

FEATURE

LITIGATION ISSUES AND THE INTERNET: Does the Duty and Standard of Care in Negligence Remain the Same When Products Are Distributed Through the Internet?

Thomas G. Heintzman, McCarthy Tétrault

The Duty of Care

If the product distributed through the Internet is a "conventional" product, then the conventional duty of care to the consumer of the product will be owed. However, if the product falls more into the realm of information, and the consequences of the defendant's negligence are largely economic, then the duty of care is more likely to be restricted to "a small class of known persons with a sufficiently close relationship to the giver of the information that the duty of care should apply".¹

How is that "small class of known persons" to be defined with respect to the distribution through the Internet of a product which is largely information? Here, the distinction between "passive" and "active" Internet sites may be of importance. A passive site publishes information to the world at large. An active site requires the user to interact with the site, by "clicking" into it, or providing information to it, or activating some other mechanism in the site. The more a user interacts with the website, supplying information about the user, or eliciting information or advice tailored to that user's purposes, the more likely it is that a Court will find a relationship of proximity giving rise to a duty of care.

Case law supports this distinction. In an English case almost a century old, a newspaper offered financial advice in response to readers' inquiries. The paper printed a reader's letter asking for a good stockbroker and the newspaper's response, which recommended someone who was an undischarged bankrupt. The newspaper was held liable for the financial loss the reader sustained in his dealings with the stockbroker.²

A more recent U.S. case illustrates the other side of the coin – no duty with respect to published informational content. The publisher of a book on gathering and cooking mushrooms, which inaccurately identify a poisonous mushroom as edible, was sued for personal injury caused by the negligent published information. The plaintiff's claim failed because no duty of care was established.³

Until the recent decision of the Ontario Court of Appeal in the Bre-X decision⁴, Canadian case law in the class action field also supported this distinction. If the plaintiff suing in negligent misrepresentation interacted with an intermediary before he or she used or purchased the product, it is unlikely that the Court would certify a class action. Why? Because the duty of care will depend upon the specific relationship between each member of the class and the intermediary, and upon the specific content of the representation made to each member of the class by an intermediary. Conversely, if the representation was a standard one made to all members of the class, it is more likely that a class action will be certified.⁵ The Ontario Court of Appeal in the Bre-X decision seems to have changed all of that, at least if the claim in negligent misrepresentation is brought with another certifiable claim, especially in deceit.

The previous disinclination of a Canadian court to certify a class action is, therefore, the obverse of the Court's inclination to establish a duty of care. The more active the relationship with potential plaintiffs, the more likely it is that a duty of care will be found, but the less likely it is that a class action will be

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QUOTABLE QUOTE

"The more a user interacts with the website, supplying information about the user, or eliciting information or advice tailored to that user's purposes, the more likely it is that a Court will find a relationship of proximity giving rise to a duty of care."

Litigation Issues and the Internet
Page 91

certified. The less active the relationship, the more likely it is that a class action will be certified but the less likely that liability will actually be imposed.

This situation may leave the Internet distributor with a dilemma. The more active it makes its website, the more likely it is that a duty of care will be imposed on it, but the less likely it is that a class action will be certified against it. In the context of a website and distribution of products rather than information, this dilemma will likely be resolved in favour of a more active website, for three reasons. First, when a tangible product rather than information is being distributed, it is likely that a duty of care will be found to exist in any event. Second, the interaction with a website will likely be at the "standardized" end of the spectrum, rather than the "individual interaction" end of the spectrum, at least compared to a personal meeting between a potential plaintiff and an intermediary; accordingly, the increased likelihood of liability through an interactive site may be marginal. Third, the Internet distributor will likely wish to take advantage of the increased opportunity of an interactive site to require the Internet user to "buy-into" the Internet distributor's warnings, limitation of liability and jurisdictional requirements.⁶

Standard of Care

In the case of distribution of products over the Internet, the standard of care will likely be the same as the standard for other methods of distribution, unless there are factual and policy reasons why the standard should be different. A body of expert evidence may develop concerning the proper

level of competence of Internet site operators and distributors. Those operators and distributors will effectively have the burden of demonstrating why their duty of care should be any lower, or higher, than that of other distributors. However, expert evidence will not displace a Court's entitlement to find that a particular level of conduct does not meet the requisite standard of care where injury to the plaintiff was obvious and that such a level of conduct was not reasonable or responsible.⁷

E-commerce may lead to the distribution of products, or advice about them, by persons who are not professionally qualified. That conduct may result in the distribution of a product, such as a standard form of will or contract, or a medicinal product, by non-professionals. In these circumstances, should the standard of care of the professional apply?

