Letter of the Law

How Far Can a Court Reach Across the Internet?

E-commerce crosses borders easily and commonly. Most courts, by contrast, have jurisdiction within a physically defined territory. As a result, courts and businesses are faced with increasingly complex issues of jurisdiction over—and effective remedies for—what are termed cyberliability issues, like theft or destruction of critical data, defamation, libel, and copyright or trademark infringement over the internet.

The British Columbia Supreme Court has recently adjudicated one such case, *Equustek Solutions Inc. v. Jack,* where Madam Justice Fenlon considered whether the Court had territorial jurisdiction over e-commerce facilitated by Google Inc. and, if so, the extent of its equitable jurisdiction to control that e-commerce. Deciding in this instance that it did have territorial and broad equitable jurisdiction, she ordered Google Inc. to de-index, worldwide, certain websites. In other words, she ordered Google to prevent its search results showing those websites to anyone, anywhere, using its search engines.

Although the decision has received notoriety as a threat to free speech, the issues at the heart of the case involve the remedies local courts can devise to protect intellectual property rights in the multi-jurisdictional world of the internet. In July, the B. C. Court of Appeal, in *Equustek Solutions Inc. v. Google Inc.,* granted Google leave to appeal the lower court decision but denied the company's application to stay the effect of the de-indexing order.

The background to these cases shows just how complex e-commerce is. The Vancouver-based plaintiff, Equustek, a manufacturer of networking devices, accused Datalink and its principals of designing and manufacturing a competing product using Equustek's trade secrets. It also alleged that they covered over Equustek's name and logo in order to pass off Equustek products as Datalink's. In addition, it claimed that the defendants advertised Equustek products on the Datalink website but, using bait-and-switch tactics, delivered Datalink devices to fill orders for Equustek products.

Since 2012, the B.C. Supreme Court has imposed numerous orders against Datalink and its principals to prohibit them from this online misbehaviour. But they refused to obey these orders and carried on business through what the Court called "a complex and ever expanding network of websites through which they advertise and sell their product."

During the litigation, Equustek asked Google—and Google initially agreed—to de-index certain Datalink websites from *google.ca*. But Datalink continued to make prohibited sales outside Canada through other associated websites. When Google refused to remove Datalink's websites from all of its search pages globally, Equustek brought its application for a worldwide de-indexing order against Google.

During the course of her deliberations, the judge established certain facts:

- This was an intellectual property case where the plaintiff's right to be free of

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SINGLETON LEGAL COUNSEL URQUHART

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the continuing infringement was well established.

- No third-party free speech interests appeared to be at stake.
- Datalink's opportunities to argue that any legitimate business it might have would be harmed by the order were lost long ago in the underlying litigation.
- There was no evidence of technical or practical impediment to the order because Google could de-index worldwide without significant cost.
- Google did not argue de-indexing Datalink's websites would offend California or any other law.

Google first argued that the Court had no jurisdiction over it because it was a non-resident and non-party with only a virtual presence in this province. The search company claimed therefore that there was no real and substantial connection between it and the B.C. Court. Alternatively, Google argued that California was a more appropriate jurisdiction.

Justice Fenlon applied the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA), which gives courts "territorial competence" when there is at least one "real and substantial" connection between B.C. and a party to the proceeding or the facts on which the proceeding is based. She held there were two facts creating a "real and substantial" connection under CJPTA: the proceeding to enjoin Google was brought in B.C. to enforce the plaintiffs' intellectual property rights at the heart of the underlying action *and* the injunction sought concerned Google's business in B.C.

On the latter point, the judge concluded that Google sells advertising space and priority to British Columbians. Further, Google's websites were active and not merely a "virtual presence"; they responded to a B.C. user's searches by, among other actions, linking advertisements—including those sold to British Columbians—to the subject matter of a specific search or to a user's search history.

The judge referred to "Google's submission that this analysis would give every state in the world jurisdiction over Google's search services." In response, she pithily noted: "That may be so. But if so, it flows as a natural consequence of Google doing business on a global scale, not from a flaw in the [Court's] territorial competence analysis."

She also determined that the Court should exercise its territorial competence because California was not obviously the more appropriate venue in which the application should proceed. A number of facts were important to the judge on this issue. She held Equustek was a comparatively small B.C. company that was suffering damages in B.C., and it was no hardship for Google to litigate in this province. Refusing to exercise jurisdiction would mean Equustek would have to start a second proceeding in California.

