

E-Commerce Jurisdiction—The Canadian Approach

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Lurking in the background of virtually every Internet law issue is the question of jurisdiction. Given the borderless nature of the Internet, the matter of who is entitled to regulate or assert jurisdiction quickly becomes as important as what is being regulated. Canadian courts and regulators have now faced the issue of Internet jurisdiction on several occasions, with the approach largely mirroring that found in the United States.

As Internet law has developed, a two-step analytical approach has emerged. First, courts, regulators and legal practitioners must determine what law applies. In many instances it is unclear if traditional legal rules can be readily adapted to Internet activity. Although the common law is based on the law's ability to adapt to changing circumstances, in certain fields the Internet represents a paradigm shift of a magnitude not previously contemplated by courts and legislators, thus leaving existing law ill-equipped to handle these emerging legal issues.

Assuming the applicable law can be identified, the analysis then shifts to a second step consisting of determining who is entitled to apply the law. The effects of Internet activity are global in nature such that online activity—be it fraudulent conduct or defamatory postings—can be accessed worldwide and therefore theoretically subject the party to the legal system of any country worldwide.

Internet jurisdiction law typically breaks down into two main branches, prescriptive jurisdiction and adjudicative jurisdiction. Prescriptive jurisdiction refers to the power of law enforcement officials or regulators (such as the Canadian Radio-television and Telecommunications Commission—the Canadian equivalent of the FCC—or various provincial securities commissions) to apply their laws to Internet activity. Adjudicative jurisdiction refers to the power of the courts to rule in a legal dispute arising from the Internet.

I. PRESCRIPTIVE JURISDICTION

The Internet presents a particularly thorny problem for law enforcement officials and regulators who are charged with upholding local law. In pre-Internet times, the matter of jurisdiction was generally straightforward. Regulators understood the need to protect the local community by enforcing local laws. Since most criminal and regulated activity occurred locally, jurisdiction was rarely a cause for concern.

With the emergence of the Internet, the effects of certain activity, such as the recent denial of service attacks and computer viruses, are felt worldwide, with perpetrators capable of residing anywhere. Finding those responsible is therefore only half the battle, since actually applying local laws to such activity can prove to be an impossible task.

Canadian officials will apply Canadian law if either the person or the Web server (preferably the person) is located in Canada. If both the person and the server are located outside Canada, officials will have little hope of effectively enforcing Canadian law, even though the activity may have had an impact within the country.

If the person is located within the jurisdiction, the issue is relatively straightforward. Quite simply, officials will not hesitate to apply local laws, regardless of where the Web server is located.¹ If the person is located outside Canada but uses a Web server or computer within the country, Canadian law will also apply. For example, if the person or persons responsible for a recent computer virus are located outside Canada but used Canadian Internet service providers as part of their activities, Canadian officials could seek to apply Canadian law.

The leading case on the jurisdictional reach of Canadian law in such circumstances is *Libman v. The Queen*, a 1985 Supreme Court decision case involving fraudulent telephone sales.² The fraudulent sales pitches for worthless shares in Central American mining companies originated in Canada but targeted victims in the U.S. The Supreme Court recognized Canada's legitimate interest in prosecuting persons for activities that occur

¹ *Zundel v. Canada (Attorney General)*, (1999) 67 C.R.R. (2d) 54 (F.C.T.D.). In this case, Mr Zundel, a noted holocaust denier, argued that the Canadian Human Rights Tribunal did not have jurisdiction to regulate material posted on an extraterritorial Web site. The Court found that despite the fact that the server and webmaster for the so-called "Zundelsite" were located in California, Zundel still controlled the content of the material posted on the site itself from within Canada and jurisdiction was therefore proper.

² (1985) 21 D.L.R. (4th) 174 (S.C.C.).

in Canada but adversely affect other jurisdictions (as well as prosecuting persons in other jurisdictions whose activities produce unlawful consequences in Canada). The court established a two-part test for asserting jurisdiction that requires a “real and substantial” link between the offence and Canada as well as the need to consider international comity before asserting jurisdiction.

