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“Real and Substantial” Issues in Cross-Border Disputes

Courts can be territorial. They will only hear and decide cases that fall within their territory and will generally respect other courts’ rights to do the same. This can create issues in the modern economy, where disputes frequently arise across these territorial borders. Efficiently resolving these cross-border disputes requires an understanding of the procedural challenges they can create. Below is a primer on some of the issues that arise most often: jurisdiction to hear a case and enforcing judgments obtained in other jurisdictions.

Jurisdiction: Where Will the Case Be Heard?

The first consideration when a cross-border dispute proceeds toward the litigation stage is where it should be litigated. There are many reasons why a party might want a case heard in a particular jurisdiction, including simple convenience as well as particularities of the local procedure (for example, litigants in Ontario have more constrained discovery rights than in many US jurisdictions). When a defendant disagrees with a plaintiff’s choice of jurisdiction, they can challenge it before the court. These challenges generally fall into two categories: whether the court can hear the case (jurisdiction *simpliciter*) and whether it should (*forum non conveniens*)

Jurisdiction *Simpliciter*: Can the Court Hear the Case?

A court considering a challenge on the basis of jurisdiction *simpliciter* will ask whether it has the power to hear the case. Historically, there were only two ways a court in Ontario could find that it had jurisdiction simpliciter: the defendant either had to be present in Ontario or have consented to have the case heard in Ontario. However, in recent decades, a more flexible approach has arisen, allowing Canadian courts to assume jurisdiction where there is a “real and substantial connection” between a court’s territory and the subject matter of the dispute.

The Traditional Bases: Presence & Consent

For many years, a plaintiff facing a jurisdictional challenge had to show the defendant was either present in the jurisdiction or that they had consented to their case being heard there. These two bases for jurisdiction remain intact: the more flexible “real and substantial connection” test supplements them but does not replace them.

Whether or not a person is present in the jurisdiction is simple: if they are physically in Ontario at the time they are served with the Statement of Claim, the Ontario Court can exercise jurisdiction over them. It does not matter, for the question of jurisdiction *simpliciter* , whether that physical presence is permanent or temporary. In one

English case, a defendant who lived in France was served with a claim while in England to attend a horse race. The Court commented that while this "may have ruined his day at the races," it was sufficient to establish jurisdiction *simpliciter*.

For corporations, presence-based jurisdiction is generally established if the defendant carries on business at a physical location within Ontario, even if its head office is elsewhere. This presence must be physical, not just virtual, with the classic example being maintaining an office. Once the corporate defendant is served at this brick-and-mortar business location in accordance with the *Rules*, the Ontario Court can exercise jurisdiction over it.

The other traditional basis for jurisdiction is the defendant's consent. This consent generally arises in one of two ways. First, a defendant who takes steps to defend an action in Ontario without contesting the jurisdiction of the Ontario courts will be deemed to have consented to the Court's jurisdiction. Second, where the defendant (generally as a clause in a larger contract) has agreed to litigate disputes of a particular kind in Ontario, they will have consented to the Court's jurisdiction. It may not always be clear, however, whether a particular dispute falls within the ambit of such a clause.

The Modern Approach: A "Real and Substantial Connection"

The traditional bases of jurisdiction had the advantage of being relatively clear: either a defendant was present in Ontario or it wasn't; it had consented or it hadn't. But they also created real risks of fragmenting proceedings and often forced plaintiffs to litigate in foreign jurisdictions or go without a remedy.

As cross-border disputes multiplied, Canadian courts developed what has come to be called the "real and substantial connection" test for assuming jurisdiction over a dispute.

It asks first whether a "presumptive connecting factor" exists — i.e., whether the case falls into a category of factual situations that suggest a strong enough connection between the claim and the jurisdiction that it is appropriately litigated there. Presumptive connecting factors include a contract connected with the dispute being made in the jurisdiction, the defendant carrying on business in the jurisdiction, and a tort being committed in the jurisdiction.

If a presumptive connecting factor is established, the defendant can then lead evidence to show this factor does not actually show a strong connection, and that the Court should not assume jurisdiction.

Forum Non Conveniens: Should the Court Hear the Case?