Justice Fenlon also held that an order requiring Google to do something outside B.C. would be effective because it could be enforced by B.C. courts' contempt powers. Those powers, she noted, permit the courts to order fines or imprisonment and the ability to "dismiss or refuse to hear proceedings brought by a party who is violating a court order."

Most importantly, the judge decided that the fact a worldwide de-indexing order was sought did not make California a more appropriate jurisdiction than B.C.

On this point, Google had argued that the B.C. Court's order could not be enforced in California but it provided no proof of

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EDITOR'S NOTE

One of the fascinating things about the practice of law is observing how the common law adapts so that it can apply in new and unforeseen circumstances. Case in point – our cover article on internet commerce.

Technology today is evolving faster than you can say "new iPhone". Internet commerce is rapidly expanding and on a global level. But with these new technologies come new challenges for our existing laws to govern the new ways of doing business.

Moreover, the parties to these transactions are domiciled in different parts of the world so when a dispute arises we need to find ways to use our courts and our laws to reach across the globe.

As our lead article reveals, the courts in British Columbia have taken jurisdiction on a global level in an effort to address a problem that only a few short years ago would not even have existed.

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California law on the point. In response, the judge indirectly referred to statements made by Chief Justice McLachlin in dissenting reasons in a 2006 Supreme Court of Canada judgment involving the enforcement of a foreign non-monetary judgment in Canada, the mirror case on this issue. In *Pro Swing Inc. v. Elta Golf Inc.*, the Chief Justice wrote that "the common law must evolve in a way that takes into account the important social and economic forces that shape commercial and other kinds of relationships" ***and*** "a court should not refuse to enforce a foreign non-monetary judgment merely because there is a theoretical possibility that questions may arise in the course of enforcement."

Justice Fenlon took a broad view of the B.C. Court's equitable jurisdiction, finding it could make the order. She reasoned:

> The Court must adapt to the reality of e-commerce with its potential for abuse by those who would take the property of others and sell it through the borderless electronic web of the internet. I conclude that an interim injunction should be granted compelling Google to block the defendants' websites from Google's search results worldwide. That order is necessary to preserve the Court's process and to ensure that the defendants cannot continue to flout the Court's orders.

In deciding that she should grant the order, the judge also forcefully rejected Google's four remaining arguments, holding that:

- Google would not have to monitor content because it was being asked to de-index all the defendant's web sites, as it had already done for *google.ca*.
- The de-indexing would not constitute "undue censorship" because Google already censors search results for, and removes, child pornography and "hate speech" pursuant to court orders.
- Google would not be ordered to contravene a law in another jurisdiction because, as Google conceded, most countries will likely recognize intellectual property rights and view the selling of pirated products as a legal wrong.
- Although Google was at least initially only unwittingly involved, the Court needed to adapt to the reality of e-commerce.

In the Court of Appeal, on the application to stay the effect of the Supreme Court's "worldwide" de-indexing order, Google's central arguments were that it would suffer "irreparable harm" because it claimed that a Canadian court's making of a worldwide de-indexing order might tempt other jurisdictions to use Google "as a vehicle for global enforcement of their laws" and that the order might cause concerns for or difficulties with Google's clients.

The Court of Appeal rejected these arguments in principle, stating clearly: "A stay will not change the fact that the Supreme Court of British Columbia has found jurisdiction to make the impugned order."

On the merits of the appeal, Equustek will hope the Court of Appeal upholds the order or will provide another equally effective remedy to stop or slow the abuse of its rights and the lower court's orders that Datalink continues to flout. For its part, Google will argue for what it clearly sees as the best result: the ability to defend applications such as this in California and the overturning of an unprecedented order.

In arriving at its decision, the Court of Appeal will have to wrestle with whether or not there can be objective and consistent standards for determining jurisdiction for courts in complex, cross-border, e-commerce cases and, if so, what they should be. It will also have to consider, if jurisdiction is established, the extent of a court's ability to fashion effective remedies. We expect it to provide significant further insight and guidance on these issues.

For more information on this case and matters involving the Court Jurisdiction and Proceedings Transfer Act *or electronic commerce in general, please contact*

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KYLE THOMPSON, summer student, assisted with the research and writing of this article.

The electronic version of this article at ***www.singleton.com*** contains links to the cases discussed above.

