

# Blakes Dispute Review

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**Blakes Dispute Review** is a periodic publication of the Blakes Litigation Group. Our goal is to provide you with information about current developments in the law affecting your business and to assist you in making informed decisions about avoiding disputes and dealing with them when they arise.

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The Editors

## Class Action Avoided by Arbitration Clause in Contract

by Sharissa Ellyn

In addition to providing a reasonable alternative dispute resolution mechanism, an appropriately drafted arbitration clause in a sales or services agreement may serve to inhibit resort to class actions.

The Ontario Superior Court of Justice recently stayed a proposed class proceeding, holding that a court action was precluded by the arbitration clause in the contract between the parties. The plaintiffs in *Kanitz v. Rogers Cable Inc.* proposed to represent customers of Rogers Cable Inc. ("Rogers") in a class action against Rogers for damages arising from alleged disruptions in Rogers' internet service and for punitive damages. Rogers' subscription agreement provided that all disputes between Rogers and the customer would be resolved by arbitration, and that the customer would not commence or participate in any class action against Rogers.

The *Arbitration Act* (Ontario) requires the court to stay proceedings where the parties have agreed that disputes will be resolved by arbitration, unless one of a number of exceptions applies. The plaintiffs argued that the action should not be stayed as the arbitration provision was unconscionable and therefore invalid. The plaintiffs also argued that the matter was not capable of being arbitrated because an arbitrator would have no authority to award the punitive damages they claimed.

The Court began its analysis by indicating that a high standard should be applied in determining whether the exceptions to the mandatory stay provision in the *Arbitration Act* apply. Otherwise, the "clear legislative intent to promote arbitral autonomy" would be negated.

The plaintiffs contended that enforcement of the arbitration clause would be unconscionable as Rogers had taken advantage of them merely by inserting the arbitration clause into its internet services subscription agreement. The Court rejected this argument and reaffirmed the notion from earlier decisions that the *Class Proceedings Act, 1992* (Ontario) is a procedural statute which does not affect parties' substantive rights. Further, in response to the plaintiffs' submission that the arbitration provision was unconscionable because it would defeat the public policy of the *Class Proceedings Act, 1992* (Ontario), the Court held that there is no reason to prefer the public policy represented in the *Class Proceedings Act* over that represented in the *Arbitration Act*.

The plaintiffs also argued that the arbitration clause was unconscionable as it amounted to a waiver of any remedy by the customers because no customer would pursue arbitration given the small amount of money involved. The Court rejected this argument on the basis that there was no evidence that any customer had tried to arbitrate and had been put off from doing so because of the expense of arbitrating. Further, the Court noted that arbitrators are authorized to award the costs of arbitration.

(cont'd on page 4)

# Bringing the Foreign Tort Home

by Lise Favreau

When can foreign defendants be sued in Canada for a tort committed outside of Canada? Five recent decisions from the Ontario Court of Appeal (the "OCA") provide clear guidance in this previously murky area. The cases dealt with claims by Ontario residents who were injured while travelling abroad.

The OCA outlined eight factors to guide the courts in deciding whether to assume jurisdiction over a foreign defendant. These factors are intended to provide a proper balance between the plaintiff's and foreign defendant's respective rights to be treated fairly, and the need to respect the principles of comity between states.

The first factor to be considered is the connection between the forum and the plaintiff's claim. Canadian courts have assumed jurisdiction over foreign defendants where their conduct caused an injury in Canada. Under this factor, even where the initial injury occurred in a foreign jurisdiction, if the plaintiff received medical attention in Ontario and continued to suffer damages in Ontario, this would weigh in favour of proceeding in Ontario. Where the initial injury is sustained outside of Ontario, this factor may not outweigh the others.

The second factor for consideration is the connection between the forum and the foreign defendant. If the foreign defendant had no direct contact with Ontario, and did not behave in a way that suggests that it intended to submit to the jurisdiction of Ontario courts, this factor weighs in the defendant's favour. In two of the cases considered by the Court, the foreign defendants provided services to tourists travelling to the defendants' countries of residence. Ontario tourists were injured in the two foreign countries, and sued in Ontario upon their return. There was no evidence that the foreign defendants offered services to tourists who were predomi-

nantly from Ontario or that the foreign defendants took any steps in Ontario to entice residents to travel to the foreign country and use their services. The Court stated that the mere fact that it was foreseeable that injured tourists might bring claims in their home jurisdictions could not be sufficient to confer jurisdiction on an Ontario court over the Ontario tourists' claims.

The third and fourth factors concern potential unfairness to the parties in assuming or not assuming jurisdiction. The Court stated that where the foreign defendants confined their activities to their home jurisdictions, it would be unfair to them to allow the actions to proceed in Ontario. On the plaintiff side, mere inconvenience does not amount to unfairness in these cases. The plaintiff chose to travel away from Ontario and chose to participate in the activity which led to the injury.

