

**Conflict of Laws:
Recognition and Enforcement of Foreign Judgments**

Conflict of laws is a complex topic that touches on practically every area of law. Although mastering any part of it is a daunting task, the dangers of ignoring the areas that are relevant to your practice can have devastating consequences for your client, as well as pose an enormous liability hazard for you.

The purpose of this paper is to provide a general overview of how conflict of laws relates to the areas of law most relevant from an insurance perspective, be it tort, contract or property law. It is essential that counsel be aware of the key issues relating to inter-provincial and international aspects of litigation.

The following overview attempts to encapsulate the most relevant and key issues that counsel should focus on when dealing with a conflict of laws issue in the context of insurance litigation.

I. FORUM SELECTION

Forum selection is the process by which an appropriate jurisdiction is selected to entertain a particular action. Where counsel commences an action in Ontario, he or she would likely argue that despite the existence of one or more foreign elements in the case, the Ontario court should assume jurisdiction over the matter, as it is the proper forum. Whether or not Ontario is in fact the proper forum depends on the subject matter of the litigation, the parties, and whether counsel can satisfy the court that Ontario has a “real and substantial connection” to the action. Insurers must be aware of the implications of forum selection as it may considerably alter the economic reality of defending an insured in a foreign jurisdiction.

a) Types of Jurisdiction

Courts can have either *in rem* or *in personam* jurisdiction. *In rem* jurisdiction is jurisdiction over a particular “thing”, which means that the court affects the rights or interests of everyone else over a specific object. This in turn means that the object must be located within the territory of the court that is affecting it.

In personam jurisdiction, on the other hand, allows a court to impose personal liability or obligation on a particular individual. As will be discussed later in the paper, this jurisdiction may potentially be exercised over individuals outside the court’s jurisdiction. Nevertheless, in asserting jurisdiction, counsel should first determine if the court possess *in rem* or *in personam* jurisdiction. Once that is determined, counsel should then note the limitations on the subject matter and parties to the action.

b) Limitations on the Subject Matter of the Action

Counsel must be aware that Canadian courts have no jurisdiction to enforce a foreign penal, revenue or public law. Additionally, Canadian courts are also barred from asserting

in rem jurisdiction over a foreign object, or awarding damages for trespass to a foreign object.

c) Limitations on the Parties to the Action

Counsel must also be aware that Canadian courts cannot entertain an action against a foreign state, sovereign, as well as head of a foreign state, pursuant to the *State Immunity Act*¹. Exceptions to these limitations involve commercial activity by the foreign state, death and personal injury, Maritime Law, property in Canada and violation of human rights.² Interestingly, however, a foreign state or sovereign may assert a claim in Canadian courts as plaintiffs.

Moreover, diplomats and consuls are also immune as defendants in Canadian courts, pursuant to the *Foreign Missions and International Organizations Act*³. International organizations and enemy states also cannot be sued in Canadian courts.

However, jurisdiction can be asserted over any of these parties if immunity is waived.

d) Asserting Jurisdiction

Once it is determined that jurisdiction over a party can be asserted in an Ontario court, counsel must decide how to assert it. There are three ways to assert jurisdiction: Counsel may either serve the party *in juris*, which means that the party is served pursuant to the *Rules of Civil Procedure* for service within Ontario, or counsel may serve the party *ex juris*, pursuant to Rule 17 of the *Rules of Civil Procedure*, for service outside Ontario. The third method of asserting jurisdiction over a particular party requires that the party attend or submit to the Ontario court by, for example, defending the action.

1) Service *in juris*

i) Individuals

Service *in juris* requires the party over whom jurisdiction is being asserted to be present in Ontario at the time of service. The debate over whether jurisdiction can be asserted by service *in juris* on a person simply passing through Ontario, rather than residing in Ontario, is outside the scope of this paper. Suffice it to say that the former type of service is more controversial and may raise difficulties for counsel in asserting jurisdiction over that individual. In the same vein, jurisdiction asserted over a person induced by fraud or physical force to enter Ontario for the purpose of serving him or her *in juris* might be set aside as an abuse of process.

ii) Corporations

¹ R.S. 1985, c. S-18.

² *Ibid.*, at sections 5-8.

³ 1991, c. 41.

Counsel should note that service *in juris* over foreign corporations could be accomplished pursuant to Rule 16.02(1)(c) of the *Rules of Civil Procedure*.

