Jurisdiction and the Internet: Are the Traditional Rules Enough 1998

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Jurisdiction and the Internet; Are the Traditional Rules Enough?

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Introduction

The internet is an increasingly important communication and business tool. Many consequences of its use, however, are not specifically addressed by existing law. Moreover, unique aspects of internet communications may make it resistant to the application of traditional legal principles and rules.

Nowhere is this more evident than in disputes over forum. Traditional rules relating to jurisdiction and competence incorporate a notion of territoriality. But internet communications are not geographically dependent. The very origin of an e-mail message may be unknown. Website information cannot be confined to a target audience, but is disseminated simultaneously to a global market. It may affect individuals in a myriad of jurisdictions, all of which have their own particular local laws.

This gives rise to enormous challenges. If someone posts a message on a website, can he or she be prosecuted for obscenity, ***See footnote*** *2* trademark infringement ***See footnote*** *3* , slander ***See footnote*** *4* or deceptive trade practices ***See footnote*** *5* in the courts of any jurisdiction where the message may be downloaded? Or should the website operator only be subject to the jurisdiction of the courts of his or her residence, or where the server is located? If someone buys goods or services over the internet from a company in another jurisdiction, whose court may properly hear their disputes? ***See footnote*** *6*

Not only is the determination of forum for internet disputes challenging, but it has legal, practical and commercial implications. In the absence of evidence that foreign law applies, courts have traditionally applied the substantive and procedural rules of the forum. ***See footnote*** *7* Competence based on too loose a test - for example, the conclusion that a website operator is carrying on business in every place where information may be downloaded, and hence is amenable to the jurisdiction of the courts in each of those places ***See footnote*** *8* - will make conducting business or even simply communicating in cyberspace a risky and expensive proposition. On the other hand, a party should not be able to escape the consequences of his or her own negligence or misconduct based solely on use of this new medium. ***See footnote*** *9*

In this paper, in discussing issues relating to courts' jurisdiction over cases arising from internet use, extensive reference will made to selected American judgements. ***See footnote*** *10* Since U.S. companies are in the forefront of internet technology, its courts have already had numerous occasions to deal with internet-related jurisdiction problems.

These precedents will likely influence Canadian courts when they are seized with similar issues. The issue of courts' jurisdiction over internet-related activities is associated with broader constitutional questions. There has been and still is much debate as to whether internet use and content should be regulated and, if so, how and by whom. Since the internet is a medium of communication which virtually knows no boundaries, its regulation within Canada is bound to raise challenging constitutional questions which will have to be resolved in the context of Canada's federal structure. Whether the provincial legislatures or Parliament may regulate the internet _ and to what extent each order of government may do so _ will surely be the source of constitutional litigation, as were communication by radio and by telephone in their day.

Therefore, before reviewing the issue of the courts' jurisdiction to hear internet- related cases, we will briefly address the preliminary constitutional question of who may regulate the internet. We propose to review the existing case law relating to legislative jurisdiction over communication and anticipate, in broad terms, how this issue is likely to be resolved.

Regulating the Internet: Jurisdiction in Cyberspace

The internet has been described by the U.S. Supreme Court as an "international network of interconnected computers" ***See footnote*** *11* . Although the internet is first and foremost a means of communication, it knows no territorial limits. This characteristic is fundamental to the issue of legislative jurisdiction.

Legislative Jurisdiction over Communication

By virtue of Section 92(10)(*a*) of the *Constitutional Act, 1867*, the federal Parliament has exclusive legislative jurisdiction over "works" and "undertakings" connecting one province with another and which relate to transportation or communication. ***See footnote*** *12* This two-fold jurisdiction extends to inter-provincial communication infrastructures ("works"). ***See footnote*** *13* It also extends to organizations or enterprises involved in inter-provincial communication ("undertakings"). ***See footnote*** *14* On that basis, courts have confirmed Parliament's exclusive jurisdiction to regulate works and undertakings relating to television communication and telephone communication. ***See footnote*** *15*

Courts have also held that Parliament has, by virtue of its peace, order and good government ("POGG") power, a broader legislative jurisdiction over the entire field of communication by radio. ***See footnote*** *16* There is academic support for the proposition that Parliament also has, under its POGG power, exclusive legislative jurisdiction over the entire field of television communication. ***See footnote*** *17* Some authors have even argued that Parliament's POGG power extends to all inter-provincial communication, including communication by telephone. ***See footnote*** *18*

Legislative Jurisdiction to Regulate the Internet: Basis and Extent

It is difficult to predict with any degree of certainty the position that Canadian Courts are likely to adopt concerning legislative jurisdiction to regulate the internet as a whole or the various components and actors that constitute the internet. The question has _ to our knowledge _ yet to be addressed by legal scholars and the courts. However, it is reasonable

to expect that the issue will arise, as history shows that the advent of new means of communications has consistently given rise to important constitutional litigation over legislative jurisdiction.

It is also reasonable to expect the courts to grant Parliament some, if not all, legislative authority to regulate the internet. Through the years, the courts have consistently brought within the ambit of Section 92(10)(*a*) of the *Constitution Act, 1867* _ which only mentions telegraphs _ new means of communication which have effects extending beyond the reach of a given province. ***See footnote*** *19*

In our view, a strong argument can be made that Parliament is vested with exclusive legislative jurisdiction to regulate works and undertakings which are an integral part of the internet communication system, not unlike Parliament's jurisdiction over works and undertakings relating to telephone communication. Once this principle is recognized then, on the basis of existing jurisprudence, the scope of Parliament's jurisdiction can be said to extend to matters, such as labour relations, which form an essential part of the management and operation of those works and undertakings. ***See footnote*** *20* Parliament, therefore, also arguably has jurisdiction to regulate the content of communications by internet, just as its jurisdiction over undertakings related to television extends to the regulation of the content of television programs. ***See footnote*** *21*

Courts could also vest Parliament with a broader legislative jurisdiction to regulate not just works and undertakings related to the internet, but the entire field of communication in cyberspace. Such jurisdiction could be founded on Parliament's POGG power and supported by authorities which argue in favour of a POGG-based federal jurisdiction over all inter-provincial communications.