The Alberta Securities Commission recently provided an excellent example of how this issue plays out in practice in an Internet world. In a much anticipated decision, it ruled that it was entitled to assert jurisdiction over the World Stock Exchange, an offshore online stock exchange that had run afoul of Alberta’s securities laws.³ The Commission reasoned that notwithstanding the fact that the exchange was located on a Web site outside Canada, the effects were felt in Alberta. Moreover, since the individuals behind the exchange resided within the province, applying local law was reasonable.

This landmark decision, which marked the first time a Canadian securities regulator had asserted jurisdiction over an offshore Web site, confirmed that merely placing a Web server outside of the jurisdiction is not sufficient to avoid the jurisdictional reach of local officials. With legal actions involving out-of-country hate and defamatory

Web sites currently winding their way through the Canadian legal system, the decision strongly suggests that the “server is elsewhere” defence is likely to fall on deaf ears.

II. ADJUDICATORY JURISDICTION

The stunning growth of e-commerce has business concerned with whose laws apply to their online activities. Since Web sites are accessible worldwide, some fear that they may be subjecting themselves to any jurisdiction that can access their site. In fact, during the Internet’s commercial infancy, several U.S. courts ruled precisely in this manner.⁴ Confronted with the Internet for the first time, several judges ruled that since a Web site was accessible within their jurisdiction, they were entitled to assert their authority over the site’s activities. Legal experts quickly objected to this reasoning, noting that such an approach effectively turned the Internet

³ *Re World Stock Exchange*, [2000] 9 A.S.C.S. 658 (Chapter 6—Reasons for Decision).

⁴ See, e.g., *Inset Sys. Inc. v. Instruction Set Inc.*, 937 F. Supp. 161 (D. Conn. 1996) and *Maritz v. Cybergold Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996).

from the proverbial “lawless Wild West” into the most regulated space in the world.⁵

Happily, courts took note of the undesirable result of the early U.S. approach and a new standard emerged.⁶ Frequently referred to as the “passive versus active test”, this standard has significant implications for the Canadian legal system as well as for Canadian companies doing business on-line. Rather than treating the Internet as a single entity, the passive versus active test recognizes that a spectrum of activities occur on-line and that each must be individually examined. The legal response ought to differ with the specific nature of each activity.

At one end of the spectrum are “passive” Web sites that are largely informational in nature. These sites feature minimal interactivity by functioning much like an electronic brochure. In the interest of fairness and the facilitation of e-commerce, courts have agreed to take a hands-off approach to such sites.⁷ This sensible decision recognizes that site owners cannot reasonably foresee facing a legal action in a far-off jurisdiction based simply on the availability of information.

At the other end of the spectrum are those sites that are fully e-commerce enabled. These sites, which feature significant interactivity by functioning as the on-line equivalent of a real space store, are characterized as “active” sites. Courts have repeatedly asserted their authority over such sites, arguing that site owners are aware of the risk of facing legal actions in multiple jurisdictions since they are doing business globally via the Internet.⁸

⁵ See, e.g., M.A. Geist, “The Reality of Bytes: Regulating Economic Activity in the Age of the Internet” (1998) 73 Washington L. Rev. 521.

⁶ *Zippo Mfg. Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). *Zippo* test applied in *Cybersell Inc. v. Cybersell Inc.*, 130 F.3d 414 (9th Cir. 1997); *Blackburn v. Walker Oriental Rug Galleries Inc.*, 999 F. Supp. 636 (E.D. Pa. 1998); *Mid City Bowling Lanes & Sports Palace Inc.*, 1999 U.S. Dist. LEXIS 1630 (E.D. La. 1999); *Millenium Enterprises Inc. v. Millenium Music Inc.*, Civ. N° 98 1058-AA (D. Ore. 1999); *Atlantech Distribution Inc. v. Credit General Insurance Co.*, 30 F. Supp. 2d 534 (D. Md. 1999), *aff’d* in *Soma Medical Int’l v. Standard Chartered Bank*, 1999 U.S. App. Lexis 31227 (10th Cir. 1999).

