

# Consultation Paper

## Reforming the Law of Crossborder Litigation Judicial Jurisdiction

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## JUDICIAL JURISDICTION

necessity provision in article 3136. In Québec, there is only one layer of discretion in each direction.<sup>45</sup> Accordingly, one option for an Ontario statute would be to state the grounds on which a real and substantial connection could exist as a definitive list.

Should it be thought imprudent to attempt to establish a definitive list, one way to provide a small measure of flexibility would be to indicate that the list was illustrative of the real and substantial connections that would suffice to support jurisdiction.<sup>46</sup> This could be done by adding “such as” to the provision above as follows:

*A court may exercise jurisdiction in a civil matter where there is a real and substantial connection between Ontario and the matters in dispute, such as...*

The list itself would need to be sufficiently comprehensive to ensure that any case with a real and substantial connection that was not specifically enumerated would readily be understood as coming within the *ejusdem generis* scope of this provision, and the list would need not to be over-inclusive so as to encompass cases in which there was no real and substantial connection and which might not be stayed on grounds of *forum non conveniens*.

Framed in this way, such a list would provide flexibility in interpreting the facts of the case, but the opportunities for a court to depart *downward* from the list would be limited to a determination that there was a clearly more appropriate forum elsewhere, and would not include a finding that, despite the case fitting one of the categories on the list, there was no real and substantial connection between the matter and Ontario. The opportunities for a court to depart *upward* from the list would be explicitly confined to cases that had connections that were analogous to the connections enumerated in the list, or to cases that met the stringent test of forum of necessity.

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Should the statute preserve the “two layers of discretion” that exist in the CJPTA for exercising jurisdiction based on a real and substantial connection? In other words, should the statute preserve discretion to identify real and substantial connections beyond those contained in a list, and to determine that connections contained in the list were not real and substantial, in addition to the discretion to accept or decline jurisdiction on grounds other than the existence of a real and substantial connection?

Alternatively, should discretion be confined to the “second layer”—that associated with an exercise of jurisdiction on forum of necessity grounds or declining jurisdiction on forum non conveniens grounds?

If so, should the statute eliminate discretion in determining what constitutes a real and substantial connection by providing a definitive list as has been done in the Civil Code of Québec?

Alternatively, should the courts retain the flexibility to find that a real and substantial connection exists on grounds analogous to those listed in the statute?

With these considerations in mind, a simplified list based on the list found in the CJPTA could include the following connections:

*...where the proceedings relate to:*

- (i) immovable or movable property<sup>47</sup> in Ontario;*
- (ii) the estates of persons who died while ordinarily resident<sup>48</sup> in Ontario, including their movable property elsewhere;*
- (iii) trusts administered in Ontario, or by trustees ordinarily resident in Ontario;*
- (iv) contractual or other obligations<sup>49</sup> to be performed in Ontario, or governed by the law of Ontario;*
- (v) torts, equitable wrongs, or unjust enrichment<sup>50</sup> that occurred in Ontario;*
- (vi) the status or capacity of persons ordinarily resident in Ontario;*  
*or*
- (vii) claims by public authorities in Ontario.*

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Although Ontario courts have recently relied upon this rule to decline jurisdiction in recent cases, there are also cases in which courts have assumed jurisdiction to provide *in personam* relief between parties disputing title to foreign immovables. Accordingly, as an alternative to specifying that the courts lack jurisdiction, it would be possible to leave this question to the courts' discretion on a case-by-case basis. This would permit them to exercise jurisdiction where an order was sought, for example, against an Ontario resident, requiring the transfer of title to a foreign immovable; and it would permit them to decline jurisdiction where, for the reasons considered below, some other forum, such as the place where the immovable was situated, was clearly more appropriate.

Should provision be made for prohibiting courts from exercising jurisdiction over questions of title to immovables located outside Ontario, or for tortious damage to foreign immovables?

If so, should special provision be made for an exception to this prohibition for matters involving persons within the jurisdiction of the court who may be ordered to convey title to foreign immovables?

### VI. Additional bases of jurisdiction

To the three main bases for judicial jurisdiction may be added three more supplementary bases. While they are narrower in scope and less commonly invoked, they are conceptually distinct from the main bases and, therefore, are necessary features of a comprehensive statute on jurisdiction.

#### A. Forum of necessity

It is a fundamental principle of civil justice that there must be a means to prevent a denial of justice. The right to be protected from a denial of justice is enshrined in the European Convention on Human Rights.<sup>52</sup>

Despite the breadth of the available bases of jurisdiction contemplated so far, there remains the possibility that for some reason it will be impossible or impracticable for a plaintiff or applicant to commence proceedings in any other court. Rare as such circumstances may be, provision has been made for them in Ontario Rule 17.03, the Civil Code of Québec<sup>53</sup> and the CJPTA.<sup>54</sup> Rule 17.03 simply provides that "In any case to which rule 17.02 does not apply, the court may grant leave to serve an originating process or notice of a reference outside Ontario." It could be argued that the lack of a real and substantial connection could render the exercise of this basis of jurisdiction unconstitutional. However, it could also be suggested that this was the nature of the unsuccessful challenge brought against Rule 17.02(h) in the *Muscutt* decisions.<sup>55</sup>