

CANADIAN COURT USES JURISDICTION SIMPLICITER TEST IN DOMAIN NAME CASE

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In a unanimous decision, the British Columbia Court of Appeal has ruled that British Columbia has jurisdiction in a dispute related to a right to use a domain name “Poker.com” even though the defendant in this case was incorporated in Samoa (*UniNet Technologies Inc. v. Communications Services Inc.*, 2005 BCCA 114 (March 2, 2005, Newbury J.A.)). The complexity in the circumstances of the case is a good illustration of the challenges of applying traditional legal concepts of jurisdiction to cases that involve different players in the global internet-based economy.

Factual Background

ALA, a corporation incorporated in St. Vincent and the Grenadines, granted the first plaintiff/respondent, UniNet Technologies Inc., a 99-year licence to use the domain name “Poker.com”. The domain name is associated with on-line gambling, an activity that is illegal in some jurisdictions, including Canada. UniNet then sublicensed the domain name to the second plaintiff/respondent Poker.com Inc. a Florida company. The facts of the case also indicate that, although another company, incorporated in Antigua, was originally designated to operate the internet poker room, the site was actually operated from Costa Rica.

The licence agreement contained a choice of law and jurisdiction clause which specified that the agreement was to be governed by the laws of the Province of British Columbia and that the parties to the agreement recognized the jurisdiction of the courts of British Columbia.

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Furthermore, any dispute between the plaintiff and the defendant in connection with the agreement which could not be settled by mediation, would be resolved by arbitration under the British Columbia Commercial Arbitration Act, R.S.B.C. 1996, c. 55 to take place in Vancouver.

UniNet alleges that ALA wrongfully terminated the original licence agreement and transferred rights to use the domain name to the defendant Communications Services Inc., a company incorporated in Samoa and linked to ALA. The statement of claim against Communications Services Inc. also raised claims related to a trade-mark application and alleged passing off.

In the court of first instance, the plaintiffs claimed a right to serve a writ of summons and a statement of claim on the defendant outside British Columbia based on the fact that there was a breach of contract or a tort committed in British Columbia. The defendant claims that the Supreme Court of British Columbia was without jurisdiction over the claims or that it should have declined jurisdiction.

The trial judge found that the claims raised by the pleadings of inducement of a breach of contract made in British Columbia and damages suffered in British Columbia in the arbitration case between the two parties were sufficient for a finding of jurisdiction *simpliciter*. Consequently, the court found that the plaintiffs had an arguable case for relief. The defendants appealed the decision.

Analysis by the Court of Appeal

Although the Court of Appeal mentioned that it would be challenging to apply a “real and substantial connection” test to the present facts, it proceeded to do so. In fact, the Court found that a cumulative weight of connecting factors between British Columbia and the circumstances of the case were sufficient to support the conclusion that British Columbia courts had jurisdiction *simpliciter*. The connecting factors included:

- The licence agreement under which the plaintiffs claimed right to use and eventually own the domain name is governed by the law of British Columbia;
- The right to use and eventually own the domain name was also being concurrently adjudicated in arbitration proceedings in British Columbia;
- The licence agreement was entered to in British Columbia;
- According to the plaintiffs, the contract was to be performed, at least in part, in the province;

- British Columbia law was chosen by both parties to the licence agreement.

Consequently, the Court of Appeal held that the trial judge's treatment of the arbitration between the parties as grounds for establishing jurisdiction was valid, and dismissed the appeal.

This case is an illustration of the importance of jurisdiction clauses in licensing agreements. As shown above, parties who think that their interests are well protected by incorporating in countries having strong "asset protection" laws, can see their fortunes turned by signing licensing agreements that make them subject to the same foreign jurisdictions they were originally seeking to escape.

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