

PRIVATE INTERNATIONAL LAW

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Competence of Tribunal Interjurisdictional Aviation Accidents

I. INTRODUCTION

Which forum can assume jurisdiction over domestic or international aviation accidents or liability claims, when these occur at Canadian airports? This article attempts a response to these inter-jurisdictional disputes. In doing so, it will consider to some extent the jurisdictional rules of Canada and the United States; it will offer examples illustrating the applicable forum as well. It should be noted that in analyzing jurisdictional principles in these disputes, the Canadian concept of jurisdictional competence appears to combine the American concepts of subject matter jurisdiction and personal jurisdiction over the defendant.

II. THE CANADIAN RULES FOR ASSUMING JURISDICTION

The Canadian rules regarding competence to adjudicate a case derive from the English common law rules. The traditional English approach was recognised under the term, "as of right," and assumption of jurisdiction was based on links to the defendant. There were two ways to invoke this type of jurisdictional assumption:

- (a) If the defendant to the proceeding could be found in England and served notice in England, then England had the right to assume jurisdiction over the matter. Thus, even transient presence within the jurisdiction was sufficient to establish competence.
- (b) If the defendant to the proceeding submitted to the court, then England again assumed jurisdiction over the case.¹

As time went on, courts realized that these rules allowed a defendant to evade proceedings brought against it so long as the defendant was never present in England and did not submit to its jurisdiction. This situation prompted legislation which provided additional rules for:

- (c) serving a defendant *ex juris* so that he or she could be served outside England. Under these rules the defendant was unable to avoid the proceeding by claiming lack of presence or submission to the court's jurisdiction. Moreover, if the defendant chose not to appear in court, the plaintiff could be

1. *Phillips v. Eyre*, (1870) L.R. 6 Q.B. 1.

granted a default judgment. This, of course, led to issues of executing the judgment elsewhere (if that was where the defendant's assets were located), but that is not the issue in question. This statutory regime provided a third method enabling English courts to assume jurisdiction over a defendant and a case.²

Thus, Canada followed three methods of assuming jurisdiction until the pioneering cases of *Moran v. Pile*³ and *Interprovincial Cooperative Ltd. v. Regina*.⁴ These cases introduced the concept that a foreign body (in these disputes a corporation) could be subject to domestic jurisdiction if its products, during the normal course of trade, caused injury in a place where the products foreseeably would be distributed and consumed. Together, these cases allowed the possibility that a particular jurisdiction was competent to hear the case so long as there was a certain level of connection with the jurisdiction where the action was commenced. However, the parameters of a "connection" sufficient to grant jurisdictional competence were never defined until *Morguard Investments Ltd. v. De Savoye*.⁵ Justice LaForest there discussed, albeit in dicta, that in the context of a federation such as Canada, jurisdiction should be established using a "real and substantial connection" test. Thus, mere lack of presence or submission to the court would no lon-

ger deny the court's competence to hear a matter. However, this test likewise did not define the terms of a "real and substantial connection," except to say that the jurisdiction must have a real interest in the case for that jurisdiction to assume competence.

Over the years, certain criteria have developed to determine whether a particular court should assume or decline jurisdiction.⁶ These factors include:

- (1) the domicile of the defendant;
- (2) the location of the evidence and key witnesses;
- (3) the location of the cause of the action;
- (4) the juridical advantages/disadvantages to the parties, and
- (5) the interests of justice.

These factors illustrate that although links to the defendant can still warrant jurisdiction, they no longer provide the only basis for jurisdictional competence to hear a case. Links to the subject matter can also provide jurisdictional competence. Nevertheless, the factors enumerated above are not exhaustive, nor does any one carry more weight than another.

After *Morguard*, a debate arose about whether this test also admits of a constitutional foundation so as to prevent individual

2. *Machado v. Fontes*, 2 Q.B. 231.

3. [1975] 1 S.C.R. 393.

4. [1976] 1 S.C.R. 477.

5. [1990] 3 S.C.R. 1077.

6. *MacDonald v. Lasnier*, (1994) 21 O.R. 3d 177.

provinces from derogating its principles. The case of *Hunt v. T&N plc*⁷ finally resolved this issue. The Supreme Court of Canada affirmed Justice LaForest's test and further noted that it was a constitutionally based test whose inclusion was required in any provincial rules governing jurisdictional competence. As such, Canada now has a general rule of jurisdictional competence as defined by the "real and substantial connection" test.

