INTERJURISDICTIONAL LAW

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In the practice of motor vehicle accident litigation, it is inevitable that you will encounter a situation where an individual is injured in a jurisdiction outside of Ontario. After all, if people intended to stay in one place all the time they would not be travelling about in automobiles. When you encounter such a situation in your practice, there are certain investigations you have to undertake to ensure that the matter proceeds in the forum that is most advantageous and appropriate for your client. This paper outlines some pertinent issues related to interjursidictional motor vehicle accidents as it relates to the resolution of tort claims and accident benefits related issues.

When facing a problem with competing forums, you must first of all examine the latest jurisprudence. The Supreme Court of Canada has been quite clear in setting out directions as to where and how cases are to be heard in interjurisdictional tort disputes. Most notably in the cases of *Amchem Products v. British Columbia Workers Compensation Board*[1] and *Tolofson v. Jensen*.[2] The Ontario Court of Appeal recently discussed the issue in *Muscutt v. Courcelles.*[3] Hopefully, this paper should help as a guide to assist you in coming to grips with the factors that the Courts have considered relevant.

Forum Non Conveniens and the Real and Substantial Connection

The doctrines of *forum non conveniens* and "real and substantial connection" suggest that an action should be brought in the forum that is most appropriate for the case. The choice of forum in most circumstances is straightforward. For instance, an action arising out of an accident occurring in Ontario with Ontario plaintiffs and Ontario defendants is not going to be heard in Alberta. However, cases with interjurisdictional litigants do not yield such simple answers. Consider for example the situation of an accident which occurs in Ontario,

[1] 1993 1 SCR 897 [*Amchem*]
[2] 1994 CarswellBC 1 [*Tolofson*]
[3] 2002 CarswellONt 1756 [*Muscutt*]

the defendant is a resident of New Brunswick, the plaintiff lives in British Colombia where he/she is receiving all of his/her medical treatment and the witnesses live in Ontario. This situation is much more complex as some guidance to these complex situations may be obtained from a careful review of the *Muscutt* and *Amchem* cases.

Real and Substantial Connection: *Muscutt v. Courcelles* 2002

The Ontario Court of Appeal recently had a chance to review the laws relating to choice of forum in the *Muscutt v. Courcelles* case. This appeal was heard with four other appeals and each case shared the common problem of an Ontario resident being injured outside of the province and was seeking to bring their claims for damages in an Ontario Court. An interesting note from this case is that the Court addresses and differentiates the concepts of "real and substantial connection" and "*forum non conveniens*". While often discussed in the same vein, the Court is careful to suggest that they serve different, yet overlapping, legal purposes. Sharpe J. explains the difference by quoting several academic sources as follows:

> ***In G.D. Watson and F. Au, "Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard"(2000) 23 Adv. Q. 167 at 211-14, the authors explain the implications of a two-stage approach that first considers assumed jurisdiction and then considers forum non conveniens. I agree with their analysis of this issue. The residual discretion to decline jurisdiction where the real and substantial connection test is met assumes that the forum in question is not the only one that has jurisdiction over the case. The real and substantial connection test requires only a real and substantial connection, not the most real and substantial connection. See also J.-G. Castel & J. Walker, Canadian Conflict of Laws, 5th ed. (Markham: Butterworths, 2002) at 1.40. Further, the residual discretion to decline jurisdiction also suggests that the consideration of fairness and efficiency is not exhausted at the stage of assumed jurisdiction and that there is scope for considering these factors at the forum non conveniens stage. The residual discretion therefore provides both a significant control on assumed jurisdiction and a rationale for lowering the threshold required for the real and substantial connection test.***[4]

[4] Muscutt, para 44

In delineating the "real and substantial" connection test the Court restated the factors which ought to be considered. The Court of Appeal notes that the Supreme Court's previous discussions of the doctrine have not provided crystal clear direction as to what a "real and substantial" connection embodies. This is especially so considering that the Court's objective in the first place was to ensure that the definition remain "flexible".[5] After surveying the case law, the Court went on to identify eight factors which ought to be considered in determining whether the real and substantial connection test had been met. The Court was careful to caution that in order for the test to retain an air of flexibility none of the factors are to be taken as superior or determinative, but rather they must be considered wholly. The factors are outlined as follows:

1) Connection between the forum and the plaintiff's claim[6]

This factor examines the connection between the forum and the Plaintiff's claim. On one hand the argument has been made that states have an interest in dealing with negligent acts that occur in their territory, but at the same time this should not mean that they have an inherit right to jurisdiction, especially when weighed against all the other factors. The Court comments as follows:

