



Locating Torts: Where Can a Defendant be Sued Under Canadian Law?

By Kevin O'Brien and Waleed Malik

OSLER

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Introduction

When an out-of-province or foreign defendant objects to being sued in a territory's court, that court must first decide whether it has the jurisdiction to hear the dispute. Where the tort alleged by the plaintiff took place will be key to this decision.

This paper is a guide for determining where a tort has been committed for such an analysis under Canadian law.¹ It then reviews the specific tests for determining where the most common torts are located under Canadian law.

¹ This paper only addresses issues of *territorial* jurisdiction (i.e., a provincial superior court's jurisdiction over cases arising within, or persons with connections to, that province). Issues of *subject matter* jurisdiction (i.e., a court's ability to consider the subject matter of a dispute, for example where a court is limited by statute to only hearing matters relating to specific areas of law) are not discussed.



The role of the location of a tort in determining jurisdiction

In cases involving out-of-province or foreign defendants who do not otherwise agree² to the jurisdiction of a territory's court, the court must determine whether or not there is a basis for it to “assume” jurisdiction over the dispute. In doing so, courts apply one of two frameworks, depending on the province: a common law framework or a statutory framework. Under either framework, the place where the tort is committed (sometimes called the *situs* of the tort) is a relevant and often decisive factor.

A. TWO FRAMEWORKS

At common law, a court may assume jurisdiction (or will have “jurisdiction *simpliciter*”) where there is a “real and substantial connection” between the province and the dispute. According to the Supreme Court of Canada in *Club Resorts Ltd v Van Breda*, a real and substantial connection will presumptively exist if one of four connecting factors is present. Those factors are whether

- a) the defendant is domiciled or resident in the province;
- b) the defendant carries on business in the province;
- c) the alleged tort is committed in the province; and
- d) a contract connected with the dispute was made in the province.³

Although the common law framework is the default one, a few Canadian provinces (including British Columbia, Saskatchewan and Nova Scotia) have

² Courts will automatically have jurisdiction over disputes involving defendants who are present in the province (“presence-based jurisdiction”) or who have consented to the court’s jurisdiction (“consent-based jurisdiction”). In such cases, it is unnecessary to engage in a jurisdiction *simpliciter* analysis to determine whether the court can assume jurisdiction: *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 82.

³ 2012 SCC 17 (“*Van Breda*”) at para 90.

displaced it with legislation⁴ based on the *Uniform Court Jurisdiction and Proceedings Transfer Act* (the CJPTA). The CJPTA substitutes the term “jurisdiction *simpliciter*” with “territorial competence”⁵ but the test significantly overlaps with the common law one. Under the CJPTA, a court will have territorial competence if there is a real and substantial connection between the province or territory and the facts on which the proceeding against an out-of-province defendant is based.⁶ A real and substantial connection will be presumed to exist if the proceeding at issue “concerns a tort committed in the province.”⁷

B. THE LOCATION OF THE TORT CREATES A STRONG JURISDICTIONAL PRESUMPTION

Regardless of whether a common law or statutory framework applies, a court will presumptively have jurisdiction over any dispute arising from a tort committed in its province. While that presumption is rebuttable, such rebuttals rarely succeed.⁸

Even where a court determines that it has jurisdiction, it can still decline to exercise that jurisdiction.⁹ However, courts will only do that when a defendant has shown that there is another jurisdiction that is “clearly more appropriate” for the determination of the dispute. “Clearly more appropriate” is a purposefully high threshold, as the Supreme Court has held that “the normal state of affairs is that jurisdiction should be exercised once it is properly assumed.”¹⁰

KEY TAKEAWAY:

Where a Canadian court finds that an alleged tort has been committed within its territorial boundaries, it will very likely exercise its jurisdiction over the underlying dispute.

Forum non conveniens is a legal doctrine where courts may refuse to take jurisdiction over matters when a clearly more appropriate forum is available to the parties.

⁴ See British Columbia’s *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; Saskatchewan’s *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1; Nova Scotia’s *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess), c 2; and the Yukon’s *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7. Prince Edward Island has also passed legislation based on the CJPTA, but that law has not yet come into force.

⁵ *Ewart v Nippon Yusen Kabushiki Kaisha*, 2016 BCSC 2179 at para 6.

⁶ CJPTA, s 3(e). Section 3 also provides a number of other bases for territorial competence not discussed here.

⁷ CJPTA, s 10(g). As with the common law test, section 10 of the CJPTA also provides a number of other factors that create a presumptive real and substantial connection that are not discussed here.

⁸ *Goldhar v Haaretz.com*, 2016 ONCA 515 at para 130, per Pepall J.A. dissenting; *Stanway v Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at para 22. See also *Van Breda*, at para 96 (“[W]here the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province”).

⁹ Common law doctrine of “*forum non conveniens*”, which is codified in s. 11 of the CJPTA.

¹⁰ *Van Breda*, at paras 108-109; see also *Garcia v Tahoe Resources Inc.*, 2017 BCCA 39 at paras 54 and 127.

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Locating the most common torts

Deciding where a tort has been committed has been a challenge for Canadian courts,¹¹ which have resisted providing any hard or fast rules for this exercise.