This uniform test is significant: as between provinces, it will be easier to assess whether a particular court should assert jurisdiction over a given case. Furthermore, in cases of appropriate concurrent jurisdiction, it will also be easier to establish which court has a greater real and substantial connection, such that it should be the deciding court of competent jurisdiction.

While all provinces incorporate this real and substantial connection test, it is important to understand how the test is applied. Quebec and Ontario provide relevant examples for assessing how jurisdictional rules combine with this overall test.

A. Quebec

Article 3134 CCQ states the general rule regarding competent jurisdiction in Quebec. This rule provides Quebec with jurisdiction over any defendant domiciled in Quebec. Thus, the rule confirms traditional principles, conferring jurisdiction where the court has links to or power over the defendant. This same rule had been

earlier codified in Article 68 CCP, enacted prior to the amendments to the civil code. Under Article 68 CCP, Quebec had jurisdiction and had no discretion to decline jurisdiction once domicile was assigned in Quebec. Furthermore, if the defendant was not domiciled in Quebec, that province could only assume jurisdiction if the "whole cause of action" occurred in Quebec, as defined by Article 68(2) CCP. Subsequent to the civil code amendments, this rule is no longer stringently applied, since Article 68 CCP has also been amended, making it subject to the jurisdictional rules found in Book X of the CCQ (arts. 3076ff). The legislature realised that even though the defendant is not always domiciled in Quebec, jurisdiction in Quebec should be proper if there are certain substantial links between Quebec and the subject matter of the case. These links or contacts are delineated in Articles 3148-3151 CCQ, which also apply the real and substantial connection test to Quebec jurisdiction, as required by *Morguard*. Article 3148 CCQ provides a broad basis on which Quebec courts can assume jurisdiction. For example, 3148(3) CCQ confers jurisdiction if:

- (a) a fault was committed in Quebec (regardless of where the tortious act took place);
- (b) damage was suffered in Quebec (regardless of where the tortious act took place);
- (c) an injurious act was committed in Quebec (regardless of

7. [1993] 4 S.C.R. 289.

where the damage was suffered), or

- (d) one of the obligations arising from a contract was to be performed in Quebec (regardless of whether there was actually a breach of contract or not).

Many provinces have adopted similar provisions that allow equally broad-based assumption of jurisdiction.

B. Ontario

Ontario has adopted jurisdictional rules that are similar to Quebec. Under Rule 17 of The Rules of Court of Ontario, Ontario has jurisdiction to adjudicate a case if:

- (a) the defendant is ordinarily resident there;
- (b) service can be performed *in juris*;
- (c) service can be performed *ex juris* with or without leave;
- (d) the contract was concluded or to be performed in Ontario;
- (e) damage was sustained in Ontario, regardless of where the tort or breach of contract occurred;
- (f) the proceeding in question is a cross demand to a principal action already commenced in Ontario;
- (g) the parties have submitted to Ontario jurisdiction.

Quebec employs similar principles under 3134ff CCQ. It is thus apparent that cases involving both forums often result in concurrent

jurisdiction. For this reason, application of the doctrine of *forum non conveniens* is significant when determining which jurisdiction has a real and substantial connection with the case.

C. Other Provinces

Most of the Canadian provinces have adopted similar rules of jurisdiction. All common law provinces still rely on the traditional sufficiency of a defendant's presence within the province to confer jurisdiction. This traditional principle survives because it is usually more efficient and effective to adjudicate a matter where the defendant resides and retains assets.

Since the decisions in *Morguard* and *Hunt*, all of the provinces must comply with the real and substantial connection test in order to validly assume jurisdiction. Although concurrent jurisdiction can exist, however, this test works to provide the most appropriate jurisdictional forum under Canada's unique federation structure. Thus, based on comity between sister provinces, jurisdiction theoretically will be declined by the less appropriate forum.

III. THE DOCTRINE OF FORUM NON CONVENIENS

Initially, the plaintiff chooses to institute an action in the jurisdiction assumed to be most advantageous to the plaintiff's interests. If the defendant disagrees with the propriety of that choice, a motion to decline jurisdiction can be made to the seized court (where the action was instituted) under the doctrine of *forum non conveniens*.

