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Cross-border Litigation in Canada: Increasing Predictability and Clarity

As was said in one of Canada's seminal cases on conflict of laws, "the business of litigation, like commerce itself, has become increasingly international." Lawyers who practise cross-border litigation know that a key element in any international dispute is the battle over the locus of the lawsuit. Parties fight to have a court exercise or decline jurisdiction, or to wrest jurisdiction from a foreign court.

Predictability and clarity in the rules to resolve such disputes are important to litigants. Judicial rulings on the subject have given Canada well-settled and workable legal principles to resolve these opening skirmishes. Recent legislative initiatives in Canada seek to refine matters even further.

In Canada, jurisdictional disputes have been resolved traditionally by applying the common law doctrine of *forum non conveniens*, the Scottish doctrine that was accepted in much of the Commonwealth following the English House of Lords decision in *Spiliada Maritime Corp. v Cansulex* (1987). In applying the "real and substantial connection" test, Canadian courts have considered factors that include the following:

- in a contractual dispute, the location in which the contract was signed and the applicable law of the contract (in a torts dispute, the location in which the tort was committed and the law governing the tort);
- the location where key witnesses and the majority of witnesses reside;
- the location of the bulk of the evidence;
- the jurisdiction in which the factual matters arose;
- the residence or place of business of the parties;
- any loss of juridical advantage (such as an issue regarding limitation periods);
- unfairness to one party or the other in the court assuming or declining jurisdiction;
- the involvement of other parties to the dispute;
- the standards of jurisdiction, recognition and enforcement that may apply in a foreign jurisdiction.

Until recently, these matters were generally governed in Canada by common law principles. Lately, however, a number of Canadian provinces have taken steps to codify their practices; others are considering such initiatives. (Canada's federal system has national and provincial levels of government: provinces are constitutionally competent to legislate in this area.) Provinces pursuing codification have done so by enacting legislation based on the Uniform Law Conference of Canada model legislation, *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA"), available online at http://www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_Proceedings_Transfer_Act_En.pdf.

While still a comity-based approach, where CJPTA legislation has been enacted, the text of the statute will govern. In the words of Canada's Chief Justice writing for a unanimous Supreme Court of Canada in the recent case of *Teck Cominco Metals Ltd. v Lloyd's Underwriters* (2009): "the CJPTA thus constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions."

Although the new statutes do not eliminate entirely the discretion traditionally exercised by Canadian courts in deciding whether to assume or decline jurisdiction in cross-border cases, they do bring an element of additional structure to the decision-making process. CJPTA legislation identifies certain circumstances in which the "real and substantial connection" test will be *presumed* to have been satisfied.

In the province of British Columbia, for example, if the dispute is over a contract in which the obligations were to be performed in B.C., the presumption is that the "real and substantial connection" test has been met. Other circumstances that will presumptively establish jurisdiction in B.C. include proceedings concerning a business carried out in the province, or a contract stating it is governed by B.C. law. The latter situation underscores the autonomy the legislation affords parties to deal with

many of these issues in drafting their contractual documents.

While CJPTA legislation still affords courts the discretion to decline to hear a case – even where there exists what the authorities refer to as jurisdiction *simpliciter* – a court must consider all of the following:

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

As such, CJPTA legislation strikes a balance: it sets out primary criteria to govern the assumption of jurisdiction, but still reserves discretion to the court to consider the "larger picture".

Canada has long been a financially stable and legally secure place in which to do business. In an increasingly competitive world, Canada recognises the need to continually fine-tune its legal system to meet the requirements of parties from all jurisdictions in conducting their business here. As the Chief Justice of one Canadian province recently said:

"Ontario needs to do a better job of marketing its world class legal system to the business community as a means of strengthening its economy during these tough financial times."

Foreign parties want clarity and predictability in the event of a dispute. Recent Canadian initiatives to codify jurisdictional rules in cross-border litigation can be seen as a further and positive step in this direction. ■

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