The fifth factor to be considered relates to the involvement of other parties in the suit. In two of the cases, travel agents or tour companies were parties to the action and either were Ontario residents or were foreign residents who had chosen to submit to the jurisdiction and were claiming indemnity from the foreign defendant challenging jurisdiction. The Court acknowledged that there may be some unfairness to these other parties in precluding their indemnity actions against the foreign defendants in Ontario, as doing so might lead to a multiplicity of proceedings. However, it held that the "core" of the action was based in the foreign jurisdiction (that is, where the negligence and initial injury had allegedly occurred and where the defendants who were the central focus of the action were located) and, therefore, the concern over unfairness to these other parties was not sufficient for an Ontario court to assume jurisdiction.

The sixth factor is the Court's willingness to

recognize and enforce a foreign judgment. In Canada, assumption of jurisdiction over a foreign defendant and the enforcement of a foreign judgment against a Canadian entity are reciprocal concepts. Canadian courts will enforce a foreign judgment granted in circumstances where a Canadian court could have assumed jurisdiction. The OCA expressed concern over assuming jurisdiction in the tourist cases as it would be reluctant to recognize a foreign judgment obtained against an Ontario company that provides services to foreign tourists in similar circumstances.

The seventh factor for consideration is whether the case is interprovincial or international in nature. Ontario courts will be more reluctant to assume jurisdiction in international cases than in interprovincial ones.

The eighth and final factor for consideration is comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere. The Court emphasized the need to consider standards of jurisdiction, recognition and enforcement of judgments in international law and in the foreign defendant's jurisdiction.

These recent decisions on jurisdiction will make it difficult for a plaintiff to bring a claim in Canada against a foreign defendant based on injuries sustained in a foreign country absent some activity by the foreign defendant in Canada. However, it remains the case that if a foreign defendant offers goods or services in Canada and injuries are sustained, the foreign defendant will likely have to defend any claim brought by that plaintiff in his or her province.



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## Blakes' Class Actions Seminar, October 10, 2002

Blakes' Class Action Team will host a breakfast seminar, *In Defense of Business: Managing Class Actions*, and will provide insights on strategies to manage class actions and lessen their potential impact. Topics include: Status Report—update on today's class action environment and

new legislation across Canada; What to Watch For—cross-border trends and potential implications for Canadian businesses; plaintiff counsels' tactics; Why Worry—financial exposure, internal inconvenience, public perception and stakeholder impact; How to Defend—offensive

and defensive strategies and management of the process.

For information or to register, contact Lynn Spencer at 416.863.2403 or [lynn.spencer@blakes.com](mailto:lynn.spencer@blakes.com). Register online on our Home Page at [www.blakes.com](http://www.blakes.com) - scroll down to Seminars.

# Costs Awarded Against Crown in Advance of Aboriginal Title Trial

by Kirsten Nicolson

The British Columbia Court of Appeal has upheld an award of costs to a plaintiff First Nation in advance of trial, regardless of the trial's outcome. This interim costs award required the federal and provincial Crowns to share equally in the payment of the Plaintiff's legal fees to conduct the litigation (at an enhanced assessed costs level) including disbursements in their entirety.

The Plaintiff, on behalf of all members of the Xeni Gwet'in First Nations Government and Tsilhqot'in Nation people, made claims of aboriginal rights and title in respect of certain lands within the Cariboo region of British Columbia. The Plaintiff also sought other relief, including declarations concerning the issuance of certain forest licences, injunctions restraining the issuing of cutting permits, damages for infringement of aboriginal title and aboriginal rights and compensation for breach of fiduciary duty.

The Plaintiff had applied to the federal Indian Test Case Funding Program and to British Columbia for funding in order to continue with the litigation through trial. As that application was unsuccessful, the Plaintiff brought an application to court for an order requiring British Columbia and Canada to pay all of its future legal fees and disbursements or, alternatively, the costs in advance of the trial and in any event of the cause. The chambers judge dismissed the application for the payment of the Plaintiff's legal fees, but granted the order for costs in advance.

The chambers judge found that substantial time, effort and money had already been expended in the proceedings and that to continue the trial would require the commitment of substantial financial resources. It was also found that the Plaintiff lacked the resources to proceed further and, unless they were successful on the application for interim costs, they would be unable to continue with the proceedings. Neither British Columbia nor Canada took issue with those findings on appeal.

The federal and provincial governments had argued that before the Plaintiff pursues an order for costs in advance, they should be required to pursue other remedies, specifically, the British Columbia Treaty Process. The chambers judge found that there was public funding available for treaty negotiations under the treaty process but noted that the process has yet to conclude a single treaty. Furthermore, he stated a cloud of uncertainty hung over the entire process because of British Columbia's decision to hold a referendum on treaty negotiations. Thus, treaty negotiations were not a reasonable alternative to litigation for the Plaintiff.

In reference to the Crown's argument that the Plaintiff failed to take advantage of the Treaty Process, the Court stated that the first action in these proceedings was filed in 1990 and the Treaty Commission did not open its doors to accept Aboriginal groups into the Treaty Process until 1993. Furthermore, it was also noted that, while Canada's argument that the Nisga'a Final Agreement was proof that the negotiation process works, Canada failed to mention that the agreement was the result of 20 years of tripartite negotiations, 100 years of Nisga'a activism and protest, and landmark court decisions.