The recognition of Parliament's jurisdiction over internet-related works and undertakings would not preclude provincial legislation having an incidental impact on the internet or on internet communication. Provincial legislation which does not specifically and directly apply to federal undertakings and which is otherwise within provincial legislative authority would be valid so long as it does not impair, sterilize or paralyze the federal undertaking. ***See footnote*** *22*

2. Courts' Jurisdiction in Internet Disputes

Principles underlying competence and *forum non conveniens*

Before considering courts' jurisdiction over internet activities, it is important to review the bases on which courts generally may assert their competence, and the circumstances in which they will yield to the competence of the courts in another state.

1. Competence over civil disputes

Courts first of all assert jurisdiction in civil matters on the basis of the geographical location of the parties. The primacy of *in personam* or personal jurisdiction is reflected in both civil and common law regimes, which provide that the defendant's residence in the jurisdiction

confers authority to its court in the absence of any other connecting factor between the territory and the dispute. ***See footnote*** *23*

It has long been obvious, however, that this limited basis for competence is not enough. Human interaction has never respected state borders. With the rise of international commerce and communication tools that transcend state boundaries, states have by necessity or design expanded the grounds for their courts' competence. This has led to courts regularly asserting jurisdiction over defendants outside their territory.

a. Personal jurisdiction under Canadian law

The grounds for competence over extra-territorial defendants differ from province to province, but all rest on a notion of a "real and substantial connection" to the jurisdiction of the court. ***See footnote*** *24* The following are the statutory grounds for Canadian courts asserting competence over extraterritorial defendants in civil disputes:
The business activities which gave rise to the litigation were conducted in the province; ***See footnote*** *25*
(1)a tort or delict was committed in the province; ***See footnote*** *26*
(2)damages from a tort or a contractual breach were sustained in the province; ***See footnote*** *27*
(3)contractual obligations were to be performed in the province; ***See footnote*** *28*
(4)the parties to a contract specified that the courts of the province would have competence over any disputes arising from it; ***See footnote*** *29*
a contract specifies that disputes are to be governed by the laws of the province; ***See footnote*** *30*
(5)in a dispute over support or custody or the effects of marriage, one of the spouses or children is domiciled or resident in the province; ***See footnote*** *31*
(6)the dispute concerns real property or goods situate in the province. ***See footnote*** *32*

As well, every province has a provision of law conferring discretionary power on its courts to take competence in circumstances where there is some other "real and substantial connection" other than those specifically identified by statute. ***See footnote*** *33* The ability of courts to adjudicate disputes is thus only limited by judicial creativity, constitutional restraints and the knowledge that courts in other provinces and states may refuse to enforce judgments by courts which have improperly asserted jurisdiction. This has led the Supreme Court of Canada to emphasize the need for "order and fairness" in determining appropriate forum, and to caution Canadian courts against over-reaching. ***See footnote*** *34*

b. Personal jurisdiction under U.S. law

The exercise of determining whether a U.S. court is competent to hear a dispute resembles that used by Canadian courts, but is complicated by the overlay of the Due Process Clause of the 14*th* Amendment of the Constitution. ***See footnote*** *35*

As in Canada, the starting point for jurisdiction over parties to a dispute is their presence in the forum. A court may assert "general" jurisdiction where the defendant is domiciled in the state or has "continuous and systematic" activities there. ***See footnote*** *36* Otherwise, a

court must find grounds for "specific" jurisdiction. This requires a finding of sufficient contact between the forum and the non-resident defendant. The court then must analyze whether the exercise of its jurisdiction is consistent with "traditional notions of fair play and substantial justice". ***See footnote*** *37* This is sometimes cast in terms of the reasonable expectation of the parties of having their disputes litigated in the particular forum. ***See footnote*** *38*

One test often used to determine specific jurisdiction in the U.S. is the application of the "purposeful availment" test. ***See footnote*** *39* Under this rule, the court analyzes whether the defendant has deliberately taken the opportunity to conduct activities in the forum and thereby obtain the benefits of the domestic law. If so, and assuming the exercise of jurisdiction is otherwise reasonable and fair, the court will be competent to hear a dispute arising from those activities. The purposeful availment test, and other rules used to establish specific jurisdiction, do not require that a defendant have a physical presence in the forum. ***See footnote*** *40* In the words of the U.S. Supreme Court, the defendant's conduct and connection with the forum must only be such that he "should reasonably anticipate being haled into court there". ***See footnote*** *41*

2. *Forum non conveniens*

As the grounds for assuming competence have increased, so too have disputes over forum. Defendants sued in foreign courts more and more frequently attempt to bring the case back to their own domestic forum. Under the *forum non conveniens* principle, a court may stay or dismiss a suit if it is persuaded that there is another forum that is more closely connected to the events giving rise to the suit, or otherwise better suited to adjudicate the issues.

Although all Canadian jurisdictions recognize the principle of *forum non conveniens*, the rules respecting its application are not elaborated in any detail in governing legislation. Art. 3135 of the Quebec *Civil Code*, for example, says simply that a court may decline jurisdiction "if it considers that the authorities of another country are in a better position to decide." Provisions in common law statutes are equally succinct. ***See footnote*** *42* This legislative restraint has allowed the courts to adapt fluid criteria on forum and adapt those criteria to specific disputes.