2) Service *ex juris*

Where jurisdiction is asserted over a party residing outside Ontario, Rule 17 of the *Rules of Civil Procedure* states that service of an originating process can be made *ex juris* on that party, provided that there is a “real and substantial connection” between the subject matter of the action or the defendant, and Ontario. Rule 17.02 lists the categories of appropriate subject matter for which service *ex juris* will be permitted. Counsel should also be aware that the court has discretion to validate service, pursuant to Rule 17.06(3), even if the subject matter of the action does not fall within the enumerated categories listed in Rule 17.02. However, it should also be noted that a motion could be brought, pursuant to Rule 17.06(1), to set aside service *ex juris*.

3) Attornment/Submission

Jurisdiction may also be asserted over a party where that party attorns or submits to the jurisdiction of a particular court. For example, by defending a claim against him in Florida, a Canadian citizen has attorned to the jurisdiction of the Florida court. By defending the foreign action, the Canadian citizen essentially recognized the jurisdiction that the Florida court asserted over him. Once that is done, the Canadian citizen must not ignore the foreign court’s proceedings against him or her.

However, counsel must also be acutely aware that advising a client to ignore a foreign court’s attempt to assert jurisdiction over it in the first place, may result in judgment against that client, as well as expose counsel to a claim for negligence based on erroneous legal advice. This was the case in the *Beals v. Saldonha* case, which is discussed in more detail below.

Moreover, insurers must decide whether they should attorn and defend their insureds in foreign jurisdictions, or whether they should not attorn and try to thwart any attempt to enforce a foreign judgment obtained against their insureds. While it may be more cost effective to try and block the enforcement of the foreign judgment rather than defend the action, insurers must decide whether they should take that risk, given the trend in Canadian courts to encourage reciprocity and international comity. In addition, insurers must also keep in mind that the risk of enforcement is vastly greater where a judgment obtained in one Canadian province is sought to be enforced in another province.

e) “Real and Substantial Connection” Test

The key test that must be satisfied in order to assert jurisdiction, particularly where *ex juris* service is made⁴, is the “real and substantial connection” test, which was articulated

⁴ Although there is debate whether the “real and substantial connection” test should also apply in cases involving *in juris* service.

by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*⁵ and in *Hunt v. T & N plc*⁶.

The Ontario Court of Appeal recently elaborated on this test in *Muscutt v. Courcelles*⁷. It set out the factors to be considered in applying this test. These factors, which are not intended to be exhaustive, include the connection between the forum and the plaintiff's claim, the connection between the forum and the defendant, unfairness to the defendant in assuming jurisdiction, unfairness to the plaintiff in not assuming jurisdiction, the involvement of other parties to the suit, the court's willingness to recognize and enforce 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.

In its most elemental form, this test is the bedrock of any claim that attempts to assert jurisdiction where foreign elements are involved. Counsel must apply this test to the specific facts of each individual case in order to satisfy an Ontario court that it should assume jurisdiction over a proceeding containing one or more foreign elements.

f) Current Trend

Conflict of laws evolved out of necessity and a realization that our world is inter-related. Boundaries are regularly crossed, individuals constantly travel, and corporations conduct business over continents. Out of this realization evolved the principle of comity, which is based on reciprocity and an understanding that greater cooperation between provinces and countries would lead to greater mutual benefit. In *Morguard*, the Supreme Court defined comity as "the deference and respect due by other states to the actions of a state legitimately taken within its territory."⁸

However, a recent 2004 Ontario Court of Appeal decision, *M.J. Jones Inc. v. Kingsway General Insurance Co*⁹, indicates that the courts may be moving away from the comity principle. In this case, the court dismissed an appeal from a finding by a lower court that jurisdiction could, in effect, be asserted over a defendant residing in the United States. In assuming jurisdiction, the lower court judge applied the "real and substantial connection" test, as articulated in *Muscutt*, and concluded that it favored the assumption of jurisdiction over the foreign defendant.

Although the implications of *M.J. Jones* are not yet fully known, as it has not been considered by the Supreme Court, it could signal a shift by Canadian courts towards a more flexible and, perhaps, more aggressive assertion of jurisdiction over foreign defendants. Although this approach may be contrary to the principles of comity or territorial sovereignty, its precise effect on how Canadian courts would deal with

⁵ [1990] 3 S.C.R. 1077 (S.C.C.) ["*Morguard*"].

