Date: 20071116

Docket: A-587-06

Citation: 2007 FCA 365

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

CAROLINE DUCHESNE,
In her capacity as liquidator of the Estate of Patrick Desjean

Appellant

and

Intermix Media Inc.

Respondent

Hearing held at Montréal, Quebec, on October 9, 2007.

Judgment delivered at Ottawa, Ontario, on November 16, 2007.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] The appellant, Caroline Duchesne, in her capacity as liquidator of the Estate of Patrick Desjean, is appealing a decision of Mr. Justice de Montigny, which held that the Federal Court lacks jurisdiction over Mr. Desjean's complaint that the respondent violated the *Competition Act*, R.S.C. 1985, c. C-34, and that he suffered damages as a result. The respondent allegedly installed software known as "spyware" on his computer without his knowledge. The appellant also disputes the fact that the judge, on his own motion, struck out the motion for certification of Mr. Desjean's

action as a class action because it "[did] not meet the requirements set out in rule 299.18 of the *Federal Courts Rules* . . . ".

FACTS AND SUBMISSIONS OF THE PARTIES

[2] The facts giving rise to this litigation can be summarized quickly. The respondent, Intermix Media Inc., is an American corporation with offices in California that carries on business on the Internet where it offers, free of charge, various screen savers that the user can choose to download to his or her own computer. According to the statement of claim filed by Mr. Desjean, when users consent to download the respondent's software, they also download spyware that [TRANSLATION] "uses the users' Internet connection in the background to collect personal information, without their knowledge or consent, in particular, information about their interests and browsing habits, and to transmit that information to an advertising network." Mr. Desjean's statement of claim goes on to say that the installation of this spyware and other software that he did not consent to impaired the operation of his computer and resulted in loss of time and money.

[3] Mr. Desjean's statement of claim alleges that the respondent breached section 52 of the *Competition Act*: its advertising about its screen saver is false and misleading because it does not mention the existence or effect of this software, which is installed surreptitiously on the user's computer. Mr. Desjean is seeking damages from the respondent based on section 36 of the same Act, which reads as follows:

36. (1) Any person who has suffered loss or damage as a result of	36. (1) Toute personne qui a subi une perte ou des dommages par suite:

(*a*) conduct that is contrary to any provision of Part VI, or	*a*) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;
(*b*) the failure of any person to comply with an order of the Tribunal or another court under this Act,	*b*) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,
may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.	peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

[4] The respondent disputed these allegations by filing a motion to strike the statement of claim on the ground that the Federal Court lacks jurisdiction over both the respondent and the subject matter of the statement of claim. De Montigny J. granted the motion. After summarizing the facts and the parties' arguments, he briefly reviewed the case law on the jurisdiction of Canadian courts pertaining to foreign defendants. Relying on *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (*Morguard*), *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 (*Tolofson*) and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 (*Hunt*), he concluded that, before exercising their jurisdiction over a foreign defendant who has no presence in Canada and who has not submitted to their jurisdiction, Canadian courts require a real and substantial connection between the defendant, the cause of action and Canada. The judge then turned to an analysis of the circumstances giving rise to the dispute, in light of the factors delineated in *Muscutt v. Courcelles*

(2002), 213 D.L.R. (4th) 577 (Court of Appeal for Ontario) (*Muscutt*), to determine whether there was in fact a real and substantial connection between the respondent, the cause of action as set out in Mr. Desjean's statement of claim and Canada.

[5] After analyzing each of the relevant factors, the judge was of the view that none of them, either individually or taken as a whole, supported the finding of a real and substantial connection with Canada. He noted that the respondent has no commercial or financial links with Canada. He concluded his analysis by ruling that the Court lacked jurisdiction over both the person of the respondent and the subject matter of the action. The judge went on to say that even if he believed that the Federal Court had jurisdiction, the Court would not be justified in exercising it because the American courts were better positioned to do so. Last, the judge noted that there is a clause in the licence agreement governing the downloading of the software, a clause that provides that the applicable law is the law of the State of California. Accordingly, the judge granted the motion to strike and, on his own motion, also dismissed the motion for leave to commence a class action since it had no purpose once the statement of claim was struck out.

