

A Survey of Recent Canadian Developments in Cross-Border Litigation

By Ken MacDonald

I. Introduction

This article will review selected recent developments in the Canadian law of cross-border litigation.

The most notable development is that the test for deciding whether a court has jurisdiction over a non-resident defendant (jurisdiction *simpliciter*) and whether it will assert that jurisdiction (*forum non conveniens*) has been made more objective and predictable. This may help a foreign plaintiff wishing to avail itself of Canadian pre-trial remedies such as *Mareva* injunctions (to freeze a defendant's assets) and Norwich orders (which allow access to a defendant's bank records or other information needed to determine the viability of a proceeding), or to avail itself of Canadian laws that provide for damages to relatives of personal injury tort victims, or other advantages in Canadian law.

Another, related, development is that the test for jurisdiction in defamation cases over non-resident defendants now is easier for plaintiffs. Thus such plaintiffs will more likely be able to take advantage of Canada's substantive law of defamation, which is more favorable to plaintiffs than is the law in the U.S.

In the area of enforcement of foreign judgments, one of the defenses to enforcement, namely, breach of natural justice, has arguably been widened to cover breach of a meaningful right to be heard. Also, Canada has abolished its long-standing blanket prohibition against enforcement of foreign, non-monetary judgments. Now enforcement is decided on a case-by-case basis, and several foreign non-monetary judgments have been enforced recently.

These are just some of the recent developments reviewed below.

II. Changes to the Law Regarding Jurisdiction Over an Out-of-Province Defendant in Tort Cases

At common law in Canada, a court can have jurisdiction over a defendant on three grounds: (i) that the defendant resides in the province; (ii) that the defendant consents (or attorns) to jurisdiction (e.g., by way of a forum selection clause in a contract, or by defending the case on its merits, or by bringing a counterclaim); or (iii) that, although the defendant resides outside the province, a real and substantial connection exists between the forum and the case's subject matter or the defendant. In a recent pair of cases the Supreme Court of Canada has modified the test for determining whether a real and substantial connection exists. The new test applies at least to tort cases, but

may also be extended to non-tort cases in the future. The test now is based on objective factors that connect the case to the forum. Discretionary, subjective considerations have been removed, so as to make the test more predictable. The cases reached the Supreme Court not because of unusual facts, but because of widespread sentiment that the existing law¹ was in need of review. For that reason the Ontario Court of Appeal convened a special, five-judge panel. There were several interveners in that court as well as at the Supreme Court.

In both cases—*Van Breda v. Village Resorts Ltd., Club Resorts et al.* and *Charron v. Village Resorts Ltd., Club Resorts et al.*²—the plaintiffs were Canadians involved in accidents at resorts in Cuba. Van Breda was catastrophically injured, and Charron drowned. In both cases, the plaintiffs had arranged their vacations in Canada, from different companies. Both resorts were managed by Club Resorts, a company located in the Cayman Islands, and which had marketed the resorts in Ontario. The plaintiffs sued the parties from whom they had bought their vacations, the management of the resorts, and others, including defendants from Canada, Cuba, and the Cayman Islands. All defendants had challenged the jurisdiction of the Ontario court to hear the cases, saying Ontario lacked jurisdiction, or, in the alternative, even if Ontario had jurisdiction, Cuba was clearly the more suitable forum. The Supreme Court ruled that the plaintiffs could sue in Canada. In *Van Breda* the real and substantial connection was a contractual relationship formed in Canada with the resort. In *Charron*, the plaintiff had no contract with a Cuban company but nonetheless there was a real and substantial connection in that the resort carried on business in Ontario, not just by advertising but also with an office and frequent visits by staff to promote its resorts.

The law prior to *Van Breda* and *Charron* can be summarized as follows: The court would first consider the following factors to determine whether a real and substantial connection existed between the case and the forum:

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;
- any unfairness to the defendant in assuming jurisdiction;
- any unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the suit;

- the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature;
- comity, and the standards of jurisdiction, recognition, and enforcement prevailing elsewhere.