The chambers judge relied upon the British Columbia Court of Appeal's decision in *British Columbia (Ministry of Forests) v. Jules*, sub. nom. *British Columbia (Ministry of Forests) v. Okanagan Indian Band*, in granting the order for costs in advance. The Court of Appeal recognized the jurisdiction of the courts to order costs in advance where the case involved special, exceptional or unique circumstances that outweighed the concerns about pre-judging its outcome. In *Jules*, the Minister of Forests initiated proceedings to stop a band's logging on Crown lands that the band had asserted aboriginal title over. The defendant band, in conjunction with other bands, challenged the constitutionality of the provincial Forest Practices Code where it purported to regulate band logging activities.

In *Jules*, some of the circumstances or factors found to make that case special or exceptional were that the particular facts of the case were of a test case nature, they stood to try rights in a new or largely unexplored domain. As well, the proceedings raised issues of obvious public importance. The Court of Appeal in *Jules* also observed that the honour of the Crown is at stake in all dealings between the Crown and aboriginal peoples and that the discretion of the court in making costs orders must surely be informed by that principle in the particular circumstances of the case. The chambers judge in *Xeni Gwet'in* held that he was unable, in any principled way, to distinguish the case before him from *Jules*.

The Court of Appeal, in upholding the decision of the chambers judge, stated there are likely to be issues determined at trial that would fall into the category of a test case, including but not limited to the reserve creation defence raised by the province. The province claimed that if the Plaintiff establishes aboriginal title at trial, it will argue that their title was justifiably infringed by the Indian reserve creation process.

The Court held that the elucidation of principles in the Supreme Court of Canada's *Delgamuukw* and *Van der Peet* decisions were not exhaustive of the jurisprudence required for determination of claims for aboriginal rights and title.

Given the financial restrictions facing First Nations, decisions such as *Jules* and *Xeni Gwet'in* are of great significance. Leave to appeal the *Jules* decision was recently granted, and the Supreme Court of Canada's ruling will be closely watched by First Nations and those practicing First Nations Law.

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## Professional Notes

Neil Finkelstein, interviewed, "LSUC rejigs specialist certification program", *Law Times*, July 8, 2002.

Brad Berg, author, "Working out there", *209 Canadian Labour and Employment Law Journal*, Vol. 9(2), July 2002.

Bruce Elwood and Joe Wood, co-authors, "An air of reality breathed into securities class actions?", *Class Action Journal*, Federated Press, vol.1, no. 1, 2002.

Ken Mills, presenter, "Privilege and the in-house counsel", *Canadian Petroleum Law Foundation Conference*, Jasper, June 14, 2002.

Ben Jetten, Chair, "Litigating aboriginal claims", *Pacific Business and Law Institute Conference*, Ottawa, June 6 - 7, 2002.

Brad Berg, Martha Cook and Anne Glover, authors, "Director's duties and liabilities", *Canadian Corporate Counsel*, June 2002.

Maria Morellato, speaker, "Enforcing the fiduciary obligation in court", *Litigating Aboriginal Claims Conference*, Ottawa, June 6, 2002.

Paul Cassidy, author, "Federal court ruling hopefully to end "canoe"/NWPA myth", *Environment Policy & Law*, June 2002.

Ben Jetten, speaker, "Litigation based on breach of fiduciary obligation", *Litigating Aboriginal Claims Conference*, Ottawa, June 6, 2002.

Gordon McKee, "Editor-in-Chief, *Class Action Journal*", *Class Action* vol.1, no.1, Federated Press, 2002.

Nigel Campbell and Daniel Bernstein, speakers, "Vicarious liability: An update", *Ontario Bar Association Conference*, "Rogue Brokers: Current Issues in Liability for Investment Fraud and Malpractice", Toronto, May 29, 2002.

Roy Millen, author, "The Role of Law in Balancing Rights and Responsibilities", *The Advocate*, May 2002.

Gordon McKee, speaker, "Overview of Class Actions in Canada", *Insight Conference*, *Preparing for Class Actions*, Calgary, Alberta, March 5 - 6, 2002.

Timothy Reibetanz, editor, "Canadian Guide to Uniform Legal Citation/Manuel de la reference juridique", *McGill Law Journal*, 5th edition, 550pp., Carswell, 2002.

## Class Action Avoided

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Finally, the Court held that the plaintiffs could not avoid a stay of the proposed class action as they had claimed punitive damages. The Court stated that to hold otherwise would effectively make all arbitration agreements optional and thereby erode the clear policy of the legislature, as all a party would have to do to avoid arbitration

is to advance a claim for punitive damages.

Defendant's counsel has advised that this decision has not been appealed. In view of the recent increase in class action litigation in Canada, it is probably not the last word from our courts on this issue but it may be worth serious consideration to include arbitration clauses in

sales and services agreements in the meantime.

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