The starting point for a court's consideration of a *forum non conveniens* motion is evidence of the existence of another court more appropriate for the adjudication of the parties' dispute. ***See footnote*** *43* This involves a review of the connections between the action and the two (or more) forums competing for jurisdiction. In addition to obvious factors like the applicable law and the site of the activities giving rise to litigation, courts consider practical factors such as the location of the parties and key witnesses; and the location of evidence. ***See footnote*** *44*

The weight to be given to each factor varies according to the circumstances of the case and with the court adjudicating the motion. In some recent decisions, Canadian courts have declined seemingly well-founded *forum non conveniens* applications despite the occurrence of the alleged negligence in the competing jurisdiction. ***See footnote*** *45* This flies in the face of well-established caselaw stating that the manifestation of damages in the province

by itself will not be sufficient to ground competence, if the act giving rise to the damage and other key elements are all located in another province. ***See footnote*** *46*

Competence over internet disputes: The American experience to date

To date there have been no reported Canadian cases on competence over disputes arising from internet use. ***See footnote*** *47* The increasing use of the medium, however, and the broad rules governing personal jurisdiction in both civil and common law provinces, make such caselaw inevitable. In due course Canadian courts will have to wrestle with such issues as whether operating a website constitutes "carrying on business" in a particular province; whether a New Brunswick seller of products advertised over the Web is amenable to prosecution under consumer protection laws in B.C.; whether a Manitoba court is competent to hear a lawsuit pitting a Saskatchewan company against an Ontario company, simply because the server for the internet communications was located in Winnipeg; and whether a Quebec court can compel a non-resident defendant to make his website comply with the requirements of provincial language laws.

In the absence of Canadian authorities, our courts may turn to American caselaw when faced with these questions. Whether guidance will be obtained may depend on how soon it is sought. Prior to the mid-nineties, there were very few decisions by U.S. courts on competence over internet disputes. ***See footnote*** *48* Since 1995, there has been a veritable explosion of cyberspace litigation. American courts have used various tests to determine whether they have jurisdiction over internet disputes. Some courts have simply applied traditional rules, while others have tried to devise new tests to accommodate the peculiarities of the medium.

As a perhaps inevitable result, it is already difficult to find complete consistency in the application of rules relating to competence. A review of four recent decisions makes this point. These cases were chosen because they illustrate how differently courts may approach the issue of their jurisdiction over internet disputes, depending on the applicable state rules, the facts of the case, public policy, and the court's ability or desire to adapt traditional jurisdictional rules to a new medium.

Inset Systems Inc. v. Instruction Set Inc. See footnote 49

Inset Systems Inc. ("Inset") was a software company based in Connecticut and Instruction Set Inc. ("Instruction") was a technology company based in Massachusetts. Inset sued in its home state for an injunction and damages based on the defendant's use of the Inset name as the title of its webpage and in its toll-free number ("1-800-US-INSET"). Instruction asked the court to decline jurisdiction on the grounds that it had no office or employees in Connecticut, and only conducted its affairs regularly in Massachusetts.

Under Connecticut's long-arm statute, its courts have specific jurisdiction over any non-resident defendant who repeatedly solicits business in the state, subject only to the due process requirements of the 14*th* Amendment of the U.S. Constitution. The court in this case found that Instruction's webpage was a solicitation of business which had been continuously in effect over the previous six months. Since there were about 10,000 internet

users in the state who could have been exposed to this solicitation, the court concluded that it had specific jurisdiction.

The court further found that its assumption of jurisdiction did not offend the due process requirement of "minimum contacts" with the forum. Since the defendant had set up a webpage and a toll-free number which could be used by anyone in the U.S., including internet users in Connecticut, Instruction must have reasonably foreseen that it could be sued in the state's courts on the basis of its acts. The court also held that the defendant would not be greatly prejudiced by its decision because the distance between Connecticut and Massachusetts is not great, and it had already retained counsel in the state.

The actual result in this case does not seem terribly unjust given the proximity of the competing jurisdictions. The court's reasoning, however, must give pause to any website operator. The mere possibility of consulting a website from any particular territorial jurisdiction was deemed sufficient to give rise to a finding of business activity there. No specific attempts to solicit business from citizens of Connecticut (as opposed to those in the other 49 states) was necessary to ground competence. On the court's reasoning, a company operating a website and a toll-free number should reasonably anticipate being sued in the courts of any state. The only safeguard to over-reaching jurisdiction was the consideration of fair play, which was met by the court's conclusion that it would not greatly inconvenience Instruction to defend in the forum.

Cybersell Inc. v. Cybersell Inc. See footnote 50

This litigation involved an Arizona company and a Florida company with the same name, both offering consultation services for advertising on the internet. The Arizona company sued in its home state for infringement of its federally registered trademark "Cybersell". The defendant Florida company moved for a dismissal based on the absence of jurisdiction of the Arizona court.

Applying the "purposeful availment" test, the Arizona court found that it was necessary to distinguish between "active" and "passive" websites. Passive sites only transmit information, and are not directed at persons in any particular territory. The court concluded that there must be something more to indicate that a website operator has purposefully directed his activity in a substantial way to the forum's residents. Examples of website attributes sufficient to trigger a finding of purposeful availment would include a chance to register a user name or be put on a mailing list, or the placement of a toll-free number or e-mail address to obtain further information. A large number of "hits" from users in any particular jurisdiction might also give rise to specific jurisdiction of its courts.

Based on these criteria, the U.S. Court of Appeals upheld the lower court's decision to dismiss the Arizona action for lack of personal jurisdiction over the Florida defendant. The court found that the defendant's website was essentially passive. Internet users who hit the site were given the opportunity to record their addresses but could not buy products or services without taking further steps to contact the company. The purpose of the site was not the direct transaction of business, but rather the advertising of services which could be obtained by means other than through the internet.

There is a logical connection between the purpose of the website and the operator's reasonable expectation of the consequences that may flow from its use, including the possibility of being sued outside his home state. Making this distinction represents an improvement on the blanket approach of the Connecticut court in the *Inset* case.

Unfortunately, the court in *Cybersell* also held that specific jurisdiction can be based on the number of times a site is "hit" by users in a particular forum. This is not reasonable, since the use of the site is completely out of the control of the operator. It could be argued that a high level of interest in a site from a particular jurisdiction should alert an operator to the possibility of a lawsuit there. This presupposes, however, that a website operator may know who is consulting the site. The burden the test places on operators is very heavy, since it is well nigh impossible for an operator to selectively prevent the use of its website by users in any particular place. This means that even an operator who is aware of a high number of hits from certain users may face the unpalatable choice of risking prosecution in that place (even if the website does not target users there) or abandoning the medium altogether.

