied either through contacts sufficient to support specific jurisdiction, or contacts that adequately support general jurisdiction. General jurisdiction will attach where the defendant's contacts with the forum state are not related to the plaintiff's cause of action, but are continuous and systematic. Specific jurisdiction arises when the defendant has purposefully directed activities towards the forum state from which the litigation arises or to which it relates: (...)

Applying the theory to the facts of the case, Justice de Montigny concluded once again that Canada, and the Federal Court, was not the proper forum for Mr. Desjean's claim as there was no evidence that Intermix's had a sufficient level of interaction with Canada to meet the "minimum contacts" rule. The learned Trial Judge further stated that even if he was wrong, and the Federal Court of Canada could assume jurisdiction, it should nonetheless decline it as California, or another state, would be a better forum for Mr. Desjeans' claim since the evidence and the key witnesses that the Plaintiff may require to make his case appear to be located in the U.S. Justice de Montigny therefore concluded that since there appeared to be a better forum for the dispute, the Federal Court of Canada had no alternative but to refuse/decline jurisdiction and strike the Statement of Claim.

CONCLUSION

The case constitutes a perfect illustration of the new challenges facing not only the Courts around the world if a dispute arises concerning an Internet transaction, but also all persons who use the Internet as a business or personal tool. Generally, persons who use the Internet should be aware of the existence of jurisdictional clauses. For Internet businesses, the terms of use of their websites should include not only the applicable laws, but also the applicable forums if a dispute arises, and these jurisdictional clauses should be easily accessible for the user. As for Internet users, who often pay little or no attention to the terms and conditions of use of the websites they visit, they should also diligently review the terms and conditions of use of such websites before beginning their transaction. A little extra care and caution when surfing the Net can go a long way to preventing unpleasant surprises...

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