⁷ In *Desktop Technologies Inc. v. Colorworks Reproduction & Design Inc.*, 1999 U.S. Dist. LEXIS 1934 (E.D. Pa. 1999); *Colorworks Reproduction & Design Inc.*, a Vancouver based firm was forced to defend its right to the “colorworks.com” domain name. The court found that specific personal jurisdiction could not be found over Colorworks in part due to the passive nature of the Web site at issue.

⁸ *Zippo*, *supra* note 6, and *Twentieth Century Fox Film Corp. et al. v. iCraveTV et al.* (W.D. Pa., filed January 20, 2000), settled February 28, 2000. *iCraveTV*, a Canadian based Web site was retransmitting captured TV signals, which is permitted under

Falling between the clearly passive sites and the obviously active sites are sites that provide more than simple information but less than full blown e-commerce. These sites present courts with a tough balancing act. Judges must carefully consider all the features and circumstances to determine at which end of the spectrum the site falls.

Moreover, it is important to note that the passive versus active test does not remain static. A site characterized as active two years ago could today be considered passive, since the level of interactivity found on the world's leading e-commerce sites has increased dramatically.

Braintech Inc. v. Kostjuk, a 1999 British Columbia Court of Appeal case, was the first Canadian appellate level decision to address the Internet jurisdiction issue.⁹ Of concern in that case was a series of allegedly defamatory messages posted on a stock chat site by a B.C. resident. Braintech, a B.C. based company, sued the poster in a Texas court, which awarded the company roughly \$400,000 in damages. When the company returned to B.C. to enforce the judgement, the B.C. courts examined the appropriateness of the Texas court's assertion of jurisdiction over the dispute.

Relying on U.S. law to adopt the passive versus active test, the B.C. Court of Appeal ruled that the Texas court had improperly asserted its jurisdiction. It argued that the postings were passive in nature and thus insufficient grounds to grant the Texas court authority over the case. A Braintech appeal to the Supreme Court was denied on March 2000.

Canadian companies have not been immune to litigation in the U.S. arising from their Internet activity and have thus also found the need to avail themselves of the passive *versus* active test in several U.S. cases. In one recent decision, Transglobe Energy Corporation, a B.C. company involved in the drilling and production of oil and gas, successfully relied upon U.S. Internet jurisdiction law in a federal district court in Louisiana.¹⁰ When a

Canadian law but not U.S. law. A coalition of broadcasting corporations and motion picture studios took iCraveTV to court in order to stop the retransmission. The Court issued an injunction barring iCraveTV from retransmission until it developed means to prevent U.S. users from accessing the site. As part of the terms of settlement that was ultimately reached, iCraveTV will implement more effective measures to prevent U.S. users from accessing broadcasts. As well, iCraveTV will discontinue broadcast until Canadian law is clarified to permit such broadcasts.

⁹ (1999), 171 D.L.R. (4th) 46 (B.C.C.A.), leave to appeal refused (March 9, 2000), 182 D.L.R. (4th).

¹⁰ *Minge v. Cohen*, 2000 U.S. Dist. LEXIS 403 (E.D. La. 2000).

Louisiana-based plaintiff argued that the court could assert its jurisdiction based on the availability of the company's Web site within the state, Transglobe responded by noting the site's passive nature. The U.S. court agreed, affirming that a passive Web site was not sufficient to confer jurisdiction over the Canadian company.

CONCLUSION

Given the international nature of the Internet and e-commerce, jurisdictional questions will remain the preeminent Internet law issue. By largely following the approach adopted in the U.S., Canadian courts and regulators have ensured that a North American standard is easily ascertainable, thereby reducing the risk and uncertainty for Internet users and e-commerce businesses on both sides of the border.