If the court determined a real and substantial connection exists, the court had a basis to assume jurisdiction, and would then proceed to decide whether there was a forum elsewhere that was clearly more appropriate (i.e. the discretionary *forum non conveniens* analysis), based on the following, non-exhaustive set of factors:

- the location of the majority of the parties;
- the location of key witnesses and evidence;
- the jurisdiction where the factual matters arose;
- in contract cases, where the contract was made;
- the applicable substantive law;
- the difficulty in applying any applicable foreign law;
- geographic factors suggesting a natural forum;
- avoidance of a multiplicity of proceedings;
- loss of juridical advantage;
- discouragement of forum shopping;
- special considerations in oppression cases.

Several commentators had observed that the foregoing approach was too subjective, too complicated and insufficiently predictable. As well, there has been a tendency to merge considerations pertaining to the *forum non conveniens* test into the real and substantial connection analysis, in part because the factors for identifying a real and substantial connection include fairness to the plaintiff and to the defendant.³ Also, some had called for the law to be harmonized with the Court Jurisdiction and Proceedings Transfer Act ("CJPTA"), a Uniform Law Conference model law that codifies the principles for jurisdiction *simpliciter* and *forum non conveniens*, and that has been enacted in three Canadian provinces, British Columbia, Saskatchewan and Nova Scotia, as well as in the Yukon Territory.⁴ The biggest difference between the common law and the CJPTA had been that under the CJPTA a real and substantial connection is to be presumed if certain facts exist connecting the case to the province.⁵

In a unanimous decision the Supreme Court has made two main changes. The first is that, borrowing from the CJPTA, a real and substantial connection is to be presumed (subject to rebuttal) if one or more of certain, objective, factors that connect the subject matter of the litigation with the forum exist. If no recognized presumptive connecting factor applies, the court should not accept jurisdiction.

What are those factors? The Supreme Court indicated that, in tort cases, these presumptive connecting factors include the following:

- The defendant is domiciled or resident in the province.
- The defendant carries on business in the province.
- The tort was committed in the province.
- A contract connected with the dispute was made in the province.

The Supreme Court made clear that neither the mere fact the plaintiff is present in the jurisdiction, nor that damage was incurred there, nor considerations such as fairness, comity and efficiency, would constitute presumptive connecting factors, and they are not to be considered in determining whether there is a real and substantial connection (jurisdiction *simpliciter*). The Supreme Court made clear that over time courts may identify more presumptive connecting factors, i.e. connections giving rise to a relationship with the forum that is similar to the four factors listed above. However, the Supreme Court was far less specific or expansive about this than the CJPTA or the Ontario Court of Appeal. That Court had ruled that the presumptive connecting factors are all but two of the fifteen factors listed in Ontario's Rule 17.02 of the Rules of Civil Procedure regarding service out of the jurisdiction, e.g., that property is situate in Ontario and, in tort cases, that the tort was committed in Ontario.⁶

The Court of Appeal had said that, if none of the Rule 17.02 factors apply, the plaintiff has the burden to show a real and substantial connection. In light of the Supreme Court ruling, if none of the four factors listed above apply, the plaintiff's burden would be to show that a new presumptive connecting factor applies.

To rebut the presumption of jurisdiction, the defendant must show that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum, or that the relationship is weak. For example, if the connecting presumptive factor is that the defendant carries on business in the forum, the defendant must show that the subject matter of the litigation is unrelated to the defendant's business there.

The second change is to more clearly separate and distinguish the real and substantial connection test, as to whether the court has jurisdiction (i.e. jurisdiction *simpliciter*), from the discretionary test as to whether the court should exercise that jurisdiction or leave the case for another court elsewhere (i.e. *forum non conveniens*), as is the case in the CJPTA. The court may consider *forum non conveniens* only after having first determined it has jurisdiction, and then only if the defendant invokes *forum non conveniens*. The defendant has the burden to show that another forum is clearly more appropriate; this is because normally jurisdiction should be exercised once it is properly assumed.