> ***As La Forest J. explained in Hunt at p. 327, while "a province undoubtedly has an interest in protecting the property of its residents within the province … it cannot do so by unconstitutional means". Similarly, in Tolofson, at p. 1055, La Forest J. stated that "the mere fact that another state (or province) has an interest in a wrong committed in a foreign state (or province) is not enough to warrant its exercising jurisdiction over that activity in the foreign state for a wrong in one state will often have an impact in another".***[7]

2) Connection between the form and the defendant[8]

This point asks one to consider whether the defendant has done anything that would connect the defendant to the jurisdiction. This step would involve examining the defendant's

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[5] Muscutt, para 56
[6] Muscutt, para 77 - 81
[7] Muscutt, para 80
[8] Muscutt, para 82 - 85

conduct and asking whether or not it was foreseeable that that the alleged negligent course of action would affect an individual outside of the defendant's home jurisdiction.

3) Unfairness to the defendant in assuming jurisdiction[9]

One must also pause to ask whether or not there is anything that prejudices the defendant by hearing the matter in a particular forum.

4) Unfairness to the plaintiff in not assuming jurisdiction[10]

As a necessary balance to point number three, the Court should also consider whether or not there is any unfairness that would result to the plaintiff in not assuming the chosen jurisdiction. The Court notes that oftentimes the plaintiff, especially in a personal injury action, may not be well enough to be able to travel to a different jurisdiction for the purposes of litigation and thus it would be unfair to ask him/her to travel the distance to foreign jurisdiction. The other issue to consider is the residence of the plaintiff's treating and examining health care professionals who will undoubtedly become necessary witnesses at trial, as it would be unfair to the plaintiff to try the action in a location a considerable distance from where their expert witnesses reside. It is also interesting to note that the Court considers the fact that in most cases an individual plaintiff will most likely be paying for and instructing counsel on their own as opposed to an insured who is indemnified for legal costs by their insurance company. This was considered in the *Muscutt* case where Sharpe J. stated:

> ***In this case, if jurisdiction were refused, the Plaintiff would be compelled to litigate in Alberta. This would undoubtedly be inconvenient to the Plaintiff, especially given the injuries he has sustained. Further, unlike the Defendant, the Plaintiff does not have the benefit of an insurer to cover the cost of litigation. While the unfairness to the Plaintiff of having to litigate in Alberta may not be as strong as it was in Oakely v. Barry, on balance, a consideration of unfairness favours the Plaintiff.***[11]

[9] Muscutt, para 86 - 87
[10] Muscutt, para 88 - 90
[11] Muscutt para 90

5) Involvement of the other parties in the suit[12]

This stage of the analysis suggests that one look at all the parties involved in the litigation and to help make a determination as to proper forum. The purpose behind this inquiry is explained as follows:

> ***The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations. Where the core of the action involves domestic Defendants, as in McNichol, the case for assuming jurisdiction against a Defendant who might not otherwise be subject to the jurisdiction of Ontario courts is strong. By contrast, where the core of the action involves other foreign Defendants, courts should be more wary of assuming jurisdiction simply because there is a claim against a domestic Defendant.***[13]

6) Court's willingness to recognize and enforce extra-provincial judgment rendered on the same jurisdictional basis[14]

This point suggests that in deciding between competing jurisdictions one must consider whether or not the Court in the jurisdiction of the foreign defendant would be willing to recognize and enforce an extra-provincial judgment from the jurisdiction at issue. In *Muscutt*, the Court discussed interprovincial judgments the following way:

> ***In my view, it is appropriate for Ontario courts to recognize and enforce judgments from the courts of sister provinces rendered on the same jurisdictional basis as in the case at bar. Morguard and Hunt recognize the modern reality of rapid and frequent movement by Canadian citizens across provincial borders. Further, the risk of accidents with and injury to the residents of another province is inherent in motor vehicle travel, and insurance arrangements reflecting this risk are common across Canada. The spirit of Morguard and Hunt favours recognition and enforcement of the judgments of the courts of sister provinces where jurisdiction has been assumed on the basis that serious damages have***

[12] Muscutt, para 91- 92
[13] Muscutt, para 91
[14] Muscutt, para 93- 94

been suffered within the province as a result of a motor vehicle accident in another province.[15]

7) Whether the case is interprovincial or international in nature[16]

This next point suggests that jurisdiction is more easily assumed in interprovincial cases as opposed to international cases. This is the case because of the nature of our federal state and the fact that all judgments from across the provinces are subject to rulings handed down by the Supreme Court. In this federal climate a Court should be much more comfortable in assuming jurisdiction over an interprovinical matter. The situation differs somewhat with international cases. Further inquiry into the circumstances of the competing forums needs to be given in international cases to determine whether or not the "real and substantial" connection is made out.

