

Navigating Cross-Border Tort Litigation: Canadian Jurisdiction Primer

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Cross-Border Issues in Tort Litigation

- Globalization has increased cross-border issues for litigants
 - Cross-border mobility, travel, product distribution streams, etc.
 - Complexities advancing a claim if someone from the US is injured while in Ontario (e.g., MVA), or if someone from Ontario is injured while vacationing in Cuba (e.g., scuba diving)
- Practice issues: how and where do you effectively litigate a claim with international underpinnings of fact and law?

Threshold Issues: Canadian Conflict of Laws 101

Jurisdiction *Simpliciter*

- Does the court *have* jurisdiction?

Forum Non Conveniens

- *Should* the court exercise jurisdiction?

Choice of Law

- What substantive law *applies* to the dispute?

Jurisdiction *Simpliciter*

What is Jurisdiction *Simpliciter*?

- Jurisdiction *simpliciter* is about whether the forum court **can** exercise jurisdiction (not discretionary)
 - ... whereas *forum non conveniens* is about whether the forum court **should** exercise jurisdiction (discretionary)
- Absent consent, jurisdiction *simpliciter* is established on a “**real and substantial connection**” test using **presumptive connecting factors**
 - Presumptive connecting factors *prima facie* entitle a court to assume jurisdiction over a dispute

How does the Real and Substantial Connection Test work?

- The Supreme Court of Canada test involves shifting burdens:
 - **The plaintiff** must establish that one or more **presumptive connecting factors** exists to link the subject matter of the litigation to the forum
 - If no, the court does not have jurisdiction
 - If so, the court might *presume* (absent indications to the contrary) that the claim is properly before it
 - It is then open to a **defendant** to **rebut the presumption**
 - Argue that a given connection is inappropriate; and
 - Convince the court it would be inappropriate to assume jurisdiction

Club Resorts Ltd. v. Van Breda, 2012 SCC 17 (“*Van Breda*”), paras 80-81, 94, 100

What are the Presumptive Connecting Factors?

- **Connecting factors** in tort claims include:
 - The defendant is domiciled or resident in the forum;
 - The defendant carries on a business in the forum;
 - The tort was committed in the forum; or
 - A contract connected with the dispute was made in the forum
- Each has a body of case law, and the list of connecting factors is not closed or exhaustive:
 - research how the facts fit with similar cases
 - determine whether you can make a case for a “new” connecting factor based on the considerations in *Van Breda*

Club Resorts Ltd. v. Van Breda, 2012 SCC 17, paras 80, 82-91

Forum non conveniens

When does *Forum non Conveniens* come into play?

- *Forum non conveniens* may come into play once jurisdiction is established
- It has no relevance to the jurisdiction *simpliciter* analysis itself

Van Breda, para 101

- If a defendant raises an issue of *forum non conveniens*, the burden is on the defendant to show **why the court should decline** to exercise its jurisdiction and displace the forum chosen by the plaintiff, i.e.:
 - There is another forum that has a **real and substantial connection** with the subject matter of the litigation; and
 - The proposed alternative forum is **clearly more appropriate** than the plaintiff's choice of forum

Van Breda, paras 103, 108-109

Factors Relevant to *Forum non Conveniens*

- Factors relevant to determining whether the alternative forum is “**clearly more appropriate**” include:
 - The locations of the parties and witnesses;
 - The cost of transferring the case to another jurisdiction or declining a stay;
 - The impact of a transfer on the conduct of the litigation or on related or parallel proceedings;
 - The possibility of conflicting judgments;
 - Problems related to the recognition and enforcement of judgments;
 - The relative strengths of the connections of the two forums;
 - Loss of juridical advantage; and
 - The law applicable to the claim

Van Breda, paras 105-106, 110-112

Choice of Law

What Laws Apply?

- **Substantive law:** Generally the law of the jurisdiction where the tort was committed applies (subject to limited public policy exception)
 - This rule is not mandatory; in the absence of evidence proving the foreign law, the court may apply the law of the forum

Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon, [1994] 3 SCR 1022, p. 1050 and 1053
- **Procedural law:** Generally the law of the forum court applies, regardless of the applicable substantive law
- Much turns on whether a particular right or obligation is properly characterized as substantive or procedural (e.g. statutory limitations periods; prejudgment interest; particular heads of damages; damage caps; etc.)

Other Considerations?

- If a contract is connected to the dispute, consider whether it includes a **choice of law** clause that may be construed as applying to tort claims
 - Common law courts will give effect to choice of law clauses as long as they are *bona fide*, legal, and not contrary to public policy
***Douez v. Facebook, Inc.*, 2017 SCC 33, para 70**

The Importance of Contracts

Relevance of Contractual Dispute Resolution Clauses

- It is a **presumptive connecting factor** if a contract connected with the dispute is made in the country/province/forum
- The contract may specify the parties' **choice of law**
- Must consider the contract and applicable legislation in each jurisdiction to assess enforceability of clauses in standard form contracts:
 - **choice of forum** (exclusive or non-exclusive) and/or
 - **arbitration** (subject to statutory provisions invalidating arbitration/forum selection clauses)

See, e.g.: *Douez v. Facebook, Inc.*, 2017 SCC 33, paras 28-29
Uber Technologies Inc. v. Heller, 2020 SCC 16
Ontario *Consumer Protection Act, 2002*, s. 7(2)

Conclusion