In Canada, a breach of a regulating statute is not a tort itself. Rather, the statute will be taken as evidence of negligence, or a standard of care, if breach of the statute is a cause of the resulting damage.⁸ It can be expected that regulatory standards will form the prima facie basis for the standard of care expected for product distribution to the Internet. It will likely be up to those supplying goods through the Internet to establish good reasons why that standard should not apply, or that the standard of conduct adopted by the supplier was reasonable and responsible.⁹

The Internet would seem to be an obvious venue for the application of the defences of illegality and voluntary assumption of risk. However, these defences have been so limited in Canada that they have limited practical

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application.¹⁰ Nevertheless, Internet users can check other sources of information in a matter of moments and without exerting more effort than it takes to manipulate a mouse. Most people who use the Internet regularly are aware that it is a rich environment for spoofs and hoaxes, and information should not necessarily be taken at face value. Accordingly, it may be that the Courts will be much more willing to apply the defences of illegality and voluntary assumption of risk in the context of the Internet than in more traditional environments.

The same may be true with respect to unreasonable reliance. Reliance may be so unreasonable as to negate the duty of care altogether. However, the traditional Canadian approach is that “reliance” that is “unreasonable simply goes to reducing damages otherwise recoverable by the plaintiff; it does not go to cancelling the prima facie liability of the defendant.”¹¹

Jurisdictional and Choice of Law Issues and the Internet

Issues relating to jurisdiction and the Internet have most recently and authoritatively been addressed in Canada in *Braintech Inc. v. Costiuk*.¹² In this case, the British Columbia Court of Appeal quoted extensively from the leading American decision in *Zippo Manufacturing Co. v. Zippo Distribution Company Inc.*¹³

In *Zippo*, the defendant operated a website and an Internet news service. Subscribers to the defendant’s website and Internet news service contracted with the defendant by visiting its website and filling out an application. The plaintiff, located in Pennsylvania, contended that the Pennsylvania Courts had jurisdiction over the defendant, which carried on business in California. In concluding that the Pennsylvania Court could exercise personal jurisdiction over the defendant, the Court held that the determination of personal jurisdiction is dependent upon the “nature

and quality of commercial activity” that a defendant conducts over the Internet. The Court formulated a sliding scale to measure the nature and quality of the defendant’s Internet activity. As discussed above, at one end of the scale the defendant conducts an active business over the Internet. At the other end of the scale a defendant simply posts information on the Internet. In the middle are interactive websites where a user can exchange information with a host computer. The Court concluded that, in the first situation, the defendant is doing business in the Court’s territory, and accordingly is subject to the Court’s jurisdiction, whereas in the second situation, where only a posting occurs, there is no active business being carried on in the Court’s territory and there is no jurisdiction over the defendant. In the middle case, the obtaining of jurisdiction will be fact specific. According to *Zippo*, a website avails itself to a jurisdiction where the defendant enters into contracts with residents of that jurisdiction that involve those residents in repeated transmissions of computer files to the defendant over the Internet. A passive website, on the other hand, does little more than make information available to those who are interested in it, and as such does not subject itself to the exercise of personal jurisdiction by a foreign Court.

In *Braintech*, the British Columbia Court of Appeal relied extensively upon *Zippo* in determining whether or not there was a real and substantial connection between the State of Texas and the Canadian defendant. The plaintiff, a technology company resident in British Columbia and doing business in various jurisdictions in the United States, brought an action in Texas against a

resident of British Columbia, alleging that the defendant had published defamatory information about the plaintiff on an Internet bulletin board. The defendant had no connection with the State of Texas. The material in question was not aimed at residents of the State of Texas, nor had it been read by any residents of that State. The plaintiff obtained a default Judgment in Texas against the defendant. When that Judgment was sought to be enforced in British Columbia, the British Columbia Court of Appeal held that the assertion of personal jurisdiction by the Texas Court over the defendant was improper and ought not to be recognized in British Columbia.

