Civil Procedure
Fall Term 2018

LECTURE NOTES NO. 1

I. INTRODUCTION

"Adversarial" Justice

Rules 1.04 (1)

> General Principle
>
> 1.04 (1) These rules shall be liberally construed to secure the **just, most expeditious** and **least expensive** determination of every civil proceeding on its merits.

- **The importance of the adversarial principle cannot be overstated.** It colours the entirety of the field of litigation. As a matter of principle, it may well be a very useful approach to peaceful dispute resolution. For the litigants, it is brutal.

- In normal circumstances the contest is fought by adversaries before a judge who acts as neutral umpire respecting the rules of the contest and its ultimate result. Whichever side convinces the trier of fact (judge or jury) on a **'balance of probabilities'** wins.

- While the Court is neutral, the realities of economic disparities and resources challenge the judge to ensure that the weaker party is not denied justice. Judges may have to provide some guidance to an unrepresented party just to keep the matter on track and allow other cases to be heard before the end of time.

- **Procedures should be proportional to what is at stake.** Lawyers should bear in mind what things cost and how long procedures take and should then mould them to suit the nature of the dispute and how much money is at stake – i.e. use some common sense (an underrated quality, much prized in practice).

What exactly are 'The Rules'?

There are various types and sources of procedural rules:

- There are regulations under the statutes that create the court in question which we refer to as "rules or procedure" or "rules of practice". We will be dealing primarily with the "Rules of Civil Procedure" that are created under the *Courts of*

Justice Act, Section 66, for proceedings in the Superior Court and the Court of Appeal.

- Superior Courts (and some inferior courts) have an inherent jurisdiction to deal with procedural points.

- 'Practice Directions' issued by courts provide procedures in a given region for particular kinds of litigation.

Access to Justice

"Access to Justice" has become a catch-all phrase in relation to the ability of a person to have reasonable recourse to the law. While there is a lot of talk, there is unfortunately not a lot of money. Legal Aid has been cut back substantially in recent years causing a glut of self-represented litigants before the courts (nb: there is no constitutional right to be represented by a lawyer; see *British Columbia (A.G.) v Christie*, [2007] 1 S.C.R. 21. Where the courts have confronted such issues it is most often in relation to the imposition of additional road-blocks, such as fees charged for court time.

Trial Lawyers Association of British Columbia v. British Columbia (A.G.) **2014 SCC 59**

The B.C. Rules of Civil Procedure provide for 'hearing fees' for the use of a courtroom during trial; $156 for the first half-day of a trial and rising to $624/day after ten days. The imposition of the fees was struck down at first instance in this case. At trial, McEwan J held that fees were within the legislative ambit of the province but the level of fees rendered them unconstitutional as they went far beyond cost recovery. In the Court of Appeal (*Vilardell v. Dunham*, 2013 BCCA 65), **Donald J.A.** largely agreed with the reasoning of the trial judge but cured the constitutional defect by enlarging the jurisdiction of a judge to order relief based on need:

> [26] **… What makes hearing fees constitutionally suspect is in their potential to impede persons who cannot afford them. Wealthy individuals and corporations may not like paying the fees but they are unlikely to alter their litigation strategy because of them. In that sense, the government efficiency objective is invidious because the fees impinge only on the economically disadvantaged. Only they, not the well-to-do, will be discouraged from pursuing their rights in a hearing of sufficient length to do justice to the issues. However, an effective exemption defeats the invidious purpose but allows the cost recovery objective to be achieved.**
> …
>
> [32] *Schachter v. Canada* is the leading case on constitutional remedies. Chief Justice Dickson in B.C.G.E.U. noted at 229 that "the rule of law is the very foundation of the Charter". Section 52(1) of the Constitution Act, 1982, states that any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In effecting a constitutional remedy under s. 52(1), Chief Justice Lamer for the majority in