8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere[17]

Lastly the court suggests that with regard to international cases one ought to consider the principles and agreements already established between countries with regard to the enforcement of foreign judgments and the conduct of foreign actions.

After the Court's attempt to clarify the issues related to real and substantial connection test there still isn't a definitive clear answer. Each of these factors need to be looked at along with the circumstances of the case to determine whether or not there is a real and substantial connection to a particular jurisdiction. As is often the case, the particular fact scenario that you are dealing with will drive your conclusion.

Forum Non Conveniens

Amchem Products v. British Columbia Workers Compensation Board, 1993

If one believes that an inappropriate forum is chosen, the Courts have the mechanisms to intervene and make orders which affect the conduct of an action in another jurisdiction.

[15] Muscutt para 94
[16] Muscutt para 95-100
[17] Muscut para 101 - 109

This can either be done by way of a stay or an anti-suit injunction. It is under the umbrella of the *forum non conveniens* doctrine that these mechanisms can be used. Issues relating to the exercise of this power were addressed in the *Amchem Products* case referred to previously.

In *Amchem* the Plaintiffs were injured as a result of exposure to asbestos products. It was an extremely complicated and cumbersome action and there were a large number of both plaintiffs and defendants who were spread out across Canada and the United States. The Plaintiffs for the most part resided in British Columbia, although their exposure to asbestos occurred in some cases outside of British Columbia, and many of the Defendants were comprised of companies who operated throughout the United States and Canada. The case made its way to the Supreme Court of Canada on the issue of an injunction which restrained court proceedings in the foreign courts. An action had been commenced in Texas where the Texas Courts assumed jurisdiction. This was met with an application in the British Columbia Courts for an anti-suit injunction to restrain the B.C. Plaintiffs from pursuing the Texas action. The basis of the injunction claim was that British Columbia was the most appropriate forum to hear the action. The specifics of the appeals relating to the anti-suit injunctions, while interesting in and of themselves, are beyond the scope of this paper and the commentary on this case will focus on the greater principles to be gleaned from this case as it relates to the doctrine of *forum non conveniens*.

In dealing with the question of the application of anti-suit injunctions, the Court considered the principles relevant to the doctrine of *forum non conveniens*. The Court declared that before it intervenes in a foreign action it should first ask whether the foreign forum has the closest connection to the action or the parties, or phrased another way, query whether or not there is another forum that is more appropriate to hear the matter. If there are still competing appropriate forums after the first step of the question is asked, the second step of the test is to ask whether or not a party will suffer an unjust deprivation of personal or judicial advantage by the change in forums.

The Court is cognizant of the fact that these issues will arise more often in this day and age of international travel and business, however they were careful to state that they wanted to discourage forum shopping as undesirable conduct. Sopinka J. stated that:

> ***"This does not mean, however, that 'forum shopping' is now to be encouraged. The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. I recognize that there will be cases in which the best that can be achieved is to select an appropriate forum. Often there is no one forum that is clearly more appropriate than others."***[18]

Once you've determined an appropriate place to have the matter heard, the next important step is to determine what law will be applied to the hearing of your matter. The Supreme Court has not left this area uncovered.

The Choice of Law Rule: *Tolofsen v. Jensen*, 1994

Tolofson v. Jensen, oft-cited as the seminal case of choice of law issues in tort, was handed down by the Supreme Court of Canada over a decade ago. It is a decision with a profound effect on choice of law issues and is particularly pertinent to motor vehicle accident litigation. The Courts have now had ample time to react and make comment on this decision. The *Tolofson* case has been considered many times yet its principles remain solid.

The Basic Premise in *Tolofson*

The Court in *Tolofson* sought to hand down a statement of law that would bring about clarity and certainty in issues of interjurisdictional tort law. It was noted that the previous incarnations of the law both in British case law and Canadian case law lead to unpredictability, a trait that is wholly undesirable in a justice system. The basic premise in *Tolofson* is a relatively simple one and can be restated as such: "The substantive law of the place where the tort occurred is applicable with regard to determinations of liability; the

[18] Amchem, para 26

procedural law (mechanics of the court process) of the forum where the action is brought is applicable to the trial of the action."

