 Jurisdiction, Forum non conveniens, and Choice of Law

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Analysis:

Background - Jurisdiction and Forum Non Conveniens

Conflict of laws rules in Canada have developed through inter-provincial litigation, but jurisdiction over international cases has generally been determined through the same legal analysis.¹ These rules developed gradually and cautiously, out of sovereignty concerns. The result was that traditionally, it was difficult for domestic plaintiffs to sue foreign defendants in home courts.² During the 1970s, this traditional approach was eroded as courts recognized that treating defendants who did business in one province but lived in another, as ‘foreigners’, was somewhat artificial. In the early 1990s, several inter-provincial cases were resolved by the S.C.C., which revolutionized this area of law.³ More recently, it appears the Ontario Court of Appeal restricted it anew.

The real change came with Moran v. Pyle,⁴ where the plaintiff’s husband was fatally electrocuted in Saskatchewan while changing a lightbulb that was manufactured in Ontario. At issue was where the tort occurred. The Supreme Court articulated the principle that the situs of the tort could be where the injury “occurred”, and that forum could assume jurisdiction over the claim.

A two-stage common law test for deciding adjudicative jurisdiction emerged.⁵

¹ The recent case of Beals v. Saldanha, [2003] 3 S.C.R. 416 suggests that there is little difference between the enforcement of foreign judgments for international and inter-provincial cases, as they would both be determined according to whether there was a “real and substantial connection” between the claim and the foreign court.

² Muscutt v. Courcelles, infra.

³ Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, which held that Canada’s federal constitutional system requires a real and substantial connection to a claim and the forum where it is heard. Once this is met, recognition and enforcement within the federation should follow; Hunt v. T. & N. plc, [1993] 4 S.C.R. 289, which stands for the principle that comity concerns across Canadian provinces means that one province’s statute cannot have extra-territorial reach; and Tolofson v. Jensen, [1994] 3 S.C.R. 1022, described infra.

⁴ [1975] 1 S.C.R. 393. Also in 1975, the Ontario Rules governing service outside the jurisdiction were amended and many of the traditional constraints were removed. In Ontario, R. 17.02 allowed service under specifically enumerated categories without permission from the court. R. 17.03 allowed for service outside the jurisdiction with permission from the court for further categories not enumerated.

⁵ That Canada’s jurisdiction analysis for inter-provincial torts is a common law test differentiates us from the U.S., where the jurisprudence is governed by the Full Faith and Credit Clause of Article IV of the Constitution.
• **First**, does the court have jurisdiction *simpliciter* to hear a dispute, considering the principles underlying comity, namely fairness, order, jurisdictional restraint, and whether a “real and substantial connection” exists with the forum.6

• **Second**, if so, does the *forum non conveniens* doctrine require waiving the exercise of jurisdiction.7

If jurisdiction was to be assumed over out-of-province defendants, the system of law to be applied – domestic or foreign – was determined as a third step; usually, this was the law where the tort occurred,8 although exceptions could be made in the name of fairness.9

Importantly, the two-stage test for jurisdiction weighs various factors that infuse the doctrine of comity. “Comity” is a cornerstone of conflict of laws rules. A difficult term to define, it is rooted in concerns about sovereignty of nations, the inherent ability of states to adjudicate over their internal affairs, and the reticence of states to impede on others’ jurisdiction.10 This vaguely definable notion has long provided an excuse for courts not to adjudicate on a foreign matter: “it violates the principle of comity.” Where judicial systems are similar, it provides a means for assuming jurisdiction; the converse is true where judicial systems are dissimilar. The real and substantial connection test, we now know from *Spar Aerospace*,11 evolved as a mechanism to ensure jurisdictional restraint among equal provinces in the Canadian federation because of comity concerns.

**Ontario Rules of Civil Procedure**

Territoriality over the defendant or the subject matter is the principle that governs civil jurisdiction in Canada.12 This means that generally, the forum where the tort occurred has jurisdiction over the claim.