⁶ [1993] 4 S.C.R. 289 (S.C.C.).

⁷ [2002] O.J. No. 2128 (Ont. C.A.) ["*Muscutt*"].

⁸ *Supra* 5 at p. 1095.

⁹ [2004] O.J. No. 1087 (Ont. C.A.) ["*M.J. Jones*"].

applications of anti-suit injunctions and foreign judgments in the future is yet to be seen. For now, counsel should be aware that Canadian courts might possibly reciprocate and recognize more aggressive assertions of jurisdiction over Canadian citizens and corporations. Accordingly, counsel should be aware of the mechanisms available to block both local and foreign proceeding, when such actions are necessary. Moreover, insurers should be mindful of the potential added costs and risks of defending insureds over which jurisdiction has been asserted by a foreign court.

II. STAY APPLICATION & ANTI-SUIT INJUNCTION

Once jurisdiction has been assumed and the court has recognized that it is a proper forum, it must then query whether it should decline or accept jurisdiction over the suit. In other words, where the court can assume jurisdiction, the question is, should it?

The court may decline jurisdiction because it recognizes that another forum is more convenient, or perhaps to avoid multiplicity of proceedings where a suit has already been commenced elsewhere (*lis alibi pendens*). Whatever the reason is, the court must apply the *forum non conveniens* test in order to determine whether it should decline jurisdiction by staying the local proceeding, or whether it should restrain a person within its jurisdiction from commencing or continuing a proceeding in a foreign court by way of an anti-suit injunction.

a) Stay of Proceedings

1) Authority

The authority to grant a stay of proceedings is derived from section 106 of the *Courts of Justice Act* and Rules 17.06(1)(b) and 21.01(3) of the *Rules of Civil Procedure*. In order to convince a court to decline jurisdiction, counsel must satisfy the *forum non conveniens* test, as articulated by the Supreme Court in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*¹⁰. The general test of *forum non conveniens* is to determine whether there is another forum that is more convenient and appropriate for the pursuit of the action and for securing the ends of justice. This entails looking at the balance of convenience and juridical advantage of the plaintiff.

2) Factors of *Forum Non Conveniens* Test

While the court in *Amchem* lists some factors to be considered, such as the connection of the parties to the competing jurisdictions, where the acts that are the foundation of the claim took place, and legitimate juridical advantage in the domestic forum, the Ontario Court of Appeal in *Eastern Power Ltd. v. Azienda Comunale Energia and Ambiente*¹¹ listed some more factors to be considered, such as the location where the contract in dispute was signed, the applicable law of the contract, the location in which the majority

¹⁰ [1993] 1 S.C.R. 897 (S.C.C.) [*“Amchem”*].

¹¹ [1999] O.J. No. 3275 (Ont. C.A.).

of witnesses reside, the location of key witnesses, the location were the bulk of the evidence will come from, the jurisdiction in which the factual matters arose, and the residence or place of business of the parties.¹² The court must, therefore, weigh the competing factors and determine whether there is another forum that is more suitable for entertaining the action.

In arguing for or against a stay of proceedings, counsel must be aware that the application of the *forum non conveniens* test is very much within the discretion of the court, and as a general rule, the more factors can be adduced to support the assertion of *forum (non) conveniens*, the more effective counsel would likely be in obtaining or thwarting a stay.

In a recent 2004 Ontario Superior Court decision, *Zurich Insurance Co. v. Muscletech Research & Development Inc.*¹³, the court was faced with what it noted was “an increasing number of motions to stay an action brought by an Ontario company against another Ontario company on the grounds that Ontario is not the appropriate jurisdiction.”¹⁴

This case involved an insured’s application to stay its insurer’s action in Ontario on the basis of *forum non conveniens*. The essence of the dispute concerned coverage and interpretation of insurance policies. The insurer, Zurich, argued that the action should be tried in Ontario, since its head office was in Ontario and the insured’s head office was also in Ontario. However, the insured, Muscletech, argued that since California was the largest market for its products, the action should be heard there. Muscletech conducted business in many other U.S. states as well. The California court dismissed the action on the basis that it was not the appropriate forum. The Ontario court held that Ontario was the appropriate forum and dismissed Muscletech’s application for a stay. In its judgment, the court stated that in deciding whether to decline jurisdiction based on *forum non conveniens*, it is “not obliged to determine which forum is the most appropriate forum, but only determine that there is a forum that is more appropriate than Ontario.”¹⁵

3) Burden of Proof

With respect to who has the burden of proof in *ex juris* cases, the court in *Amchem* was of the view that it would depend on the rule that permits service out of the jurisdiction. However, the court also noted that the burden of proof should not play a significant rule unless the court could not determine based on the materials presented, which is the more convenient forum.