The doctrines of real and substantial connection and *forum non conveniens* remain alive and well and are protections built into the system to avoid the concern of forum shopping. The Court did, however, leave a small window of opportunity open for exceptions to this general rule in its musings that there could be the possibility of unfairness in an application of the above-noted rule, especially in international cases.

One of the large areas of enquiry arising out of the *Tolofson* case is the distinction between what is considered a procedural issue and what is a substantive issue of law.

The *Tolofson* principle has been revisited on a number of occasions. The lower Courts have been unwilling for the most part to alter and refine the rule set out in Tolofson, even when the consequence of following the rule is seemingly unfair.

Discretion in Tolofson – *Soriano (Litigation Guardian of) v. Palacios*[19]

I had the opportunity to be involved in this case which was heard in the Court of Appeal in 2005, which case attempted to push the boundaries of *Tolofson*. The *Soriano* case involved a young boy who was seriously injured when a car rolled onto him and pinned him against a garage wall. The boy was from Ontario, the car was registered in Ontario, the policy of insurance claimed upon was an Ontario policy, however the accident physically occurred in Quebec, and therein lies the rub. Quebec's system of no fault insurance prevents individuals from bringing claims against the responsible party based on injuries sustained in automobile accidents.

The *Tolofson* premise would suggest that the law of the place where the accident occurred would govern its adjudication. Quebec's no fault regime meant that in terms of bringing a lawsuit to recover damages the Plaintiff was simply out of luck. The Defendant insurer brought a motion for summary judgment. The case for the Plaintiff was argued with

[19] 2005 CarswellOnt 2218

the hope that judicial discretion might be employed to allow this case to proceed. The insurer was successful in that motion, however the judge hearing the case at first instance stated that while she was unable to use judicial discretion in interprovincial cases, if she could, this would be an appropriate case to do so. With those encouraging words the matter was appealed to the Ontario Court of Appeal.

The Court of Appeal agreed with the motions judge that there was no room for her to exercise judicial discretion to avoid the rule in *Tolofson v. Jensen* in an interprovincial case. The Court of Appeal clung firmly to the principles enunciated in *Tolofson v. Jensen.* On behalf of the Plaintiffs we sought leave to appeal to the Supreme Court, but leave to appeal was denied.

The lesson to be learned from this case is that the *Tolofson* principles, in the context of interprovincial law are somewhat of an inflexible and immovable rule. In light of that, lawyers need to counsel their clients appropriately or it can be expensive as we have learned the hard way.

Other considerations wording of: The Standard Ontario Automobile Policy

The common law principles in and of themselves are not the only factor that needs to be considered when evaluating where to have a matter heard. There are conditions and terms worked into Ontario's automobile insurance scheme that may answer some of your questions for you. The Standard Ontario Automobile Policy has built into it limits on its application for accidents that occur outside of Ontario. For example, as it relates to uninsured coverage provided by the Standard Policy, there is a requirement that disputes be brought before a Court in Ontario, regardless of where the accident occurred.[20] As this contract may be viewed as a factor, it is this writer's opinion that this section in and of itself is not enough to dictate jurisdiction.

[20] See for example section 5.6.3 of the Standard Automobile Policy

OPCF 44 – Underinsured coverage in other jurisdictions

With the variance of motor vehicle accident insurance minimums across different jurisdictions and complete bar to recovery in provinces such as Quebec and Manitoba, the underinsured motorist endorsements can be of particular importance in ensuring that there is adequate coverage available to your insured Plaintiff.

OPCF-44 meets *Tolofson*: *Chomos v. Economical Mutual Insuarnce*

This case involved an interpretation of the OPCF-44 Family Protection coverage in the context of interjurisdictional law. The issue was as follows; the Plaintiff was an Ontario resident was insured under a Standard Ontario Policy with the optional OPCF-44 underinsured protection and she was injured in an automobile accident in California. The Plaintiff brought a lawsuit against the at fault driver in California. She settled her lawsuit for the insurance policy limits of the at-fault California driver, namely $100,000.00. After receiving this amount the Plaintiff still had a shortfall in damages she was owed and she sought to recover the excess under the OPCF-44 endorsement from her own insurer. The provisions of the OPCF-44 echoed the *Tolofson* choice of law provisions stating that all issues relating to liability are to be decided in the context of the rules of the place where the accident occurred. The OPCF-44 explicitly stated that the issues of "quantum" are to be decided in accordance with the law of Ontario. The insurer brought a motion for summary judgment on the basis that the Plaintiff's injuries did not meet the verbal threshold or deductible and therefore with the claim that was statute barred by virtue of sections 267.1 (threshold) and 267.2 (deductible) of the *Insurance Act*. The question then became whether these sections related to liability or quantum. The Court of Appeal concurred with the Court of first instance who determined that sections 267.1 and 267.2 addressed issues of liability and not procedure. As such they were inapplicable to an accident in California and they could not be relied upon by the insurer.