The *forum non conveniens* doctrine gives the court a “residual power to decline...jurisdiction in appropriate but limited circumstances...to assure fairness to the parties and the efficient resolution of the dispute.”⁷ To establish *forum non conveniens*, the defendant must show a presumptive connecting factor connecting the subject matter of the litigation to the other forum; in this respect the common law differs from the CJPTA. The defendant then must show that forum is clearly more appropriate, based on factors such as “the locations of the parties and witnesses, the cost of transferring the case, 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 enforcement or recognition of judgments, and the relative strengths of the connections of the two parties.”⁸ These factors are among the usual *forum non conveniens* factors in the case law and in the CJPTA.

Loss of juridical advantage, often considered an important factor in the *forum non conveniens* analysis, was a concern for the plaintiffs in *Van Breda* also, in that if Cuban law applied instead of Ontario law, the relatives would not be entitled to damages for loss of the companionship, care or guidance that the injured plaintiff could no longer provide, or to damages to compensate them for housekeeping, nursing or other services they provide to the injured plaintiff. However, loss of juridical advantage does not necessarily follow from a decision to move the case to a jurisdiction with different laws. Choice of law is an issue separate and distinct from choice of forum. In other words choosing Ontario as the jurisdiction does not necessarily mean that the law of Ontario is the applicable law. Indeed under Canadian choice of law principles for tort cases, the proper, applicable law is the law of the place where the tort was committed (*lex loci delicti*). The Supreme Court rightly pointed out that “a court may be too quick to assume the proper law naturally flows from the assumption of jurisdiction”⁹ but did not rule on which law—Ontario law or Cuban law—would govern in these cases. In *obiter*, the Court commented that “to use [the factor of loss of juridical advantage] in a *forum non conveniens* analysis too extensively may be inconsistent with comity in an international context.” However, the Court stated that the decision is left to the trial judge, whose decision will be entitled to deference on appeal.

III. Changes to the Law Regarding Jurisdiction Over an Out-of-Province Defendant in Defamation Cases

Two recent Supreme Court of Canada decisions—*Black v. Breeden*¹⁰ and *Editions Ecosociete Inc. v. Banro Corp.*¹¹—address jurisdiction in cross-border defamation cases. In *Black*, a media magnate sued several defendants, most of whom resided in New York or Illinois, for defamatory statements made in the U.S. which were subsequently circulated in Ontario. The defendants moved for a stay, ar-

guing that the Ontario court lacked jurisdiction *simpliciter*, and in the alternative, that either New York or Illinois were clearly a more suitable forum than Ontario. The Court held that even a single instance of the defamatory statement being published in Ontario would suffice as a factor connecting the case to Ontario, thus placing the onus on the defendants to rebut the presumption of jurisdiction *simpliciter*.¹²

That even very limited publication suffices for the presumption of jurisdiction comes out very clearly in the companion case of *Editions Ecosociete*. The book alleged to be defamatory was published in Quebec, with five thousand copies printed, only ninety-three of which were distributed to bookstores in Ontario. Copies were also available through the publisher’s website and Ontario public libraries, from which a single copy had been checked out. Nonetheless, this was the basis on which the Supreme Court found that Ontario courts have jurisdiction.

In its *forum non conveniens* analysis in *Black* and in *Editions Ecosociete*, the Supreme Court indicated that the plaintiff’s desire to sue in the jurisdiction where the plaintiff’s reputation would face the greatest damage is an important consideration as to fairness. In *Black*, that jurisdiction was Ontario, where Black had lived most of his life. In fact, this factor, plus the Court’s determination that Ontario law was the applicable law, outweighed several other factors that favored Illinois or New York in *Black*, including comparative convenience and expense for parties and witnesses (most of whom were in the U.S.), avoidance of a multiplicity of proceedings (there were proceedings in Illinois and Delaware, not for libel, but in which the focus would be the truth of the allegedly defamatory statements), and enforceability of the judgment (a Canadian judgment for libel might not be enforceable in the U.S.). In *Editions Ecosociete* also, the fact the plaintiff’s reputation faced more substantial risk in Ontario was a key reason why the Court held that the case should proceed in Ontario, not Quebec.