> *Schachter* stated that the first step is to properly define the extent of the Charter inconsistency. In this case, **the constitutional inconsistency consists of an under-inclusive exemption from hearing fees, which restricts it to people who would be defined as impoverished. As I stated earlier, an enlarged interpretation of the indigency provision is necessary to uphold the constitutionality of hearing fees and remove a barrier to court access.**
>
> [33] The next step is to determine the appropriate remedy for a constitutional violation, which can include severance, reading down or reading in provisions into the Rules. **Reading in is the most appropriate remedy in this case. Striking down the hearing fees or the exemption in its entirety would be undesirable for the reasons already given. This violation stems from an exemption which omits people who, while not impoverished, cannot afford the hearing fees. The effect of this omission limits their access to the courts, which violates the rule of law. The most effective way to deal with this omission is to read in the words "or in need" to Rule 20-5**.

The matter was then brought to the Supreme Court of Canada by interveners on the question of remedy. The appeal was allowed and the legislation struck down with immediate effect. **Per McLachlin CJC:**

> [40] **In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law.** If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631 (CanLII), 262 D.L.R. (4th) 51, at paras. 68-9, per Newbury J.A.
>
> [41] **This Court's decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in Christie — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not "every limit on access to the courts is automatically unconstitutional" (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts.** The tax at issue in Christie, on the evidence and arguments adduced, was not shown to have a similar impact.

…

> [46] **A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized**

> **by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.**
>
> [47] Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.
>
> [48] **It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them.** Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts — a tradition that goes back to the Statute of Henry VII, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees.

[Please note that Ontario courts do not charge hearing fees. However, there are filing and other charges from which Courts may order relief.]

Proportionality

See Rule 1.04 (1.1)

> **Proportionality**
>
> (1.1) In applying these rules, **the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved**, in the proceeding.

This is of increasing importance in the conduct of litigation - Cadillac-procedures are not required in a fight over an old beater.

Professionalism: Fees

Fees = charges for professional services performed under a contract.

The usual practice is **hourly fees**; in some areas, **contingency fees** (payable at a percentage of an award only in case of success) or **block fees** are used. Minimum fees may be charged. In some cases, lawyers work *pro bono* or their fees are paid by Legal Aid (on an hourly or block-fee basis) or are ordered by the Court to be paid by the Crown (rarely). A contract between a lawyer and a client is called a **retainer agreement**. Money paid 'on retainer' is held in trust and applied to the amount owing after **an account is rendered**.

A client can have a lawyer's account '**assessed**' under the *Solicitors Act*, s.3 by an 'Assessment Officer' within 30 days after the final account is rendered. The bill can be reduced where it is outside the retainer agreement or unreasonable based on the following factors:

1. The time expended by the solicitor;
2. The legal complexity of the matters to be dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matter to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The client's expectation as to the amount of the fee.

Professionalism: Rules of Professional Conduct

Examples:

> 5.1-5 A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.
>
> 5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation.
> …
>
> 7.2-1.1 A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.
>
> 7.2-2 A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

See also R. 57.07(1) of the Rules:

> 57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
>
> (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
>
> **(c) requiring the lawyer personally to pay the costs of any party.**
>
> (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.
>
> (3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

Standard Life Assurance Co. v Elliott
2007 CanLII 18579 (Ont. S.C.J.)

Here the claim was made against an insurer and all of its former and present employees who dealt with the plaintiff's insurance claim for disability payments. The claim against the third parties was both unnecessary practically (the defendant admitted vicarious liability if the principal allegations were proved) and failed on legal grounds. The effect was to increase the defendant's costs which were sought on an elevated basis from the lawyer for the plaintiff *personally*.