Historically, the common law recognized two theories for determining the location of a tort: (i) the “place of acting” theory, which puts the tort in the jurisdiction where the original act of the defendant causing the final damage occurred; and (ii) the “last event” theory, which puts the tort in the jurisdiction where the last act completing the cause of action occurred.¹²

The Supreme Court of Canada rejected both approaches in its 1975 decision in *Moran v Pyle National (Canada) Ltd.*¹³ In *Moran*, the Court held that when “determining where a tort has been committed, it is unnecessary, and unwise, to have to resort to any arbitrary set of rules.”¹⁴ Instead of following either theory, the Court held that a tort can be found to have occurred “in any country substantially affected by the defendant’s activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties.”¹⁵ The Court further emphasized its flexible approach in finding that a tort may be found to have taken place in more than one place for jurisdictional purposes.¹⁶

A tort can be found to have occurred in any jurisdiction substantially affected by the defendant’s activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties.

¹¹ See, for example, *Van Breda*, at para 88 (“The *situs* of the tort is clearly an appropriate connecting factor [...] The difficulty lies in locating the *situs*, not in acknowledging the validity of this factor once the *situs* has been identified”).

¹² Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law Inc, 2016) (“Pitel and Rafferty”) at pp 87-88.

¹³ [1975] 1 SCR 393 (“*Moran*”) at p 408.

¹⁴ *Moran*, at p 408.

¹⁵ *Moran*, at pp 408-409.

¹⁶ *Moran*, at p 398. This reasoning does not apply in the “choice of law” context (i.e., determining which territory’s laws apply to a dispute). For choice of law purposes, a tort must be held to have occurred in one place: Pitel and Rafferty, at p 86. However, in *Moran*, at p 397, the Supreme Court explained that the place of tort for territorial jurisdictional purposes may be different than the place of a tort for choice of law purposes.

Following *Moran*, Canadian courts have adopted a contextual and flexible approach for determining the location of torts.¹⁷ While it is impossible to summarize that approach in a set of neatly defined principles, courts have developed general rules for locating certain specific torts. For more recently established torts, the law regarding their location is still developing.

Set out below is a summary of how Canadian courts have located the most commonly encountered torts.¹⁸

A. NEGLIGENCE

In a very broad sense, the tort of negligence compensates people who suffer injuries as a result of the unreasonable conduct of others.¹⁹ The tort of negligence takes many forms, including professional negligence, medical malpractice, product liability, or actions against public authorities.

However, in all its forms, in order to prove negligence, a plaintiff must show: (i) the defendant owed the plaintiff a duty of care; (ii) the defendant's behaviour breached the standard of care; (iii) the plaintiff sustained damage; and (iv) the damage was caused, in fact and in law, by the defendant's breach.²⁰

Negligence test

- | | |
|------------------------------|-------------|
| ① Duty of care | ③ Damage |
| ② Breach of standard of care | ④ Causation |



The tort of negligence occurs in any province where the claimant suffered damage.

When confronted with a negligence claim where the underlying conduct and consequences are located in more than one jurisdiction, Canadian courts have found that the tort of negligence occurs in any province where the claimant suffered damage.²¹

The British Columbia Court of Appeal applied that principle in the product liability context in *Furlan v Shell Oil Co.*, where it found that the alleged

¹⁷ See, for example, *Gulevich v Miller*, 2015 ABCA 411 (“*Gulevich*”) at paras 44-52; and *Kaynes v BP, PLC*, 2014 ONCA 580 (“*Kaynes*”) at para 27.

¹⁸ The authors have not found any decisions discussing where the tort of nuisance is committed. This is not surprising, given that the tort itself is based upon proximate contact between parties involving one of the parties' property, such that in all but the most extreme cases (e.g., where the plaintiff and defendant live on the immediate opposite sides of a territorial boundary) a court will have presence-based jurisdiction over the defendant: see footnote 2 above. The authors have also not found any decisions discussing where the recently established tort of invasion of privacy (or “intrusion upon seclusion”) is committed. The plaintiff in *Difeo v Blind Ferret Entertainment*, 2013 NBQB 337, alleged both the tort of defamation and intrusion upon seclusion, and the defendant challenged the jurisdiction of the Court of Queen's Bench of New Brunswick to hear the dispute. However, the Court's discussion of the presumptive connecting factor of “tort committed in the province” focused exclusively on the defamation allegation (see paras 30-33).

¹⁹ Lewis N. Klar, *Tort Law*, 5th ed (Toronto: Thomson Carswell, 2012) (“*Klar*”) at p 164.

²⁰ *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 3. There is some disagreement on how to express or divide up the elements of a cause of action in negligence: Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 10th ed (Markham, Ont: LexisNexis Canada, 2015) at pp 118-119.

