

# Noteworthy

2003 No. 3

## Jurisdiction - A Step Toward Rationality

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BARRISTERS & SOLICITORS

by *Jamie Trimble*

Because Canadians are traveling more frequently, cross-border litigation is growing. Ontario residents may be injured while abroad or have their contracts breached, causing them damage here. In either case, they will suffer damages and want to sue here.

Do the Ontario Courts have jurisdiction to hear the case against a foreigner, whether from another Province or Country? If so, should they exercise it?

Traditionally, Ontario Courts have only considered whether service on the foreigner has met the technical requirements of Rule 17.02 (which permits a Plaintiff to serve a Statement of Claim outside of Ontario without an Order of the Court), and, if so, whether the Court should decline to hear the case against the foreigner because there is a Court in another jurisdiction that *clearly* has more of a connection to the action than Ontario. This approach has made it very difficult for foreigners to stay an action against them in Ontario.

Recent decisions from Ontario's Court of Appeal and Divisional Court have made it easier for a foreign Defendant to stay an action in Ontario. Assuming that service of the Statement of Claim on the foreign Defendant complies with Rule 17, an Ontario Court must

ask itself whether it CAN hear the case, as a matter of law, before asking itself whether it SHOULD exercise its discretion to hear a case involving a foreigner.

### Jurisdiction *Simpliciter*

In 5 recent Court of Appeal decisions heard together<sup>1</sup>, the Court examined the basis upon which, as a matter of law, the Court CAN exercise jurisdiction over a foreign Defendant; i.e. whether it had *jurisdiction simpliciter*.

In each of these cases the Plaintiff, an Ontario resident, traveled to another Country or Canadian Province, was injured and received preliminary medical treatment there, then returned to Ontario and received the balance of the treatment and suffered damages here.

The Court of Appeal held that an Ontario Court has *jurisdiction simpliciter* over the foreigner only if there is a real and substantial link connecting the Defendant or the action to Ontario. Of course, such a link automatically exists where

*(Continued on page 2)*

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<sup>1</sup>The decisions are *Muscutt v. Courcelles*, (2002) 60 O.R. (3d) 20; *Sinclair v. Cracker Barrel Old Country Store Inc.* *ibid* at 76; *Leufkens v. Alba Tours International Inc.*, *ibid* at 84; *Lemmex v. Sunflight Holidays Inc.*, *ibid* at 54; *Gajaraj v. DeBernardo*, *ibid* at 68.

## In This Issue

### Jurisdiction: A Step Toward Rationality

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### Firm News

## Noteworthy

(Continued from page 1)

the foreign Defendant i) is present in the jurisdiction, ii) accepts the Court's jurisdiction by defending the action, or iii) agrees with the Plaintiff in advance that their disputes will be determined by the Ontario Courts. Otherwise, the Court must turn to the common law to determine if such a link exists.

### The Eight Factors For Assumed Jurisdiction:

Where none of these three conditions pertain, whether the Ontario Court CAN exercise jurisdiction is then based on the application of eight factors to the facts of the case. The test while flexible, should provide clarity and certainty. There is no fixed formula and no one factor is determinative:

1. *Connection between the forum and the Plaintiff's claim:* That the Plaintiff lives in Ontario here weighs in favour of exercising jurisdiction over the foreigner.

2. *Connection between the forum and the Defendant:* If the Defendant has a connection to Ontario, it weighs in favour of assuming jurisdiction. If they maintain a presence in the jurisdiction, defend the action, or agree by contract to have disputes decided in Ontario, the Court will assume jurisdiction. If the foreigner conducts business or puts goods into the stream of commerce elsewhere that come to Ontario, the Ontario Court is more likely to assume jurisdiction. However, where the Ontario resident travels and consumes goods or services elsewhere, which cause her injury, notwithstanding that she returns to Ontario to suffer fur-

ther damage, the case is weaker.

