

Hicks  
Morley

# ADVANTAGE

Your resource for Continuing  
Professional Development

## Ex-Pats and Imports: International Employment Law 101

November 19, 2014

accredited  
**cpd**

# **Ex-Pats and Imports: International Employment Law 101**

Jeffrey E. Goodman  
John-Paul Alexandrowicz  
Amanda J. Hunter

# Agenda

- Legal Tourism – The Extra-Territorial Application of Canadian Law
- How is Legal Jurisdiction Determined – Does Jurisdiction Matter?
- Inter-Jurisdictional Hirings and Transfers
- Professionalism

# Legal Tourism

The Extra-Territorial Application of Canadian Law

# Extra-Territorial Application of Canadian Law

- *R. v. Hape, 2007 SCC 26*
  - *"Sovereignty" refers to the various powers, rights and duties that accompany statehood under international law. Jurisdiction – the power to exercise authority over person, conduct and events – is one aspect of state sovereignty. Although the two are not coterminous, jurisdiction may be seen as the quintessential feature of sovereignty. Other powers and rights that fall under the umbrella of sovereignty include the power to use and dispose of the state's territory and the right to state immunity from the jurisdiction of foreign courts and the right to diplomatic immunity.*

## ***R. v. Hape***

- *Comity refers to informal acts performed and rules observed by states in their mutual relations out of politeness, convenience and good will, rather than strict legal obligation....When cited by the courts, comity is more a principle of interpretation than a rule of law, because it does not arise from formal obligations.*

## ***R. v. Hape***

- Prescriptive jurisdiction
- Enforcement/investigative jurisdiction
- Adjudicative jurisdiction
- Concurrent jurisdiction

## ***R. v. Hape***

- Parliament has clear constitutional authority to pass legislation governing conduct by non-Canadians outside Canada.
- Its ability to pass extraterritorial legislation is informed by the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations, and by the limits of international law to the extent they are not incompatible with domestic law.



# What about provincial law?

- Section 92 of the *Constitution Act, 1867*
- Generally can make laws that affect the province and are within the province

## Discussion

- Can Canada make a law that prohibits Canadians from smoking in Paris, France?

## Discussion

- Can the Ontario *Employment Standards Act, 2000* apply in Paris, France?
- s. 3. (1) Subject to subsections (2) to (5), the employment standards set out in this *Act* apply with respect to an employee and his or her employer if,
  - (a) the employee's work is to be performed in Ontario; or

## Discussion

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

- This *Act* does not apply with respect to an employee and his or her employer if their employment relationship is within the legislative jurisdiction of the Parliament of Canada.

## Contrast – Québec Legislation

- This *Act* applies to the employee regardless of where he works. It also applies
  - 1) to the employee who performs work both in Québec and outside Québec for an employer whose residence, domicile, undertaking, head office or office is in Québec;
  - 2) to the employee domiciled or resident in Québec who performs work outside Québec for an employer contemplated in subparagraph 1;

## ***Global Helicopter Pilots Assn v. CHC Global Operations, 2010 FCA 89***

- Certification application for all pilots except for foreign nationals
- Pilots all worked in foreign countries
- Trained in Canada
- Similar terms and conditions of employment

## ***CHC Global Operations (2008) Inc. and Blackwell et al. 2012 CarwellNat 4061***

- Notice and severance claim under Part III of the *Canada Labour Code*
- All pilots and aircraft maintenance engineers in Nigeria
- All flying within the territory of Nigeria
- Nigeria responsible for regulating aircraft maintenance

# Conclusion

- Assume nothing
- Review specific legislation
- Ask local counsel



# How Is Legal Jurisdiction Determined?

Does Jurisdiction matter?

# How is Legal Jurisdiction Determined?

- First assessment for determining jurisdiction:
  - 1) Does the Ontario court have jurisdiction over the dispute?
  - 2) Should the Ontario court exercise jurisdiction over the dispute?

# Contractual Forum Selection Clauses

- Read the contract first:
  - Does it have a forum selection clause?
  - Was it negotiated by sophisticated parties?

# Step 1: Does Ontario Have Jurisdiction?

- The test for enforceability of forum selection clauses:
  - The "Strong Cause Test"
    - *Z.I. Pompey Industrie v. ECU-Line N.V.* (SCC)
    - *Expedition Helicopters Inc. v. Honeywell Inc.* (OCA)

# Step 1: Does Ontario Have Jurisdiction?

- "Strong Cause Test"
  - Where a contract contains a forum selection clause, the court is not bound to grant a stay of proceedings, but has a discretion whether to do so or not.
  - The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

## Step 2: Should Ontario Take Jurisdiction?

- What is Strong Cause?
  - In which jurisdiction is the evidence situated?
  - What is the relative convenience and expense of trial as between the competing jurisdictions?
  - Whether the law of the foreign court applies?
  - Whether it differs from Ontario/Canadian law?
  - With what country are the parties connected?
    - How close is the connection?