²¹ *Moran*, at p 409; *GWL Properties Ltd v WR Grace @ Co of Canada Ltd*, 1990 CarswellBC 236 (CA) at paras 11-13; *Garipey v Shell Oil Co*, 2000 CarswellOnt 3684 (SCJ) at para 40, leave to appeal refused, 2001 CarswellOnt 1361 (Div Ct).

negligence had been committed in British Columbia.²² The plaintiffs sued three American manufacturers for damage caused by allegedly defective plumbing systems. The defendants had manufactured the resins used in the plumbing systems, but did not manufacture the plumbing systems themselves. Further, two of the defendants provided evidence that they had not sold any of their resins directly to consumers or manufacturers in Canada. The Court of Appeal nevertheless concluded that the alleged tort had occurred in British Columbia because the alleged damage had been sustained in that province.²³ The fact that the plumbing systems' manufacturer was interposed between the plaintiffs and the American defendants in the supply chain did not negate the causal connection between the defendants' alleged negligence and the plaintiffs' losses.²⁴

When locating negligence, Canadian courts have usually differentiated between damage or injury (which is an element of a claim of negligence) and the consequences of that damage or injury such as suffering or continuing damages (which are not elements of the claim).²⁵ For example, in *Gulevich v Miller*,²⁶ the plaintiff, Gulevich, alleged that the defendant doctor, Miller, had negligently failed to identify a malignant brain tumour when he examined her in Ontario. She subsequently moved to Alberta, where the tumour was discovered and she underwent surgery to remove it. She commenced a medical malpractice action against the doctor in Alberta.²⁷ The doctor moved to set aside service and stay the action on the basis that the Alberta courts did not have jurisdiction. At first instance, the chambers judge agreed. He concluded that the alleged tort had occurred in Ontario, since the misdiagnosis (which was the foundation of Gulevich's claim and the cause of her damages) had occurred in Ontario.²⁸ The Court of Appeal of Alberta disagreed. The majority concluded that Gulevich had suffered the damage in Alberta because "[t]he consequences of the negligent act were that the Alberta physicians who attended upon [the plaintiff] initially relied upon the respondent's report" and "[t]he consequences of the respondent's negligent report were significant to [the plaintiff's] health in Alberta."²⁹ Therefore, the majority concluded that the alleged tort had taken place in Alberta.³⁰

This can be contrasted with the decision in *CIC Capital Fund Ltd v Rawlinson*.³¹ CIC Capital Fund, a company headquartered in China, alleged that its delisting from the Alternative Investment Market of the London Stock Exchange was caused by the negligence and breach of fiduciary duty of the defendant accountant Rawlinson, who was based in England. The British Columbia Supreme Court noted that all of the alleged negligent acts had occurred outside British Columbia, and that the CIC Capital Fund's business (which suffered as a result of the delisting) was located overseas.³² CIC Capital Fund argued that the alleged negligence had occurred in British Columbia because it had a registered

²² 2000 BCCA 404 ("*Furlan*").

²³ *Furlan*, at para 21.

²⁴ *Furlan*, at paras 21-22.

²⁵ J.G. Castiel and Janet Walker, *Canadian Conflict of Laws*, 6th ed (Markham, Ont: Butterworths, 2005) (loose-leaf) ("*Castiel and Walker*") at section 11.6.

²⁶ See footnote 17 above.

²⁷ *Gulevich*, at paras 3-4.

²⁸ *Gulevich*, at paras 10-11.

²⁹ *Gulevich*, at para 52.

³⁰ O'Ferrall J.A. agreed with the result, but refused to rely on the location of the alleged tort and indicated that it was not appropriate to focus on this factor too much in cases involving multi-jurisdictional torts (see para 59).

³¹ 2016 BCSC 516 ("*CIC Capital*").

³² *CIC Capital*, at paras 25-27.

office in the province and, therefore, it suffered losses there. The Court rejected that argument. It found that the alleged injury had occurred in England, and the “fact that the injury may have had some repercussions for the plaintiff in other jurisdictions, including British Columbia, does not give rise to a real and substantial connection with those jurisdictions.”³³

B. NEGLIGENT MISREPRESENTATION

A claim of negligent misrepresentation is a cause of action for economic losses suffered as a result of the plaintiff’s reliance on negligently made statements.³⁴ It consists of the following elements: (i) a duty of care based on a special relationship between the plaintiff and defendant; (ii) an untrue, inaccurate or misleading statement by the defendant; (iii) negligence on the part of the defendant in making the statement; (iv) reasonable reliance by the plaintiff on the statement; and (v) damage suffered by the plaintiff as a result.³⁵



The tort of negligent misrepresentation occurs in the jurisdiction where the negligent representation is received or acted upon.

Negligent misrepresentation test

- | | |
|--|------------------------------------|
| ① Duty of care | ④ Reasonable reliance on statement |
| ② Untrue, inaccurate or misleading statement | ⑤ Damage |
| ③ Negligence in making the statement | |

Canadian courts have found that the tort of negligent misrepresentation occurs in the jurisdiction where the negligent representation is received or acted upon.³⁶

In *Central Sun Mining Inc v Vector Engineering Inc.*,³⁷ Central Sun Mining Inc., a company headquartered in Ontario, retained Vector Engineering Inc. to provide studies for the siting, design and operation of a mine located in Costa Rica, including an overall assessment of the stability of the proposed mine site and design. Central Sun Mining lost its investment and incurred substantial remediation costs after a major landslide forced the mine to cease operating. It sued Vector Engineering for breach of contract, negligence, and negligent misrepresentation.

Vector Engineering challenged the jurisdiction of the Ontario court, and succeeded at first instance. However, the Court of Appeal ultimately found that the tort of negligent misrepresentation had occurred in Ontario. The Court noted that Central Sun Mining had received and acted upon Vector’s studies

³³ *CIC Capital*, at para 32.

³⁴ Klar, at p 233. Negligent misrepresentation is one of the exceptions to the general rule that purely economic losses resulting from negligence are not recoverable in tort.