Bensusan Restaurant Corp. v. King See footnote 51

The plaintiff corporation owned the internationally famous "Blue Note" nightclub in New York City. The defendant was the owner of a nightclub in Missouri also called "The Blue Note", which catered to college students at the nearby university. The plaintiff sued in New York for trademark infringement and unfair competition on the basis of the defendant's website. It also asked the court to order the defendant to change the name of the club and to shut down the website, which contained a calendar of upcoming attractions, and a telephone number to call for further information. The Missouri Blue Note website originally contained a hyperlink to the New York "Blue Note" site, but it was removed when the plaintiff complained.

The U.S. Court of Appeals upheld the trial decision dismissing the lawsuit for lack of jurisdiction.

Under New York's long-arm statute, a court has jurisdiction if a tort is committed in the state or damages are suffered there. With respect to the site of the tort, the court held that all the acts complained of (the creation of the website, the use of the Blue Note name and the creation of the hyperlink) had taken place in Missouri at the instigation of Missouri residents. Jurisdiction over non-resident defendants based on the occurrence of damage in New York had to be restrictively interpreted. In this case, the defendant could not reasonably foresee that its acts could cause damage in New York, nor was it obtaining substantial income from inter-state commercial activity. The mere fact that the defendant hired nationally-known musicians to play, and that its student clientele might be not be uniquely Missouri residents, was not enough to attract jurisdiction.

The reasoning in the *Bensusan* case is appealing because the court looks beyond the potential effect of the internet's use to examine its actual effect on the facts of this case. Although advertising of the Missouri club on the internet reached into other jurisdictions, on the evidence the club was a local enterprise which did not threaten its namesake in New

York. The court did not even have to deal with the issue of due process, since it found that it had no jurisdiction at all.

The court's rationale, however, is difficult to apply to other facts. Since the defendant business in *Bensusan* had a single, specific, geographical location, it was natural for the court to be skeptical about the impact of "national" advertising on either the Missouri club's revenues or those of the New York Blue Note. Many disputes involving the internet will not involve a business with one specific location.

There were also none of the hallmarks of "interactivity" on the website that complicated the analysis of jurisdiction in *Cybersell* and *Inset*. The Missouri club website had no toll-free number, tickets to shows could not be purchased on the internet, and there was no mechanism for registration of users. If these elements had been present, would the result have been different? None of these earmarks of "interactivity" would have changed the reality of the Missouri club's customer base and the lack of real competitive threat to the plaintiff's business. Using the analysis of the courts in *Inset* and *Cybersell*, however, these elements might have been a justification for the exercise of jurisdiction by the New York court.

State of Minnesota v. Granite Gate Resorts, Inc. See footnote 52

This is an unusual case in that it involves a quasi-penal proceeding against a non- resident. Whether the reasoning of the court would apply in a private litigation is unclear, because public policy considerations may have weighed more heavily than in a litigation between two private parties. The case is discussed because, despite this context, the court used traditional principles of jurisdiction applicable to purely civil disputes.

Granite Gates Resorts was a Nevada company which advertised Wagernet, a forthcoming on-line sports betting service on the internet. The Wagernet website offered a toll-free number to call for further information, and invited internet users to register to be included on a mailing list. Subscribers were also warned that they should check local laws with respect to restrictions on sports betting.

The Wagernet site was actually operated by a company in Belize, and was connected by a hyperlink with a webpage which explained the contract into which subscribers would enter. Under this contract, all lawsuits against Wagernet would have to be taken in the courts of Belize, but lawsuits against subscribers could be taken in the courts of their residence.

A consumer investigator for the Minnesota Attorney General's office telephoned the toll-free number on the site, identified himself as a Minnesota resident and asked about betting. He was told how to bet, and that it was legal. This was incorrect, since all forms of sports betting are illegal in Minnesota. On the basis of the website and the phone call, the state sued Granite Gate for deceptive trade practices, false advertising and consumer fraud.

The Minnesota Court found that it had jurisdiction to proceed against Granite Gate, and the appeal court agreed. It based its competence on its long-arm statute, which provided that it had jurisdiction over a non-resident defendant so long as this did not offend due process considerations. The plaintiff hence had to show that the defendant had minimal contacts

with the forum and that jurisdiction would not offend traditional notions of fair play and substantial justice. In the court's words, the defendant must have committed some act by which it "purposefully availed itself of the privilege of conducting activities within the state, thus invoking the benefits and protections of its laws".

To determine whether these tests were met, the Minnesota court examined five factors:

- **the quantity of contacts:** the court noted that computers located in Minnesota were among the 500 computers that most often accessed the defendant's website, and that the Wagernet mailing list included the name and address of at least one Minnesota resident. Minnesota residents were also identified as having used the toll-free number on the site.
- **the quality of contacts:** in the court's view, the defendant had targeted an American market by setting up a website in English and offering a U.S. phone number.
- **connection between the cause of action and the contacts:** the lawsuit was based on the information available on the website, which was intended for and received by Minnesota consumers.
- **the state's interest:** the court found this to be self-evident since, if the state had no interest, it could not uphold its consumer protection laws.
- **convenience of the parties:** according to the court, a company which maintained the right to sue in subscribers' home states could not complain when it was sued in those same states. In the court's words: " 'Foreign' corporations that seek business in Minnesota and reserve the right to sue Minnesotan customers in court here cannot claim inconvenience as an excuse to avoid personal jurisdiction here, particularly in light of the state's interest in regulating advertising and gambling."

This decision, like that in *Bensusan*, purports to apply traditional rules of jurisdiction on internet activities. The results are mixed. It is hard to dispute that the state's interest was engaged once it was established that a Minnesota resident had been informed over the phone that he could legally participate in on-line sports betting, and that at least one Minnesota resident was on a mailing list.