Molloy J.:

> 10 In exercising discretion as to an appropriate costs award, it is relevant to take into account "the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding" and "whether any step in the proceeding was improper, vexatious or unnecessary": Rules of Civil Procedure, Rule 57.01(1)(e) and (f).
> ...
>
> 13 Counsel for Standard Life gave Mr. Masters several opportunities to drop the third party claim against the employees without the necessity of a motion, but he refused.
> ...
>
> 15 As a result of the third party proceeding alone, Standard Life will have incurred nearly $40,000.00 in legal fees. This kind of tactical litigation is

not conducive to the legitimate settlement of disputes in our judicial system. On the contrary, it is exactly the kind of conduct that makes litigation so prohibitively expensive that legitimate disputes cannot be litigated. It is appropriate in this kind of situation to discourage such conduct by imposing stiff costs consequences...

...

20 There is no evidence whatsoever to support that accusation. There is, in my view, considerable merit to Standard Life's request that Mr. Masters be personally liable for the costs. Although Ms Elliott is an intelligent, well-educated person, she is not a lawyer, has no legal training and cannot have been the inspiration behind the third party proceeding. That litigation strategy must have been developed and recommended by her lawyer...

21 Furthermore, from what I have seen of Mr. Masters' conduct in the material before me, I believe it goes well beyond a lawyer "forcefully and aggressively" advocating for his client...

...

23 In Ontario, the test is now set out in Rule 57.07 (1) (c), which states:

> 57.07 (1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (c) requiring the solicitor personally to pay the costs of any party.

...

26 In *Young v. Young* (1993), 108 D.L.R. (4th) 193 (S.C.C.), the Supreme Court of Canada held that costs ought not to have been awarded personally against the solicitor for the father in protracted child custody proceedings dealing with the extent to which the father could involve the children in his Jehovah's Witness religious activities during periods of access. The Supreme Court recognized that the proceedings had been lengthy and acrimonious. However, the Court held, at p. 284 that costs are compensatory and are not awarded for the purpose of punishing a barrister. McLachlin J, (writing for the majority on this point), stated p. 284:

> . . . **Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging that abuse and delay. It is as clear that the courts possess that jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. . . . Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation**

> **where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.**
>
> 31 **Costs are meant to be compensatory. The likelihood of recovering the costs thrown away as against the defendant are remote. The only way to truly compensate the plaintiff insurer for its costs would be to make them payable by the solicitor.** Given my finding that Mr. Masters was the instigator of the action taken and that he took the steps he did for an improper purpose, as well as the fact that his general conduct of the litigation excessively drove up costs, it is in my view appropriate that he pay the costs personally.

Best v. Ranking
2016 ONCA 492

The typical part of this case is that a litigant alleged a widespread conspiracy against him involving the judiciary, lawyers, the police, and others that opposed his claims. The less typical part is that costs of $84,000 were ordered to be paid by the plaintiff and his lawyer (personally), jointly and severally. The plaintiff already owed huge sums for costs in the same proceedings. The lawyer argued that other lawyers would be reluctant to provide forceful advocacy in weak cases if costs were ordered against him personally – the Court of Appeal would have none of it.

Pardu J.:

> [50] I agree with the submission of the appellant that the fact that a lawyer starts an action which is unlikely to succeed is not, on its own, a basis to award costs personally against that lawyer.
>
> [51] Rule 57.07 is "designed to protect and compensate a party who has been subjected to costs being incurred without reasonable cause, not to punish a lawyer": *Galganov* [*Galganov v. Russell (Township)*, 2012 ONCA 410], at para. 14.
>
> [52] The motion judge here did not make Mr. Slansky liable for costs personally simply because he started a case that was weak. As the motion judge pointed out, the nature of the proceedings is an important contextual factor in assessing whether costs wasted by a solicitor justify an order that he pay costs personally.
>
> …
>
> **[54] The motion judge examined the entire course of the litigation in assessing the specific actions and conduct of counsel, as she was required to do. In particular, she focused on the vexatious or abusive nature of the proceeding. This is not a necessary element of an award of costs against counsel personally but is not unfamiliar in this context…**
> **[55] On appeal, Mr. Slansky argues that Action 2 was not abusive. It was against many different parties and for different causes of action.**

That issue has now been conclusively determined by the dismissal of Mr. Best's appeal from the decision striking Action 2 as an abuse of process. Action 2 made similar allegations of impropriety as had been voiced in the course of Action 1. The motion judge did not err in considering that Mr. Slansky incorporated into the pleading in Action 2 accusations of criminal misconduct against opposing counsel that had repeatedly been judicially rejected as baseless.