³⁵ *Queen v Cognos Inc*, [1993] 1 SCR 87 at p 110.

³⁶ 2249659 *Ontario Ltd v Sparkasse Siegan*, 2013 ONCA 354 at para 31; *Canadian Commercial Bank v Carpenter*, 1989 CarswellBC 167 (CA) at para 18; *Cannon v Funds for Canada Foundation*, 2010 ONSC 4517 at para 52, aff’d, 2011 ONCA 185; *Smith v Belanger*, 2009 ABQB 23 at para 13.

³⁷ 2013 ONCA 601 (“*Central Sun*”).

at Central Sun Mining's office in Toronto. On that basis, the Court held that the tort occurred in Ontario.³⁸ The Court added that, even if the studies at issue themselves had never been transmitted to Ontario – and only the Central Sun Mining's Vancouver office's recommendations based on those studies had been transmitted – that still would have been enough to locate the alleged negligent misrepresentation in Ontario.³⁹

However, the decision in *Central Sun Mining Inc v Vector Engineering Inc.*, should be contrasted with that in *Algonquins of Barriere Lake First Nation v Canada (Attorney General)*.⁴⁰ In that case, a First Nation community located in Québec brought an action in Ontario against the Minister for Aboriginal Affairs and Northern Development Canada, who controlled the First Nation's community funding through successive third-party management agreements. The plaintiff commenced an action in Ontario that alleged that the agreements had been mismanaged and pleaded a number of causes of action, including negligent misrepresentation. The Minister challenged the jurisdiction of the Ontario court. In response, the plaintiff, among other things, argued that the tort of negligent misrepresentation had been committed in Ontario. The Court rejected that argument. It found that representatives of the First Nation community met with Ministry representatives through their regional offices in Québec, and that any alleged misrepresentations occurred in those meetings. Further, any reliance to the plaintiff's detriment would have occurred within the community in Québec.⁴¹ Therefore, the Court concluded that the tort had not occurred in Ontario.

C. FRAUDULENT MISREPRESENTATION

In order to prove fraudulent misrepresentation, a plaintiff must show the following: (i) a false representation made by the defendant; (ii) some level of knowledge of the falsehood of the representation on the part of the defendant; (iii) the false representation caused the plaintiff to act; and (iv) the plaintiff's actions resulted in a loss.⁴²

Fraudulent misrepresentation test

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|--|--------------------------------------|
| ① False representation | ③ False representation causes action |
| ② Knowledge of falsity of representation | ④ Damage |

Despite their different elements, fraudulent misrepresentation has been treated as analogous to negligent misrepresentation for jurisdictional purposes. Like the tort of negligent misrepresentation, the tort of fraudulent misrepresentation takes place where the misrepresentation is received and acted upon.⁴³

Repeating or recording a representation originally received and relied upon in one location in a second location will not locate the misrepresentation in that second location.



The tort of fraudulent misrepresentation takes place where the misrepresentation is received and acted upon.

³⁸ *Central Sun*, at paras 30-32.

³⁹ *Central Sun*, at para 33.

⁴⁰ 2015 ONSC 3505 ("*Algonquins*").

⁴¹ *Algonquins*, at paras 30-32.

⁴² *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8 at para 21.

⁴³ *Sincies Chiementin SpA (Trustee of) v King*, 2010 ONSC 6453 at para 179, aff'd, 2012 ONCA 653; *Right Business Limited v Affluent Public Limited*, 2011 BCSC 783 at para 68, aff'd, 2012 BCCA 375.

In *Parque Industrial Avante Monterrey, SA de CV v 1147048 Ontario Ltd*,⁴⁴ the Ontario Superior Court of Justice had to decide if it had jurisdiction over a claim in which the plaintiff argued that the defendant had obtained money from it by falsely representing that it would use the funds to return some of the plaintiff's equipment. The Court found that it had jurisdiction because the alleged misrepresentation had been received and acted on by the plaintiff in Ontario. That was the jurisdiction where the plaintiff agreed to transmit funds based on the promise that its equipment would be returned.⁴⁵

However, merely repeating or recording a representation originally received and relied upon in one location in a second location will not locate the misrepresentation in that second location. In *Glasford v Canadian Imperial Bank of Commerce*,⁴⁶ the plaintiffs signed a mortgage agreement with the defendant bank for a property in St. Kitts. They later brought actions against the bank in both St. Kitts and Ontario. The Ontario action pleaded a number of causes of action, including fraudulent misrepresentation. The bank successfully challenged the Ontario court's jurisdiction. The Court noted that, in their statement of claim, the plaintiffs alleged that they were induced by a representative of the bank into signing the mortgage agreement during a meeting that took place in St. Kitts. At the jurisdiction motion, the plaintiffs argued that the representations were received and relied on in Ontario because they were later put in writing and sent to one of the plaintiffs in Ontario. However, that same plaintiff had been present at the meeting in St. Kitts and therefore had received and relied on the representations there. The fact that those representations were subsequently written down and sent to Ontario was held to be irrelevant.⁴⁷

D. CONSPIRACY

Canadian tort law recognizes two kinds of conspiracies: (i) ***predominant purpose conspiracy***, where the predominant purpose of the defendant's conduct is to cause the plaintiff injury, whether or not the defendant's means are lawful, and the plaintiff does in fact suffer loss caused by the defendant's conduct; and (ii) ***unlawful means conspiracy***, where the defendant's conduct is unlawful, directed towards the plaintiff and, in the circumstances, the defendants should know that injury to the plaintiff is likely to, and does, result.⁴⁸

Canadian courts have found that an actionable conspiracy occurs in the jurisdiction where the alleged harm is suffered, regardless of where the wrongful conduct occurred.⁴⁹



An actionable conspiracy occurs in the jurisdiction where the alleged harm is suffered, regardless of where the wrongful conduct occurred.