Rule 17 of the *Ontario Rules of Civil Procedure*13 is the regulated exception to the territoriality principle, governing “Service outside Ontario.” The originating process of a tort

6 *Morguard Investments*, supra note 3.

7 *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897. The factors to be considered in a *forum non conveniens* analysis are discussed below, and come from the UK case *Spiliada Maritime Corp. v. Cansulex Ltd.* , [1987] A.C. 460.

8 *Tolafson*, supra note 3.


10 The Supreme Court of Canada has defined comity as follows: “‘Comity’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws.” Quoted in *Morguard Investments Ltd. V. De Savoye*, supra note 3 at para. 31, citing Estey J. in *Spencer v. R.* [1985] 2 S.C.R. 278 at 283.

11 [2002] 4 S.C.R. 205. Note that since *Spar Aerospace* dealt with the correct application of Quebec *Civil Code* provisions concerning international jurisdiction, it is not relevant to this case and is not discussed here.

action may be served outside Ontario, without leave of the court, where the proceeding involves those types of claims listed in R. 17.02. The relevant sub-provisions are:

A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims, […]

(g) Tort committed in Ontario – in respect of a tort committed in Ontario;
(h) Damage sustained in Ontario – in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence wherever committed;

Reading provisions (g) and (h) together show that (h) foresees damage arising in the province for an injurious act occurring outside the province. Courts have given the “damage sustained” rule in (h) a generous and liberal interpretation, construing “damage” to include both physical and mental suffering arising from extra-territorial acts. The underlying purpose of this rule is to allow Ontarians easier access to their home courts.

Although several cases have made it clear that “serving” a defendant ex juris – outside the jurisdiction – is not tantamount to the assumption of jurisdiction for out-of-province torts, especially because there is room in the overall scheme for such service orders to be challenged, it is generally how a jurisdiction claim is initiated in Ontario, as an exception to the territoriality principle.

Rule 17.06 allows a defendant to seek a stay of the proceedings on a number of grounds, including that Ontario is not a convenient forum for hearing the proceeding. Thus built into these Rules is the two-part jurisdiction test that the Supreme Court has detailed: [the initiating process for] jurisdiction simpliciter and forum non conveniens.

1. What is the likelihood of an Ontario court assuming jurisdiction over a claim against a potential Ontario-based defendant?

14 Muscutt, infra at 173.
16 Sharpe, J.A. in Muscutt, supra note 13 at 172 explains that this ‘damage sustained’ rule was a legislative response to an inadequacy highlighted in Moran v. Pyle, supra at 408-09. In that case, the issue was the product liability of goods made in one jurisdiction but ultimately used by the plaintiff in another jurisdiction. The SCC said the overriding concern was to allow a plaintiff to access local courts for damage ’sustained’ in the jurisdiction.
17 Muscutt, supra at 178, referring to R. 21.01(3)(a), and R. 17.06, infra.
18 See 17.06(2)(c). This can also be done through the Courts of Justice Act, R.S.O 1990, Chap. C.43, s. 106: “Stay of proceedings – A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.”
Muscutt v. Courcelles (2002), 60 O.R. (3d) 20 (C.A.) (“Muscutt”) is the leading Ontario case governing jurisdiction and forum non conveniens. This was an inter-provincial case, argued with four international appeals. This decision lays out a more detailed approach to the jurisdiction simpliciter analysis than before seen. Each appeal was argued on the basis of R. 17.02(h), that damage was “sustained” in Ontario, even though the negligent act occurred elsewhere. Crucially, of the quintet, the Ontario Court only assumed jurisdiction over Muscutt, the sole inter-provincial case.

In Muscutt, Sharpe, J.A. reiterated the two-part analysis for assuming jurisdiction. The jurisdiction simpliciter analysis at stage 1) is given a low threshold; this is mitigated by the forum non conveniens analysis at stage 2). Sharpe, J.A. states at p. 177:

This residual discretion assumes that the forum is not the only one that may hear the case. The real and substantial connection test requires only a real and substantial connection, not the most real and substantial connection… the residual discretion therefore provides both a significant control on assumed jurisdiction and a rationale for lowering the threshold required for the real and substantial connection test. [emphasis added]

In practice, however, Sharpe’s stage 1) analysis belies his claim of its low threshold when the claim is international in nature. Only when jurisdiction simpliciter is found, is the forum non conveniens analysis undertaken. Jurisdiction simpliciter was not found for any of the international claims.