[56] Finally, as this court indicated in *Galganov*, at paras. 23-25, deference is owed to a motion judge's decision as to whether a lawyer should pay costs personally:

> The determination as to costs is a matter within the discretion of the application judge. An appellate court may set aside a costs award if the application judge made an error in principle or if the costs award is plainly wrong.
>
> In *Rand Estate*, this court held that:
>
> The application judge who managed the proceedings was in a much better position than this court to make the necessary assessments underlying the findings of fact he eventually made. Those findings are, by their nature, somewhat subjective and the cold paper record cannot, in our view, capture all of the considerations that would be relevant to those findings. We defer to the [application] judge's findings unless they are clearly in error and clearly material to his ultimate determination.
> As a result, this court owes a high degree of deference to the application judge's holding…. [Citations omitted.]

[57] I see no basis to interfere with the motion judge's discretionary decision to order Mr. Slansky to pay some portion of the costs wasted.

[58] In the event leave to appeal a costs order against counsel personally is necessary, I would grant leave.

Resolution of the Dispute

(a) Adjudication, Mediation and Negotiated Settlements

- Adjudication is one method of dispute resolution. A facilitated negotiation ('mediation') may be preferred and in some jurisdictions (Toronto and Ottawa for example) must be attempted before a matter may be listed for trial. See Rule 24.1.

- 'Negotiation' usually refers to facilitated settlement discussions.

(b) Settlement Offers, Agreements, and Minutes of Settlement

- Settlements usually represent a compromise between the parties to end the dispute. The settlement is itself a contract which will include such terms as dismissal of the proceedings. The terms are normally contained in a document entitled 'Minutes of Settlement' executed by the parties.

- A settlement in favour of a party under a 'disability' (e.g. a child) must be approved by the Court.

Introduction to the 'Costs Rules'

- **Costs** = money paid by the unsuccessful party to the successful party in litigation, adjusted for offers to settle, bad behaviour, and proportionality.

- Aim: compensation for the costs of litigation.

- 'Partial indemnity' is the norm (expect 60% of reasonable costs at best), 'substantial indemnity' (90% of reasonable costs) are exceptional and usually based on offers to settle, and 'full indemnity costs' are rare.

- ***These are discretionary awards and very hard to predict.***

Courts of Justice Act, R.S.O. 1990, c.C.43

131.(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

See Rules 49 (Settlement Offers), 57 (Costs)

Plaintiff's Offer

49.10 (1) Where an offer to settle,

(a) is made by a plaintiff at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the defendant,
and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

...

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;
(b) the apportionment of liability;
(c) the complexity of the proceeding;
(d) the importance of the issues;
(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
(f) whether any step in the proceeding was,
  (i) improper, vexatious or unnecessary, or
  (ii) taken through negligence, mistake or excessive caution;
(g) a party's denial of or refusal to admit anything that should have been admitted;
(h) whether it is appropriate to award any costs or more than one set of costs where a party,
  (i) commenced separate proceedings for claims that should have been made in one proceeding, or
  (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
  (iii) any other matter relevant to the question of costs.

Barlow v Citadel General Assurance Co.
2008 CanLII 3215 (Ont. S.C.J.)