⁴⁴ 2016 ONSC 6004 ("*Parque*"), aff'd, 2017 ONCA 311.

⁴⁵ *Parque*, at paras 25-26.

⁴⁶ 2015 ONSC 197 ("*Glasford*"), aff'd, 2015 ONCA 523.

⁴⁷ *Glasford*, at paras 25-26.

⁴⁸ *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 73-74 and 80.

⁴⁹ *British Columbia v Imperial Tobacco Canada Ltd*, 2006 BCCA 398 ("*Imperial Tobacco*") at para 41; *Ontario v Rothmans*, 2013 ONCA 353 ("*Rothmans*") at para 37; *Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd*, 2002 CarswellOnt 235 (SCJ) at paras 58 and 70; *WIC Premium Television Ltd v General Instrument Corp*, 1999 ABQB 460 at paras 17-18, aff'd, 2000 ABCA 233. However, in *Airia Brands Inc v Air Canada*, 2017 ONCA 792 at para 112, the Court of Appeal for Ontario found that the Ontario court had jurisdiction over an alleged conspiracy and a claim for damages under the *Competition Act*, RSC 1985, c C-34, because three meetings in furtherance of the alleged conspiracy took place in Ontario and the tortious conduct related to air freight shipments to and from Canada.

Unlawful means conspiracy test

- | | |
|---|---|
| ① Conduct is unlawful | ③ The defendant should know that injury is likely to result |
| ② Conduct is directed towards the plaintiff | ④ Injury occurs |

Predominant purpose conspiracy test

- | | |
|---|--|
| ① Predominant purpose of defendant's conduct is to injure the plaintiff | ② Plaintiff suffers loss caused by defendant's conduct |
|---|--|

In *Fairhurst v De Beers Canada Inc.*,⁵⁰ Fairhurst brought a proposed class action alleging that members of the proposed class, all of whom resided in British Columbia, “directly or indirectly purchased hundreds of millions of dollars of Gem Grade Diamonds [...] manufactured and distributed by the defendants,” and that the defendants had illegally conspired to fix prices for those diamonds.⁵¹ The Court of Appeal for British Columbia found that the allegation was sufficient to establish that the conspiracy had occurred in British Columbia. It concluded that in a case involving an “alleged conspiracy causing economic loss [...] Canadian courts recognize the ‘important interest a state has in injuries suffered by persons within its territory.’”⁵²

 The tort of defamation occurs in any jurisdiction where the defamatory statement is communicated to at least one person other than the plaintiff.

E. DEFAMATION

Defamation protects a person's reputation from unjustified assault.⁵³ To succeed on a claim for defamation, a plaintiff must prove: (i) the words at issue were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (ii) the words referred to the plaintiff; and (iii) the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established, falsity and damage are presumed.⁵⁴

⁵⁰ 2012 BCCA 257 (“*Fairhurst*”).

⁵¹ *Fairhurst*, at para 1.

⁵² *Fairhurst*, at para 45.

⁵³ *Grant v Torstar Corp*, 2009 SCC 61 (“*Torstar Corp*”) at para 2.

⁵⁴ *Torstar Corp*, at para 28.



Defamation test

- ① Words at issue would tend to lower the plaintiff's reputation in the eyes of a reasonable person
- ② The words referred to the plaintiff
- ③ The words were communicated to at least one person other than the plaintiff

Under Canadian law, the tort of defamation occurs upon publication of a defamatory statement to a third party. Canadian courts have accordingly held that the tort of defamation occurs in any jurisdiction where the defamatory statement is communicated to at least one person other than the plaintiff.⁵⁵

This principle was applied by the Supreme Court of Canada in two companion decisions, *Breeden v Black*⁵⁶ and *Éditions Écosociété Inc v Banro Corp.*⁵⁷ In *Breeden*, the plaintiff alleged that the defendants, an American corporation and its employees, had published allegedly defamatory statements on the corporation's website. The defendants challenged the jurisdiction of the Ontario court, but were unsuccessful. The impugned statements were read, downloaded and republished in Ontario, and every repetition or republication of a defamatory statement constituted a new publication. The Court therefore found that the alleged defamation had occurred in Ontario.⁵⁸

In *Éditions Écosociété*, the plaintiffs established that defamation had been committed in Ontario based on the distribution of an allegedly defamatory book. Ninety-three copies of the book were distributed in bookstores in Ontario, a number of copies were available in Ontario public libraries, and the book was available for purchase on the publisher's website. The Court found that jurisdiction was easily established, and stated that "publication may be inferred when the libellous material is contained in a book that is circulated in a library."⁵⁹

⁵⁵ *Breeden v Black*, 2012 SCC 19 ("*Breeden*") at para 20.

⁵⁶ See footnote 55 above.

⁵⁷ 2012 SCC 18 ("*Éditions Écosociété*").