Sharpe, J.A. notes that none of the case law from the Supreme Court of Canada clearly defines what is meant by a ‘real and substantial connection.’ The case law only indicates the test is discretionary and flexible, and must be guided by requirements of order and fairness. Sharpe identifies a test of eight factors, taken from jurisprudence across the country, for Ontario courts to consider. No factor is determinative; all must be weighed together.

The first four factors weigh concerns about fairness to the plaintiff against fairness to the defendant, as well as the connection each party has to the forum. The next two factors consider the involvement of other parties to the suit, and whether the court would recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis. The seventh factor looks at whether the case is inter-provincial or international in nature. Importantly, this factor supports assuming jurisdiction over inter-provincial disputes, but not over international ones. The eighth factor considers comity and the standards of jurisdiction, recognition, and enforcement prevailing elsewhere. For international tort claims, factors seven and eight appear determinative.

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20 In Muscutt, which involved an automobile accident-related claim, an important factor seemed to be that automobile insurance schemes were nation-wide, favouring the same standard across the country. It is difficult to accept that this one factor was determinative, however, when jurisdiction over every one of the international cases in the quintet was rejected.
In Muscutt, the court found that where the case is international in nature, the comity factor is more closely scrutinized to see if, in spite of this hurdle, jurisdiction can be assumed. Implied comity concerns would look for a different quality of justice in the foreign jurisdiction, including unfair process, quality of judges, and final review for the proper exercise of jurisdiction. Where a case is transnational, there will also be greater concerns about sovereignty or the difficulty of applying foreign law.

These factors for international cases seem to trump fairness to the plaintiff. In the four international cases of the Muscutt quintet, Sharpe, J.A. looked to the international standards for jurisdiction, and found that none were broader than the Canadian default rule, which situates jurisdiction in the place where the injury occurs.

**Application of Muscutt factors to this case**

1. **Connection between the forum and the plaintiff’s claim**

2. **Connection between the forum and the defendant**

3. **Unfairness to the defendant in assuming jurisdiction**

4. **Unfairness to the plaintiff in not assuming jurisdiction**

5. **Involvement of other parties to the suit**

6. **Court’s willingness to recognize and enforce extra-provincial judgment rendered on the same jurisdictional basis.**

In Beals v. Saldhana, the Supreme Court of Canada held that the real and substantial connection test also applied to determine whether a Canadian jurisdiction would enforce a foreign judgment. Therefore, this factor requires us to consider whether in a reverse scenario, a foreign court would have jurisdiction over this type of claim. If so, our courts would likely enforce the judgment of that foreign court.

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21 Supra, note 1.
7. Whether the case is international or interprovincial in nature

In all the international cases of the Muscutt quintet, the Court simply found that jurisdiction is less favourable because of comity concerns.


2. What is the likelihood of success of a forum non conveniens argument, should a potential defendant raise it?

Only when jurisdiction simpliciter is found, a forum non conveniens analysis is undertaken. Since jurisdiction is declined at the simpliciter stage for the four international cases of the Muscutt quintet, a forum non conveniens analysis is deemed unnecessary.

In the Muscutt decision itself, the forum non conveniens analysis is brief. At para. 41, the Court of Appeal lists the following factors for consideration when determining whether another forum is clearly more appropriate:

- the location of the majority of the parties
- the location of key witnesses and evidence
- contractual provisions that specify applicable law or accord jurisdiction
- the avoidance of a multiplicity of proceedings
- the applicable law and its weight in comparison to the factual questions to be decided
- geographical factors suggesting the natural forum
- whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.