3. *Unfairness to the Defendant in assuming jurisdiction:* Order and fairness require that the Court consider the unfairness to the foreigner. Assuming jurisdiction may impose significant expense and inconvenience on the foreigner that she would not incur if sued in her home jurisdiction. If the foreigner has insurance that will respond to the loss, the unfairness is eliminated. The Court cannot assume that there is insurance, or its coverage. The onus is on the Plaintiff to prove that the Defendant's insurer would defend the action in Ontario.

4. *Unfairness to the Plaintiff in not assuming jurisdiction:* Order and fairness require that the Court consider unfairness to the Plaintiff in declining jurisdiction. Forcing an Ontario resident to sue elsewhere imposes expense and inconvenience on the Plaintiff. The Court should consider, however, whether the Plaintiff traveled to the foreign place and suffered her damage there. In such cases, it is reasonable to assume that the foreigner would want to be tried before her own Court, according to her own law.

5. *Involvement of other parties:* A Court will try to avoid the risk of multiple proceedings and inconsistent results. The Court should look, however, at where the "core" of the action (the essential events causing the loss) lies. Where the core of the action lies in Ontario, the case for assuming jurisdiction over the foreigner is stronger. Where the core of the action lies elsewhere, the Court should be reticent about assuming ju-

isdiction over a foreigner simply because there is a claim made against a domestic Defendant in the same action.

6. *Reciprocal Enforcement of Judgments:* The Ontario Court must consider whether it would recognize and enforce an extraprovincial judgment against a domestic Defendant. When an Ontario Court assumes or declines jurisdiction, it establishes a standard that may be used by foreign Plaintiffs suing Ontarians elsewhere to force them to attorn to that jurisdiction. If the Ontario Court is not willing to assume jurisdiction it must be prepared to enforce the judgment of the foreign Court.

7. *Interprovincial versus international actions:* Ontario Courts can assume jurisdiction more readily where the foreign Defendant is from another Canadian Province.

8. *Comity:* Issues of comity (deference to foreign Courts' jurisdiction) clearly favour Ontario Courts assuming jurisdiction in interprovincial cases. In international cases, the Court must consider international rules governing which law applies and the rules governing assumed jurisdiction and the recognition and enforcement of judgments in the Defendant's location. This may be affected by the convention between Canada and the U.K., or in the common law as in such states as New South Wales, or the Hague convention for those states that are signatories.

### The Five Cases:

The reader is encouraged to review the five decisions in detail.

(Continued on page 3)

(Continued from page 2)

For present purposes it is sufficient to note that only one case (*Muscutt*) was permitted to continue.

It appears that the decision of the Court of Appeal in *Muscutt* was influenced by two factors.

a. The case was interprovincial and not international (as were the other four); where a foreign Defendant was from another province, the court was prepared to apply the rules less rigidly.

b. Since all Canadian provinces have compulsory auto insurance requiring the insurer to defend anywhere in Canada, this ameliorated the unfairness of Alberta residents having to defend in Ontario.

#### Subsequent Decisions:

##### *Subramaniam v. Shelter, [2002] O.J. 3426*

Here, the Ontario Plaintiffs were injured while passengers in a car, involved in an accident in Nebraska. The car was driven by one Ontario resident and owned by another. The striking car was driven by a New Jersey resident, and owned by someone from Washington. The Plaintiff sued in Ontario and named the Plaintiff's underinsured motorist carrier, because the limit of the tort Defendants' insurance policy was \$25,000. After the New Jersey Defendant was served with that Claim, he commenced his own action in Nebraska against the Plaintiffs.

Lane, J., applying the 8 factors, did NOT stay the action. The foreigners were not prejudiced.

Their insurance provided for a defence in Ontario. The New Jersey Defendant would be no more inconvenienced in defending in Ontario as in bringing his own claim in Nebraska.

