DISTRIBUTION OF POWERS IN THE CANADIAN LEGAL SYSTEM

American lawyers should be aware of the differences in the two countries' legal systems—they can cause significant problems in a case with cross-border elements

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As a general proposition, Canadian laws and legal systems are similar to those in the United States. There is much in Canadian law and legal institutions that is familiar to a lawyer trained in the US. However, they are most assuredly not the same, and the devil is in the details. There are differences that can cause significant problems for an unwary American lawyer with a case with cross-border elements. In this article, we describe some of the more common problem areas that arise, both because of the differences between the Canadian and American legal systems and because of internal differences among the Canadian systems themselves.

Distribution of political and judicial powers

Canada is made up of 10 provinces and three territories. The territories, Yukon, Northwest Territories and Nunavut, are, in effect, wards of the Canadian federal government and do not have full independence and self-government as do the provinces. They do, however, each have legislatures, court systems and the full panoply of statute law. However, save for energy and mining matters, they are unlikely to engage the interest of American lawyers. On the other hand, the provinces are full and independent partners with the federal government in constituting the nation of Canada. It was created in 1867 by a British statute, *The British North America Act* (BNA Act), which, upon its repatriation to become a Canadian statute, became known as the *Constitution Act*, 1867. The primary function of that Act is to apportion the legislative powers between the provinces and the federal government. Thus, for example, foreign affairs, banking and criminal law are federal matters,

while property and civil rights, municipal institutions and education are within the jurisdiction of the provincial legislatures.

When the Fathers of Confederation, the men who brought the Canadian federation into existence, were preparing the BNA Act in the middle of the 19th century, the Civil War was raging in the south. It was a widely held belief of Canadians that part of the cause of that war, if not the primary cause, was that the states had retained too much power under the US Constitution. Whether it was true or not, the BNA Act was drafted with the intent of vesting both the primary powers and the residual powers in the federal government. The provinces were intended to be restricted to lesser powers and, in particular, to those powers that related purely to domestic matters within the provincial borders.

That was the intent, but the reality turned out quite differently. Until 1949, the Canadian final court of appeal was the British House of Lords, which called itself the Judicial Committee of the Privy Council (JCPC) when it heard appeals from the colonies or the dominions, as Canada was until relatively recently. In a series of constitutional cases beginning late in the 19th century and continuing into the early 20th century, the JCPC basically rewrote the BNA Act, particularly by conferring on the provinces the residual power to legislate in fields not identified specifically in the BNA Act. Thus the intent of the Fathers of Confederation was thwarted and the provinces assumed a role within Confederation that had never been intended for them.

What does this have to do with cross-border issues? Quite a lot, because the provinces have great powers in commercial matters and the laws in each province are not necessarily the same. In fact, they can be quite different. There are two legal systems in Canada; civil law in Québec and common law in the rest of the country. But the common-law systems differ as well, and the courts of one province are not bound to follow the decisions of the courts of another province, with the result that there can be profound legal differences between provinces.

The court that binds the law and legal systems together is the Supreme Court of Canada. It is the court of final resort for all the courts in all the provinces and territories in Canada. But it does not consider itself to be a court to correct error, and only grants leave to those cases that it finds to be of national importance. Coupled with the fact that the Supreme Court only hears about 90 cases a year, the consequence is that for all practical purposes the courts of final resort for most cases, particularly those involving commercial matters, are provincial Courts of Appeal.

From the foregoing, one might suppose that the legislative power possessed by the province would be accompanied by a parallel judicial system, such as exists in the United States. Somewhat ironically, the opposite is the case. There is only one judicial system for the whole country. It is the creation of the BNA Act, which provides that the federal government is to appoint and pay the judges of the Superior District and County Courts for each province. On the other hand, the provincial authorities are charged with the duty to provide the facilities for the administration of justice in their jurisdiction and, importantly, to legislate in respect of procedure in civil matters. Consequently, the rules of civil procedure can vary quite markedly from province to province but the judges are all federally appointed.

What the foregoing comes to from the perspective of the American lawyer is that there is not the same supervening authority of federal law as exists in the United States. Instead, there are 10 separate and distinct jurisdictions for commercial law purposes. To be sure, there are federal competition laws, patent and trade-mark laws as well as a federal communication/broadcasting regime, in addition to other pan-Canadian matters identified by the BNA Act. Notably, however, there is no national securities regulator, such as the Securities and Exchange Commission, nor is there any system for consolidating class actions into one proceeding, such as exists in the United States.