Interestingly, the Ontario Court of appeal in *Frymer v. Brettschneider et al.*¹⁶ was of the view that in the case of *ex juris* service, the burden should be on the plaintiff to justify the

¹² *Ibid.*, at 19.

¹³ [2004] O.J. No. 2739 (Ont. S.C.J.).

¹⁴ *Ibid.*, at 1.

¹⁵ *Ibid.*, at 11.

¹⁶ [1994] O.J. No. 1411 (Ont. C.A.).

choice of a domestic forum. However, in the case of *in juris* service, the court held that the burden should be on the defendant to justify the choice of another forum.

4) *Lis Alibi Pendens*

Literally, *lis alibi pendens* means “a suit pending elsewhere”. Sections 106 and 138 of the *Courts of Justice Act*, as well as Rule 21.01(3)(c) of the *Rules of Civil Procedure*, and section 50.1(a) and (2) of the *Federal Courts Act* provide authority to Ontario courts to order a stay or dismissal of a local action due to multiplicity in proceedings.

The difference between ordering a stay based on *lis alibi pendens* and ordering an anti-suit injunction is that with the former, the court declines jurisdiction, which means that it recognizes that another forum is a more appropriate venue to entertain the action. In contrast, an anti-suit injunction is used by the courts to restrain a litigant from commencing or continuing an action in another forum.

b) *Anti-Suit Injunction*

An anti-suit injunction is a very aggressive remedy that enables a court to restrain a person within its jurisdiction from commencing or continuing an action in a foreign court. Canadian courts are very hesitant to issue an anti-suit injunction because it effectively bars a litigant from pursuing an action in another forum, thereby, arguably contravening the principle of comity.

Given the intrusive character of an anti-suit injunction, the court in *Amchem* was of the view that counsel should, as a general rule, only seek it where a proceeding in the same matter was pending in a foreign court. If it was pending in a foreign court, counsel must first seek a stay or dismissal in that court, failing which the domestic court can proceed to entertain an application for this injunction. However, the domestic court can only consider this remedy if (1) it is alleged to be the most appropriate forum and, (2) it is potentially an appropriate forum. Moreover, the court in *Amchem* also stated that unless a domestic proceeding has been commenced, the court should not consider an application for this injunction unless the applicant contends that the action should have been commenced in the domestic forum.¹⁷

Therefore, an anti-suit injunction would only be granted where a foreign court fails to apply the *forum non conveniens* test properly and injustice results. However, if the domestic court concludes that the test was properly applied then the application for anti-suit injunction would likely not be granted.

c) *Jurisdiction Selection Clauses*

Canadian courts generally give deference to contractually agreed upon forum selection clauses unless the agreement, as it relates to jurisdiction, offends public policy, or was the

¹⁷ *Ibid.*, at 51-52.

product of grossly uneven bargaining positions.¹⁸ Furthermore, courts would also not enforce such a clause if it contravenes a domestic statutory provision that forbids its ouster, or if the balance of conveniens strongly favors another forum.

In a recent 2004 Ontario Superior Court decision, *Hirsi v. Swift Transportation Co.*¹⁹, the court acknowledged the deference given to forum selection clauses, as they created certainty and security in transactions. The court further held that unless “strong cause” can be shown, such clauses should be enforced, and the onus is on the plaintiff to persuade the court that a forum selection clause should be ignored.

III. RECOGNITION AND ENFORCEMENT

Once judgment has been rendered in a foreign court, there are certain requirements that must be met before Canadian courts can enforce it domestically. Counsel would be well advised to be aware of the various enforcement mechanisms available and how they maybe utilized.

a) Actionability of Foreign Judgments

A foreign judgment is, by its very nature, foreign, and as such, its enforcement depends on whether and to what extent the domestic forum will make it actionable. That said, Canadian courts would only enforce foreign judgments if the foreign court that issued the judgment had jurisdiction, in the international sense, to make that judgment. Counsel should be aware that it is irrelevant whether the foreign court assumed jurisdiction properly under its own domestic law(s). The foreign court must have had a real and substantial connection to the subject matter, or parties to the action.