Contrary to the Court of Appeal's ruling, Lane, J. found that if the Plaintiff were forced to bring an action elsewhere, the burden of proving damage would be "more than an inconvenience"; there was potential prejudice. There were other Defendants over whom the Court legitimately had jurisdiction. Since the injuries were serious, liability of the foreign defendants likely, and the assets of the foreign Defendants were likely insufficient, the claim against the Ontario underinsured motorist insurer was not a "bootstrapping" attempt as it was in *Garaj*. Also pertinent was a second and overlapping injury claim one of the Plaintiffs had pending in Ontario.

##### *Argiros v. Whistler, [2002] O.J. NO. 3916*

Here, the Superior Court of Ontario, in the first application of the *Muscutt* principles to a contract case, stayed an Ontario action, on the basis that the Ontario Courts did not have *jurisdiction simpliciter* over the British Columbia Defendants. The significance of the case is that the Court held that where the parties agree by contract where their disputes will be heard, that agreement decides the issue.

An Ontario resident was injured when he fell while taking ski lessons at Whistler/Black-

comb in British Columbia. He received preliminary treatment in B.C., but returned to Ontario where he suffered his damages. His instructor was resident in British Columbia, but lived and instructed in Switzerland during B.C.'s off season. Named in the action was a partner in the limited partnership that ran the resort's financial and accounting aspects. It was also in Ontario developing real estate for an Ontario based ski resort.

The lift ticket, ski school vouchers, and plainly marked signs around the resort provided, in part, that "The Ticket Holder agrees that any litigation involving the ski area operators [defined to include all the named Defendants] shall be brought within the Province of British Columbia ...." This bold face black type was contained in a red-bordered box with a yellow background. In red capital letters above that box were the words "PLEASE READ, EXCLUSION OF LIABILITY ON TICKET". Below the box were the words "NOTICE TO USERS OF THESE FACILITIES, Exclusion of Liability, Assumption of Risk – Jurisdiction. These conditions will affect your legal rights. PLEASE READ CAREFULLY, which were also printed in red.

The Master stayed the action against all of the Defendants on the basis of the jurisdiction provisions in the contract and because British Columbia was the more convenient forum for hearing the action.

Justice Archie Campbell dis-

(Continued on page 4)

missed the appeal. His Honour held: "Because the Plaintiff contracted that any litigation involving the ski area operators shall be brought within the Province of British Columbia, that province has jurisdiction to try this case." He held that the Respondents had taken all reasonable steps to bring the jurisdiction clause to the Appellant's attention, and that the Appellant was bound by it. The wording was clear and presented to the Appellant in bold colours at several instances in the tickets, which he received three times; as well there were signs conspicuously posted around the resort. The Appel-

lant must have seen the wording at least eight times.

In the event that he was incorrect in holding that the contractual provisions satisfied the *jurisdiction simpliciter* question, Campbell, J. also held that even applying the eight *Muscutt* factors, the Ontario Courts could not exercise jurisdiction. The core of the action was in B.C.. The involvement of one of the parties in Ontario was "comparatively small" and had nothing to do with the B.C. ski operation. The contractual provisions removed any unfairness to the Appellants in declining jurisdiction in Ontario.

Finally, while accepting jurisdiction over Defendants from another Canadian Province is easier than over Defendants from another country, the considerations of fairness to both sides weighed in favour of B.C. The Appellant traveled to B.C. where he was injured. The only significant connection to Ontario is that he suffered his damages here and this is insufficient to support a substantial connection between the core of the action and Ontario.

Jamie Trimble successfully argued the *Argiros* matter before the Learned Master and the Divisional Court.

## Firm News

Michael Girard is speaking at an Advocates' Society program on May 6, 2003 entitled "Cross-examination, impeachment and rehabilitation on re-examination"

Wendell Wigle will be speaking on "Warnings, Labelling and Product Recalls" on May 22, 2003 at a Canadian Institute Conference on Drug and Medical Device Liability.

Jamie Trimble will be the co-chair of a program put on by the Ontario Bar Association on mediation, to be held in Toronto on Friday May 23, 2003.