GLENN A. URQUHART, Q.C. MEMORIAL SCHOLARSHIP IN LAW AT THE UNIVERSITY OF BRITISH COLUMBIA

A $1,000 scholarship has been endowed in memory of **GLENN A. URQUHART, Q.C.** by his family. The award is for a Juris Doctor student in the Faculty of Law who has achieved high standing in Construction Law or Alternate Dispute Resolution courses. Financial need may be considered. Glenn Urquhart, Q.C. was a highly respected litigation lawyer and, in later years, mediator and arbitrator in the construction law area. He was well-known for his down-to-earth manner and keen sense of humour. His intelligent and practical approach made him a trusted advisor and a friend to many. The award is made on the recommendation of the Faculty of Law. (First award available in the 2014/2015 Winter Session.)

Terms of the award as accepted by the Vancouver Senate of the University of British Columbia.

Federal Government Overhauls the *Citizenship Act*

IMMIGRATION LAW

Just before Canada Day, the federal government substantially amended the requirements for both attaining and maintaining Canadian citizenship. Bill C-24 passed third reading in Parliament and received Royal Assent on June 19, 2014. Some of these changes, such as the attempt to restore citizenship to "Lost Canadians" who had been unfairly denied citizenship because they were born to a Canadian in a foreign country, have been roundly supported.

But other amendments have not been as warmly received. The *Citizenship Act* (Act) now has a narrower definition of "residence" so its meaning is restricted to physical residence alone. In addition, the Act increases residency requirements for residents wishing to become citizens. Previously, residents could apply for Canadian citizenship after spending three of the past four years in Canada, with no strict requirement of physical presence for a set number of days necessary to establish residency.

With the new requirements, residents must wait until they have resided in Canada for four of the past six years and must be physically present in Canada for more than half of each of the past four years. Citizenship applicants must also file tax returns in Canada for at least four of the previous six years. These new requirements are relaxed for applicants who enlist with the Canadian Forces—from four years of residency to three years.

Language and knowledge requirements have also become more stringent. In the past, language requirements only affected applicants aged 18-54 and knowledge requirements could be met with the aid of an interpreter. Now the assistance of interpreters on knowledge exams is not permitted and language requirements apply more broadly to any applicant aged 14-64.

The application process itself has been streamlined from three steps to just one. Consequently, the federal government hopes to cut average wait times between applying for and receiving citizenship from the current two or three years to one year. However, the shorter process will not cost less—application fees are quadrupling to $400.

Most controversial of all, though, are the changes concerning the revocation of citizenship. The new citizenship application form includes a question which asks applicants to declare an "intent to reside" in Canada. A number of commentators, including the National Immigration Law Section of the Canadian Bar Association (CBA), argue that this provision is probably unconstitutional since it creates two tiers of citizenship: natural-born Canadians who can leave the country as and when they please (although they may lose provincial health care benefits if they are absent for too long over the course of one year) and naturalized Canadians who risk losing their citizenship if they spend too much time abroad.

While officials in the Department of Immigration have indicated that they will not be checking the residency status of naturalized Canadians after they have successfully gained citizenship, the *Citizenship Act* now grants the Minister of Immigration the power to revoke citizenship without a court hearing where applications are found to contain "false representation or fraud [or by] knowingly concealing material circumstances."

Furthermore, the federal government now has the authority to revoke citizenship from dual citizens convicted of terrorism, treason and espionage offences abroad. The CBA and others contend that this power creates a form of double punishment for dual citizens and furthers a problematic tiered model of citizenship.

These controversial amendments to the *Citizenship Act* have already provoked legal challenges. Whether or not they pass constitutional muster will remain uncertain until the courts have had their say. But, given the widespread criticism and the federal government's recent record at the Supreme Court of Canada, the law of citizenship may well be changing again soon.

For more information on the new amendments to the Citizenship Act *and on immigration law in general, please contact*