OPCF-44R outside North America: *Sutherland v. Pilot Insurance*

Interjurisdictional application of the underinsured provisions of the Ontario Automobile Insurance Policy were also recently addressed in the 2006 case of *Sutherland v.*

Pilot Insurance.[21] Very briefly, this case involved a Plaintiff, Mr. Sutherland, who was severely injured in a motor vehicle accident that occurred in Jamaica. He was a passenger at the time of the accident. Mr. Sutherland resided in Ontario and was insured under the Standard Ontario Automobile Policy. His insurance coverage included the option OPCF-44R underinsurance protection coverage. There were two vehicles involved in the accident, both of which were insured under Jamaican insurance policies. The policy limits of these policies were roughly equivalent to $18,400.00 Cdn.

Given Mr. Sutherland became a quadriplegic as a result of this accident, it was clear that the amount of compensation available under the Jamaican policies would not be sufficient to cover his damages. Mr. Sutherland then looked to the underinsured provisions of his own automobile insurance policy here in Ontario.

The insurer initially denied this claim on the basis that the OPCF-44R was not applicable to accidents occurring in Jamaica. The matter ended up before the Ontario Courts with the primary question being whether or not there were territorial limits to the OPCF-44R endorsement. This, as it turns out, was not a particularly easy question to answer. The Court noted firstly that other parts of the standard policy did in fact include territorial limitations; accidents that occur in Canada, the United States, and jurisdictions listed in the Statutory Accident Benefits Schedule and a vessel travelling between those ports. This language is not included in the OPCF-44R document. The Defendant insurer maintained that the OPCF-44R was a part or an extension of the OAP 1 and thus the territorial limitations listed in the later document were imported into the OPCF-44R. Mr. Sutherland argued that it was a separate document that stands on its own. The Court was inclined to agree with Mr. Sutherland.

The Court found that the OPCF-44R was to be considered separate from the rest of the standard policy. This conclusion is based on the fact that OPCF-44R is a separate document for which an insured pays a separate premium apart from the standard policy and it deals with an entity known as the "underinsured" which is addressed separately from other concepts that dealt with under the standard policy. To further distinguish the OPCF-44R

[21] 2006 CarswellOnt 4090

from the standard policy, reference was made to the case of *Szela v. Gore Mutual Insurance Co.* This case treated the SEF No. 42 (a predecessor endorsement which is similar in character and wording to the OPCF-44R) as a separate and "self contained code". It was noted that, if outside limitations and exclusions are to be imported they must be done so expressly and without ambiguity. This statement is congruent with the general principles of drafting and interpretation that exclusions are to be read narrowly.

The Court also paid particular attention to the drafter's references to jurisdiction in both documents, namely the OPCF-44R and the OAP 1. As mentioned above the OAP 1's jurisdictional limitations are clear. The OPCF-44R however is not devoid of reference to jurisdiction. In fact it contemplates expressly the possibility of accidents occurring in Quebec. This is evidence that the drafters turned their minds to jurisdictional issues. One can only assume that the absence of further jurisdictional references was a deliberate decision on the part of the drafters. Being that the OPCF-44R is a complete document in itself with proof of forethought to the issue of jurisdiction, the absence of territorial reference created an ambiguity. This ambiguity ought to be resolved against the insurer who drafted the document and in favour of the insured. The Court in fact found in favour of the insured and Eberhard J. stated that:

> ***"The absence of clear and express language as to the extent and scope of the limitation as it impacts upon a claimant in circumstances of underinsurance addressed by OPCF 44R, has left the question in a sate of ambiguity. As such, the issue is to be resolved in favour of the insured. I declare that the OPCF 44R provides coverage pursuant to its terms for a collision that occurred in Jamaica on December 31, 2001."***[22]

It is understood that the Defendants in this matter are appealing the decision.