The court's decision, however, was not based primarily on these factors, but on the features of the website. Once again, it was held that a website constitutes a deliberate "broadcast" everywhere, and that this inherent quality, as well as a toll-free number on the site, suffices to attract the jurisdiction of any state's court. As well, as in *Cybersell*, the court grounded jurisdiction in the number of hits from computers in the home forum, a factor beyond the control of the website operator. The warning on the website about checking local laws with respect to on-line betting was disregarded by the court. The inconvenience of litigating in a distant forum was dismissed on the sole ground that the defendant had reserved the right to sue in any subscriber's home state.

Conclusions

Legislative Jurisdiction to Regulate the Internet

Existing authorities which have delineated federal and provincial legislative jurisdiction with respect to telecommunications are not necessarily conclusive authority in respect to

legislative jurisdiction to regulate the internet, which is in some respects a wholly new and unique means of communication. We can therefore expect to see in the future important constitutional litigation concerning legislative jurisdiction to regulate the internet. In our opinion, on the basis of existing authority, Canadian courts are likely to conclude that Parliament has exclusive legislative jurisdiction over works and undertakings relating to the internet.

Recognition of exclusive federal jurisdiction over works and undertakings forming an integral part of the internet communication system would still allow the Provinces to enact legislation which incidentally affects the internet. Under recent Supreme Court caselaw, this would leave considerable room for provincial legislation affecting internet communication. Indeed, some provincial regulatory bodies, such as the Quebec's Office de la langue française and Commission de l'accès à l'information ***See footnote*** *53*, have already purported to apply certain provincial legislation to cyberspace-related activities.

In our view, those developing policy or legislative strategies concerning the regulation of the internet would be wise to bear in mind the constitutional issues which underlie their initiatives in this area.

How should forum issues over internet disputes be resolved by Canadian courts?

Given the difficulties already encountered by American courts, it is appropriate to ask whether traditional forum principles may be adapted to internet disputes, or whether special rules should be developed for such jurisdictional conflicts.

Traditional rules have proved appropriate for some cases such as *Bensusan*. Where litigation centers on a defendant's activities in a single, specific, geographical location, the use of the internet for advertising purposes should not defeat the usual rules relating to evidence of damage within a forum and the defendant's intent (or lack of intent) to target a specific market. The use of the internet in such cases is incidental, and its unique qualities should not alter the usual jurisdictional principles. ***See footnote*** *54*

These rules may be inadequate, however, when the impugned activity occurs primarily in cyberspace. A website posting may have no particular effect in any particular place. The application of traditional rules in these circumstances may result in a too broad jurisdiction, based on the notion that a defendant should be compellable in the courts of any jurisdiction where citizens may use the internet.

Some courts have attempted to adapt accepted jurisdictional rules by differentiating between active and passive websites. It seems reasonable that a website operator who has targeted a specific market by referring to a particular forum, or by selling services on-line to customers, should be subject to the jurisdiction of the courts of the forum. There are, however, two problems with the test as so far formulated by U.S. courts.

First, the level of "interactivity" deemed sufficient to trigger jurisdiction is minimal. Should the mere fact of including a toll-free number on a website confer jurisdiction on the courts of every forum from which the number may be used? Does the posting of a message in

English necessarily connote an attempt to target a North American market? Should not a greater degree of intent to reach a specific market be required?

A second and greater problem is the willingness of courts to equate the interactivity of a website with its use by parties in a particular forum. This is unfair in that it may be impossible to know who has used a website, or to control access from any given place. The importance conferred on the number of hits from users in the forum shows a basic misapprehension about the anonymity afforded by cyberspace. It is also a departure from the traditional rule requiring a defendant to do something to trigger competence of the courts within a specific jurisdiction.

In considering whether traditional rules on jurisdiction may be used or adapted for internet disputes, it is important to remember that the *forum non conveniens* test as currently applied by Canadian courts may not always afford the same protection as the due process requirements of the 14*th* Amendment of the U.S. Constitution. The Canadian test focuses on the relative merits of two or more forums, whereas the American test addresses the unfairness that may result if a party is forced to defend in a foreign jurisdiction. Canadian courts tend to engage in a balancing exercise, while U.S. courts must consider procedural guarantees.

Given these potential difficulties, the caselaw which will emerge from the Canadian courts on their jurisdiction over internet disputes should be closely monitored. A failure by the courts to account for the unique nature of the internet may inhibit the internet's commercial use, since the application of traditional rules without modification may lead to the assertion of jurisdiction grounded in very minimal contacts with the forum. In determining jurisdiction, Canadian courts should more specifically, in our view, consider the following guidelines:

Courts should avoid a blanket rule equating the possibility (or even fact) of access to a website from the domestic forum as sufficient grounding by itself for jurisdiction. The posting of a website should accordingly not, by itself, constitute "doing business" in any jurisdiction that has access to the web.

- As a preliminary issue, courts should consider whether the use of the internet is truly central to the dispute, or whether it is merely incidental. If it falls in the latter category, jurisdiction should be found having regard to traditional factors, and should not be unduly influenced by the far-reaching effects of the internet.
- Even where use of the internet is central to a dispute, there should be a careful examination of other factors which would, in its absence, trigger or militate against the jurisdiction of a particular court.
- Canadian courts might usefully adopt the distinction by American courts of the passive versus active website, on the basis that a high degree of interactivity may show the defendant's willingness to avail itself of the laws in a particular jurisdiction.
- If this test is used, however, care must be taken to ensure that the interactivity is significant. For example, the mere fact of posting information in English (often considered to be the international language of business) should not be taken to infer a desire by the defendant to target a North American audience, still less to attorn to the jurisdiction of courts in any particular province or state.