⁵⁸ *Breeden*, at para 20.

⁵⁹ *Éditions Écosociété*, at para 38.

By contrast, in *Elfarnawani v International Olympic Committee & Ethics Commission*,⁶⁰ the Ontario Superior Court of Justice concluded that the tort had not been committed in Ontario because the plaintiffs failed to adduce any evidence of publication in the province. The plaintiff, an Ontario resident, had acted for cities bidding to host Olympic games. The International Olympic Committee's (IOC) Ethics Commission (EC) investigated allegations that the plaintiff had paid bribes to secure votes for Olympic bids, and recommended that the plaintiff be declared *persona non grata* within the Olympic movement. The IOC accepted the EC's recommendation and issued a corresponding decision, which was published on the IOC's website. Subsequently, the plaintiff started an action in Ontario where he argued that the recommendation and decision were defamatory. The Court found that the plaintiff had failed to establish that the alleged defamation had been committed in Ontario. It noted that there was "absolutely no evidence that the allegedly defamatory material posted on the IOC's internet website in relation to the plaintiff was ever viewed by anyone other than the plaintiff himself and his legal representatives." In addition, there was no evidence that the defendants had targeted Ontario.⁶¹ Therefore, the Court concluded that it could not find the alleged defamation was committed in the province.

F. INDUCING BREACH OF CONTRACT

Under Canadian tort law, a plaintiff may have a cause of action against a defendant for inducing a third party to breach the third party's contract with the plaintiff.⁶² The five elements of the cause of action are: (i) the existence of a valid and enforceable contract; (ii) awareness by the defendant of the existence of the contract; (iii) breach of the contract procured by the defendant; (iv) such breach being effected by wrongful interference on the part of the defendant; and (v) damage suffered by the plaintiff as a result of the breach.⁶³

There is limited case law addressing where the tort is committed, and the case law that does exist does not provide any clear answers. In two cases, the British Columbia Court of Appeal has indicated that the tort can be held to occur in a jurisdiction where the plaintiff suffered damages. However, the Ontario Superior Court of Justice, in brief reasons, focused on the location of the conduct in question to find that the tort had not taken place in Ontario. As it stands, the limited appellate authority on the issue has held that the tort may be held to occur where the plaintiff suffered damages.

In *AG Armeno Mines & Minerals Inc v PT Pukuafu Indah*,⁶⁴ the plaintiff (a British Columbia company) contracted with an Indonesian company to acquire an interest in a mining project in Indonesia. That contract was made in British Columbia. When the contract was not carried out, the plaintiff alleged that the breach had been induced by an American company, which itself had no connection to British Columbia.⁶⁵



Limited appellate authority from British Columbia has held that the tort may be found to occur where the plaintiff suffered damages. However, there is conflicting case law in Ontario where the court focused on the location of the conduct in question when locating the tort.

⁶⁰ 2011 ONSC 6784 ("*Elfarnawani*").

⁶¹ *Elfarnawani*, at paras 33 and 36.

⁶² Klar, at p 708.

⁶³ *Royal Bank of Canada v Wilton*, 1995 CarswellAlta 98 (CA) at paras 10 and 13-28.

⁶⁴ 2000 BCCA 405 ("*AG Armeno*").

⁶⁵ *AG Armeno*, at paras 4 and 6-8.

The Court of Appeal for British Columbia (relying on one of its earlier decisions) held that the tort for inducing breach of a contract may be found to have occurred where the claimant suffered damages, even if the contract was made and the conduct in question took place somewhere else.⁶⁶

Inducing breach of contract test

- ① The existence of a valid and enforceable contract
- ② Awareness by the defendant of the existence of the contract
- ③ Breach of the contract procured by the defendant
- ④ Breach effected by wrongful interference by defendant
- ⑤ Damage

In *Szecsodi v MGM Resorts International*, the Ontario Superior Court of Justice found (in brief reasons on the issue) that the tort had not been committed in Ontario.⁶⁷ The plaintiff in that case (an Ontario resident) sued a former business associate and two of his companies (also located in Ontario) for breach of contract, among other things alleging that they had excluded him from a gambling-related business. He also sued another American defendant, MGM Resorts International (MGM), alleging that MGM had induced a breach of contract between the plaintiff and the other defendants. MGM successfully challenged the jurisdiction of the Ontario court. In its decision, the Court focused on the absence of any *conduct* of MGM in Ontario. It noted that “the core of this cause of action lies in the plea that the stranger knew of the existence of a contract and procured its breach.”⁶⁸ The plaintiff had not identified any conduct of MGM that occurred outside of Nevada, and the Court held there was no tort committed in Ontario because “neither the pleading nor the evidence disclosed things which MGM had done in Ontario to induce the [other] Defendants to breach any (unparticularized) contracts which they may have had with the plaintiff.”⁶⁹ The Court did not consider the earlier decisions of the British Columbia Court of Appeal on the *situs* of the tort.

G. UNLAWFUL MEANS TORT

Canadian law recognizes a cause of action where a defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff.⁷⁰ Until recently, this was a relatively unsettled area in tort law.⁷¹ However, in a recent decision, the Supreme Court held that the essential

 Canadian courts have not yet provided a clear rule with respect to how to locate the unlawful means tort.