Jurisdiction *simpliciter* addresses only the question of whether the Court can exercise jurisdiction. *Forum non conveniens* asks whether, in the circumstances, the Court should exercise that jurisdiction.

The doctrine of *forum non conveniens* applies when the Ontario

Court technically does have jurisdiction, but the action is clearly better litigated elsewhere. It counteracts the unfairness that can arise from forcing a defendant to litigate in a jurisdiction to which they have few, if any, ties, when another jurisdiction is much more suitable.

For a jurisdictional challenge on the basis of *forum non conveniens* to succeed, the defendant must demonstrate there is another forum that is "clearly more appropriate." In determining whether another forum is clearly more appropriate, the Court will consider factors including the convenience and expense of the parties and witnesses, the likelihood of conflicting judgments, and the prospects for enforcing an eventual judgment.

The precise factors relevant to deciding whether there is a clearly more appropriate forum are wide-ranging and will depend on the particular case. Similarly, which ones will carry the most weight will also depend on the case. No two cases are alike and the factor that carries the day in one case might be irrelevant in another.

Case Study: Jurisdiction in a Cross-Border Dispute

A recent decision of the Court of Appeal for Ontario in a complex cross-border commercial dispute highlights the Ontario courts' increasing flexibility toward questions of jurisdiction.

In *Vale Canada Limited v Royal & Sun Alliance Insurance Company of Canada*, a dispute arose between a mining company, Vale Canada, and its primary and excess insurers. One of the excess insurers commenced litigation in New York and, shortly after, Vale Canada started a parallel proceeding in Ontario. A number of the insurers disputed Ontario's jurisdiction, arguing that Ontario did not have jurisdiction *simpliciter* or, in the alternative, that New York was a clearly more appropriate forum.

The Court of Appeal rejected the insurers' jurisdictional challenge. While some of the insurers had no Canadian operations at the time the action was commenced, they had all agreed to underwrite risks associated with the mining company's operations, the majority of which were in Ontario. The Court considered that this was sufficient for the purposes of jurisdiction *simpliciter*. The underwriting of Ontario risks constituted "carrying on business," which was a presumptive connecting factor, and ultimately strong enough to establish a real and substantial connection.

As far as *forum non conveniens*, the Ontario Court rejected the contention that New York was "clearly more appropriate." The

Court noted that both Vale Canada and its primary insurer were Ontario companies, and it would not be fair to preclude them from litigating in their home jurisdiction. While the excess insurance policies had been purchased on the New York insurance market, the claim centred on the dispute between Vale Canada and the primary insurer, and the evidence and witnesses relating to that dispute were predominantly in Ontario. To send the litigation to New York because New York could exercise jurisdiction over the excess insurers would be akin, the Court held, to the proverbial “tail wagging the dog.”

In the result, the Court of Appeal held that Ontario had jurisdiction over all the claims, and New York was not a clearly more appropriate forum. This case illustrates the benefit of the increasing flexibility applied in the jurisdictional analysis in Ontario. If the questions had been limited to presence or consent, the claims would have been fragmented, with the Ontario and New York courts rendering potentially inconsistent decisions. Instead, the Ontario Court was able to determine the entire dispute, involving all the parties, should proceed together.

Enforcement: Giving Effect to Foreign Judgments

Parties who obtain judgments against Ontario parties from courts outside Ontario must often seek the help of the Ontario courts to execute on those judgments. Retaining experienced Ontario counsel with an understanding of Ontario’s rules for enforcing foreign judgments is critical to ensure efficient resolution of these disputes.

The foreign judgments that might need to be enforced in Ontario can generally be divided into two categories: monetary and non-monetary.

Enforcing Monetary Judgments: Process, Not Substance

Traditionally, the only foreign judgments that could be enforced in Ontario were those for a “definite sum of money.” This rule has since been relaxed, but the enforcement of monetary judgments remains more straightforward than non-monetary judgments.

To have a foreign monetary judgment enforced in Ontario, the party seeking enforcement must show:

The Court that issued the judgment properly had jurisdiction. This is assessed on the Canadian standard, meaning that the “real and substantial connection” test must have been satisfied.

The judgment is final and conclusive, meaning it cannot be revised or appealed in the original jurisdiction.

The judgment was not procured by fraud or in violation of basic principles of justice and enforcing it would not be contrary to

Canadian public policy.