The question of which jurisdiction’s law applies is often an important factor in the *forum non conveniens* analysis, and particularly in these two defamation cases because the Canadian law of defamation differs from American law in important ways that favor the plaintiff. The court will presume that the allegedly defamatory statement is false, and that it caused damage to the plaintiff’s reputation. The defendant must rebut these presumptions. Moreover, in Canada plaintiffs who are public figures need not prove the statement was made with malice. In both *Black* and in *Editions Ecosociete*, although the defamation occurred both inside and outside Ontario, the court held that Ontario law was applicable, without explanation. The Court commented, albeit in *obiter*, that an exception might be made to the *lex loci delicti* principle in defamation cases, such that the law of the place where harm to the plaintiff’s reputation would be most substantial would govern.

IV. Other Jurisdictional Issues

A. Forum of Necessity

In *Van Breda*, the Ontario Court of Appeal, borrowing again from the CJPTA, endorsed the concept of a forum of necessity. That means that, even if the defendant is not in the province, has not consented or attorned to jurisdiction, and there is no real and substantial connection, a court may assume jurisdiction over a foreign defendant in exceptional cases “where there is no other forum in which the plaintiff could reasonably seek relief.” The CJPTA also provides for forum of necessity.¹³ The Supreme Court declined to address forum of necessity in *Van Breda*.

B. Forum Selection Clauses and the Court Jurisdiction and Proceedings Transfer Act

As stated in the *Z. I. Pompey Industrie* case, at common law in Canada, forum selection clauses (“FSCs”) are enforced unless there is “strong cause” not to enforce it.¹⁴ However, the CJPTA codification of principles regarding jurisdiction does not address the effect, if any, of FSCs on jurisdiction. The Supreme Court of Canada has ruled that the CJPTA codification is comprehensive.¹⁵ As such, arguably it leaves no place for an otherwise valid FSC. If the CJPTA does not exclude FSCs, where do they fit in? Appellate courts in British Columbia and Saskatchewan have now considered this, and have reached the same conclusion: Courts must apply the *Pompey* principles, not in the determination of jurisdiction *simpliciter* but in the *forum non conveniens* analysis whether to decline jurisdiction.¹⁶ Consideration of the FSC comes under the rubric of one of the statutory factors to be considered, namely, “the fair and efficient working of the Canadian legal system as a whole.”¹⁷ The existence of an FSC is a weighty factor that may be reason enough by itself to decline jurisdiction; it is not merely one factor among many to be considered. As well, the court in *Pompey* indicated that consideration of an FSC is an inquiry separate and apart from the *forum non conveniens* analysis, and therefore the CJPTA does not affect the law of FSCs.¹⁸

C. Standard of Appellate Review on Questions of Jurisdiction of an International Arbitral Tribunal

The Ontario Court of Appeal has recently decided that the standard of correctness, not reasonableness, applies on appellate review of an international arbitral tribunal’s decision as to its jurisdiction. In *Mexico v. Cargill*¹⁹ the government of Mexico challenged an award for damages, arguing that the decision dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Was the standard of review on this issue correctness or reasonableness?

The Court of Appeal held that the tribunal had to be correct in its determination that it had the ability to render the award it did. Such an assessment did not involve a review of the merits. The court decision departs from a series of Canadian cases stating that international arbitral

tribunals deserve a high degree of deference. That the tribunal’s decision is outside its jurisdiction is one of the limited grounds for setting aside an arbitral award under the UNCITRAL Model Law on International Commercial Arbitration.²⁰

D. Substituted Service of Statements of Claims Where Service of Claim in Foreign Country Is Impractical

Generally speaking, in Canada statements of claim or other legal documents that start a legal proceeding are to be served personally on the defendant. In circumstances where personal service proves impractical, the court has the power to authorize service by other means (“substituted service”) or, if the defendant has already received the statement of claim by other means, to validate such other means (“validated service”).