## Step 2: Should Ontario Take Jurisdiction?

- What is Strong Cause? (cont'd)
  - Is the desire to litigate in an alternate jurisdiction genuine?
  - Would the opposing party be prejudiced?
    - Deprived of security for the claim/costs
    - Unable to enforce a judgement
    - Time-or statute-barred
    - Unlikely to get a fair trial for political, racial, religious or other reasons

## Step 2: Should Ontario Take Jurisdiction?

In general, the law favours the enforcement of forum selection clauses between sophisticated parties.

*Expedition Helicopters Inc.*



## Step 2: Should Ontario Take Jurisdiction?

The "Strong Cause" test reflects the desirability that parties honour their contractual commitments and is consistent with the principles of order and fairness at the heart of private international law.

*Pompey Industrie*

# Real and Substantial Connection Test

In the absence of a forum selection clause, the court shall review whether the matter has a "real and substantial connection" to the jurisdiction where the claim was commenced.

*Van Brenda v. Club Resorts Ltd (SCC)*

# Step 1: Does Ontario Have Jurisdiction?

- Presumptive connective factors:
  - Defendant is domiciled or resident in the province
  - Defendant carries on business in the province
  - Tort was committed in the province
  - Contract connected with the dispute was made in the province/jurisdiction

## Step 1: Does Ontario Have Jurisdiction?

"When a court considers whether a new connective factor should be given presumptive effect, the values of order, fairness and comity can serve as a useful analytical tool for assessing the ***strength of the relationship with a forum*** to which the factor in question points"

## Step 1: Does Ontario Have Jurisdiction?

- If no recognized presumptive connective factor applies – whether listed or new – the effect of the common law real and substantial connection test is that the court should not assume jurisdiction.
- Where a presumptive connective factor does apply, the court should assume it is properly seized of the subject matter.

## Step 1: Does Ontario Have Jurisdiction?

- Presumption of jurisdiction is rebuttable.
- Burden of rebutting the presumption lies with the party challenging jurisdiction.

## Step 1: Does Ontario Have Jurisdiction?

- The challenging party must establish facts which demonstrate that the presumptive connective factor does not point to any real relationship between the subject matter of the litigation and the forum.
- If party resisting jurisdiction fails to rebut the presumption, then the court has jurisdiction.

## Step 2: Should Ontario Take Jurisdiction?

- Where the court has jurisdiction, it may still decline to exercise that jurisdiction should *forum non conveniens* be raised by one of the parties.
- If *forum non conveniens* is not raised by the defendant, the matter will proceed in the forum chosen by the plaintiff.



## Step 2: Should Ontario Take Jurisdiction?

- The doctrine of *forum non conveniens* requires the court to go beyond the strict application of the test of jurisdiction to determine whether it is appropriate to decline jurisdiction to assure fairness to the parties and efficient resolution of the dispute.

## Step 2: Should Ontario Take Jurisdiction

- *Forum non conveniens* factors:
  - Comparative convenience and expense for parties and their witnesses
  - The law to be applied to issues in the proceeding
  - The desirability of avoiding a multiplicity of legal proceedings
  - Desirability of avoiding conflicting decisions from different courts
  - Enforcement of an eventual judgment
  - The fair and efficient working of the legal system

# Inter-jurisdictional Hirings and Transfers

- Things to think about
  - Who is the Employer?
  - Avoid common employer findings if not intended
  - Which country's/province's law applies?
  - Which one do you want?
    - For example:
      - Transfer to U.S. want U.S. at will doctrine
      - Transfer to France want Ontario law to apply

# Five Types of Ex-Pat Postings

## 1. Business Traveller

- Easy to administer and for short term use
- High risk of stealth/accidental ex-pat

## Five Types of Ex-Pat Postings (Cont'd)

### 2. Direct Foreign Posting ("Foreign Correspondent"):

- Easy to administer and best where no home host country entity
- High risk of violating payroll laws of host country

## Five Types of Ex-Pat Postings (Cont'd)

### 3. Secondment ("Employee Loan")

- Home country employs with a shadow payroll
- Risk of payroll violations
- Not all secondees are ex-pats and not all ex-pats are secondees