If the party meets all these criteria, the Ontario Court will not examine whether the foreign judgment was correct on the merits. In other words, an enforcement action is not a chance to re-try the case. As long as the process leading to the judgment met the standard above, it will be enforced.

Enforcing Non-Monetary Judgments: Clarity is Key

The Supreme Court of Canada's 2006 decision in *Pro Swing v Elta Golf* loosened the strictures of the traditional rule limiting enforcement to monetary judgments. However, Ontario courts will still scrutinize non-monetary orders of foreign courts carefully before enforcing them. In light of the variety of orders that might be made in a cross-border commercial dispute, understanding the requirements to have the order enforced in Ontario is essential.

Like with monetary judgments, the Ontario Court does not look at whether a non-monetary judgment was warranted on the merits of the case when determining whether it should be enforced. However, in addition to the concerns regarding finality and procedural fairness, there are a number of considerations specific to non-monetary judgments. For example, because the Ontario Court is not prepared to re-examine the facts leading to the foreign judgment, the order to be enforced must be clear and specific enough that the party subject to it knows what they must do. Similarly, Ontario courts will be reluctant to enforce orders that create open-ended obligations or require ongoing supervision from the Court. The courts rarely grant these sorts of orders in Canada, and the courts are reluctant to grant more assistance to foreign litigants than domestic ones.

Case Study: Monetary & Non-Monetary in Tandem

In the case of *Dish v Shava*, the Commercial List was asked to enforce a judgment against a number of Ontario parties that included both monetary and non-monetary elements. The defendants had operated a service that was alleged to have unlawfully captured and transmitted broadcasts of the plaintiffs' television channels. The plaintiffs litigated in Virginia and obtained a judgment against Ontario parties for monetary damages as well as an injunction against further copyright and trademark infringement.

The defendants contested enforcement on three grounds: the Virginia Court did not have jurisdiction, the judgment had been procured by fraud, and because the defendants had not received proper notice of the proceeding, there had been a denial of natural justice. Had any of these grounds been made

out, the judgment would not have been enforced. However, the Court rejected each ground:

- **Jurisdiction:** The Court noted the defendants' family member, a Virginia resident, was their exclusive distributor in the US, and they had also leased server space from a Virginia web-hosting service. These were sufficient to establish a real and substantial connection, meaning that by Canadian standards, the Virginia Court had appropriately assumed jurisdiction.
- **Fraud:** The Court held that the plaintiffs had not misled the Virginia Court to assume jurisdiction.
- **Natural Justice:** The Court accepted the evidence that the Virginia claim had been delivered to the defendants' home and that they unquestionably had notice of the claim, which constituted proper service by Ontario standards.

Lastly, the Ontario Court considered whether it should enforce the non-monetary relief, an injunction. The Court noted that the terms of the injunction were clear and specific, and there was no risk that the defendants would not be able to identify which actions were prohibited. The judgment was therefore enforced.

Conclusion

Jurisdiction and the enforcement of judgments have both become more flexible over time, but that flexibility requires careful consideration of the specific case:

- Where did the substance of the dispute happen?
- What do any contracts relevant to the dispute say?
- If the litigation proceeds to trial, who are the witnesses who will need to testify, and where are they?
- Does the judgment to be enforced stand up to the scrutiny Ontario courts will give it?

Jurisdiction and the enforcement of judgments are issues that commonly arise in cross-border litigation, but they are by no means the only ones. If a plaintiff starts litigation in Ontario against foreign parties, they will need to determine how to properly serve them abroad (whether under the *Hague Convention* or otherwise.) If discovery or testimony is needed from parties or non-parties outside of the jurisdiction, letters rogatory or the proper process for summoning a witness in another jurisdiction will need to be used (for example, under Ontario's *Interprovincial Summonses Act* or its equivalent in other provinces). Further considerations arise where parties in different jurisdictions have an agreement to arbitrate their

disputes, for example, under the International Commercial *Arbitration Act*.

Businesses and their counsel considering or responding to litigation against parties in other jurisdictions must plan carefully from the outset to determine where the litigation should proceed, what will be required when the right jurisdiction is decided, and how any judgment can be usefully enforced at the end of the proceeding.