The rules of court in many Canadian jurisdictions require that service on defendants residing in foreign countries bound by the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters (“the Hague Convention”) must be served in accordance with the Hague Convention. The Ontario Superior Court of Justice has recently ruled that in such cases the plaintiff has no recourse to substituted or validated service. In *Khan Resources Inc. v. Atomredmetzoloto JSC*,²¹ the plaintiff attempted to serve a statement of claim on a Russian company in which the Russian Federation owns a more than eighty-percent interest. The plaintiff did so through the only means of service in the Russian Federation that is available under the Hague Convention, namely, to ask Russia’s Central Authority under the Hague Convention to serve the claim. The plaintiff complied with the requirements of the Convention, e.g., providing a translation of the claim. Nonetheless, the Central Authority refused service, explaining the refusal with only a bald reference to Article 13 of the Hague Convention, which provides that a state may refuse service where service would “infringe its sovereignty or security.” The plaintiff obtained an opinion from its law firm in Moscow, Baker and McKenzie, to the effect that to challenge the Central Authority’s decision in Russia would entail an application to a certain Russian court, or to another higher authority, at a cost of Fifty Thousand Dollars, and that success would be unlikely due to political interference. The plaintiff therefore sought an order (on the grounds that the defendant was clearly aware of the claim) validating the existing service or allowing for substituted service.

The motions court gave an order validating the service, noting that the Russian government itself had stepped in to render service via the Hague Convention impractical, so as to block the proceeding, contrary to the purpose of the Hague Convention. This writer notes that many Russians take their disputes to foreign courts, such as those in the United Kingdom—even disputes with other Russians. On appeal the decision was reversed. The Court held that the

Ontario Rules of Civil Procedure and the Hague Convention must be interpreted such that the Hague Convention must be followed in all cases where applicable, and therefore the Rules of Civil Procedure regarding substituted service, dispensing with service and validating service are not available if the Hague Convention applies. The Court also found that Article 13 of the Hague Convention, although not referred to in the Rules of Civil Procedure or elsewhere in Ontario statute law, had nonetheless been implemented and therefore had become law in Ontario. Thus Ontario is legally bound to respect the Russian Federation's refusal under Article 13 to serve the claim. This decision is under further appeal to the Ontario Court of Appeal.

V. Issues Involving Foreign Judgments and Awards

A. Enforcement of Foreign Judgments—the Natural Justice Defense

There are three well-established defenses to the enforcement of a foreign judgment: (i) there was a breach of natural justice in the foreign proceeding; (ii) the judgment had been obtained by fraud; and (iii) enforcement would be contrary to public policy.²² The Supreme Court has now left the door open to new, additional defenses in *Beals v. Saldanha*.²³ Some Canadian motions courts recently considered whether to add a new defense, namely, denial of a meaningful opportunity to be heard.²⁴ The Ontario Court of Appeal has now decided, in *United States v Yemec*,²⁵ not to recognize the new defense, on the ground that it is no different from the existing defense of breach of natural justice. The ruling arguably widens implicitly the latter defense.

The Supreme Court of Canada in *Beals v Saldanha* stated that “natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend.”²⁶ Limitations on that opportunity are not necessarily a breach of natural justice. For example, the fact that the foreign court's rules do not allow for *viva voce* evidence is not a breach.²⁷

In *Yemec*, the United States sought to enforce an Illinois court's judgment for an injunction barring Yemec from telemarketing to the United States. Yemec's defense was not that he had received no notice of the proceeding in which the judgment was issued, but instead that he had been denied a meaningful opportunity to be heard. He alleged that he had been unable to access funds and evidence necessary for his defense of the U.S. proceedings, because the U.S. had obtained an *ex parte* order freezing his account and had seized his business records. On the U.S.'s motion for summary judgment for enforcement, the motions judge had ruled that, while Yemec had not established any of the traditional defenses, there ought to be a trial on this new defense. The motions court judge in *Yem-*

ec stated that the existing natural justice defense pertains to the procedures and processes of the foreign court, whereas the new defense would pertain to how the litigation was conducted.²⁸ The Ontario Court of Appeal, in upholding enforcement of the judgment, held that a “‘meaningful opportunity to be heard’ is indistinguishable from the natural justice defence.”²⁹

That the defense of breach of natural justice includes loss of a meaningful right to be heard arguably enhances the existing standard of natural justice. As to what constitutes a meaningful right, the facts of *Yemec* are not so instructive, in that the Court of Appeal held that Yemec did in fact have access to evidence and money.