## Five Types of Ex-Pat Postings (Cont'd)

4. Dual or Joint Employment ("Moonlighting")
  - Favoured by ex-pats
  - Payroll challenges
  - Employer subject to laws of two countries

## Five Types of Ex-Pat Postings (Cont'd)

### 5. Temporary Transfer ("Localization"):

- Host country employs
- Most common
- Employee resigns from home country
- Dormant repatriation agreement
- Compliant and low risk regarding payroll exposure



# Concluding Comments

- Choosing the appropriate arrangement: "it depends!"
- Avoid creating permanent establishment in host country.
- Choice of law risk.
- Avoid choice of law clauses in ex-pat agreements.
- Get worst of both worlds!

# Professionalism

- Competence
- Practising in Other Jurisdictions
- National Mobility Agreement
- U.S. Experience
- Multijurisdictional Privilege

# Competence

- Rule 3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer
- Competent lawyer includes:
  - Knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises

## Competence (cont'd)

- Only competent in the jurisdiction where authorized to practise law
- Avoid advising on law in other jurisdictions unless authorized in the jurisdiction where the law arises

# Practising In Other Jurisdictions

- Law societies across Canada have rules that generally prohibit persons from practising law or providing legal services, if they have not been called to the Bar of that province
- However, temporary mobility is facilitated across many provinces by the **National Mobility Agreement**.

# National Mobility Agreement

- Following provinces have signed onto an implemented the National Mobility Agreement:

British Columbia

Alberta

Saskatchewan

Manitoba

Ontario

New Brunswick

Nova Scotia

Newfoundland and Labrador

Prince Edward Island

# National Mobility Agreement

- Basic Rule:
  - Lawyers may provide legal services in these provinces, without being called to the respective Bar and without a Permit
  - For up to 100 days per year
  - A "day" is calendar day or part of a calendar day

# National Mobility Agreement

- Does not apply to practicing law as counsel in a proceeding:
  - Supreme Court of Canada
  - Federal Court of Canada
  - Tax Court of Canada
  - A tribunal established under an Act of Parliament
  - Service tribunal within meaning of the *National Defence Act*
  - Court Martial Appeal Court of Canada



# National Mobility Agreement

- To qualify for temporary mobility:
  - Must be entitled to practise law in a home jurisdiction
  - Carry liability insurance
  - Have defalcation compensation coverage
  - Not be subject to conditions or restrictions on membership or practice
  - Not be subject of criminal or disciplinary proceedings
  - Have no disciplinary record

# National Mobility Agreement

- Exception to the Basic Rule:
  - Must not establish an economic nexus with host jurisdiction
    - Providing legal services for more than 100 days
    - Opening an office
    - Becoming resident
    - Opening or operating a trust account

# National Mobility Agreement

- Lawyers are responsible for:
  - Recording and verifying the number of days in which he or she provides legal services in a host jurisdiction

# The Three Territories

- NWT, Yukon, and Nunavut have distinct rules:
  - Only allow for special rules for permanent mobility
  - Do not permit temporary mobility
  - Ontario-licensed lawyers cannot advise on the laws of the Territories

# Québec

- Québec signed the 2013 National Mobility Agreement but it has not been implemented.
- At present, lawyers from jurisdictions other than Québec are precluded from practising law in Québec

## U.S. Experience

- Model Rule 5.5
- Allows an in-house lawyer (foreign or domestic) who is licensed in good standing in his or her home jurisdiction to practise in other jurisdictions on behalf of his or her client employer with certain restrictions:

## U.S. Experience

- Through an office or other systematic and continuous presence in the jurisdiction
  - Provided to the employer and do not require *pro hac vice* admission
  - When performed by foreign lawyer based on the advice of a lawyer duly licensed in the jurisdiction
  - Or, are services lawyer is authorized by federal or other law to provide in the jurisdiction

# U.S. Experience

- Beware, each state, court and tribunal may have its own rules: Model Rule does not always apply.

- 
- Source: Multijurisdictional Labor & Employment Practice: Understanding the Ethical Rules of the Road – ABA, Section of Labor and Employment Law, paper by M. Green, T. W. Jackson, H. Korrell and M. Warren.



# Multijurisdictional Privilege

- Are communications between corporate counsel at separate but related corporate entities privileged?

# Multijurisdictional Privilege

- Sexual harassment allegations against a Canadian VP arise from office parties he attended in Toronto, New York, Amsterdam and China. The parent company is headquartered in New York. Who should run the investigation?