

Conflict of Laws

Section I of Stikeman Elliott's *Doing Business in Canada*



Conflict of Laws

GENERAL

Each province and territory in Canada has its own set of rules for determining when it will apply the laws of another jurisdiction or hear disputes connected with another jurisdiction. The rules are found partly in statutes (or, in Quebec, the *Civil Code*) and partly in case law. The rules of the common law provinces are similar but not identical. Quebec's rules differ from those in the common law provinces in some significant respects.

WHEN THE LAW OF THE FORUM APPLIES

A Canadian court will always apply the laws of its own jurisdiction – the law of the forum – to matters that are procedural in nature. This includes principles of evidence, the rules governing court proceedings (e.g. the proper parties) and principles for the measurement of damages (although not whether any particular type of damage is recoverable). The law of the forum may apply to matters that are not procedural where the parties do not sufficiently plead and prove the relevant foreign law. Foreign law is generally proved through the testimony of a legal expert from the foreign jurisdiction.

There are also certain types of foreign laws that a Canadian court will not apply. These include laws that offend the Canadian jurisdiction's concept of public policy ("public order" in Quebec), that would have anti-competitive effects in Canada or that would involve the direct or indirect enforcement of a foreign tax or criminal law. With respect to the foreign tax law restriction, there is some issue as to whether a tax indemnity agreement that covers foreign taxes would be enforceable.

"CHOICE OF LAW" IN CONTRACTS

The rule with respect to contracts is that a Canadian court will apply the proper law of the contract. The proper law is the law with which the contract has the most significant connection and in this regard the court will consider all relevant connecting factors. However, if the parties select a law in the contract to govern their relationship, then the court will respect that choice as long as it was made in good faith, in the sense that it was not chosen deliberately to avoid the laws of a more appropriate jurisdiction. If the choice is made in good faith, then the court will determine whether there is an enforceable contract and how it is to be interpreted by applying the chosen foreign laws, even if they have no particular connection with the contractual relationship. In addition, there may be laws in the place where the contract is to be performed that affect enforceability and which the

court will apply. For example, if the contract is for the purchase and sale of shares in a province, compliance with the provincial Securities Act may be required and non-compliance might affect enforceability even though the parties have not chosen that province's laws to govern their contract.

TORTS AND CIVIL LIABILITY

In cases involving non-contractual obligations (known in the common law as *torts* and in the civil law as *extra-contractual liability*), Canadian courts apply the law of the place where the tort was committed. For example, if a person is alleged to have provided negligent advice, the court will look to the place where the negligent advice was received and relied upon.

SECURITY INTERESTS IN PERSONAL PROPERTY

There is a set of rather complex rules in each jurisdiction to cover the means of perfecting security interests in personal property. The governing law of the security agreement will not apply to validity and perfection of security interests. These issues will generally be governed either by the place where the debtor is located or by the place where the collateral is located.

ENFORCEMENT OF FOREIGN JUDGMENTS

Under certain conditions, a Canadian court will enforce a foreign judgment without re-opening the case on the merits. A key condition is that the foreign court must have had jurisdiction over the defendant. Canadian courts will be satisfied on this point if the defendant appeared and defended on the merits, resided in the foreign jurisdiction, had previously agreed to submit to the jurisdiction (e.g. pursuant to either an exclusive or non-exclusive jurisdiction clause) or if there was a real and substantial connection between the defendant and the foreign jurisdiction in relation to the matter which is the subject of the litigation. It is no longer strictly the case, as it long was under the common law, that the judgment must have been for a "sum certain" of money – where enforcement of another type of order would not overtax the resources of the Canadian court, it may now also be recognized. However, a judgment will *not* be enforced if the defendant establishes that the foreign court proceedings were not conducted fairly (i.e. in accordance with principles of natural justice), that enforcement is against public policy or public order, or that the judgment is a foreign tax or penal judgment. Another possible defence is fraud. In a recent case that confirmed there are limited grounds to challenge the enforceability of a foreign judgment, the Supreme Court of Canada held that where a judgment is obtained by fraud that was undetectable by the foreign court, it will not be enforced in Canada. There are similar rules for the enforcement of foreign arbitration awards.

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