Confusingly, this is not to suggest that there is no federal court in Canada. There is, and not surprisingly, it is called the Federal Court of Canada, and the appeal court is the Federal Court of Appeal. However, the Federal Court is a court of limited jurisdiction. It concerns itself largely with claims against the federal government, such as would be brought before the US Court of Federal Claims, applications for judicial review of decisions made by the federal government or its agencies, and appeals from decisions made by federal administrative tribunals or inferior federal courts dealing with issues relating to taxation, industrial property, including patents and trade-marks, and immigration and citizenship. It does not hear disputes between private litigants, with the major exceptions of patent, trade-mark and maritime actions. Private commercial disputes are largely reserved to the provincial superior courts.

Choosing a forum

One of the results of significant provincial autonomy is that substantially the same principles of private international law apply to determining the jurisdiction of provincial superior courts with respect to claims made by or against residents in other provinces as would apply to claims made by or against citizens resident in other countries. The court engages in a two-step process if jurisdiction is challenged. First, the court reviews whether the court has jurisdiction over the parties and the subject matter — this is referred to as jurisdiction simpliciter. Next, the court reviews whether there is another forum that is clearly more appropriate to hear and to decide the dispute — this is referred to as the *forum non conveniens* issue.

Canadian superior courts have jurisdiction *simpliciter* if there is a real and substantial connection between the claim and the province in which the claim has been brought. To determine whether there is a real and substantial connection, provincial superior courts have developed slightly different methodologies involving the weighing of various factors to assess the strength of the connection to the jurisdiction (see *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20). In practice, the threshold is low for finding jurisdiction *simpliciter*. Jurisdiction may be established if the plaintiff suffered damages within the province, so long as those damages were not *de minimus* compared to the damages that were suffered elsewhere (see *Markandu* (*Litigation Guardian of*) *v. Benaroch* (2004), 71 O.R. (3d) 377). Once jurisdiction is established, the second step is for the court to determine whether the defendant challenging the jurisdiction of the court has established that there is clearly a more appropriate forum for the dispute such that the court should decline jurisdiction. The court will consider a number of factors, including: (a) the location of the majority of the parties; (b) the location of key witnesses and evidence; (c) contractual provisions that specify applicable law or jurisdiction; (d) the avoidance of multiplicity of proceedings; (e) the applicable law and its weight in comparison to the factual questions to be decided; and (f) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage.

Enforcement of foreign judgments

In Canada most provinces have legislation regarding the reciprocal enforcement of judgments of other provinces. However, this is not uniformly the case. For example, there is no legislation providing for the reciprocal enforcement of judgments granted by courts in Ontario and Québec, despite the fact that these are Canada's most populous jurisdictions. Absent legislation, the test for whether one provincial court will enforce the judgment of another turns on the issue of whether the judgment was rendered by a court with jurisdiction *simpliciter* — that is, whether there was a real and substantial connection between the claim and the province in which the judgment was obtained (see *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077).

Similarly, judgments rendered by American courts of competent jurisdiction are generally recognized and enforced by courts in Canada on the same basis — that is, the litigant must establish that there was a real and substantial connection between the claim and the jurisdiction in which judgment was obtained. There are, however, three exceptions to the enforcement of a foreign judgment — the judgment is a foreign tax or penal judgment, the judgment was obtained by fraud, or the judgment is against public policy or public order (see *Beals v. Saldanha*, 2003 SCC 72).

Beyond those exceptions, Canadian courts will afford American courts significant deference and comity. The result is that a Canadian court will enforce a wide variety of judgments obtained in the US against Canadian residents. Default judgments obtained by American citizens against Canadian citizens in American courts are enforceable, absent fraud, so long as the real and substantial connection test to the American jurisdiction is satisfied. The Canadian court will not review the merits of the American decision or the procedure used to obtain the judgment other than whether the Canadian resident received adequate notice.

Class proceedings in Canada

The United States' introduction of class-action procedures, which effectively began in the mid-1960s with an amendment to Rule 23 of the Federal Rules of Civil Procedure, had a belated effect in Canada. It wasn't until the 1990s that class actions began to be a popular vehicle for those seeking collective redress for damages. Québec and Ontario, in that order, were the first to pass class-action legislation, followed quickly by British Columbia. The other provinces were slower in enacting legislation to permit class actions but the delay turned out to be of no moment. The Supreme Court of Canada, for reasons that are far from apparent, decided in 2001, in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, that class-action legislation was unnecessary to ground jurisdiction to authorize class actions; all Canadian provinces,

whether or not there was class-action legislation in place, were held to have an inherent jurisdiction to do so.