⁶⁶ *AG Armeno*, at para 17, citing the Court of Appeal's earlier decision in *Ichi Canada Ltd v Yamauchi Rubber Industry Co*, 1983 CarswellBC 43 (CA).

⁶⁷ 2014 ONSC 1323 (“*Szecsodi*”).

⁶⁸ *Szecsodi*, at para 62.

⁶⁹ *Szecsodi*, at para 63.

⁷⁰ *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 (“*Bram Enterprises*”) at para 4.

⁷¹ As noted by the Supreme Court of Canada in *Bram Enterprises*, at para 2, the tort has been called many things over the years, including “unlawful interference with economic relations,” “interference with a trade or business by unlawful means,” “intentional interference with economic relations,” or simply “causing loss by unlawful means.”

elements of this tort are: (i) the defendant intended to injure the plaintiff's economic interests; (ii) the interference was by illegal or unlawful means; and (iii) the plaintiff suffered economic loss or harm as a result.⁷²

As with inducing breach of contract, there are few cases in which courts have addressed the location of the unlawful means tort. The reasoning in the few decisions addressing where the tort is committed have been brief and do not provide a clear rule.⁷³

In *Canadian Olympic Committee v VF Outdoor Canada Co*,⁷⁴ the Canadian Olympic Committee (COC) alleged that VF Outdoor Canada Co (VOC) was marketing and selling products with the Olympic logo without authorization, and in a way designed to mislead the public. One allegation was that the VOC created a promotional contest that constituted unlawful interference with the COC's economic relations.⁷⁵ The British Columbia Supreme Court held that the marketing of the contest in Canada, including British Columbia, for the purpose of promoting the collection meant that the tort had occurred in that province.⁷⁶

Unlawful means tort test

- ① Intention to injure economic interests
- ② Inference by illegal or unlawful means
- ③ Damage

However, in *Blazek v Blazek*,⁷⁷ the plaintiff argued that the defendant had attempted to harm the plaintiff's reputation with a number of third parties, by obtaining and circulating a defamatory report about the plaintiff prepared by a doctor and based on information from the defendant.⁷⁸ The plaintiff argued that the report constituted unlawful interference with economic relations.⁷⁹ The Court found that neither tort occurred in British Columbia because while the defendant may have been in British Columbia when the conversations with the doctor took place, the doctor was not. The Court noted that the "conversations occurred by telephone or some other electronic means," and that this was not sufficient to locate the torts in British Columbia.⁸⁰ The Court did not otherwise address the question of where the unlawful means tort is committed.

⁷² *Pro-Sys*, at para 81.

⁷³ In *Fairhurst*, discussed in greater detail above, the plaintiff had pleaded both an illegal conspiracy and tortious interference with economic interests. In that context, the Court of Appeal for British Columbia made the comment that "an 'economic tort' such as conspiracy to fix prices illegally will be regarded as taking place where the economic damage is suffered" (at para 43). However, read in context, it is likely that the Court's comments only related to the allegations of conspiracy and not the unlawful means tort.

⁷⁴ 2016 BCSC 238 ("*VF Outdoor Canada*").

⁷⁵ *VF Outdoor Canada*, at para 38.

⁷⁶ *VF Outdoor Canada*, at para 38.

⁷⁷ 2009 BCSC 1693 ("*Blazek*").

⁷⁸ *Blazek*, at paras 9-10.

⁷⁹ *Blazek*, at paras 28 and 37.

⁸⁰ *Blazek*, at para 38.

H. STATUTORY

The preceding sections have discussed torts created and maintained at common law. Tort-like causes of action are also provided for in statutes, and courts have been asked to locate claims based on those causes of action for jurisdictional purposes. In a few recent decisions, courts have indicated that they will determine the location of statutory claims by analogy to common law torts.

The decision in *Ontario v Rothmans*⁸¹ is a representative example. The province of Ontario sued tobacco manufacturers under a statutory right of action under the *Tobacco Damages and Health Care Costs Recovery Act, 2009* (the Act).⁸² A number of the manufacturers challenged the jurisdiction of the Ontario court. Ontario argued that the statutory cause of action was founded on the common law tort of conspiracy, and given that the common law tort takes place (for jurisdictional purposes) where the alleged harm is suffered, the same should apply to the statutory cause of action. The manufacturers argued in part that the cause of action under the Act was unique and a creation of the statute and did not otherwise exist, and therefore could not constitute a “tort committed in Ontario.”⁸³ The Court of Appeal accepted Ontario’s argument, and held that the statutory cause of action was sufficiently similar to the common law tort that the same reasoning should apply in determining where it was committed. The Court applied the rule that a conspiracy occurs in the jurisdiction where harm is suffered, regardless of where the wrongful conduct occurred, and concluded that the alleged tort took place in Ontario.⁸⁴

Similar reasoning was applied by the Court of Appeal for Ontario in *Kaynes v BP, PLC*.⁸⁵ In *Kaynes*, the plaintiff brought a proposed securities class action alleging the statutory cause of action for secondary market misrepresentation under Part XXIII.1 of Ontario’s *Securities Act*.⁸⁶ The statutory cause of action was based on the common law tort of negligent misrepresentation, but expressly removed the element requiring the plaintiff to demonstrate that it relied on the alleged misrepresentation. A negligent misrepresentation is committed where the alleged misrepresentation is received and acted upon. The defendant in *Kaynes* argued that, since reliance was not an element of the statutory cause of action, the basis for determining the location of the common law tort could not apply to the statutory cause of action, and that the location of the statutory cause of action should be where the document containing the alleged misrepresentation was released.⁸⁷ The Court of Appeal rejected that argument, and held that the same approach applied for determining the location of both the common law tort of negligent misrepresentation and the statutory cause of action.⁸⁸

⁸¹ See footnote 49 above.