B. Enforcement of Foreign Arbitral Awards—Limitation Periods

The Supreme Court of Canada has ruled in *Yugraneft v. Rexx*³⁰ that recognition and enforcement of foreign arbitral awards is subject to the limitations period in the law of the jurisdiction where the award is to be enforced, even where the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and the UNCITRAL Model Law on International Commercial Arbitration are in effect. The result of this case was that the enforcement of a Russian award in Alberta was barred by the expiration of the limitations period.

Although the New York Convention creates an obligation to recognize and enforce eligible foreign arbitral awards, and limits the grounds on which enforcement may be refused, it also says that recognition and enforcement shall be “in accordance with the rules of procedure of the territory where the award is relied upon.” The New York Convention is silent as to time limits for enforcement. The Court held that limitations periods constitute a rule of procedure, not substantive law, and thus may be applied to the enforcement of foreign arbitral awards.

The Court said that the question was whether the legislature that enacted the limitations period in question intended that it apply to recognition and enforcement proceedings, and, if so, whether such time limits fall within the ambit of the “rules of procedure” as that term is used in the New York Convention. The Court held in the affirmative on both questions. The Alberta Limitations Act provides a two-year limitations period for all causes of action except certain matters for which separate limitations periods have been established. The law establishes a ten-year period for the enforcement of judgments. The court rejected Yugraneft's argument that the foreign award should be considered a judgment. As such, no separate limitation period applied to the award, and thus the two-year period applied.

The Supreme Court of Canada had ruled earlier in a choice of laws case, *Tolofson v. Jensen*,³¹ that limitations periods are substantive law, not procedural law. Yugraneft argued that, as such, Alberta's limitations period is not a rule

of procedure within the meaning of the New York Convention and thus not applicable. The court rejected that argument, saying that *Tolofson* is irrelevant to this case.

The Court also clarified that the limitations period does not begin to run until the judgment creditor knows, or would know if it had exercised reasonable diligence, that the debtor has assets in a given province.

C. Enforcement of Foreign Non-Monetary Judgments

Until 2006, Canadian law did not permit the recognition or enforcement of foreign non-monetary judgments (e.g., judgments granting an injunction)—not even non-monetary judgments from other parts of Canada. Only foreign judgments for damages could be recognized or enforced. In *Pro Swing v. Elta Golf*,³² the Supreme Court of Canada opened the door to enforcement of foreign non-monetary judgments. The Court ruled that enforcement of non-monetary judgments would be subject to all the requirements for enforcement of monetary judgments, but also would be subject to judicial discretion governed by a number of factors. A review of non-monetary judgment enforcement cases since *Pro Swing* shows that courts have enthusiastically embraced their new powers to enforce non-monetary judgments.

First let us briefly review the requirements for enforcement of foreign monetary judgments and the *Pro Swing* decision. The first requirement is that the foreign court that issued the foreign judgment must have had jurisdiction over the case, in accordance with Canadian principles of jurisdiction. That is, the defendant must have resided in the issuing court's jurisdiction, or attorned to the issuing court's assumption of jurisdiction, or there must have been a real and substantial connection between that jurisdiction and the subject matter of the case. Second, the judgment must be final. Third, Canadian courts will not enforce foreign penal judgments or judgments to collect taxes. In addition, there are several defenses to enforcement, namely, breach of natural justice, fraud in obtaining the judgment, and that enforcement would be contrary to public policy.