In many respects this test re-visits the criteria already considered in the real and substantial connection test; many have commented on the difficulty of clearly distinguishing the two steps of the test for jurisdiction.\(^\text{22}\) Sharpe, J.A. decided, in light of the facts of that case, that Ontario was the most convenient forum for the action.

Forum of Necessity

Note this would be a novel case to argue the principle of “forum of necessity” in Ontario. Article 3136 of Quebec’s Civil Code\(^\text{23}\) allows for jurisdiction to be assumed, even when a “real and substantial connection” to the forum is not found, when “necessary” grounds are pleaded. This can include the inability to litigate the case in the foreign jurisdiction; state


\(^{23}\) L.Q. 1991, c.64.
breakdown; fear of safety, etc. At present, Ontario legislation is silent on *forum conveniens* and Ontario judges have not created it through the common law.

Some hope has been provided in Nova Scotia, however, through the line of cases following *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S.C.A.), namely *O’Brien v. Canada (Attorney General)*, [2002] N.S.J. No. 57 and *PCI Chemicals Canada Co. v. ABB Trasmissione & Distribuzione S.p.A.*, [2004] N.S.J. No. 20. These cases applied the real and substantial connection test as articulated in *Morguard* and *Hunt*, even though *PCI Chemicals* was decided after *Muscutt*, and considered fairness as an underlying principle in evaluating the connection to the forum. In all cases, where the *Muscutt* test might not have allowed for jurisdiction, nonetheless jurisdiction *simplyciter* was taken.

3. **What is the likelihood of foreign law being applied in this case and if so, what would be the impact on quantum of damages?**

*Background – the General Rule in Conflicts of Laws*

*Tolofson v. Jensen*\(^2^{24}\) is the leading Supreme Court of Canada decision on choice of law. The Supreme Court held that, as a general rule, the *lex loci delicti* (law where the tort occurred) should govern a claim, rather than the *lex fori* (law of the forum). The following sets out the general rule, and the narrow recognized exception to it.

Importantly, the *lex loci delicti* is *substantive* only. Matters of procedural law are governed by the forum where the claim is heard. Janet Walker sets out the scope of the general rule as follows:

> The *lex loci delicti* determines the tortious character of the conduct; the standard of care; the duty owed to the plaintiff…; causation; conditions for liability; contributory negligence and assumption of risk; imputed negligence; joint liability; the question whether an interest is entitled to legal protection; defences including the statute of limitation; duty or privilege to act; and survival of the action. **With respect to damages and contribution, the *lex loci delicti* covers questions of remoteness and the heads of damage, whereas their quantification, that is the measure of damages, is governed by the *lex fori*.\(^2^{25}\)** [emphasis added]

Janet Walker also states:

> Civil actionability by the *lex loci* denotes civil liability in accordance with the *lex loci* including the extent of such liability. The provisions of the *lex loci* denying, limiting or qualifying the recovery of damages must be taken into consideration.\(^2^{26}\)

\(^{24}\) *Supra*, note 3.


In *Tolofson v. Jensen* at pp. 88-89, the Court held that a limitation period is a substantive issue, as is a bar to actions by virtue of legislation.

**Exceptions to the General Rule**

The Court held that a fixed rule without exceptions is more important within Canada than in the case of international torts. At para. 49, Justice La Forest stated:

> ...because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.

Where the parties are residents of Canada, but the injurious act occurred elsewhere, this might provide an exception. Specifically, at para. 45, Justice La Forest stated:

> There may be room for exceptions but they would need to be very carefully defined. It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens in State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces. **What is really debatable is whether State A, or for that matter Province A, should be able to do so in respect of transactions in other states or provinces between its own citizens or residents.** [emphasis added]

Justice La Forest then went on to reject as unsound the following, further limiting possible exceptions to the general rule:

- the assumption that it is within the reasonable expectations of the parties that their home law would apply to an action between them. He indicates that it was instead reasonable for parties to expect to be governed by the law of the state where they were at the time of the wrong.
- the “public policy” argument that it would be unjust and unfair to apply the law of another state if some aspect of that law was considered contrary to the public policy of the forum as reflected in its own law. Rather, he stated that differences in applicable laws are “a concomitant of the territoriality principle” (p. 1058 S.C.R.)
- the idea that today there is any problem for courts to hear evidence of, then apply the law of another jurisdiction.