Here the plaintiff was awarded $100,000 in damages and sought $250,000 in costs; costs in the amount of $90,000 were awarded (the trial judge held that the claim was 'outlandish' and seemed to have been made under the assumption that the defendant insurer should be punished for vigorously defending the claim). Aside from illustrating the general method by which costs are assessed, this case considers whether a lawyer may seek a premium from the losing party to assure that the lawyer's bill is paid fully (that is; that the shortfall between actual costs and the costs ordered are paid by the losing party where the winning party has insufficient funds).

Lalonde J.:

> 4 **Counsel for the plaintiff seeks a $50,000.00 premium on the basis that he took on the plaintiff's case on the basis that he would not recover any fees or disbursement unless the plaintiff was successful in a settlement or at trial. He states that his client had no financial ability to retain his services.**
>
> ...
>
> 10 It is not my role in fixing costs to engage in another piece of litigation. I find that the argumentative supplementary costs submissions of plaintiff's counsel were not helpful. Counsel can find any number of costs decisions that, if improperly applied, can support outlandish positions.
>
> 11 The plaintiff claimed a premium of $50,000.00 basically because she did not have the financial means to retain counsel (paragraph 3 of the plaintiff's submissions on costs)... In.. Ward v. Manufacturers Life Insurance Co., [2007] O.J. No. 4882 (Ont. C.A.)... In that case, Manufacturers Life froze Mr. Ward's vested commission account. Weiler J.A... states at paras. 69-71 that:
>
> ¶ 69 The concerns underlying the decision in Walker apply equally to the new language of Rule 57.01. **First, the new factors, like the old ones, are neutral in character and can apply equally to plaintiffs or defendants. Second, although the new factors do not specifically relate to the nature of the case or the conduct of the parties, they serve to uphold the principles of transparency and predictability that should govern costs awards. The two new factors merely make explicit the fact that, in the absence of a costs grid, there should be fairness and consistency in the amount that can be charged for lawyers' time across similar pieces of litigation involving similar conduct and counsel.**
>
> ¶ 70 I would note that the phrase "the principle of indemnity" in the new legislation is qualified. The listed considerations are the experience of the lawyer, the rates charged, and the hours spent. While the clause is phrased inclusively, a risk premium is not of like kind to these considerations.
>
> ¶ 71 **Clause (0.b) confirms this interpretation by insisting that costs be what the unsuccessful party could "reasonably expect to pay." This**

> **engages the other concern about risk premiums explicit in Walker: that the defendant is not aware of his potential cost exposure because the premium is a private agreement between the plaintiff and his counsel.** As noted in Walker, this is particularly important where, as here, a Rule 49 offer to settle has been made, and the defendant must be aware of the risk of refusing the plaintiff's offer.
>
> 12 Weiler J.A. cancelled the $50,000.00 premium award. For the same reasons, I dismiss the plaintiff's claim for a $50,000.00 costs premium in this case.

II. JURISDICTION

In which jurisdiction will the proceedings be held? Such a simple question; such a complicated answer. Consider that the precipitating event to the dispute may have occurred in one place, the parties reside in another, the thing subject of a dispute is somewhere else, and the people who will be witnesses yet somewhere else again.

Club Resorts Ltd. v. Van Breda
2012 SCC 17

This is the leading case. Where there is a foreign element, an Ontario court will have jurisdiction over a dispute when there is a *real and substantial connection* between the dispute and Ontario. In the *Van Breda* litigation, the 'real and substantial connection' principle was refined in the context of a tort action. Rather than a direct test, there are now two stages of basic inquiry:

> First, **the plaintiff must establish that a 'presumptive connecting factor' connects the litigation to the jurisdiction**. Such factors include whether the defendant is domiciled or resident in the province; the defendant carries on business in the province; if a tort case, whether the tort was committed in the province; and, if a contract case, the contract connected with the dispute was made in the province. The fact that the plaintiff is resident in the jurisdiction is not itself sufficient.
>
> Second, **if a 'presumptive connecting factor' is established, the onus shifts to the defendant who may rebut by establishing presumed jurisdiction by showing that the connection is insufficient to establish a real and substantial connection.** Here the real question will usually become whether another jurisdiction will be more convenient for the litigation.