In *Pro Swing*, the Court identified several additional factors to govern the decision whether to enforce a non-monetary judgment, including:

- Whether the judgment is clear enough that the defendant knows what is expected of him or her.
- Whether the judgment clearly states its territorial scope.
- Whether the judgment is limited in its scope, and whether alternative remedies available to the plaintiff would be more appropriate.
- Did the issuing court retain power to issue further orders?
- The size of the burden that enforcement would place on the judicial system. (That is, is that burden

consistent with what would be entailed for domestic litigants?)

- The impact of enforcement on third parties.
- Whether enforcement would expose litigants to unforeseen obligations, or consequences they would not face under the foreign law.
- Whether the enforcing court must venture into uncertain territory to interpret the foreign judgment.

The Court said the requirement of finality as applied to equitable orders is “indispensable” but is more complex than for a common law order, and thus “could be the object of further commentary.”

On the matter of extraterritoriality, the Court acknowledged that permitting the enforcement of foreign non-monetary orders means that “the separation of judicial systems is thus likely to be altered, since a domestic court enforcing a foreign non-money judgment may have to interpret and apply another jurisdiction's law.... [Enforcement of foreign] equitable orders will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to enforce a debt.” Thus, there must be “judicial discretion enabling the domestic court to consider relevant factors so as to ensure the orders do not disturb the structure and integrity of the Canadian legal system.”³³

The foreign injunction in question in *Pro Swing* required the defendant to, among other things, stop selling certain golf equipment that infringed a trademark, to deliver up all offending golf equipment, and to provide an accounting for sales. The Court declined to enforce it for several reasons, including (i) the territorial reach of the injunction was not clearly stated; (ii) one of the orders was a contempt order and thus (in Canada, but not in the United States) quasi-criminal in nature, and to enforce it would expose the defendant to unforeseen obligations; three, the accounting for sales included sales outside the scope of the trademark protection, and thus enforcement would offend the principle of territoriality, and four, involvement of the Canadian court might not be warranted because enforcement was not worthwhile in that it appeared the defendant was insolvent.

In *United States v. Yemec*,³⁴ the Ontario Court of Appeal considered the *Pro Swing* factors, and in particular the Supreme Court's comments quoted above about extraterritoriality and restraint, relied upon by the defendant. An Illinois court had issued an injunction against Yemec, who had been involved in telemarketing Canadian and foreign lottery tickets to Americans, barring him from “telemarketing, in any manner, of any product or service to any person in the U.S.” In deciding to enforce the injunction, the court dismissed Yemec's restraint argument with little discussion, noting that Yemec had not raised the argument in the court below, nor appealed the broad scope of the injunction

in the U.S. proceeding. The court found that the complete prohibition against telemarketing was “[not] unfair or unreasonable,” in that Yemec’s marketing had violated U.S. law. With respect, a prohibition broader than the telemarketing of lottery tickets, or for that matter a prohibition even of telemarketing done in a fashion that complies with the U.S. law, constitutes a penal order under Canadian law, which is not enforceable.

*McClintock v. McGriskin*³⁵ dealt with a judgment from Tennessee for a permanent injunction restraining McGriskin from dealing in the assets of McClintock, and ordering her to repay certain funds to McClintock. The injunction had been issued on default, despite ample notice, and McGriskin had taken no steps to vary, set aside or appeal the injunction. McGriskin had at one time been the conservator of the assets of McClintock, an elderly widow residing in Tennessee. A wealth advisor in Tennessee retained by McGriskin had transferred over a million dollars from McClintock’s bank accounts in Tennessee to McGriskin. The issuing court clearly had jurisdiction, and the injunction was clearly worded and was an appropriate remedy in the circumstances. On these facts, the Ontario court was right to enforce the judgment. However, the injunction did not state whether it applied to property outside Tennessee. The Ontario court did not address the territorial scope of the foreign injunction, perhaps because the same judgment also imposed a constructive trust specifically on a house in Port Hope, Ontario.

In *Scotia Capital Inc. v. Caribbean Commodities Inc. et al.*, an unreported decision, the Ontario Superior Court of Justice recognized an order of the Grand Court of the Cayman Islands that appointed PWC Corporate Finance & Recovery as receiver of accounts of certain companies that held, in Canadian banks, certain funds linked to some accounting irregularities. Recognition of the order enabled the receiver to take control of the funds in Canada.