Connections between the countries, and in some cases dependence of the Canadian economy on that of the US, has meant that class actions in the commercial context (securities misrepresentation/fraud and anti-trust/competition) or in the mass tort context often have cross-border aspects. It is not uncommon for Canadian plaintiffs' counsel to file class-action proceedings that are verbatim (or nearly so) copies of American proceedings. Similarly, it is not uncommon for proceedings to be filed in multiple provinces. The multiplicity of proceedings across borders and within Canada has created significant problems for the orderly administration of class-action proceedings in Canada.

There has not been a consistent, uniform approach to determining the circumstances in which the court will stay an action in favor of proceedings in other provinces. The Saskatchewan Court of Appeal stayed an action in that province in favor of a copycat proceeding filed by the same counsel in Ontario on the basis that filing multiple claims in multiple jurisdictions covering the same class is an abuse of the court's processes (see *Englund v. Pfizer Canada Inc.*, 2007 SKCA 62). However, the Newfoundland and Labrador Court of Appeal refused to stay an action brought in that province in respect of a class that was already covered by a proceeding in another province. The Newfoundland court concluded that if the Newfoundland class were certified, then it would be excluded from the class certified in the other province (see *Pardy v. Bayer*, [2003] N.J. No. 1982).

Similarly, there have been problems with respect to coordinating multiple class-action proceedings with and among the provinces and the US. There is no multidistrict litigation (MDL) process by which cases may be transferred and consolidated, as there is in the US. Rather, coordination in Canada relies upon the cooperation of the lawyers who are involved and the willingness of the judiciary to defer to case management decisions by other judges, including those of MDL judges in the US. In most cases, this works. However, if cooperation breaks down, it is necessary for the courts to hear a motion to determine who will have carriage of the class proceeding and, if necessary, the court may stay other proceedings within its jurisdiction. (See *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.* (2000), 4 C.P.C. (5th) 169 and *Setterington v. Merck Frosst Canada Ltd.* (2006), 26 C.P.C. (6th) 173.)

The fragmented approach to class proceedings in Canada complicates settlement of multiple-class proceedings in multiple jurisdictions in a single global settlement. Courts in the common-law provinces have generally accepted national classes. Traditionally, courts in Québec have been more cautious, given the fundamental differences between Québec as a civil-law jurisdiction, to recognize national classes. However, even where a national class might be appropriate, it is important to remember that provincial class-action legislation does not have extra-territorial reach. Accordingly, the enforcement of national class-action settlements depends, in part, on being able to establish that there is a real and substantial connection between the claim and the provincial jurisdiction in which the class proceeding is being certified and for which settlement approval has been sought (see *HSBC Bank Canada Ltd. v. Hocking*, 2006 QCCS 330). The intransigence of one set of plaintiff's counsel in one province can derail a global settlement, since the approval of each court in which a class proceeding is pending must be sought.

As a matter of international comity, judgments, including settlement approvals, in American class actions may be enforced in Canada. However, in addition to establishing the requisite real and substantial connection between the claim and the American jurisdiction granting judgment, it is necessary in a class proceeding to ensure that the rights of non-American resident class members are adequately protected and that non-American resident class members are accorded procedural fairness, including adequate notice of steps in the American proceeding (see *Parsons v. McDonald's Restaurants of Canada Ltd.* (2005), 7 C.P.C. (6th) 60). In one case, the Ontario Court of Appeal refused to enforce an Illinois class-action settlement in Ontario on the basis that the notice to the Canadian class members was inadequately given. The notice was published in American publications with circulation in Canada (such as *USA Today*), in three Québec newspapers and in a magazine with national (although limited) circulation.

Discovery of Canadian residents

One of the continuing irritants for American lawyers is the difficulty in getting evidence from Canadian residents who are not parties to American litigation. If the prospective witness won't cooperate by voluntarily appearing to be examined, recourse must be had to the clumsy and time-consuming letters rogatory (also known as letters of request) procedure.

This procedure is founded on the concept of comity, whereby one court agrees to assist another (foreign) court on the grounds that if it does so, the assistance will be reciprocated in the future. As a general principle, Canadian courts are quite receptive to applications by American litigants to take evidence of and require documentary evidence by Canadian residents. However, there are limits to how far the Canadian courts will go.