This is a new framework for jurisdiction (sometimes called "territorial competence") and the courts are adding detail to that framework as cases are decided.

Douez v. Facebook, Inc.
2017 SCC 33

This case is about "forum selection" clauses in contracts ("the law of Ontario shall govern the interpretation and enforcement of this contract"). In particular, the validity of a term in a user's contract with Facebook which stipulates that:

> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.

The plaintiff, a resident of B.C., sought to bring a class action against Facebook for using her personal data without her consent, and, she claimed, in contravention of the provincial Privacy Act. Sub-section s. 3(2) of the statute provides:

> (2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

Facebook sought to stay the B.C. proceedings arguing that the forum selection clause in the contract requires proceedings to be brought in Santa Clara County on California law.

Karakatsanis, Wagner and Gascon JJ. held:

> [24] Forum selection clauses serve a valuable purpose. This Court has recognized that they "are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law" (*Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450., at para. 20). Forum selection clauses are commonly used and regularly enforced.
>
> [25] That said, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Courts are not merely "law-making and applying venues"; they are institutions of "public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies" (T. C. W. Farrow, *Civil Justice, Privatization, and Democracy* (2014), at p. 41). Everyone has a right to bring claims before the courts, and these courts have an obligation to hear and determine these matters.
>
> [26] Thus, forum selection clauses do not just affect the parties to the contract. They implicate the court as well, and with it, the court's obligation to hear matters that are properly before it. In this way,

forum selection clauses are a "unique category of contracts" (M. Pavlović, "Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016), 62 McGill L.J. 389, at p. 396).

[27] Of course, parties are generally held to their bargain and are bound by the enforceable terms of their contract. However, because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. In common law provinces, a forum selection clause cannot bind a court or interfere with a court's jurisdiction. As the English Court of Appeal recognized long ago, "no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them" (*The Fehmarn*, [1958] 1 All E.R. 333, at p. 335).

[28] Instead, **where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it (Pompey, at para. 39). At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court"**… **At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.**

[29] Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In Pompey, this Court adopted the "strong cause" test from the English court's decision in *The "Eleftheria",* [1969] 1 Lloyd's Rep. 237 (Adm. Div.). In exercising its discretion at this step of the analysis, a court must consider "all the circumstances", including the "convenience of the parties, fairness between the parties and the interests of justice" (*Pompey*, at paras. 19 and 30-31). Public policy may also be a relevant factor at this step (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 (CanLII), [2001] 3 S.C.R. 907, at para. 91, referred to in *Pompey*, at para. 39; Frey, at para. 115).

[30] The strong cause factors were meant to provide some flexibility. Importantly, *Pompey* did not set out a closed list of factors governing the court's discretion to decline to enforce a forum selection clause…

…

[33] But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that

a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case (see e.g. *Straus v. Decaire*, 2007 ONCA 854, at para. 5 (CanLII)). And as one of the interveners argues, instead of supporting certainty and security, forum selection clauses in consumer contracts may do "the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account" (Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic Factum, at para. 7).

…

[38] Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. The burden remains on the party wishing to avoid the clause to establish strong cause.

[39] Although the steps are distinct, some considerations may be relevant to both steps of the test. For example, a court may consider gross inequality of bargaining power at the second step of the analysis, even if the circumstances of the bargain do not render the contract unconscionable at the first step. Taking into account the fact that the parties did not negotiate on an even playing field recognizes that the reasons for holding parties to their bargain carry less weight when there is no opportunity to negotiate a forum selection clause. This is not to say that the gross inequality of bargaining power will be sufficient, on its own, to show strong cause. However, it is a relevant circumstance that may be taken into account in the analysis.