In applying the principle that there must be a real and substantial connection between Texas and the defendant before the Texas Judgment would be enforced, the Court quoted extensively from *Zippo*. The Court concluded that the exercise of personal jurisdiction over the defendant by the Texas Court was improper, as the bulletin board in question was a “passive” posting of information that was not for any commercial purpose. In addition, the Court was concerned that enforcing a default Judgment obtained in Texas on the deemed use of an electronic bulletin board would encourage a multiplicity of actions wherever the Internet is available.

Braintech does not directly consider whether a Canadian Court would have jurisdiction over a foreign defendant for Internet postings. However, since the Court determined that a passive website “does not constitute a real and substantial presence in the forum state”, it would appear that the active/passive analysis performed in *Zippo* and applied in *Braintech* will be helpful in

Reliance may be so unreasonable as to negate the duty of care altogether.

determining whether there was a real and substantial connection created by electronic connections, and therefore both whether a Court should itself exercise jurisdiction, or recognize the jurisdiction of a foreign Court.¹⁴

In *Pro-C Computer Ltd. v. Computer City Inc.* the opposite conclusion was reached than that made in *Braintech*, even though the active/passive distinction was accepted as a good working hypothesis.¹⁵ The issue was whether the plaintiff had made “use” in Canada of its trade-mark through its passive website in the U.S.A. In holding that the “determination of the existence of ‘use’ in Canada requires a holistic approach,” the Court concluded as follows:

“The www.computercity.com website exists for the entire Computer City market. It is part of their merchandising effort with respect to the Canadian market – invariably, Canadians will reach out into cyberspace and access the webpage – although www.computercity.com is a passive website, that fact alone cannot decide the issue of use and jurisdiction. The site must be seen in the context of the overall merchandising strategy of Computer City given the existence of a store locator service to Canadians, the exposure of Canadians to the website and the phenomena of cross-border shopping, one cannot rule out the possibility of Canadians purchasing a WINGEN even though the product was not sold in the Canadian stores. The use of the WINGEN trade-mark at www.computercity.com is, for the reasons enunciated, a “use” in

Canada and therefore comes within the ambit of The Trade-marks Act.¹⁶

The primary geographic factors which determine both the issue of jurisdiction and the law which applies to liability will be the place where the defendants’ wrongful conduct occurred, the place where the product was purchased or obtained, the place where the damage occurred and/or the place where the defendant carries on business.¹⁷ In the initial decision of a Court to accept an action for trial, those factors are determined by the provision of that Court’s Rules of Civil Procedure which entitle that Court to assume jurisdiction if the tort is committed, the damage is sustained, or the defendant carries on business in that province.¹⁸ Even if those Rules confer initial jurisdiction, the Court may decline jurisdiction if the courts of another province or state may more conveniently try the claim.¹⁹

The places where the plaintiff’s damage and the defendant’s manufacturing activity occurred are unlikely to be affected by the Internet interface between the parties. But that interface may have an important bearing on the defendants’ liability, or on where the defendant carries on business. If, on the *Braintech* analysis, the maintenance of an active website means that the defendant is conducting business wherever its customers are located, that will result in the defendant being subjected to the jurisdiction of many provinces and states.²⁰ In addition, if the defendant’s Internet statements about its product – the warnings it gave or failed to give, or the alleged deceitful statements it made – are the important elements in determining liability, again

a Court may well determine that the substance of the alleged wrong or damage occurred where the Internet interactive website was activated by the plaintiff, especially if the other events (the plaintiff’s residence or the defendant’s manufacture) are found in disparate geographic locations.²¹

In a similar fashion, when it comes to enforcing an Ontario Judgment in the Court of another province or state, the decisions of *Braintech* and *Zippo* have shown that the “location” of the Internet interface may be a pivotal factor in that other Court holding that there was a real and substantial connection between the claim and Ontario.²²

Tolofson v. Jensen established that, in the common-law provinces, the law of the place where the tort occurred is the law that should be applied.²³ The statements made on the defendant’s website may influence the Court’s decision about where the defendant carried on business. Similarly, the “location” of the Internet interface may influence the decision about where the substance of the tort really occurred. If the real allegation about the defendant’s product concerns the sufficiency of the defendant’s warnings, or the alleged deceitfulness of the defendant’s statements about the product, then a Court may well hold that the law of the place where those warnings or disclosures to the plaintiff were really made should be applied. Again, the passive or active nature of the defendant’s website may be a critical factor in that determination.

