

REFORMING THE LAW OF CROSS BORDER LITIGATION

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INTRODUCTION

Cross border litigation, in the form of either interprovincial or international litigation is now very common. The Ontario Court of Appeal decision in *Precious Metal Capital Corp. v. Smith et al.*¹ showcases a recent example. The plaintiff sued nine defendants, seven of which were not Ontario residents. The plaintiff had hired one of the Ontario defendants and his company to procure financing to develop mining projects in Peru. The plaintiff alleged that the Ontario defendants then involved a Texan and his companies to try and secure financing from sources in the United Kingdom. There were a series of agreements with some of the defendants. The agreements included exclusive jurisdiction clauses in favour of the English courts.

The plaintiff brought its action in Ontario rather than in England. The plaintiff alleged that the defendants breached fiduciary duties in respect of confidential information, allowing the Texans to take control of the Peruvian mining opportunities and to exclude the plaintiff.

The lower court and the Court of Appeal both applied the factors in *Muscutt v. Courcelles*² to determine the jurisdictional issues. The courts concluded both that the action had a real and substantial connection to Ontario warranting the assumption of jurisdiction by an Ontario court, and that an Ontario court was the most appropriate forum for the claim. A fundamental part of the court's analysis was that the claim was essentially for breach of fiduciary duty, rather than breach of contract.

Thus, the Ontario court assumed jurisdiction against certain defendants which were not present in the jurisdiction, which had not attorned to the jurisdiction and notwithstanding express contractual terms whereby the plaintiff agreed to resolve any disputes in the English court.

THE COMMON LAW BACKGROUND TO JUDICIAL JURISDICTION

Such a decision would have been impossible but for the Supreme Court of Canada's decision in 1990 to break free from traditional English common law restraints. In *Morguard Investments Ltd. v. De Savoye*³ the Supreme Court accepted that a province could, in appropriate circumstances, assume jurisdiction over defendants who were not present in the jurisdiction and had not attorned to the jurisdiction. Such an assumption of jurisdiction was constitutionally acceptable provided it was restrained and consistent with overriding principles of order and fairness.

¹ [2008] OCA 577 (August 7, 2008).

² (2002), 60 O.R. (3d) 20 (Ont. C.A.).

³ [1990] 3 S.C.R. 1077.

The common law subsequently developed through numerous cases, including more Supreme Court of Canada decisions, *Hunt v. T&N plc*⁴, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*⁵ and *Beals v. Saldanha*⁶.

The Ontario Court of Appeal's decision in *Muscutt* in 2002 set out eight factors to be considered in determining whether the courts had jurisdiction *simpliciter* (sometimes referred to as territorial competence or judicial jurisdiction) based on whether there was a real and substantial connection between Ontario and the matters in dispute.

Notwithstanding that the *Muscutt* factors with respect to jurisdiction *simpliciter* have been widely applied in the courts, they have been criticized on various grounds, including that they unnecessarily include factors such as fairness to the parties, which are arguably better considered in the context of the discretionary question of which court is the more appropriate forum (*forum non conveniens*)⁷.

RECENT PROPOSALS FOR REFORM

The Law Commission of Ontario, in March 2009, issued a Consultation Paper on this very topic⁸. The Consultation Paper exhaustively analyses the law on judicial jurisdiction in Ontario and solicits input from interested parties. The Consultation Paper describes the law of judicial jurisdiction on cross border matters in Ontario as "complex and uncertain"⁹. The paper raises the concern that this uncertainty has a direct impact on business decisions affecting the local economy¹⁰ and states that:

"Clarifying the law of jurisdiction by adopting legislation could make the civil justice system in Ontario considerably more relevant, more effective and more accessible to litigants—both those who lack the resources to litigate complex

⁴ [1993] 4 S.C.R. 289.

⁵ [1993] 1 S.C.R. 897.

⁶ [2003] 3 S.C.R. 416, 2003 SCC 72.