…

[76] We would allow the appeal with costs to the appellant. Ms. Douez provided strong reasons to resist the enforcement of the clause: most importantly, the gross inequality of bargaining power between her and Facebook and the quasi-constitutional privacy rights engaged by her claim. The forum selection clause is unenforceable.

Abella J. (concurring) held that the forum selection clause was unenforceable under the first arm of the test on the basis of contract law in that the contract was contrary to public policy. At para. 104, Justice Abella wrote: "In general, then, when online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-

constitutional or constitutional rights, in my view, public policy concerns outweigh those favouring enforceability of a forum selection clause."

McLachlin C.J., Moldaver and Côté JJ. (dissenting) disagreed principally based on commercial pragmatism and comity; see para. 161: "We cannot help but note our profound disagreement with the suggestion in the reasons of Karakatsanis, Wagner and Gascon JJ., that forum selection clauses are inherently contrary to public policy… [t]he overwhelming weight of international jurisprudence shows that, far from being a subterfuge to deny access to justice, forum selection clauses are vital to international order, fairness and comity."

Airia Brands Inc. v. Air Canada
2017 ONCA 792 (Ont. C.A.)

This matter involved a claim of conspiracy to fix prices of air freight shipping services to Canada. The plaintiff sought to certify its class action as one that included "absent foreign claimants" ("AFC"s). The defendants sought to exclude AFCs from the class. On appeal, the Court of Appeal held that *Club Resorts Ltd. v. Van Breda* applied such that jurisdiction could be taken over AFCs.

Pepall J.A. surveyed the law on jurisdiction and class actions and held:

> [103] In light of the foregoing, it is clear that the motion judge erred in simply anchoring her jurisdiction analysis in a negation of the traditional bases for jurisdiction, namely presence or consent, and in failing to apply the real and substantial connection test articulated in *Van Breda*. As explained in *Van Breda*, order, fairness, and comity are not independent roots of jurisdiction but are subsumed by the real and substantial connection test. As stated by Lebel J., the purpose of the constitutionally-imposed territorial limit is to ensure the existence of the relationship or connection needed to establish the legitimate exercise of state power.
>
> [104] It is true, as noted by the motion judge and as stated by Lebel J. at para. 79 of *Van Breda*, that jurisdiction may be based on traditional grounds. This would include presence in the jurisdiction and consent to the jurisdiction. However, relying on those factors to ground jurisdiction is very different from rejecting jurisdiction based on their absence. The motion judge erred in doing the latter. Here the traditional grounds for jurisdiction were not available. As such, the real and substantial connection test had to be the start of the analysis.
>
> [105] As recognized by Sharpe J.A. in *Currie* [*Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 2005 CanLII 3360 (ON CA), 74 O.R. (3d) 321 (C.A.),] and the commentary discussed previously, the situation of unidentified non-resident class members in a proposed class action presents unique concerns with respect to ensuring that a sufficient connection exists to justify taking jurisdiction over them. In my view, this is what the Courts of

> Appeal in Ontario and Manitoba sought to address in *Currie* pre-*Van Breda*, and in *Meeking* [*Meeking v. Cash Store Inc.*, 2013 MBCA 81 (CanLII), 367 D.L.R. (4th) 684], post-Van Breda, albeit in different ways. Moreover, it seems to me that a robust analysis may encompass the approach of both appellate courts.
>
> [106] In setting out the contours of what the framework should be in these circumstances, I will address a preliminary issue raised during the appeal, which informs what is relevant to the assessment. I agree with the appellants that jurisdiction is not a function of foreign recognition and enforcement standing alone. Put differently, when addressing jurisdiction, issues of foreign recognition and enforcement are not preclusive of all other factors. Here, the motion judge permitted foreign law governing recognition to dominate her analysis to the exclusion of all other relevant factors.
>
> [107] Turning to the appropriate framework, jurisdiction may be established over AFCs where:
>
> 1) there is a real and substantial connection between the subject matter of the action and Ontario, and jurisdiction exists over the representative plaintiff and the defendants;
>
> 2) there are common issues between the claims of the representative plaintiff and AFCs; and,
>
> 3) the procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt out as described in Currie are provided, thereby serving to enhance the real and substantial connection between AFCs and Ontario.
>
> [108] In my view, this framework provides the necessary safeguards to establish that jurisdiction properly exists and ensures the protection of the values of order and fairness. Quite apart from that consequence, a positive result of this framework is that the objectives at the heart of class actions are served.