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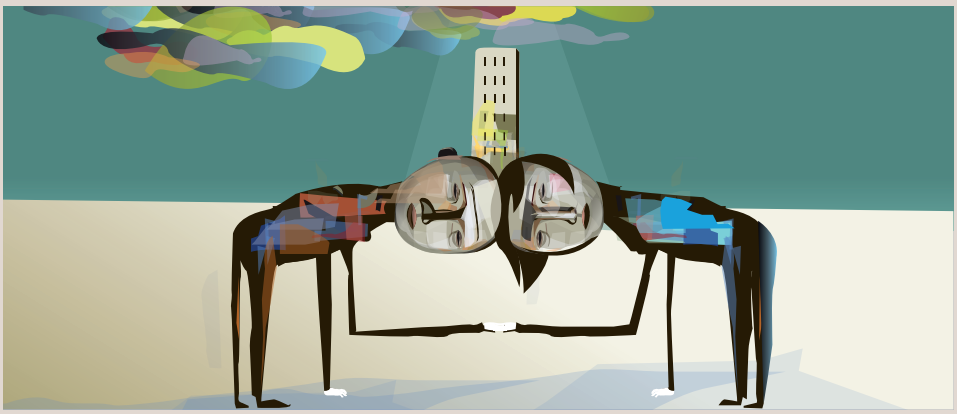
KYLE THOMPSON, summer student, assisted with the research and writing of this article.

The electronic version of this article at ***www.singleton.com*** contains links to the legislation described above.

How To Operate When You Cooperate

CONSTRUCTION LAW | *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*



When a major construction project goes wrong, multi-party litigation is often the result. A claim by an owner/developer for damages caused by delay or a failure of components of the building due to design/construction defects more often than not results in the naming of multiple defendants and, by the defendants, multiple third parties.

In many of these cases, although not all, two or more of the main defendants or third parties will have a common interest and want to cooperate in defeating the plaintiff's claim. That cooperation is sometimes accomplished simply by way of a common understanding but, in other instances, the cooperation is formalized in a written agreement. In the latter case, the agreement will stipulate the way or ways in which the parties have agreed to cooperate and often will include a "reservation of rights" that allows the parties to resolve any differences between them at a later date, depending on the outcome of the action brought by the plaintiff.

Cooperation agreements, whether oral or in writing, are common in multi-party litigation. More often than not, the agreement reached remains confidential to the parties entering into the agreement but, as was demonstrated in a recent British Columbia Supreme Court decision, in other instances there is the prospect that the agreement, or certain aspects of it, might have to be disclosed to the 'common enemy'—the plaintiff or plaintiffs.

In this case, *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* the Court was required to address the questions when, if ever, does a cooperation agreement have to be disclosed to the parties to the litigation and, if disclosure is required, what must be disclosed: the fact of the agreement, details of its terms, or the whole agreement itself?

Bilfinger was the contractor on a major construction project and eventually refused to continue work because of what it said were dangerous site conditions. The owner disagreed and the parties ended up in litigation, each claiming damages against the other. The owner completed the project with assistance from its engineer, Hatch Mott MacDonald Ltd. (HMM).

In the context of the litigation, the owner and HMM decided, for a variety of reasons, not to pursue any claims against each other for contribution and indemnity in the event that Bilfinger was successful against either of them. Instead, they continued to work together on the project and agreed to cooperate in the litigation. They further decided to resolve any remaining residual issues between them at a later date following Bilfinger's action. They also agreed that they would not be bound by any specific findings of fact that arose in the action with Bilfinger. The agreement was in writing.

When Bilfinger learned of the agreement, it complained to the Court that it was an abuse of process. Bilfinger claimed that it was entitled to have a copy of the agreement as soon as it was signed. Bilfinger asked the Court to dismiss the owner's claim—against both Bilfinger and HMM—and to nullify the owner's defences to Bilfinger's claims in light of the owner's alleged abuse of the process.

In her decision, Madam Justice Griffin held that the parties were entitled to cooperate with each other and that they were entitled to enter into an agreement to that effect. However, she went on to observe that, where cooperation agreements contained reservation of rights or agreements with respect to evidence, there is an obligation to disclose the agreement or that aspect of the agreement at an early date in the litigation—preferably before the discovery process is complete and certainly before trial. Otherwise, she found, the Court and the other parties could be misled, leading to a possible abuse of process.

Normally, agreements of this type are privileged and not subject to disclosure without the consent of the parties entering into the agreement. That privilege can be maintained where the agreement does not contain any provision which would result in either the Court or other parties to the litigation being misled as to the true nature of the dispute between and amongst the parties. The cautioning note of Madam Justice Griffin in this regard must be taken into account in preparing these agreements in complex commercial litigation where cooperation is desirable but not necessarily immune to disclosure.

For more information on cooperation agreements in complex litigation, please contact

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Singleton Urquhart LLP is representing the defendant, Greater Vancouver Water District, in this case.

The electronic version of this article at **www.singleton.com** contains a link to the case discussed above.