⁸² SO 2009, c 13.

⁸³ *Rothmans*, at paras 31 and 33.

⁸⁴ *Rothmans*, at paras. 37, 39 and 44.

⁸⁵ See footnote 17 above.

⁸⁶ RSO 1990, c S-5.

⁸⁷ *Kaynes*, at paras 22-24.

⁸⁸ *Kaynes*, at paras 25-30.

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Conclusion

Canadian courts have been fairly permissive in establishing their jurisdiction, ensuring first that claimants have an opportunity to seek redress for alleged injuries even where the conduct in question originated or largely took place in another jurisdiction. In almost all cases, they will locate the tort where the plaintiff lives.

SUMMARY CHART OF LOCATION OF TORTS

Tort	Location of tort	Case law
Negligence	The tort of negligence occurs in any province where the claimant suffered damage.	<i>Moran v Pyle National (Canada) Ltd</i> , [1975] 1 SCR 393; <i>Gulevich v Miller</i> , 2015 ABCA 411; <i>GWL Properties Ltd v WR Grace & Co of Canada Ltd</i> , 1990 CarswellBC 236 (CA); <i>Furlan v Shell Oil Co</i> , 2000 BCCA 404.
Negligent misrepresentation	The tort of negligent misrepresentation occurs in the jurisdiction where the negligent representation is received or acted upon.	2249659 <i>Ontario Ltd v Sparkasse Siegan</i> , 2013 ONCA 354; <i>Central Sun Mining Inc v Vector Engineering Inc</i> , 2013 ONCA 601; <i>Canadian Commercial Bank v Carpenter</i> , 1989 CarswellBC 167 (CA); <i>Cannon v Funds for Canada Foundation</i> , 2010 ONSC 4517, aff'd, 2011 ONCA 185; <i>Smith v Belanger</i> , 2009 ABQB 23.
Fraudulent misrepresentation	The tort of fraudulent misrepresentation takes place where the misrepresentation is received and acted upon.	<i>Sincies Chimentin SpA (Trustee of) v King</i> , 2010 ONSC 6453, aff'd, 2012 ONCA 653; <i>Right Business Limited v Affluent Public Limited</i> , 2011 BCSC 783, aff'd, 2012 BCCA 375.
Conspiracy	An actionable conspiracy occurs in the jurisdiction where the alleged harm is suffered, regardless of where the wrongful conduct occurred.	<i>British Columbia v Imperial Tobacco Canada Ltd</i> , 2006 BCCA 398; <i>Ontario v Rothmans</i> , 2013 ONCA 353; <i>Vitapharm Canada Ltd v F Hoffmann-La Roche Ltd</i> , 2002 CarswellOnt 235 (SCJ); <i>WIC Premium Television Ltd v General Instrument Corp</i> , 1999 ABQB 460, aff'd, 2000 ABCA 233.
Defamation	The tort of defamation occurs in any jurisdiction where the defamatory statement is communicated to at least one person other than the plaintiff.	<i>Éditions Écosociété Inc v Banro Corp</i> , 2012 SCC 18; <i>Breeden v Black</i> , 2012 SCC 19.
Inducing breach of contract	Limited appellate authority from British Columbia has held that the tort may be held to occur where the plaintiff suffered damages. However, there is conflicting case law in Ontario where the court focused on the location of the conduct in question.	<i>AG Armeno Mines & Minerals Inc v PT Pukaafu Indah</i> , 2000 BCCA 405; <i>Ichi Canada Ltd v Yamauchi Rubber Industry Co</i> , 1983 CarswellBC 43 (CA); <i>Szecsodi v MGM Resorts International</i> , 2014 ONSC 1323.
Unlawful means tort	Undetermined.	<i>Canadian Olympic Committee v VF Outdoor Canada Co</i> , 2016 BCSC 238; <i>Blazek v Blazek</i> , 2009 BCSC 1693.
Statutory	The location of statutory torts will be determined by analogy to common law torts.	<i>Ontario v Rothmans</i> , 2013 ONCA 353; <i>Kaynes v BP, PLC</i> , 2014 ONCA 580.

LEXICON

<i>Situs</i>	The place where something is held to be located in law.
<i>Jurisdiction simpliciter</i>	The court's ability to assert jurisdiction against an out-of-jurisdiction defendant who has not submitted or attorned to an action against it.
<i>Forum non conveniens</i>	A legal doctrine whereby courts may decline to exercise their jurisdiction over matters where there is a clearly more appropriate forum available to the parties.
Statement of claim	Equivalent to a Complaint in the United States.

AUTHORS



Kevin O'Brien
Partner, Litigation
kobrien@osler.com
416.862.4861



Waleed Malik
Associate, Litigation
wmalik@osler.com
416.862.6640

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The authors are litigators at Osler, Hoskin & Harcourt LLP in Toronto. They would like to thank articling student Daniel Tatone for his research assistance in preparing this paper.

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