Forsythe v. Westfall
2015 ONCA 810 (Ont. C.A.); leave to appeal denied, 2016 CarswellOnt 3759 (S.C.C.)

An Ontario woman was injured in a motorcycle accident in British Columbia. She was the passenger but had auto insurance in Ontario. The motorcyclist's driver was an Alberta resident and insured through an Alberta policy. The plaintiff alleged a third party unknown driver ("John Doe") was the cause of the accident. Could the action be maintained in Ontario? The plaintiff argued that Ontario was the "forum of necessity" notwithstanding *Van Breda*.

MacFarland J.A.:

Is Ontario the forum of necessity?

52 Finally, the appellant argues that an Ontario court should assume jurisdiction on the basis of the forum of necessity doctrine. She says that Ontario should assume jurisdiction to avoid a multiplicity of proceedings and the potential for inconsistent judgments in Ontario and British Columbia. In her view, the only practical approach is for one court to hear all matters relating to liability and damages.

53 I do not accept this submission. The forum of necessity doctrine is available in extraordinary and exceptional circumstances. For Ontario to accept jurisdiction as the "forum of necessity" the appellant must establish that there is no other forum in which she can reasonably seek relief: West Van Inc. v. Daisley, 2014 ONCA 232, 119 O.R. (3d) 481 (Ont. C.A.), at para. 20, leave to appeal refused, [2014] S.C.C.A. No. 236 (S.C.C.).

54 The appellant has failed to establish that she cannot reasonably seek relief elsewhere. She can, and has, pursued a claim against Westfall in British Columbia. She may also continue her claim against AXA in Ontario.

55 In respect of this submission, I agree with and adopt the motion judge's reasons, at paras. 27-29:

> I see no room for the operation of the forum of necessity doctrine. This doctrine is an exception to the real and substantial connection test that recognizes that there will be extraordinarily and exceptional cases where the need to ensure access to justice will justify the domestic court's assumption of jurisdiction: West Van Inc. v. Daisley, 2014 ONCA 232 (CanLII) at paras. 17-38; Van Breda v. Village Resorts Ltd., 2010 ONCA 84 (CanLII), [2010] O.J. No. 402 (Ont. C.A.) at para. 100, affd. S.C.C. (sub nom. Club Resorts Ltd. v. Van Breda), supra.
> The exception is very narrow, and the plaintiff must establish that there is no other forum in which he or she reasonably could obtain access to justice: Bouzari v. Bahremani, [2011] O.J. No. 5009 (S.C.J.). Typically, the doctrine is unavailable because of its high bar, and its availability has been rejected in numerous cases: West Van Inc. v. Daisley, supra; Van Kessel v. Orsulak, 2010 ONSC 619; Elfarnawani v. International Olympic Committee, 2011 ONSC 6784 (CanLII); Mitchell v. Jeckovich, supra. The doctrine is reserved for exceptional cases such as where there has been a breakdown in diplomatic or commercial relations with the foreign state or where the plaintiff would be exposed to a risk of serious physical harm if the matter was litigated in the foreign court.
>
> There is no chance in the immediate case that Ms. Forsythe will be denied access to justice. She remains free to sue in Ontario to enforce her claim against Intact after, or even before, she obtains access to justice for her claim against Mr. Westfall in British Columbia. It may be inconvenient that she is denied one-stop access to justice, but there is no room here for the forum of necessity doctrine.