- Courts must also be careful to distinguish between the defendant's acts in cyberspace, and those of other internet users. The calculation of "hits" from a particular jurisdiction may be a legitimate gauge of the parties' jurisdictional expectations in some cases; where, for example, website activities can reasonably be expected to be monitored by its operator. Courts should recognise that such monitoring is not always feasible nor reasonable.
- If its appears in emerging caselaw that courts may be taking jurisdiction too readily over internet disputes, consideration may be given to incorporating an explicit fairness requirement in the *forum non conveniens* test, similar to that afforded by the 14*th* Amendment.

The growth of the internet raises great philosophical and practical challenges for lawyers. The law and the skills of those who practice it must grow with the development of cyberspace. While specific legislation in this area may be premature, it may have to be considered in future if traditional rules cannot be adapted to this new medium.

Addendum
[by the Uniform Law Conference of Canada]

If traditional rules do prove inadequate, uniform legislation could be adopted by the federal and the provincial and territorial governments. Both Parliament and provincial legislators constitutionally appear to have a role in regulating internet use and content. Perhaps the Federal Court of Canada and provincial courts would both adopt uniform rules. The Federal Court of course has jurisdiction across the country now, but harmony with and among provincial statutes would be desirable.

The harder question is perhaps whether a rule applying only in Canada would be helpful. Canadian rules would not prevent foreign courts from exercising jurisdiction inappropriately over Canadian residents and enterprises, nor would it ensure Canadians fair and reasonable recourse against foreign internet users. Yet the Canadian market is for many purposes the most important one for Canadian businesses and consumers. Being able to deal within the country with confidence in the jurisdictional rules would be help to internet trade, and people might choose to deal with identifiably Canadian sites as a result of this confidence. It is also possible that a well-crafted set of jurisdictional rules might inspire other countries to follow suit. The Uniform Law Conference should try to cooperate with international efforts to study and resolve jurisdictional issues, but if Canadian law is needed, the limits to such lawmaking should not deter the Conference from making the effort.

Footnotes

Footnote: 1 This paper is a synthesis of research and analysis by the Ogilvy Renault Internet group, in particular by Frédéric Bachand, Christian Beaudry, Gregory Bordan, Andrew Foti, Sally Gomery and Claudine Roy.
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Footnote: 2 See for example *United States of America v. Thomas*, 74 F.3d 701 (1996) (although this case could be distinguished because it involved a bulletin board service rather than a website).

Footnote: 3 Trademark and copyright infringement, tortious interference with contracts and competition issues have so far been the most fruitful source of cases arising from internet use. American decisions include *Bensusan Restaurant Corp. v. King*, 40 U.S.P.Q. (2d) 1519 (S.D.N.Y.), conf'd by the U.S. Court of Appeals (2d cir.) on Sept. 10, 1997; *Cybersell Inc. v. Cybersell Inc.* (U.S.C.A., 9*th* Cir. 1997); *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D. N.Y. 1997); *Heroes Inc. v. Heroes Foundation*, 958 F.Supp. 1 (D.D.C. 1996); *IDS Life Insurance Co. v. Sun America Inc.*, 958 F. Supp. 1258 (N.D. Ill. 1997); *Inset Systems Inc. v. Instruction Set Inc.*, 937 F.Supp. 161 (D. Conn. 1996); *Maritz Inc. v. Cybergold Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996); *McDonough v. Fallon McElligott Inc.*, 40 U.S.P.Q. (2d) 1826 (S.D. Cal. 1996); *Panavision International, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996); *Playboy Enterprises Inc. v. Chuckleberry Publishing Inc.*, 39 U.S.P.Q. (2d) 1746 and 1846 (S.D.N.Y. 1996); *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

Footnote: 4 Cases which have considered jurisdiction in cases of alleged slander and defamation over the internet include *California Software Inc. v. Reliability Research Inc.*, 631 F. Supp. 1356 (C.D. Cal. 1986); *Naxos Resources (U.S.A.) Ltd. v. Southam Inc.*, 1996 WL 662451 (C.D. Cal. 1996); *It's in the Cards v. Fuschetto*, 1995 Wisc. App. LEXIS 489 (C.A. Wis. 1995).

Footnote: 5 The leading case on deceptive trade practices on the internet is Minnesota (State of) v. Granite Gate Resorts, Inc., 568 N.W. 2d 715 (Minn. C.A. 1997).

Footnote: 6 Decisions which have discussed the proper forum for contractual disputes arising from internet use include Beverage Management Solutions Inc. v. Yankee Spirits Inc., 460 SE 2d 564 (GA C.A 1995); Cody v. Ward, 954 F.Supp. 43 (D. Conn. 1997); Compuserve Inc. v. Patterson, 89 F. 3d 1257 (6th Cir. 1996); Digital Equipment Corp. v. Altavista Technology Inc., 960 F. Supp. 456 (D. Mass. 1997); Edias Software International v. Basis International Ltd., 947 F.Supp. 413 (D. Ariz. 1996); Hall v. LaRonde, 66 Cal. Rptr. 2d 399(Ca. C.A., 1997); Pres-Kap Inc. v. System One Direct Access Inc., 636 So 2d 1351 (Fla. App. 3 Dist. 1994); Resuscitation Technologies Inc. v. Continental Health Care Corp., 1997 WL 148567 (S.D. Ind. 1997).

Footnote: 7 This may become particularly problematic in the context of internet dispute, but the broad topic of choice of law goes beyond the scope of this paper. There are certain well-recognized situations where substantive foreign law will be held to apply: for example, where the parties have included a choice of law provision in a contract; where under the forum's own laws, status is determined under the laws of the place of birth or marriage; in tort, where lex loci delicti applies; and in the enforcement of foreign judgments (assuming that the application of foreign law does not offend public order).

Footnote: 8 See discussion of Inset Systems Inc. v. Instruction Set Inc., 937 F. Supp. 961 (D. Conn. 1996), infra.