Endnotes

1. Namely, the approach articulated in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (O.C.A.).
2. 2012 SCC 17 (S.C.C.); [2010] O.J. No. 402 (O.C.A.).
3. See paragraphs 50-56 and 81-82 of the O.C.A.’s decision in *Van Breda*, note 2 *supra*.
4. *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, ch. 28; *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, ch. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c.2; *Court Jurisdiction and Proceedings Transfer Act*, S.Y. c. 64 a. 3136. Alberta, Manitoba, and Ontario are also considering enacting a CJPTA.
5. For example, in tort cases, that the tort was committed in the province, in contract cases, that the contract was substantially performed there, in property cases, that the property (movable or immovable) is in the province. See s. 10 of the British Columbia CJPTA (SBC 2003, ch. 28).
6. The two Rule 17.02 factors to which the Court of Appeal would not give such presumptive effect, because they are not reliable indicators of a real and substantial connection, are damage incurred in Ontario (R. 17.02 (h)), and necessary or proper party outside Ontario (R. 17.02 (o)).
7. *Van Breda*, note 2 *supra*, para. 104.
8. *Id.*, para. 110.
9. *Id.*, para. 111.
10. 2012 SCC 19.
11. 2012 SCC 18.
12. Para 19-20.
13. CJPTA, SBC 2003, ch. 28, s. 6.
14. *Z. I. Pompey Industrie v. ECU-Line N.V.* [2003] 1 S.C.R. 450.
15. *Teck Cominco Metals v. Lloyd’s Underwriting* [2009] 1 S.C.R. 321.
16. In British Columbia, see *Viroforce Systems Inc. v. R & D Capital Inc.* 2011 BCCA 260, 336 D.L.R. (4th) 570; *Preymann v. Ayus Technology Corp.* [2012] B.C.J. No. 106, 2012 BCCA 30. In Saskatchewan, see *Microcell Communications Inc. v. Frey*, 2011 SKCA 136; *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137.
17. s. 10 (2) (f) in the Saskatchewan statute, and s. 11 (2) (f) in the British Columbia statute, both cited *supra* in note 4.
18. *Pompey*, note 14 *supra*, at paragraph 21. See also *Preymann*, note 16 *supra*, at paragraph 37.
19. 2011 ONCA 622.
20. http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. See chapters 34 and 36.
21. [2011] O.J. No. 4793 (Master Graham); [2012] O.J. No. 1059 (O’Marra J.).
22. Of course one can defend against enforcement if one can show that one or more of the requirements for enforcement have not been met. Those requirements, briefly summarized, are that the issuing court had properly exercised jurisdiction (in accordance with Canadian principles, as described above), that the judgment is for an exact amount, that it be final and conclusive, and that it not be a penal order.
23. [2003] 3 S.C.R. (4th) 1.
24. *United States v. Yemec* (2009) 97 O.R. (3d) 409 (S.C.J.); *King v. Drabinsky* (2008), 91 O.R. (3d) 616.
25. [2010] O.J. No. 2411 (O.C.A.).
26. *Beals*, note 23 *supra*.
27. *Cook Nook Hazelton Lanes v. Trudeau Corp.* (2003), 48 C.P.C. (5th) 330. (S.C.J.).
28. *Yemec*, note 24 *supra*, at para. 172.
29. *Id.*, at para. 27.
30. [2010] 1 S.C.R. 649.
31. [1994] 3 S.C.R. 1077.
32. [2006] 2 S.C.R. 612.
33. *Pro Swing*, note 32 *supra*, at paragraphs 13-15.
34. *Yemec*, note 25 *supra*.
35. [2010] O.J. No. 5511.

Mr. MacDonald is a partner in the Richmond Hill, Ontario, office of Henry K. Hui & Associates.

Like what you’re reading? To regularly receive issues of the *International Law Practicum*, join NYSBA’s International Section (attorneys only).