1. Proper International Jurisdiction

i) *In Personam* Judgment

Where a foreign court issues a judgment in an action *in personam*, the international jurisdiction of the foreign court must have been based on either the presence or submission of the defendant(s), or the existence of a real and substantial connection between the foreign court and the subject of the proceeding, or the defendant(s).

ii) *In Rem* Judgment

Canadian courts also recognize that foreign courts have exclusive jurisdiction to issue a judgment in an action *in rem* over objects situated within their territorial jurisdiction.

2. Final and Conclusive Judgment For a Definite Sum of Money

¹⁸ *Fairfield v. Low* (1990), 71 O.R. (2d) 599 (Ont. H.C.).

¹⁹ [2004] O.J. No. 2186 (Ont. S.C.J.).

Furthermore, to be enforced in Canada, the foreign judgment must be final and conclusive, and if it is an *in personam* judgment, it must be for a definite sum of money.

3. Sufficient Certainty

With respect to foreign non-monetary judgments, the Ontario Court of Appeal has recently held in *Pro Swing Inc. v. Elta Gold Inc.*²⁰ that “a foreign judgment would have to be sufficiently certain in its terms that the Ontario courts could enforce the judgment without having to interpret its terms or vary it.”²¹ Therefore, when considering whether to bring a subrogation claim in a foreign jurisdiction against a Canadian resident for a property loss, insurers would be well advised to ensure that the foreign judgment is sufficiently certain on its own terms without an Ontario court having to interpret or vary those terms.²²

b) Enforcement of Foreign Judgments

Once a foreign pecuniary judgment²³ is recognized by a Canadian court, its enforcement is determined by the *lex loci* (procedural law) of the domestic forum. As a consequence, a domestic court may not provide the same or similar remedies to a creditor that the foreign court would have provided.

1) Methods of Enforcement

In seeking to enforce the foreign judgment, a creditor can choose to disregard the foreign judgment and sue on the original cause of action, or sue on the foreign judgment itself, or register the judgment under special domestic legislation, if it exists, such as the Ontario *Reciprocal Enforcement of Judgments Act*²⁴.

2) Ontario’s Reciprocal Enforcement of Judgments Act

Registering a foreign judgment under the Ontario *Reciprocal Enforcement of Judgments Act* enables a creditor to register the judgment with a domestic court within six years after the date of the judgment. Once registered, the judgment can be enforced like any other domestic judgment²⁵, except where the foreign judgment has been registered *ex parte*²⁶. Moreover, upon being provided with notice of registration, the judgment debtor has one

²⁰ [2004] O.J. No. 2801 (Ont. C.A.).

²¹ *Ibid.*, at 10.

²² D. McInnis and V. Krkachovski of McCague Peacock Borlack McInnis & Lloyd LLP, “*Supreme Court Defines Test for Enforcement of Foreign Judgments*” (www.internationallawoffice.com).

²³ “Judgment” under section 1 of *REJA* means “judgment or an order of a court in any civil proceedings whereby any sum of money is payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the province or territory where it was made, become enforceable in the same manner as a judgment given by a court therein.”

²⁴ R.S.O. 1990, c. R.5.

²⁵ *Ibid.*, section 4.

²⁶ *Ibid.*, section 6.

month to petition to have the registration set aside on any of the grounds listed under the Act²⁷.

c) Defences to Recognition and Enforcement of Foreign Judgments

Counsel should be aware that there are three primary defences to the recognition and enforcement of foreign judgments, as articulated by the Supreme Court of Canada in *Beals v. Saldanha*²⁸, which include judgments obtained by fraud, failure of natural justice and judgments that are contrary to public policy.

In *Beals*, Canadian vendors sold a vacant lot in Florida to U.S. purchasers. A dispute arose and the purchasers sued in Florida. The Canadian vendors filed a defence but did not defend subsequent amendments to the action, which, according to Florida law, amounted to a failure to defend the action.