⁷ J. Walker, "Beyond Real and Substantial Connection: The *Muscutt* Quintet" in T. Archibald and M. Cochrane eds, *Annual Review of Civil Justice 2002* (Toronto; Carswell, 2003); S.G.A. Pitel, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006) 85 Can. Bar Rev. 61; T. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007) 33 Queen's L.J. 179; J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" (2007) 52 McGill LJ 555.

⁸ "Reforming the Law of Crossborder Litigation, Judicial Jurisdiction", Prof. Janet Walker, OHLs, Law Commission of Ontario.

⁹ "Reforming the Law of Crossborder Litigation, Judicial Jurisdiction", *supra*, p. 1.

¹⁰ "Reforming the Law of Crossborder Litigation, Judicial Jurisdiction", *supra*, p. 2.

issues of judicial jurisdiction, and those who might otherwise find it more convenient and cost effective to do business elsewhere."¹¹

The Consultation Paper notes that in 1994 the Uniform Law Conference of Canada drafted a Model Law which is known as the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA or Model Law). The CJPTA had subsequently been enacted in British Columbia¹², Saskatchewan¹³ and Nova Scotia¹⁴, and it has been recommended for enactment in Alberta by the Alberta Law Reform Institute¹⁵.

The Consultation Paper provides a detailed discussion of numerous issues which arise in any discussion of judicial jurisdiction. In particular, the Consultation Paper analysed whether it would be appropriate to enact the Model Law "as is" or whether it should be amended substantially to deal with the various complex issues raised in the paper.

The Ontario Bar Association (OBA) has submitted to the Law Reform Commission its position that the CJPTA should be enacted substantially as drafted. The OBA's view is that the Model Law is generally reflective of existing common law but usefully codifies it in a manner that will genuinely assist bench and bar in Ontario as well as the litigants seeking to come to this jurisdiction. Such a statute would promote consistency with at least three other common law provinces, while maintaining compatibility with Québec. Furthermore, it should introduce a degree of simplification over the existing common law. While the CJPTA will not resolve all issues, its enactment will optimize the goals of greater relevance, effectiveness and accessibility.

The OBA also noted, however, that there was a reasonable argument that no statute was necessary to deal with issues of judicial jurisdiction. The common law, while always subject to criticism, has developed incrementally to expand the reach and relevance of Ontario's legal system without introducing unacceptable uncertainty or confusion, or at least no more that would be associated with enactment of a new complex statute.

RECENT CASE LAW BASED ON THE CJPTA

In a case originating in British Columbia, *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*¹⁶ Teck sued its various insurers in the U.S. courts claiming it was entitled to coverage with respect to a claim for more than US\$779,000,000.00 by U.S. interests as a result of environmental contamination alleged to originate from four of Teck's British Columbia sites.

¹¹ "Reforming the Law of Crossborder Litigation, Judicial Jurisdiction", *supra*, p. 2.

¹² CJPTA SBC 2003, C.28.

¹³ CJPTA SS 1997, C.c-41.1.

¹⁴ CJPTA, SNS 2003 (2d Sess.), C.2.

¹⁵ "Reforming the Law of Crossborder Litigation, Judicial Jurisdiction", *supra*, p. 2.

¹⁶ [2009] SCC 11.

The insurers concurrently sued in British Columbia seeking a declaration that they had no obligation to defend or indemnify Teck.

The U.S. District Court denied the insurers' application to dismiss Teck's claims. The U.S. action was, however, temporarily stayed on consent pending the outcome of an appeal to the Supreme Court of Canada from the denial of the insurers' application in British Columbia for a stay of the British Columbia proceeding.