The Application of *Caveat Emptor* in Real Estate Transactions

REAL ESTATE LAW | *Lavigne v. Ellis*

Unfortunately, as a recent British Columbia Supreme Court decision has shown, real estate transactions are not always trouble-free. *Lavigne v. Ellis* demonstrated that, if serious defects are discovered in a property subsequent to the completion of its purchase, the purchaser may not be entitled to a remedy from the seller. The doctrine of *caveat emptor*—or "let the buyer beware"—is based on the notion that purchasers must fend for themselves, seeking protection by express warranties from the vendor or by independent examination of the premises. If they fail to do so, they are often without recourse.

When purchasers consider legal actions against vendors, they must first consider the nature of the defect. In broad terms, courts have traditionally distinguished between "patent" and "latent" defects: the former are those which are visible or discoverable through reasonable inspection and inquiry while the latter are those that are less evident.

The onus is on the purchaser to inspect and discover patent defects. A defect which might not be observable on a casual inspection by a purchaser may be considered patent if a qualified person's reasonable inspection could have discovered it. In addition, defects that a reasonably careful inspection and inquiry have not revealed might be regarded as latent but, in order to avoid the doctrine of *caveat emptor*, they may also need to be such as to render the property uninhabitable or dangerous.

Exceptions to the doctrine exist in the case of latent defects if the vendor has behaved fraudulently or if there is a fundamental difference between the property that was bargained for and the one eventually obtained.

In a 1998 B.C. Supreme Court case, *McCluskie v. Reynolds*, the judge summarized the conditions that a purchaser must usually prove to recover for alleged defects from a vendor as follows:

1. where the vendor fraudulently misrepresents or conceals;
2. where the vendor knows of a latent defect rendering the house unfit for human habitation;
3. where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;
4. where the vendor has breached his duty to disclose a latent defect which renders the premises dangerous.

To succeed in court, a purchaser must therefore prove that a vendor knowingly made misrepresentations and/or acted recklessly (in other words, acted carelessly to the point of being heedless of the consequences) with respect to his or her disclosure obligations. This can be a dauntingly high standard for an aggrieved purchaser to meet. In *Lavigne v. Ellis*, (which was a summary trial dealing only with liability issues), the plaintiffs took the position that they should be compensated for undisclosed defects in the basement of the Kelowna house they purchased in 2009. They were unsuccessful despite the fact that, in the words of the trial judge, these apparent defects turned "the plaintiffs' dream home into a nightmare."

Amanda and Kevin Lavigne, the plaintiffs in this case, sued Shawn Ellis and his real estate agent, Steve Wright, as well as Mr. Wright's company. The essence of the Lavignes' claim was that the defendants concealed or misrepresented latent defects in the house's basement, which, according to an affidavit, one of Mr. Ellis' tenants had converted into a suite and, in the process, had installed a sub-floor. Mr. Ellis gave permission for the conversion but never saw it.

Mr. Ellis had purchased the property for investment purposes in 2004. He never lived in it. In 2009 he listed the property for sale with Mr. Wright. The listing on the Multiple Listing Service described the Kelowna property as a "good, solid Glenmore home"; the purchasers viewed the house with their own real estate agent and, to quote the judgment, "formed a favourable impression of the Property."

In their affidavit, the Lavignes stated that they asked both the real estate agents involved about the sub-floor. Their evidence was that their agent stated that "sub-floors were common" and that Mr. Wright, the defendant's agent, stated "the sub-floor was put in to reduce electricity bills."

The Lavignes entered into a standard agreement with the vendor to purchase the property for $325,000. They also obtained a home inspection report which was generally "positive" and, in particular, noted that

"the foundation wall was in good condition with non-structural cracks noted."

Almost two years after moving into the house, the Lavignes noticed that cracks had developed in the drywall, doors were failing to close properly, and the outside deck was separating from the house. They hired a foundation professional and, after the sub-floor was removed, "significant cracking in the foundation was evident" to the extent that Mr. Lavigne claimed that the cracks were "wide enough in places that he [could] insert his hand into them." In spring 2012, an area of about 40 square feet in the basement was covered in water up to 4 inches deep.