The Canadian vendors were noted in default and judgment was rendered against them for \$260,000. Their legal counsel in Canada advised them that the judgment could not be enforced in Ontario. Consequently, they took no steps to set the judgment aside or appeal it.

The amount grew to \$800,000 CDN. The U.S. purchasers sought to enforce their Florida judgment in Ontario. The Ontario trial judge dismissed the enforcement action on the ground that the judgment was obtained fraudulently. However, the Ontario Court of Appeal allowed the purchaser's appeal. The Supreme Court of Canada dismissed the Canadians' appeal and enforced the Florida judgment.

The majority held that there are three possible defences to the recognition and enforcement of foreign judgments: fraud, natural justice, and public policy.

1) Fraud

With respect to the fraud defence, the court held that the merits of a foreign judgment can be challenged only where the allegations of fraud are new, and not the subject of prior adjudication. In other words, the fraud alleged must not have been known at the time the judgment was obtained. Furthermore, the burden of demonstrating that the facts supporting the allegation of fraud could not have been discovered by the exercise of due diligence prior to the foreign judgment having been obtained lies on the person raising the defence of fraud.

2) Natural Justice

With respect to the natural justice defence, the court held that this defence is restricted to the form of foreign procedure and due process. It does not relate to the merits of the case. If the foreign procedure does not accord with Canada's concept of natural justice, i.e.

²⁷ *Ibid.*, section 3.

²⁸ [2003] S.C.J. No. 77 (S.C.C.) [*Beals*].

prior notice, the foreign judgment will not be recognized. The court also held that negligent advice does not constitute a bar to the enforcement of foreign judgments.

3) Public Policy

With respect to the public policy defence, the court held that foreign judgments that are contrary to the Canadian concept of justice and “our view of basic morality” would not be recognized. However, the court also stated that large monetary judgments are not, in themselves, contrary to the Canadian concept of justice and basic morality.

IV. IMPLICATIONS OF THE *BEALS* DECISION

Historically, Canadian courts applied the “real and substantial connection” test to interprovincial judgments. However, in 2003, with the stroke of a pen, the Supreme Court of Canada broadened the application of this test to include the recognition and enforcement of international judgments.

The implications of *Beals* for Canadian insurers cannot be ignored. Of primary importance is the realization that a failure to defend their insureds in foreign jurisdictions could potentially lead to sizeable judgments against them, which might then be enforced domestically.

Canadian insurers must also be aware of variation in monetary awards that can be rendered in foreign jurisdictions, as opposed to awards traditionally afforded by Canadian courts. The potential exposure based on this factor alone may substantially vary an insurer’s assessment of whether and how to defend an action in a foreign jurisdiction. For instance, soaring punitive damage awards in the United States may persuade Canadian insurers to defend their insureds in American courts, rather than choosing to focus their resources on contesting the enforcement of judgments rendered in foreign courts. In other words, traditional economic formulas that previously dictated insurers’ legal policy must now be re-examined in light of an increased scope for liability and potential economic exposure in defending foreign legal actions.

Therefore, when faced with a decision of whether to defend an insured in a foreign jurisdiction, a Canadian insurer should consider the merits of the claim, the local legal procedures and substantive law, and the likelihood of success in contesting the enforcement of the foreign judgment domestically.

V. CHOICE OF LAW

Once the domestic forum has determined that it possesses jurisdiction over the parties and the subject matter of the action, it must choose the appropriate substantive law to apply (i.e. which jurisdiction’s substantive law would govern). The substantive law is determined by a process called characterization, or classification. The court must examine

the issue raised by the facts and then characterize, or classify it according to some known area of law (i.e. torts, contracts, property, marriage, custody, etc.). To do so, the court must consider the “connecting factor” that is raised by the facts, which connects the legal issue with a specific legal system. Thus, the connecting factor leads to the legal system that governs the issue. This legal system is referred to as the substantive law, or *lex causae*. It is separate and distinct from the procedural law, or *lex fori*. Thus, while the court may apply the substantive law of another jurisdiction, it will apply its own procedural law.

a) Torts

1) General Rule – *Lex Loci Delicti*

Generally, where the central issue in an action involves a tort, the court should apply the *lex loci delicti* rule in choosing which substantive law to apply. This means that the court must apply the substantive law of the jurisdiction in which the injury is said to have occurred, barring rare exceptions, which would be left to the discretion of the courts to apply. The primary difficulty with this approach is determining where the injury took place. In particular, the court must determine whether the place of injury is the place where the activity occurred, where the damages were sustained, etc.