Can Liability Be Excluded Over the Internet?

Canadian Courts are willing to enforce agreements arising from “click-wrap” contracts made through the Internet.²⁴ In the *Rudder* case, the Court accepted the defendant’s argument that, by clicking “I agree”, the plaintiff had accepted the terms of the Internet contract. Since all the terms of the agreement were presented in the same format, they were all equally binding, and the online

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agreement was “not materially different from a multi-page written document which requires a party to turn the pages”.²⁵ However, if the website does not require the user to expressly accept terms and conditions on the website before using it, then the mere fact that terms are shown on the website will likely not constitute a sufficient acceptance. Thus, in *TicketMaster Corp. v. Tickets.com*,²⁶ terms and conditions at the bottom of a home page, which could not be seen unless the user scrolled down to the bottom of the page, and which did not require the user to accept the conditions, were held not binding upon the user. Similarly, in *North American Systemshops Ltd. v. King*, the Alberta Court accepted the purchaser’s argument that it was not bound by the licence statements contained in a mass-marketed software program because they were not brought to his attention at the time that he paid for the product.²⁷

If the Internet access does impose a contract on the plaintiff, then a Canadian Court will not allow the plaintiff to escape the jurisdictional, choice of law, or limitation clause merely by suing in tort.²⁸ Accordingly, if the website stipulates a contract of sale or licence between the distributor and website user, then the provisions of that contract, both as to the liability, and as to the choice of law and jurisdiction, will apply to the user. Even if there is no contract between the plaintiff and the defendant, the terms posted on the website may still provide warnings and other information by which the Internet distributor may reasonably limit the basis of its liability to the user.

Subject to statutory provisions to the contrary,²⁹ a defendant can, at least with respect to representations, state the basis upon which it makes its distribution, and thereby influence the question of whether the defendant owed a duty of care.³⁰

Furthermore, a distributor is entitled,

It is clear that the wording on a website may substantially influence the basis of tort liability of the website distributor to the public.

indeed obliged, to provide warnings to potential users of the product about the appropriate use, and the damages associated with the product.³¹ In these circumstances, it seems reasonable that it can effectively do so on a website.

Thirdly, in considering the issue of voluntary assumption of risk, Canadian Courts have said that, in exceptional circumstances a plaintiff may be taken to have voluntarily accepted risk; furthermore, factors going to risk can influence the duty and standard of care owed by the defendants.³² Again, it seems reasonable that a distributor should be able to state on a website factors going to risk, and that a user should be able to accept those factors through a website.

Fourthly, Canadian law has recently recognized that contractual limitation clauses may be relied upon by third parties to a contract. In this process, the privity of contract rule has been substantially eroded. A contractual term may be relied upon by the third party if it is clear that it was intended to apply to that third party, and the activities giving rise to the claim falls within the intended scope and application of the term. In these circumstances, a limitation of liability to which an Internet user agrees may provide a defence for a much broader group of entities than the website operator with which the agreement was made.³³

With this background, it is clear that the wording on a website may substantially influence the basis of tort liability of the website distributor to the public. The distributor is entitled to state the way and the circumstances in which the product is to be used, and failure to

abide by those instructions would likely be a defence, assuming that the plaintiff ought reasonably to have been aware of and followed those instructions. How much further a notification on a website might negate an existence of a duty of care, or change the standard of care, will be a matter of considerable doubt in every case. The doubt will arise because of the very wide distribution which the product may achieve through the Internet, and the impact of local laws with respect to limitations of liability.

In view of this uncertainty, an Internet distributor may have considerable doubts about the degree or extent to which it has limited its liability to the plaintiff through statements contained on its website, absent an express contractual relationship of some sort with the plaintiff. In these circumstances, a distributor of products over the Internet may well insist on an express contractual relationship with the user through a “click-I accept” system, or on an express waiver, limitation of liability or acceptance of warnings, through a click “I accept” system.