The purchasers, in essence, argued that the sub-floor had been installed to hide the cracks in the foundation and that extensive cracking throughout the house was purposefully concealed. The trial judge found, however, that the purchasers had failed to establish that the defects came under one of the exceptions to the doctrine of *caveat emptor*. The judge accepted the evidence of the vendor that he was unaware of any such defects. In particular, the judge found that the vendor:

(a) made no representations to the Lavignes and did not conceal anything from them;

(b) did not know of a latent defect that rendered the Property dangerous or unfit for habitation;

(c) was not reckless as to the truth or falsity of statements relating to the fitness of the Property for habitation; and

(d) did not breach his duty to disclose a latent defect that renders the premises dangerous.

This case demonstrates the challenges involved in proving fraudulent or reckless conduct in the context of disclosure obligations of vendors in real estate transactions. While purchasers may be aggrieved to discover that what they thought was their "dream home" has substantial defects they were unaware of at the time of the purchase, the doctrine of *caveat emptor* can create a high bar: civil courts are unlikely to attribute fraudulent or reckless conduct without strong evidence.

In such circumstances, prospective purchasers should always engage competent and experienced experts to inspect and evaluate a property that they are considering to buy. If necessary, they should also retain legal counsel to fully review the contract documents and the circumstances surrounding the purchase transaction. This case illustrates that not only is "buyers beware!" prudent advice, it is also the law.

For more information on the caveat emptor *doctrine in real estate transactions and real estate law in general, please contact*

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The electronic version of this article at ***www.singleton.com*** contains links to the cases cited above.

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These **SINGLETON URQUHART** lawyers have been selected by their peers for inclusion in the Ninth Edition of *The Best Lawyers in Canada* in various practice areas: **JOHN SINGLETON, Q.C.**—Construction Law, Insurance Law and Product Liability Law; **CLIVE BOULTON**—Personal Injury Litigation – Defence; **BARBARA CORNISH**—Alternative Dispute Resolution.

EMILY GRAY

RAYLENE SMITH

We welcome two new associates, **EMILY GRAY** and **RAYLENE SMITH**, both of whom articled with the firm. Ms. Gray is practising in the areas of insurance defence, professional liability, and civil fraud while Ms. Smith's practice areas are general civil litigation and employment law. For more information, please go to *www.singleton.com/Our_People*.

MARNI HAMBLETON CONQUERS THE ALPS

SU Paralegal Marni Hambleton is a championship-winning road racing cyclist who has competed in many local, national and international races. Here, she describes her latest gruelling race, across the Alps between Germany and Italy, as a member of the Fifty Four-Forty Four Team.

The 2014 Schwalbe Tour Transalp road race brought 650 two-person teams from all over the world to the southern tip of Germany where we would begin our race of 824 kilometres southwards, through the Dolomite Mountains, to Italy.

The race started on June 29 in the mountainous town of Mittenwald and ended on July 5 in Arco, near Lake Garda. Over the course of 7 days we tackled 19 steep alpine passes, totalling 19,267 metres of climbing (equivalent to climbing Seymour Mountain 20 times) on several of the same mountain roads used in professional bike races such as the Giro d'Italia and the Tour of Germany.

When we crossed the finish line in Arco, we had a cumulated time of 38:37:18 hours placing us 7th overall in the Women's Category. Our longest day on the bike was 7 hours, when we covered 5 mountain passes with 3,500 metres of climbing over 154 kilometres.

This event is not for the faint-hearted—we started our preparations in January. A typical training ride included an ascent of Cypress, Grouse and Seymour mountains with our training hours increasing as we got closer to the event.