Geographical Limits on Accident Benefits

For Ontario insureds, there are geographical limitations built into the application of Statutory Accident Benefits Scheme which limits their availability to accidents which occur

[22] Sutherland para 23, 24

within Canada and the United States. Section 3(2) of the Statutory Accident Benefits Schedule outlines its application:

> ***The benefits set out in this Regulation shall be provided in respect of accidents that occur in Canada or the United States of America, or on a vessel plying between ports of Canada or the United States of America[23].***

However, individuals from foreign jurisdictions who are injured in Ontario may be eligible for Ontario accident benefits if their home insurer is subject to a reciprocal agreement.

Foreign Insurers, Ontario Accidents and the Reciprocal Agreements

In order to ensure that automobile insurance coverage is relatively seamless across jurisdictions, the Power of Attorney and Undertaking (PAU) mechanism was set up. This reciprocal agreement between insurers means, that with respect to accidents that occur in Ontario, extra-provincial insurers (who are signatories to the agreement), are obligated to pay and protect their insured at the minimum level of Ontario benefits for accidents that occur in the province. The purpose of the PAU is explained as follows in an excerpt from the case of *Healy v. Interboro Mutual Indemnity Insurance*:

> ***To paraphrase the description of Blair J.A. in Potts, supra, ((1992), 8 O.R. (3d) 556 (C.A.) at 557-8) a participating insurer agrees to be bound by the law concerning the compulsory automobile insurance coverage of the state or province where the action against it is brought rather than the automobile insurance coverage of the state or province where its policy is issued. In return a participating insurer can assure those persons whom it insures that they will be recognized as being validly insured when driving in other participating jurisdictions. It assures the same statutory guarantees to someone injured in an automobile accident in Ontario whether the relevant automobile insurance contract was made in Ontario or another participating jurisdiction.[24]***

[23] Statutory Accident Benefits Schedule s. 3(2)
[24] 119 O.A.C. 354, para 14

PAU and Ontario AB Claims: *Berg v. Farm Bureau Mutual Insurance Co.*[25]

Our firm was involved in another case whereby the Ontario Court of Appeal has had the chance to examine this issue with respect to the provision of accident benefits and proper forum in the *Berg* case. This was a case that involved an insured from Minnesota who was involved in an accident in Ontario. The Plaintiff insured claimed accident benefit payments from the Minnesota insurer at the same level as the Ontario Accident Benefits Schedule. The Minnesota insurer had signed and filed the Power of Attorney and Undertaking with the Insurance Commission. The action was brought in Ontario and the insurer brought a motion to have the action stayed with the argument that Minnesota was the proper forum to hear the action, as opposed to Ontario. The motion was granted.

On appeal, however, the Court of Appeal found that there was sufficient connection to Ontario to allow the action to proceed here. The fact that the insurer had signed the PAU was a significant factor in making the finding on forum. By signing the PAU the insurer was privy to some expectation that it may be subject to litigation in Ontario. The Court also noted that forcing the Plaintiff to sue in Minnesota could result in a loss of juridical advantage with respect to the determination of accident benefits.

> ***"If the appellant's action is allowed to proceed in Ontario, the PAU makes Ontario law applicable and the appellant will be entitled to SABS. The PAU precludes the respondent from asserting the defence that its policy does not include SABs coverage: Healy, supra, at paras. 18 and 19. If, on the other hand, a stay is granted and the appellant is forced to sue in Manitoba, the issue of whether the respondent is obliged to pay SABs is very much a live issue. The PAU provides that the law to be applied is that of the province where the "action or proceedings may be initiated." It could be argued that, because of the stay, the action may not be initiated in Ontario. There could, accordingly, be a significant loss of juridical advantage to the appellant.***
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> ***For these reasons, I am of the opinion that the learned motions judge erred in the exercise of his discretion to grant a stay because he did not consider the wording and effect of the PAU signed by the respondent. Accordingly, I would allow the appeal and set aside the stay of proceedings with costs to the appellant here and at first instance."***

[25] 2000 CarswellOnt 2521 (C.A.)

Leave to appeal to the Supreme Court of Canada was denied.

This case is an interesting one as it combines the *Tolofson* tests, the real and substantial connections tests and the interpretation and use of the PAU.

Conclusion

The interjurisdictional client presents specific challenges to your practice. While there are no easy answers to dealing with these cases, the Supreme Court has given some guidance on what to do with these cases. The flexibility worked into the rules allows counsel to be creative in crafting their arguments and securing the best advantage for their clients.