The Supreme Court of Canada affirmed the decision not to stay the British Columbia action. The result is that there are now parallel proceedings continuing in both the U.S. and Canada. The Supreme Court of Canada did not deal with what would happen if a party obtained judgment in the U.S. and then sought to enforce it in Canada.¹⁷

The interesting point for present purposes is that the Supreme Court of Canada, for the first time, interpreted the CJPTA.¹⁸ The Supreme Court of Canada quoted from introductory comments of the Uniform Law Conference of Canada to establish the main purposes of the Model Law. These include bringing:

"... Canadian jurisdictional rules into lines with the principles laid down by the Supreme Court of Canada in [*Morguard*] and [*Amchem*]." ¹⁹

The Court's main question of statutory interpretation revolved around s. 11 of the CJPTA which deals with the appropriate forum (rather than jurisdiction *simpliciter*, i.e. territorial competence) and provides:

"11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (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,

¹⁷ *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, *supra*, at paras. 39-40.

¹⁸ The British Columbia version, SBC 2003 C.28.

¹⁹ *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, *supra*, at para. 22.

- (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."²⁰

The Court had to decide whether the British Columbia action should be stayed based on these factors and having particular regard to the fact that prior proceedings had been commenced outside British Columbia and the foreign (U.S.) court had refused to stay the U.S. action.

The Supreme Court of Canada quoted from the Uniform Law Conference background papers:

"11.1 Section 11 is meant to codify the doctrine of *forum of non conveniens*, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia* (1993). The language of subsection 11(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 11(2) as relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past."²¹

The Supreme Court of Canada stated:

"Section 11 of the CJPTA thus constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions."²²

The Court noted that s. 11 of the CJPTA is a comity based approach, although "comity is not necessarily served by an automatic deferral to the first court that asserts jurisdiction."²³ The Court then analysed the relevant factors based on the CJPTA and affirmed denial of the stay request.

It is interesting that the Supreme Court of Canada did not refer to the *Muscutt* decision. It did not need to do so, not because the *Teck* case originated in British Columbia and relied on the British Columbia Act, but because the British Columbia Act essentially amounts to a codification of the common law and does not require reference to prior case law.

This conclusion should, however, be contrasted with the recent Nova Scotia decision, *Bartz v. Canadian Baptist Bible College Inc.*²⁴ where the Court interpreted essentially the same Act but

²⁰ *Teck Cominco Metals Ltd. v. Lloyd's Underwriters, supra*, at para. 14.

²¹ *Teck Cominco Metals Ltd. v. Lloyd's Underwriters, supra*, at para. 22.

²² *Teck Cominco Metals Ltd. v. Lloyd's Underwriters, supra*, at para. 22.

²³ *Teck Cominco Metals Ltd. v. Lloyd's Underwriters, supra*, at para. 23.

²⁴ [2009] NSSC 115.

still went through the eight factors identified in *Muscutt* as the basis for determining territorial and subject matter competence.²⁵

It is submitted that the *Bartz* decision did not need to apply the *Muscutt* factors and in doing so needlessly confused the law in this area. The Supreme Court of Canada analysis in *Teck* is straightforward. The interpretation of the CJPTA should not generally require analysis of prior cases. That is not to say that prior case law will not be relevant in appropriate circumstances. In *Teck* itself the Supreme Court of Canada noted that s. 11 of the CJPTA essentially legislates the principles in *Amchem*, and concluded that:

"While I am sympathetic to the difficulties presented by parallel proceedings, the desire to avoid them cannot overshadow the objective of the *forum non conveniens* analysis which is 'to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties' (*Amchem*, at page 912)."²⁶

CONCLUSION

The common law rules in *Muscutt* continue to apply in Ontario. The Ontario courts have not been shy to take jurisdiction and regularly assume jurisdiction in many cases, including *Precious Metal Capital Corp.* where this would not historically have been acceptable.

British Columbia, Saskatchewan and Nova Scotia have already adopted the CJPTA. It is hoped that this Model Law will be adopted in Ontario by way of codification and simplification. The author believes that the Model Law will facilitate determination of jurisdiction *simpliciter* (territorial competence) and *forum non conveniens* (the appropriate forum) for the benefit of both bench and bar.

²⁵ *Bartz v. Canadian Baptist Bible College Inc.*, *supra*, at para. 19.

²⁶ *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, *supra*, at para. 38.