2) Exceptions

The leading case on point is *Tolofson v. Jensen*²⁹, which was a case concerning motor vehicle accidents involving residents of different provinces. In articulating the general rule of *lex loci delicti* in tort cases, the Supreme Court left the door open to exceptions, which would be subject to courts’ discretion in cases involving international law. The court also acknowledged the possibility of public policy considerations being a bar to the application of the *lex loci delicti* rule (although not in inter-provincial circumstances), as well as instances where the parties are nationals or residents of the domestic forum and as a consequence, it would just make sense to apply the *lex causae* of the domestic forum rather than the law of another jurisdiction.

3) Limitation Periods

With respect to the issue of limitation periods, the court in *Tolofson* held that the expiration of a limitation period could not form the basis of an exception to this general rule. Insurers would, therefore, be well advised to adhere to the limitation periods prescribed by the *lex causae*.

The Ontario Court of Appeal, in a very recent 2004 decision, affirmed the principle of *lex loci delicti* in *Roy v. North American Leisure Group Inc.*³⁰ The case concerned the choice of law that governed the plaintiffs’ action against one of the defendants. This issue was critical because if the Ontario law applied then the plaintiffs’ action against this

²⁹ [1994] 3 S.C.R. 1022 (S.C.C.) [“*Tolofson*”].

³⁰ [2004] O.J. No. 4767 (Ont. C.A.).

particular defendant would be barred by the expiration of a limitation period. In overturning the motion judge's decision, the Court of Appeal expressly affirmed *Tolofson* on the issue of limitation periods and stated that the expiration of a limitation period does not constitute an exception to the general rule of *lex loci delicti*.

b) Contracts

1) Proper Law of the Contract

In cases arising out of contracts, the general rule is that the court would examine the contract and determine whether the parties have expressed an intention as to what system of law governs the contract. The parties are free to select the system of law they wish to govern the contract, provided that this choice is *bona fide* and legal. *Mala fides* may include choosing a particular system of law for the purpose of avoiding certain mandatory rules of the forum where the contract was made. The court would, therefore, not apply a chosen system of law if it is contrary to public policy or if it is illegal (i.e. if the contract involves an illegal act).

2) Implied Intention

Absent an express intention, the court would attempt to infer an intention from the contract. In trying to infer the intention of the parties, the court may consider various factors, such as the place where the contract was negotiated, the place of performance, nature and subject matter of the contract, etc.

3) No Intention

Absent any kind of intention, express or implied, the court would apply the proper law of the forum that has the most real and substantial connection to the dispute.

4) Formal & Essential Validity

A contract will be held to be formally valid if it complies with either the procedural law of the place of contracting, or the proper law that governs the contract.³¹ Formal validity includes questions such as whether the contract must be in writing, number of witnesses, etc.

Essential validity (i.e. with respect to the actual provisions of the contract) is determined in accordance with the proper law that governs the contract.³²

5) Interpretation of the Contract

³¹ *Greenshields Inc. v. Johnston*, [1981], A.J. No. 946 (Alta. Q.B.), aff'd by Alta. C.A.

³² J.G. Castel, *Introduction to Conflict of Laws* (2002). Butterworths Canada Ltd. Markham. At p.198. (citation???)

Moreover, any uncertainty as to the interpretation of the terms of the contract would be determined by the application of the rules of construction of the proper law that applies, unless the parties expressed a choice in the contract as to what law should govern the rules of construction.

c) Property

1) Movable or Immovable Property

In determining the proper law that governs the proprietary or possessory rights and interests in things, the court must first determine whether the thing is a movable or immovable. This is determined according to the law of the place where the thing is located, which is referred to as the *lex situs*.

2) Land

The *lex situs* of land is where the land is located.

3) Chattels (Choses in Possession)

The *lex situs* of a chattel (i.e. a tangible physical object) is where the chattel is located at the material time.

4) Choses in Action

Choses in action (i.e. a contract debt) does not necessarily have a specific location. Consequently, courts usually attribute a *situs* (place) to choses in action depending on the facts and purpose(s) for which it is being ascertained. For example, a debt maybe “located” where the debtor resides.