Footnote: 9 Admittedly it is less probable that courts will be too reticent to take competence over disputes simply because they involve the use of the internet. As a judge of the Federal Court recently remarked in allowing an injunction against a website operator apparently in violation of trademark: "It may perhaps be said that the case before me is already one in which, notwithstanding the peregrinations of the Internet in terms of seamless borders and its obtrusive presence across whole continents, the basic principles of property ownership require continuing protection." See Tele-Direct (Publications) Inc. v. Canadian Business Online Inc., [1997] F.C.J. No. 1387 (unreported decision of Joyal J. on September 17, 1997, court file no. T-1340-97).

Footnote: 10 Courts in other jurisdictions in Europe and elsewhere have also dealt with courts' jurisdiction over internet disputes, but due to space considerations this caselaw will not be discussed.

Footnote: 11 Reno v. American Civil Liberties Union, 000 U.S. 96-511 (1997), http://supct.law.cornell.edu/supct/hmtl/96-511.ZS.html .

Footnote: 12 See, generally, P. HOGG, Constitutional Law of Canada, (Carswell, Toronto, 1992), at pp. 565 et seq..

Footnote: 13 Westcoast Energy Inc. v. Canada (National Energy Board), S.C.C., n °25259, March 18, 1998, at p. 30.

Footnote: 14 Id., at p. 30.

Footnote: 15 E.g. Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141 (television); Toronto v. Bell Telephone Co., [1905] A.C. 52, Alberta Government Telephones v. Canadian Radio-Television Commission, [1989] 2 S.C.R. 225 and Téléphone Guévremont Inc. v. Québec (Régie des télécommunications), [1994] 1 S.C.R. 878 (telephone).

Footnote: 16 Re Regulation and Control of Radio Communications in Canada, [1932] A.C. 304 (P.C.); Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141, at p. 161.

Footnote: 17 See, for example, D. MULAN and R. BEAMAN, "The Constitutional Implications of the Regulation of Telecommunications", (1973) 4 Queens L.J. 67, at p. 71. The Ontario Court of Appeal concluded likewise in Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819, at p. 823.

Footnote: 18 R.A. BRAITT, "The Constitutional Jurisdiction to Regulate the Provision of Telephone Services in Canada", (1981) 13 Ott. L.R. 53, at pp. 79 et seq.

Footnote: 19 For an informative survey of the case law, see P. HOGG, Constitutional Law of Canada (Carswell, Toronto, 1992), at pp. 565 et seq.

Footnote: 20 Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749, at p. 762.

Footnote: 21 Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141, at p. 162.

Footnote: 22 In Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, the Supreme Court found that a statute regulating advertising addressed to minors, including adverstising broadcast on television, was intra vires Quebec's National Assembly because the provincial statute specifically targeted advertisers, not broadcasters. See also Attorney General of Quebec v. Kellogg's Co. of Canada, [1978] 2 S.C.R. 211 and Air Canada v. Ontario (Liquor Control Board), [1997] 2 S.C.R. 581, at p. 609.

Footnote: 23 For example, art. 3134 of the Civil Code of Quebec states that: "In the absence of any special provision, the Quebec authorities have jurisdiction when the defendant is

domiciled in Quebec." In Ontario, the assumption of jurisdiction over defendants residing within the province is implicit in rule 17 of the *Rules of Civil Procedure*, which establishes the circumstances in which a defendant not in Ontario may be served with an originating process without leave of the court. *In personam* jurisdiction is preserved in secart. 3(d) of the Uniform Law Conference of Canada'sLCC's draft *Uniform Court Jurisdiction and Proceedings Transfer Act* (hereinafter the "Draft Uniform Jurisdiction Act") which states that "A court has territorial competence in a proceeding that is brought against a person only if . that person is ordinarily resident in" the enacting province's territory "at the time of the commencement of the proceeding". The Uniform Act is at http://www.law.ualberta.ca/alri/ulc/acts/ejurisd.htm .

Footnote: 24 This principle was adopted by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* **,** [1990] 3 S.C.R. 1077 and upheld subsequently in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289. In the latter decision, the Supreme Court of Canada wrote that the "real and substantial connection" test is grounded in constitutional values. See also J.-G. Castel, *Canadian Conflict of Laws* 4*th* ed. (Butterworths, Toronto, 1997) at pp. 52 *et seq.*

Footnote: 25 Art. 3148, al. 2 *C.C.Q.* and secart. 10(h) of the Draft Uniform Jurisdiction Act. Rule 17.02(p) of the Ontario *Rules of Civil Procedure* simply provides that extraterritorial service may be effected without leave on any person "carrying on business in Ontario".

Footnote: 26 Art. 3148, al. 3 *C.C.Q.*, rule 17.02(g) of the Ontario *Rules of Civil Procedure* and secart. 10(g) of the Draft Uniform Jurisdiction Act.

Footnote: 27 Art. 3148, al. 3 *C.C.Q.* and rule 17.02(h) of the Ontario *Rules of Civil Procedure*.

Footnote: 28 Art. 3148, al. 3 *C.C.Q.* and secart. 10(e) of the Draft Uniform Jurisdiction Act. Rule 17.02(f)(iv) of the Ontario *Rules of Civil Procedure* similarly provides that an out-of-Province defendant may be served without leave in an action arising from a "breach of contract . committed in Ontario", which presumably implies that contractual obligations were to be performed there.

Footnote: 29 Art. 3148, al. 4 *C.C.Q.*; rule 17.02(f)(iii) of the Ontario *Rules of Civil Procedure*; and secart. 3(c) of the Draft Uniform Jurisdiction Act.

Footnote: 30 Rule 17.02(f)(ii) of the Ontario *Rules* and secart. 10(e)(ii) of the Draft Uniform Jurisdiction Act. This is not a ground for competence explicitly recognized in the Quebec *Civil Code*, although a choice of law provision mandating the application of Quebec law

would certainly be relevant to the issue of jurisdiction.

Footnote: 31 Arts. 3141 et seq. C.C.Q.; Divorce Act, R.S.C. 1985, ch. 3 (2d supp.), ss. 3-7; rule 17.02(j), (k) and (l) of the Ontario Rules of Civil Procedure. Rules governing competence over family law matters are not included in the Draft Uniform Jurisdiction Act.