In that event, the defendant argues that another forum is clearly more appropriate and requests that the seized court decline jurisdiction in favour of the other forum. Under this doctrine, the defendant makes no claim that the initial court is jurisdictionally incompetent; the defendant claims only that a more appropriate forum exists. In order to succeed (and courts often are loathe to concede their jurisdiction), the defendant must prove, by a balance of probabilities, not only that a “clearly more appropriate” forum exists, but that the seized court’s declination of jurisdiction will not unduly prejudice the plaintiff.

The 1998 case of *Lexus Maritime Inc. v. Oppenheim Forfait GMBH*⁸ outlines several factors which should be considered by the court when deciding whether to decline jurisdiction. These factors are very similar to those governing the assumption of jurisdiction, as delineated in *MacDonald*. As such, they do not bear repetition. However, these factors now cause greater uniformity in Canada when determining jurisdictional issues.

It is important to note that although all Canadian provinces espouse the doctrine of *forum non conveniens*⁹, some of the United States do not (e.g., the state of Texas). Nor is the doctrine uniformly applied as between federal and state courts. Thus, whereas Canadian courts have discretion to decline jurisdiction when another

forum has a stronger connection to the case, a number of United States courts do not subscribe to this rule or do not apply it in the same fashion. This discrepancy can and does lead to complications when the facts implicate concurrent international jurisdiction.

IV. OVERVIEW OF UNITED STATES PERSONAL JURISDICTION

Traditional rules for determining personal jurisdiction in the United States are based on the defendant’s domicile or service of process within the forum state. To some extent, these standards approach the Canadian basis for assumption of jurisdiction. Furthermore, the United States has developed a test similar to the Canadian “real and substantial connection” test in the form of long-arm personal jurisdiction, conferred by a “long-arm” statute.¹⁰ This form of personal jurisdiction permits the forum state to obtain jurisdiction over a foreign defendant if there are sufficient contacts between the defendant and the forum state. Three conditions generally must be met for any long-arm statute to apply:

- (1) the non-resident defendant or foreign corporation must have purposefully done some act or consummated some transaction in the forum state;
- (2) the cause of action must arise from or be connected with such act or transaction; and

8. [1998] AQ No. 2059 (CA).

9. Art. 3135 CCQ.

10. E.H. Schopler, *Construction and Application of State Statutes or Rules of Court Predicating In Personam Jurisdiction over Nonresidents or Foreign Corporations on the Commission of a Tort Within the State*, 24 A.L.R. 3d 532 (1969).

(3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, considering the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.¹¹

According to this test, if the first two criteria are satisfied there exist minimum contacts between the defendant and the forum state. These contacts must then satisfy 14th Amendment due process tenets of “fair play” and “substantial justice” in order to qualify for consideration. Once the test is satisfied, the contacts are constitutionally sufficient to permit jurisdiction over the defendant in the forum state.¹²

This analysis demonstrates that many of the same factors used to determine jurisdictional competence in Canada similarly determine long-arm personal jurisdiction in the United States. Thus, in cases involving both the United States and Canada, concurrent jurisdiction can be established either by defendant’s domicile (in Canada), by the defendant’s domicile (in the United States), or by contacts with the particular jurisdiction, according to the rules applicable in each forum. Once concurrent jurisdiction arises, the

party contesting the chosen (domestic) forum must invoke the doctrine of *forum non conveniens* to prove that another foreign jurisdiction (sometimes a foreign country) is clearly more appropriate. If the party discharges this burden, then the domestic forum should, in the interest of justice, decline its jurisdiction in favour of the more appropriate forum.

V. THE PREFERENCE FOR UNITED STATES JURISDICTION

Plaintiffs involved in transnational torts prefer to commence an action in a United States forum for several reasons. First, depending upon the existence of complete diversity of citizenship (subject matter jurisdiction) as defined by United States federal law, the plaintiff is entitled to commence the action in federal or state court. This choice can affect the outcome of the litigation since the trend in many state court decisions reflects a plaintiff-friendly climate. Therefore, in a transborder tort case, the decision to institute the action in either the Canadian or another foreign court might deprive the plaintiff of a perceptible juridical advantage.

The second reason a plaintiff might prefer to institute the action in a United States court (especially federal) is the constitutional right to a jury trial in civil matters. As is sometimes seen in United States jury trials, the jury is more incli-

11. *Arterbury v. American Bank & Trust Co.*, 553 S.W. 2d 943, 947 (Tex. Ct. App. 1977).