[6] The appellant is appealing this decision. She agrees that the issue is whether there is a real and substantial connection with Canada but submits that the judge erred in not analyzing this issue in accordance with the Supreme Court of Canada's decision in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 (*Moran*). In that case, the Supreme Court had to determine the place of commission of a tort. Saskatchewan law required an order allowing service of a statement of claim on a defendant outside the province where a tort had been committed outside the province. By

means of the order allowing service of the statement of claim, the Saskatchewan courts assumed jurisdiction over the defendant and over the basis of the statement of claim.

[7] Having analyzed the various theories as to the situs of a tort, the Supreme Court summarized its conclusion in the following passage, which is the cornerstone of the appellant's argument:

> By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.
>
> [*Moran*, at paragraph 12]

[8] According to the appellant, the essence of this passage was subsequently adopted in the *Morguard, Tolofson* and *Hunt* decisions, which the trial judge referred to.

[9] The appellant adopts the analysis of the factors set out in *Muscutt* and, based on her own analysis of the facts considered in light of the *Moran* case, suggests that the judge had to find that there was a real and substantial connection between the respondent's business and Canada. In doing so, the appellant does not identify any error on the part of the trial judge. She simply substitutes her analysis of the relevant factors for that of the judge.

[10] The appellant challenges the judge's finding with respect to the *forum conveniens* because the application of this rule, she says, presupposes the existence of a parallel proceeding in another jurisdiction. There is no parallel proceeding here. The only dispute dealing with downloading the respondent's software was settled in the State of New York. According to the judge, the American

courts would be in a better position to deal with this dispute. One of the factors in the judge's reasoning on this point was the choice of forum clause in the software licence agreement. According to that clause, by downloading the software, the user has indicated his or her consent that the law of California will govern the contract.

[11] The appellant argues that this clause cannot be set up against her because the user could download the software in question without reading the conditions in the licence agreement and without otherwise indicating his or her intention to be bound by these conditions.

ANALYSIS

[12] The Court cannot allow this appeal for a number of reasons.

[13] To the extent that the appellant relies on an assessment of the facts other than that of the judge, she must comply with the standard of review regarding findings of fact or mixed fact and law. She must establish that the judge has made a palpable and overriding error in assessing them: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The appellant is not free to simply substitute her assessment of the facts and of questions of mixed fact and law for that of the judge.

[14] It is clear that the appellant bases her appeal on her analysis of the facts:

> [TRANSLATION]
> Although the Supreme Court of Canada ostensibly provided an indication to the trial judge in M*oran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, the order that was made deviated from the case law of the highest court because it is based on erroneous premises as a result of a poor analysis of the facts of the case.

[Appellant's memorandum, at paragraph 38]

[15] From there, the appellant proceeds to simply substitute her assessment of the facts for that of the judge without ever establishing that he was not entitled to make the findings that he did. In the course of her argument, the appellant asks two questions:

- Is there a real connection?
- Is this connection substantial?

[16] In considering whether there is a real connection, the appellant describes the nature of the respondent's business and then states that the respondent cannot defeat the principle laid down in *Morguard*, in particular, that a manufacturer ought to assume the burden of defending its products wherever they cause harm as long as [TRANSLATION] "the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods" (appellant's memorandum, at paragraph 52). She makes no reference to the trial judge's reasons nor does she demonstrate any error on his part.

[17] Moving to her second question, the appellant relies on certain quantitative data to establish the extent of the respondent's commercial activities, including the proportion of Canadians who have downloaded its software. This is the basis for her conclusion that there is a substantial connection between Canada and the respondent's business. Again, the appellant does not mention the trial judge's analysis.

[18] It is not open to this Court to proceed in this way. Since the appellant has not established that the judge's assessment of the facts or of the mixed questions of fact and law contains a palpable and overriding error, we must respect his findings.

[19] This ground alone warrants dismissing the appeal. On the other hand, given the importance that the appellant attributes to *Moran* in her argument, it is useful to compare that case with the cause of action that Mr. Desjean pleaded in his statement of claim.