Therefore, although the Court admitted there could be exceptions to the general rule where it would otherwise work an injustice, the only clear articulation of such an exception was where the claim exclusively concerned Canadian residents. This exception was taken up in *Wong v. Wei*, [1999] B.C.J. No. 768 (S.C.), *Lau v. Li* (2001), 53 O.R. (3d) 727 (S.C.J.), and *Lebert v. Skinner* (2001), 53 O.R. (3d) 559 (S.C.J.). In all these cases, the plaintiffs were involved in car accidents either outside the province or outside the country, and no negligence was alleged on the part of any foreign party. Thus the Courts held that since the cases were connected in all significant respects with the forum, the *lex fori* would be applied. These cases also relied on *Hanlan v. Sernesky* (1997), 35 O.R. (3d) 603 (Gen. Div.), aff’d (1998) 95
O.A.C. 297 (C.A.), which borrowed from Justice Major’s concurring reasons in *Tolofson v. Jensen*, when he stated at para. 103:

La Forest, J. has recognized the ability of the parties by agreement to choose to be governed by the lex fori and a discretion to depart from the absolute rule in international litigation in circumstances in which the lex loci delicti rule would work an injustice.

In *Hanlan v. Serensky*, the action was between two parties, residents of the same province, and the only factor connecting them with the foreign jurisdiction was the fact that the incident took place there. A significant factor that the Court considered in exercising its discretion was that the *Family Law Act* claim was not permitted under the foreign forum’s law.

This jurisprudential trend was halted by the Ontario Court of Appeal with the case of *Wong v. Lee* (2002), 58 O.R. (3d) 398. In this case, an Ontario resident was injured in a single-car accident in New York state while travelling as a passenger in a car owned and driven by Ontario residents. New York law was applied to the claim. The Court held that the exception to the general rule that proper substantive law is the *lex loci delicti* is only available where the application of the general rule would give rise to an injustice. Further, the *lex fori* should not be applied simply because all parties are residents of the forum. Further still, ordinary differences between the laws of the forums are not enough to work such an injustice.

Thus the Court of Appeal re-articulated the narrow exception set out in *Tolofson v. Jensen*. In doing so, however, it cited *Hanlan v. Serensky* with approval. That stated, it is difficult to distinguish *Hanlan* from the other international single-vehicle cases cited above. Perhaps it was the constellation of all factors, including the bar of an *FLA* claim, the governing insurance scheme, the medical treatment in Ontario, and the residence of both parties in Ontario, that pushed this case over into exceptional terrain. Obviously it is a case we will want to analogize and rely upon, as it remains good law. Otherwise, the case law offers no clear guidance about exceptions to the general rule.

Janet Walker states:

The court will discount fortuitous contacts and weigh contacts according to their significance to determine the centre of gravity of the contacts and the proper law of the tort. The court will also weigh the respective policy objectives or purposes of these laws or of the interests of the governments or states involved… [T]he interest a particular jurisdiction has in the application of its law should and can only be determined by an examination of the facts of the case in light of the relevant policy considerations.  

and

It remains to be seen whether Canadian common law courts will continue to create exceptions to the *lex loci delicti* and, in the name of justice and in true conflicts
situations, apply either the *lex fori* or the law of the domicile or residence of the tortfeasor or of the victim when these laws are different in the sense of favouring one of the parties, and when the place of wrongful activity is purely fortuitous.\footnote{Ibid. at 35-12.}

*Application of the Exception to the Facts of this Claim*

We will want to show that our plaintiffs would suffer a serious injustice if the foreign law were applied. Any evidence we can put forward that shows an injustice would occur would help.

Practically, it appears that much of the evidence we would present to make out jurisdiction *simpliciter* would also be used for the choice of law argument. Further research, beyond the scope of this memo, would need to be undertaken regarding the foreign law applicable to this case.