12. Schopler, *supra*, at 547 n.12. See also *Mareno v. Rowe & Jet Aviation of Am. Inc.*, 910 F. 2d 1043 (2d Cir. 1990); *Lurie v. Maryland Associates*, 938 P. 2d 676 (Mont. 1997); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998); *Kumarelas v. Kumarelas*, 16 F. Supp. 2d 1249 (D. Nev. 1998).

ned to grant large damage awards to plaintiffs with whom they sympathize. These large awards do not occur in Canada, since jury trials for civil matters are extremely rare. In fact, they are not permitted in Quebec, and Ontario only allows them for exceedingly large cases. Thus, the civil damage awards obtainable in a Canadian jurisdiction can be and often are substantially lower than those obtained in the United States.

Finally, not only are civil awards drastically different between Canada and the United States, but the notions of punitive (or exemplary) damages are also significantly dissimilar in these jurisdictions. In the United States, punitive or exemplary damages are more easily awarded; they are also awarded on a substantially higher scale than in Canada. In fact, an observer might accurately state that the concept of punitive or exemplary damages is at an infant stage in Canada. This is illustrated by the fact that the cap for exemplary damages in Canada was fixed at a mere \$100,000 in 1978 dollars. Once indexed for 1999 purposes, that amount is still capped at a sum of \$250,000, which is far below United States standards for similar cases.¹³

VI. ASSUMPTION OF JURISDICTION IN AVIATION CASES

The rules of jurisdiction generally applicable in tort actions likewise apply to accidents involving aircraft and airports. Thus, under the general rules, if an accident occurs in Canada, the defen-

dant's domicile will determine jurisdiction unless the defendant is a foreigner. If the latter is true, then links to the subject matter that meet the real and substantial connection test will determine jurisdiction over the issue in a Canadian court. If the accident occurs in the United States, the defendant's domicile often will determine jurisdiction unless the defendant is not domiciled or present to receive process in the forum state. In that case, long-arm statutes and factors indicating a substantial connection to the forum will permit the United States courts to obtain personal jurisdiction over the defendant, thus empowering the court to hear and decide the controversy with respect to that defendant.

Due to the international nature of aviation, however, further rules have evolved implicating this jurisdiction. Treaties now exist among United Nations members to determine the criteria for establishing proper jurisdiction in aviation cases. For example, Article 28 of the Warsaw Convention (1929) implicates both subject matter and personal jurisdiction. It states that:

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties,

either before the court of the domicile of the carrier or

of his principal place of business, or

where he has a place of business through which the contract has been made, or

13. *Teno v. Arnold*, [1978] 2 S.C.R. 287; *Thornton v. Prince George Bd. Of Educ.*, [1978] 2 S.C.R. 267; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

before the court at the place of destination.¹⁴

Both the United States and Canada are high Contracting Parties to this Convention, as well as to the Hague Protocol, which adopted the same test for establishing jurisdiction in aviation personal injury cases. Thus, if the tort involves an international carrier or an international flight, both the general rules of jurisdiction and the Warsaw Convention must be used to determine which forum has power to hear the case.¹⁵

Inherent in this determination is consideration of the most appropriate forum as defined by the substantial connection test.¹⁶ A clear example of how these rules are used to establish jurisdiction is provided by the 1987 case of *In Re Air Crash Disaster at Gander, Newfoundland*.¹⁷ In that case an accident occurred in Newfoundland, en route from the Middle East to Kentucky. The court held that because the defendant aircraft company held a contract in the forum to maintain its facilities at the state's airport and had a military contract as well with the state of Kentucky, sufficient contacts existed with the state of Kentucky to authorize jurisdiction over the defendant in that state. The court went on to consider other factors, such as "the interest Kentucky has in adjudicating the dis-

pute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, [...] and the burden placed upon the defendants in litigating this case".¹⁸ The court then considered the Warsaw Convention, which confirmed Kentucky's valid exercise of jurisdiction.

It is important to note that, as with all treaties, the Warsaw Convention applies only to member nations. Therefore, foreign plaintiffs who wish to sue in the United States under the Warsaw Convention will be barred from doing so if they are not citizens of a member nation or citizens of a state which is party to a treaty for which there are "equal treaty rights."¹⁹ This assumes, of course, that the defendant is not otherwise subject to the laws of personal jurisdiction in the United States.

VII. PRACTICAL EXAMPLES: APPLICATION OF THE RULES OF JURISDICTIONS

The following examples serve to illustrate the application of these jurisdictional rules, which sometimes conflict. The examples assume a Montreal Airport as the situs of the accident and/or the point of destination.