Footnote: 32 Arts. 3152 and 3154 C.C.Q.; rules 17.02(a), (b), (c), (d) and (e) of the Ontario Rules of Civil Procedure and sarts. 10 (a), (b), (c) or (d) of the Draft Uniform Jurisdiction Act.

Footnote: 33 Art. 3136 C.C.Q. (which actually refers to "sufficient connection") and secart. 3(e) of the Draft Uniform Jurisdiction Act. Common law provinces such as Ontario generally provide that where a plaintiff asserts a "real and substantial connection" not explicitly provided for in the rules, leave of the court must be obtained before the non-resident defendant may be served; see rule 17.03(1) of the Ontario Rules of Civil Procedure.

Footnote: 34 Hunt v. T & N plc, [1993] 4 S.C.R. 289and Tolofsen v. Jensen, [1994] S.C.R. 1022.

Footnote: 35 For a more complete discussion of the rules governing forum in the U.S. and their impact on dispute related to the internet, see Barry Sookman, "Personal Jurisdiction and the Internet: If you put material in Cyberspace, Where can you be sued?", a paper presented at the Computer and Cyberspace Law Convention at the University of Dayton School of Law in July 1997.

Footnote: 36 Helicopteros Nationales de Columbia, S.A. v. Hall, 466 U.S. 408; Data Disc Inc. v. Systems Technology Associations Inc., 557 F. 2d 1280 (9th Cir. 1977).

Footnote: 37 International Shoe Co. v. Washington, 326 U.S. 310.

Footnote: 38 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286.

Footnote: 39 This test is used by both the Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals. For an example of how it has been applied in a lawsuit involving internet issues, see CompuServe Inc. v. Patterson, supra at note 6.

Footnote: 40 Burger King Corp. v. Rudzewicz, 471 U.S. 462; CompuServe Inc. v. Patterson, supra at note 6; California Software Inc. v. Reliability Research, Inc, supra at note 4.

Footnote: 41 Burger King Corp. v. Rudzewicz, ibid.; World-Wide Volkswagen Corp. v. Woodson, supra at note 38.

Footnote: 42 Rule 17.06(2) of the Ontario Rules of Civil Procedure says that a court may stay a proceedings or set aside service of a non-resident defendant if it is satisfied that Ontario is not "a convenient forum" for the hearing of the proceeding. SecArt. 14 of the Draft Uniform Jurisdiction Act says that a case may be transferred to the court of another jurisdiction if the receiving court has subject matter competence in the proceedings and it is a "more appropriate forum"

Footnote: 43 Amchem Products Inc. v. British Columbia, [1993] 1 S.C.R. 897.

Footnote: 44 For good examples of the application of such principles, see Frymer v. Brettschneider (1994), 28 C.P.C. (3d) 84 (Ont. C.A.) and MacDonald v. Lasnier (1994), 21 O.R. (3d) 177 (Ont. Gen. Div.).

Footnote: 45 In Dennis v. Salvation Army Grace General Hospital (1997), 14 C.P.C. (4th) 207 (N.S.C.A.), a medical malpractice suit, the defendant physicians and hospital moved to stay the proceedings in Nova Scotia on the grounds that all of the alleged tortious conduct had taken place in Newfoundland, all of the defendants resided in Newfoundland, and all of the hospital and medical records relating to the alleged malpractice were also there. These factors seemed to argue strongly for a transfer of the case to the courts of Newfoundland. The Nova Scotia Court of Appeal nevertheless reversed the motions court judgment allowing the stay, on the basis that the plaintiffs would face great financial and psychological hardship in returning to Newfoundland for discoveries and the trial, and that damages had

occurred in both Newfoundland and Nova Scotia, where the plaintiffs had moved shortly after the alleged malpractice took place. See in the same vein Oakley v. Barry (N.S.C.A. no. 137568, judgment rendered March 27, 1998) and Dunlop v. Connecticut College (1996), 50 C.P.C. (3d) 109 (Ont. Gen. Div.).

Footnote: 46 Frymer v. Brettschneider and MacDonald v. Lasnier, supra at note 32.

Footnote: 47 A very recent decision by the Ontario Court (General Division) touched on the issue peripherally. In Kitakufe v. Oloya, [1998] O.J. No. 2537 (unreported decision of Himel J. dated June 18, 1998 in Court file no. 97-CV-133151), an Ontario resident sued for damages arising from statements about him in a Ugandan newspaper, extracts of which were reproduced on the internet. The defendant brought a forum non conveniens motion to stay the suit in Ontario, alleging that Uganda was the more convenient forum. Madamr . Justice Himel dismissed the motion. ShHe did not discuss the effect of the internet posting on the jurisdictional issue, but did state that the plaintiff's alleged damages would have been suffered in Ontario. Beyond this, the Court's analysis is made on the basis of traditional forum non conveniens factors, such as the residence of the defendant, the location of expert witnesses, and potential hardship and expense associated with being forced to sue in Uganda.

Footnote: 48 Remarkably, the decision of the U.S. District Court in California in California Software Inc. v. Reliability Research Inc. dates from 1986, almost 10 years before any other reported case. It is no coincidence that this case involved parties involved in computer software programming and distribution. See supra at note 4.

Footnote: 49 Supra at note 3.

Footnote: 50 Supra at note 3.

Footnote: 51 Supra at note 3.

Footnote: 52 Supra at note 5.

Footnote: 53 See the Office de la langue française's brochure entitled "Information Technologies in French. It's Your Right . It's Your Duty"; see the Commission de l'accès à

l'information's website at www.cai.gouv.qc.ca/auto.html ("L'accès à l'information et la confidentialité des renseignements personnels sur l'autoroute de l'information").

Footnote: 54 In a similar vein see Naxos Resources (U.S.A.) Ltd. v. Southam Inc., 1996 W.L. 662451 (C.D.Calif. 1996).

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