References

- 1 G.J.G. Smith, ed., *Internet Law and Regulation*, 2d ed (London: FT Law & Tax 1997) at 92; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at 186-200. U.S. Courts have had to address the distinction between “products” and “information” more directly because of strict liability for products. In *James v. Meow Media*, 90 F. Supp. 2d 798 (2000 U.S. Dist.), Online: Lexis 5330, it was held that the online distributor of violent and pornographic movies and video games was not liable to the parents of a boy killed in a school shooting in Kentucky. According to an adolescence psychiatrist, the killer, a 14-year old boy, had been influenced by these materials. The Court held that “product liability” did not arise since the movies, video games and Internet published

- materials did not arise from the physical characteristics of these materials themselves, but from the ideas and thoughts contained in them. The “intangible thoughts, ideas and messages” contained in those media were not products for the purposes of the strict liability doctrine, nor was liability and negligence to be imposed.
- 2 *De La Bere v. Pearson Ltd.* [1908] 1 K.B. 280.
 - 3 *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991).
 - 4 October 31, 2000, unreported; see www.ontariocourts.on.ca/decisions/2000/october/carom.htm
 - 5 *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39; aff’d (1995), 21 O.R. (3d) 453 (Div. Ct.); *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173; aff’d 46 O.R. (3d) 315 (Div. Ct.); *Controltech Engineering Inc. v. Ontario Hydro*, [1998] O.J. No. 5350; aff’d [2000] O.J. No. 379 (Div. Ct.); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (O.C.G.D.); *Peppiatt v. Nicol* (1993), 16 O.R. (3d) 133 (O.C.G.D.); *Maxwell v. MLG Ventures*, [1993] O.J. No. 1136 (O.C.G.D.).
 - 6 See the discussion under *Rudder v. Microsoft Corp.*, below.
 - 7 *Bolitho v. City and Hackney Health Authority*, [1998] A.C. 232 at 239-241
 - 8 *The Queen in Right of Canada v. Saskatchewan Wheat* (1983), 143 D.L.R. (3d) 9 (S.C.C.)
 - 9 *Adams v. Rhymey Valley District Council*, U.K. Court of Appeal, July 20, 2000, NLJ Practitioner, August 4, 2000.
 - 10 *Lambert v. Lastoplex* (1971), 25 D.L.R. (3d) 121 (S.C.C.); *Hall v. Hebert* (1993), 101 D.L.R. (4th) 129 (S.C.C.).
 - 11 *Grant Restaurants of Canada v. City of Toronto* (1981), 123 D.L.R. (3d) 349 (Ont. H.C.) at 367.
 - 12 (1999), 171 D.L.R. (4th) 46 (B.C. C.A.); leave to appeal refused March 9, 2000.
 - 13 952 F. Supp. 1199 (W.D.Pa. 1997).
 - 14 Barry Sookman, *Sookman: Computer, Internet, and Electronic Commerce Law* (Toronto: Carswell, 2000), Vol. 3, pp. 10-126, chapter 11 (“Sookman”). The Alberta Securities Commission applied the Braintech analysis and other facts relating to the principals and the activities of an Internet stock exchange, and held that the Internet operator in the Cayman Islands was carrying on business as a stock exchange in Alberta: *Re World Stock Exchange et al* (Alberta Securities Commission, February 15, 2000). Similarly, the Newfoundland Court has upheld its jurisdiction to entertain an action brought by Newfoundland investors against a California company based upon Internet access of such investors to investment information: *Alteen v. Informix Corp.*, [1998] N.J. 122, and the Alberta Court of Appeal has recently held that the Courts of Alberta had jurisdiction over a distributor of U.S.-based satellite signals and technology to capture their signals in Canada, by reason of the entry of the defendant’s signal into Alberta and the access to that signal obtained by Alberta residents using decoders activated by the defendant: *United States Satellite Broadcasting Company v. WIC Premium Television Ltd.* (May 17, 2000; www.albertacourts.ab.ca). In contrast, an Australian court refused an injunction against a foreign Internet operator because of the futility of enforcing it: *Macquarie Bank Ltd. v. Berg*, unreported, June 2, 1999 (N.S.W.S.C.).