Canadian courts will not simply "rubber stamp" a request. The Canadian court's function is not to determine whether the American order was properly given; however, some evidence will be required to demonstrate the necessity and reasonableness of the request. For example, in both Ontario and Alberta, the court will require evidence to establish that: (a) the testimony or documentary evidence sought is relevant; (b) the evidence is necessary for trial and will be adduced at trial, if admissible; (c) the evidence is not otherwise obtainable; (d) the order sought is not contrary to public policy; (e) the documents sought are identified with reasonable specificity; and (f) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried in the Canadian jurisdiction (see *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746). In addition, the court must balance considerations of Canadian sovereignty and whether justice requires the taking of commission evidence (see *Connecticut Retirement Plans and Trust Funds v. Buchan*, 2007 ONCA 462).

It is also important for American counsel to appreciate that full deposition-style discovery is not available in Canada and Canadian courts are loath to grant extensive and intrusive discovery of multiple witnesses. The extent to which they will do so appears to be a function of the domestic practice. Some provinces, such as Alberta and Nova Scotia, grant much wider discovery rights to parties than does, for example, Ontario. Thus Ontario judges are likely to be more restrictive in the number of witnesses they will permit to be deposed, whereas Alberta judges tend to be much more liberal. On a related point, Canadian courts will generally not enforce an open-ended request that appears to be a "fishing expedition" (see *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 2005 ABQB 920 and *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746). Instead, Canadian courts will require the areas of examination to be specified and linked to the issues in the proceeding.

Finally, Canadian courts may impose terms regarding the conduct of the examination. In one recent case involving a letter of request from Nova Scotia, the Ontario court noted that there was a substantive difference with respect to how objections to questions were to be handled. In Nova Scotia, the rule is that the objection was to be noted on the record but the question was to be answered. The court concluded that the Ontario procedure should govern in order to provide the witness with the protections of the Ontario Rules of Civil Procedure. Therefore, objections were to be ruled on prior to the witness being compelled to answer them (see *Lafarge Canada Inc. v. Khan*, 2008 CanLII 6869).

Constitutional protection from self-incrimination

There is one further issue of which American counsel ought to be aware. Unlike the US, Canada did not have a constitutional Bill of Rights until the patriation of the BNA Act in 1982, which was discussed at the outset of this paper. A federal Bill of Rights had been enacted in 1960 but that had applied only in relation to federal powers. The enactment of the *Canadian Charter of Rights and Freedoms* (the Charter) as a schedule to the *Constitution Act*, 1982 was a watershed moment in Canadian legal history, which has had a profound change not only on the role of the judiciary in reviewing governmental activities but also on the social fabric of Canada.

Like the Fifth Amendment in the US, the Charter contains protections against conscripted, self-incriminating evidence. However, there is a profound difference in the way in which the Fifth Amendment operates and the Charter protection. An American citizen involved in Canadian proceedings ought to be aware of this difference.

In Canada, when a witness provides evidence in any proceeding, whether voluntarily or under legal compulsion, he or she cannot refuse to answer a question on the grounds that the answer might involve self-incrimination. Instead, Canada's *Charter of Rights and Freedoms* prohibits the use of testimony in one proceeding to incriminate the witness in another proceeding (except for the purposes of impeachment if the person testifies in the second proceeding).

It may be apparent, therefore, that a Canadian or American citizen involved in proceedings in Canada may be at risk of prosecution in the US due to the manner in which the Canadian rules operate. It may well be the case that an American court would permit testimony obtained in Canada to be used in the US,

even though the witness was deprived by Canadian law of his Fifth Amendment right to remain silent.

Interestingly, the Ontario Court of Appeal has recently held that the differences between the Fifth Amendment and the Charter do not provide a basis on which to avoid the enforcement of an American judgment in Canada. Instead, the court concluded that it is likely that testimony obtained in an American proceeding would not be admissible in a Canadian proceeding if it offends the rule against self-incrimination. Therefore, it is no excuse for a Canadian to say that he or she could not defend the proceeding in the US without risking regulatory or other prosecution in Canada. In other words, the inability to testify in an American proceeding without giving the Crown in Canada an opportunity to obtain derivative evidence (that is, evidence obtained as a result of the self-incriminatory evidence in the US) is not a ground for objecting to the enforcement of an American judgment (see *King v. Drabinsky*, 2008 ONCA 566).

Conclusion

While we have attempted to identify some of the major areas where American and Canadian law intersect, obviously there are many more in which the differences in the law and legal systems can be problematic. However, Canadian and American lawyers have a long tradition of working together. With that cooperative history, there is no reason that the cross-border problems created by our emerging continental economy cannot be solved in the future as they have been in the past.

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