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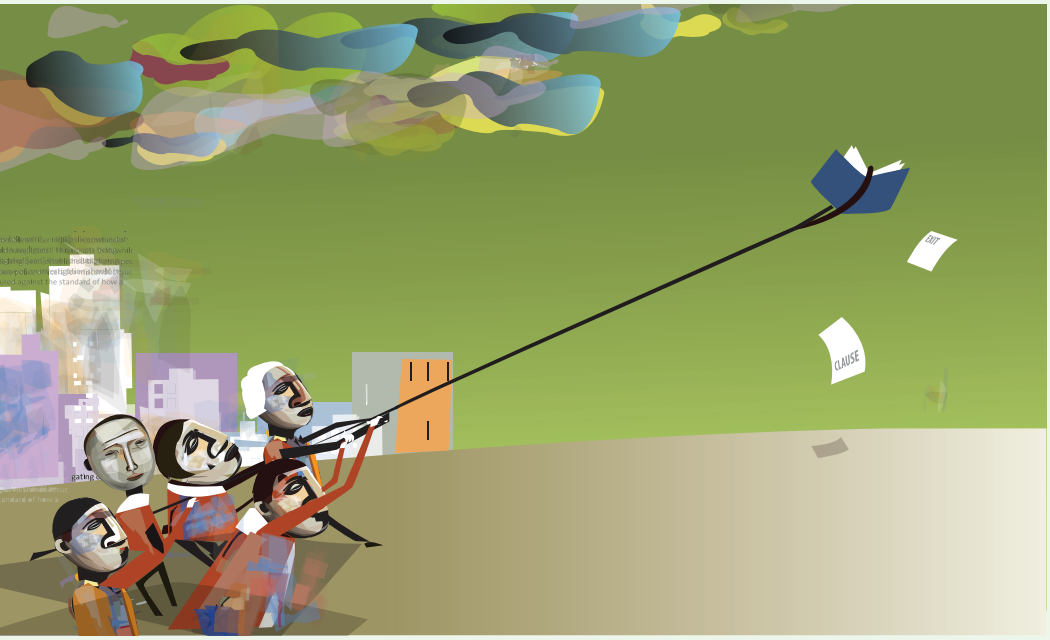
Supreme Court of Canada Limits Appeals of Arbitral Awards

ALTERNATIVE DISPUTE RESOLUTION | *Sattva Capital Corp. v. Creston Moly Corp.*

In a recent case, *Sattva Capital Corp. v. Creston Moly Corp.*, the Supreme Court of Canada (SCC) has restricted appeals to the courts from domestic commercial arbitral awards. The case stemmed from a straightforward commercial transaction over which the parties disagreed.



Mr. Hai Van Le, the principal of the plaintiff, Sattva Capital Corp., introduced Creston Moly Corp. to a molybdenum mining prospect in Mexico. In 2007, Sattva and Creston entered into an agreement that obliged Creston to pay Sattva a finder's fee if the former acquired the Mexican property.

The purchase did go ahead but, although both parties agreed that a finder's fee was payable, they disagreed on the amount. A formula with a minimum payment of $1.5 million had been set out in the agreement between the two parties. Sattva, however, claimed that Creston owed it more than $4 million. This amount was based on when the finder's fee was to be calculated and on the price of Creston shares at that time.

The parties took their dispute to an arbitration hearing, pursuant to British Columbia's *Commercial Arbitration Act* (now the *Arbitration Act*). The Arbitrator found in favour of Sattva, awarding the company $4,140,000 plus costs. Creston made a payment of $1.5 million following the award and sought leave to appeal the award.

B.C.'s legislation limits appeals from arbitral awards under the *Commercial Arbitration Act* to questions of law alone. There is no automatic right of appeal. Leave to appeal must be sought from, and requires a litigant to apply to, a court to review the arbitrator's decision and determine if it is appealable.

It is interesting to note that the case spent approximately five years in the courts, whereas the arbitration process took about one year. Over this lengthy period before reaching the Supreme Court of Canada, the case had twice been before the B.C. Supreme Court and twice before the Court of Appeal.

In the end, the SCC decision restored the arbitration award of over $4 million. The Court found that construing contracts, as this matter did, required an interpretation of mixed fact and law—as such, it was not a question of law alone. In the past, B.C.'s courts have reversed arbitral awards by interpreting contracts. In future, though, this SCC decision means that leave to appeal an arbitral award will only be granted on a question of law alone.

Many commercial contracts contain an "arbitration clause" that mandates any dispute be settled by arbitration rather than going to court. This has not prevented appeals to courts but, following this decision, there should be fewer of them. Furthermore, as this case's costly time-consuming process showed, appealing arbitral decisions can well be more expensive and less efficient than going to court, rather than arbitration, in the first instance.

Sattva Capital Corp. v. Creston Moly Corp. emphasizes the importance of considering arbitration to settle a dispute in a commercial contract. Arbitration usually has the advantage of speed and cost—but not always. It is important to consult thoughtful and competent counsel before electing to use arbitration to settle any dispute.

For more information on this case and on arbitration matters in general, please contact

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The electronic version of this article at ***www.singleton.com*** contains a link to the case cited above.

(Continued from page 7)

While being able to ascend mountains was one element in our success, we were also challenged daily by technical switchback descents in some wet and cold weather conditions—not too different from what we had experienced on the North Shore mountains.

Overall this was a fantastic event and an amazing experience. The scenery was breathtaking and the roads were like nothing you could ever experience in North America. I am looking forward to doing this event again in the very near future.