[20] At paragraph 36 of her memorandum, the appellant describes the nature of Mr. Desjean's claim:

> [TRANSLATION]
> 35. The action is based on the tort committed by the respondent when it took advantage of the downloading of the screen saver to surreptitiously install spyware or adware that damaged the computer owned by the appellant, in her capacity as liquidator, who thought she was only receiving a screen saver.

[21] This is clearly erroneous, which is apparent from reading the statement of claim itself, in particular paragraphs 33 to 36 thereof, which are reproduced below:

> 33. Defendant engaged in persistent deceptive, fraudulent and illegal practices, and false advertising, in the distribution of certain advertising software, known as "spyware" and "adware" by offering free software to download without giving Plaintiffs notice that would install devices on their computers that would enable Defendants to wrestle away control over certain features of the plaintiffs' computers and causing them to seriously malfunction.
>
> 34. Defendant engaged in persistent deceptive, fraudulent and illegal practices, and false advertising, in the distribution of certain advertising software known as "spyware" and "adware" thereby enabling third parties to expose Plaintiffs to all sorts of schemes.
>
> 35. By do doing Defendant contravened sections 52(1), 52(1.1) 52(2)(e) of the *Competition Act* (R.S.C. 1985 c. C-34).

36. Plaintiff is entitled to seek recovery of damages pursuant to sections 36(1)(a) and 36(3) as provided for by section 62 of the said Act, and Plaintiff disclosed reasonable cause of action to apply for certification of this action as a class action in accordance with rule 229.12(3) of the *Federal Court Rules* (SOR/2002-417, s. 17).

[22] The following are the relevant provisions of the *Competition Act*:

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.	52. (1) Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.
(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that any person was deceived or misled.	(1.1) Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction au paragraphe (1), de prouver que quelqu'un a été trompé ou induit en erreur.
(2) For the purposes of this section, a representation that is	(2) Pour l'application du présent article, sauf le paragraphe (2.1), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas:
. . .	. . .
(*e*) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,	*e*) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.
is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or	

contained, subject to subsection (2.1)

. . .	. . .
62. Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of any civil right of action.	62. Sauf disposition contraire de la présente partie, celle-ci n'a pas pour effet de priver une personne d'un droit d'action au civil.

[23] It must be recalled that section 36 of the *Competition Act* authorizes any person who has suffered a loss as a result of conduct that is contrary to Part VI to sue in any court of competent jurisdiction and to recover from the person who engaged in the conduct an amount equal to the loss or damage. As we have seen, subsection 36(3) specifies that the Federal Court is a court of competent jurisdiction for purposes of section 36.

[24] We are thus far from *Moran* where the defendant’s liability stemmed from the allegation that it had put a defective product on the market. Here, the respondent’s liability, according to Mr. Desjean’s own allegations, is based on non-compliance with a statutory provision prohibiting certain false or misleading practices. In other words, the fault on which Mr. Desjean bases his statement of claim consists in providing false or misleading information, not in marketing a defective product.

[25] The principle set out in *Moran* therefore has no impact on the issue of whether there is a real and substantial connection between Canada and the respondent’s activities.

[26] For these reasons, the appellant's appeal should be dismissed with costs.

"J.D. Denis Pelletier"

J.A.

"I concur.
Gilles Létourneau J.A."

"I concur.
Johanne Trudel J.A."

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-587-06

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE de MONTIGNY OF THE FEDERAL COURT DATED NOVEMBER 17, 2006, T-846-05

STYLE OF CAUSE:	CAROLINE DUCHESNE, in her capacity as liquidator of the Estate of PATRICK DESJEAN, and INTERMIX MEDIA INC.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 9, 2007
REASONS FOR JUDGMENT BY:	**PELLETIER J.A.**
CONCURRED IN BY:	**LÉTOURNEAU J.A.** **TRUDEL J.A.**
DATED:	November 16, 2007

APPEARANCES:

Stéphane Nadeau	FOR THE APPELLANT
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