 - 15 *Pro-C Ltd. v. Computer City Inc.* [2000] O.J. No. 2823 (Sup. Ct.).
 - 16 *Pro-C Computer Ltd.*, supra, at para. 133-136.
 - 17 *Moran v. Pyle National*, [1975] 1 S.C.R. 54; *Tolofson v. Jensen*, [1994] S.C.R. 1022.
 - 18 Ontario Rules of Civil Procedure, Rule 17.02(g)(h) and (p).
 - 19 Ontario Rules of Civil Procedure, R.R.O. 1990, Reg 194 as amended, Rule 17.06(2)(c).
 - 20 *Old North State Brewing Co. v. Newlands Services Inc.* (1998), 58 B.C.L.R. (3d) 144 (C.A.).
 - 21 *Moran v. Pyle National*, supra; *National Bank of Canada v. Clifford Chance* (1996), 3 O.R. (3d) 746 (Gen. Div.).
 - 22 *De Savoye v. Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077; *Hunt v. TLC* (1993), 109 D.L.R. (4th) 16 (S.C.C.); *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897.
 - 23 See *Moran v. Pyle National* and *Tolofson v. Jensen*, supra. However, this rule is not inflexibly applied and if, for instance, there is a common residence where both the defendant and plaintiff live, then the law of that place may be applied, not the law where the tort occurred: *Hanlan v. Seresky* (1997), 35 O.R. (3d) 603. In Quebec, see Articles 3126-3128 of the Civil Code of Quebec which provide that, in various circumstances, the law which applies may be the law of the place where the injurious act occurred; the place where the injury appeared; the place of the manufacturer’s residence; or the place where the moveable was acquired.
 - 24 *Rudder v. Microsoft Corp.*, [1999] O.J. No. 3778. See also *Compuserve v. Patterson*, 39 U.S.P.Q. (2d) 1502 (6th cir 1996); *Hotmail v. Van\$ Money Pie Inc.*, 47 U.S.P.Q. 2d 1020 (N.D.Cal., April 20, 1998); in Canada, a Court can decline to enforce a forum selection clause in exceptional circumstances: *Rudder* at para. 19-21.
 - 25 *Rudder*, supra, at para. 14.
 - 26 2000 U.S. Dist. LEXUS 5443, 54 U.S.P.Q. 2D (B.N.A.) 1344.
 - 27 (1989), 68 Alta. L.R. (2d) 145 (Q.B.) See similarly, *Gregorio v. Intrans - Corp.* (1994), 115 D.L.R. (4th) 200 (Ont. C.A.); *Trigg v. M.I. Movers International Transport Services Ltd.* (1991), 84 D.L.R. (4th) 504 (Ont. C.A.). *Contrast Pro CD Inc. v. Zeidenberg*, 86 F. (3rd) 1447 (7th Cir. 1996).
 - 28 *Bow Valley Husky (Bermuda) Ltd. v. St. John Ship Building Ltd.*, [1997] 3 S.C.R. 210; *London Drugs & Kuehne & Nagel*, [1992] 3 S.C.R. 299; *Corfax Benefits Systems Ltd. v. Fiducie Desjardins Inc.* (1997), 37 O.R. (2d) 50 (Gen. Div.); *Fraser River Pile v. Can-Dive Services*, [1999] 3 S.C.R. 108.
 - 29 Consumer Protection Legislation may prohibit clauses limiting liability: see Consumer Protection Act, R.S.O. 1990 C.31, section 34(2).
 - 30 Thus, in *Hedley Byrne v. Heller*, [1964] A.C. 465, the House of Lord found that, while there was a negligent misrepresentation, there was no liability because the representation was made on the express understanding that there was no duty of care.
 - 31 *Bow Valley Husky (Bermuda) Ltd. v. St. John Ship Building*, [1997] 3 S.C.R. 1210; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Air Canada v. McDonnell Douglas*, [1989] 1 S.C.R. 1554.
 - 32 *Dube v. Labar*, [1986] 1 S.C.R. 649; *Crocker v. Sundance Northwest Resources Ltd.*, [1988] 1 S.C.R. 1186.
 - 33 *London Drugs Ltd. v. Kuehne & Nagel*, supra; *Fraser River Pile v. Candrive Services*, supra; *Madison Developments v. Plan Electric Co.* (1997), 36 O.R. (3d) 80 (C.A.); *N.A.N.-B & W Diesel v. Kingsway Transports Ltd.* (1997), 33 O.R. (3d) 355 (C.A.); *Tony and Jims Holdings Ltd. et al v. Silva* (1991), 4 O.R. (3d) 633 (C.A.)

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