14. Convention for the Verification of Certain Rules Relating to International Carriage by Air [Warsaw Convention]; Oct. 12, 1929, Art. 28, § 1, reprinted in 22 I.L.M. 13 (1983).
15. *Gal v. Northern Mountain Helicopters, Inc.*, (1998) 54 B.C.L.R. 3d 87; *Lam v. Aeroflot Russian Airlines*, 999 F. Supp 728 (S.D.N.Y. 1998).
16. F.P. ALIMONTI, *Recent Developments in Aviation Liability Law*, Journal of Air Law & Commerce (1998); *Mueller v. Coronation Ins. Co.*, [1995] B.C.L.R. 3d 90.
17. 660 F. Supp. 1202 (W.D. Ky. 1987).
18. *Ibid.*, at 1214.
19. *Kern v. Jeppesen Sanderson Inc.*, 867 F. Supp. 525 (S.D. Tex., 1994).

A. Canadian Passenger Struck by Baggage Cart in Montreal

1. Based on links to the defendant, the passenger would sue the airport in Montreal since that is where the corporate establishment exists (3134 CCQ).
2. Based on links to the subject matter, the fault was committed in Quebec (3148(3) CCQ) and the dispute relates to the defendant's activities in Quebec (3148(2)). Therefore, Quebec could validly assume jurisdiction over the matter.
3. Whether the plaintiff could sue in his or her home province (if not domiciled in Quebec) would depend on the subject matter rules of that province. Most provinces still follow the traditional common law rules regarding links or contacts with the defendant, which hold that the defendant must be present at the hearing or submit to the forum for jurisdiction to attach. Under these rules, a foreign province would not have jurisdiction over the airport.

With respect to subject matter jurisdiction, the provinces require a real and substantial connection to the forum. According to Rule 17.02(f)(iii) of the Rules of Court of Ontario, Ontario has jurisdiction if damage is sustained in that province, regardless of where the tort occurred.

However, in *MacDonald*, it was clearly determined that

the mere allegation of pain and suffering under Rule 17 is not enough to establish a real and substantial connection with the forum. The court in *MacDonald* discussed the evolution that occurred in the Ontario rules in order to generate consistency with the *Morguard* principle. Subsequent to the 1975 amendments to the Rules of Court of Ontario, the word "damage" in Rule 17 was extended to include pain and suffering. The court cited the 1979 case of *Vile v. Von Wendt*²⁰, in which an action was commenced in Ontario on the basis that pain and suffering occurred in Ontario. These facts were determined to be sufficient under Rule 17. The judge reasoned that the legislature must have intended "to enable Ontario residents to use their own courts more readily even though the tortious conduct was committed elsewhere." This determination created the potential for lawsuits in Ontario when the only connection to that jurisdiction was pain and suffering. In response, the court in *MacDonald* emphasised that the *Morguard* rule of a real and substantial connection significantly limits the institution of such actions. The factors used to determine a real and substantial connection must be considered in every case. As such, the *MacDonald* court found that since the defendant resided in Quebec and had his place of business in Quebec, and since all the witnesses resided in Que-

20. (1979) 26 O.R. 2d 513.

bec, the relevant evidence was located in Quebec, and the tort occurred in Quebec, there existed a stronger connection to the Quebec jurisdiction than the occurrence of pain and suffering in Ontario. Thus, if the plaintiff had experienced only pain and suffering in his or her home province, without more, the facts would likely fail the *Morguard* test.

4. Since this is an aviation tort case, Article 28 of the Warsaw Convention must also be considered. However, such an analysis is really unnecessary because both the plaintiff and the defendant in this example are Canadian. The Convention only covers truly international cases, where both the plaintiff and defendant reside in different member nations.

B. Canadian Passenger Falls When Retractable Stairway is Moved Away From Plane

A second common source of aviation litigation occurs where a passenger suffers injury when a retractable stairway is moved away from the aircraft. Here again, since the passenger and the defendant are both Canadian, the same analysis applies.

C. American Passenger Struck By Baggage Cart In Montreal Airport

1. The rules of American jurisdiction may permit the plaintiff to sue in his or her own state, if the defendant is subject to personal jurisdiction within the United States. However, article 3134 CCQ grants jurisdiction to Quebec courts

because of the defendant's domicile. Thus, there may be concurrent jurisdiction based on contacts with the parties.

2. In determining which jurisdiction prevails, both the United States and Canada follow a similar substantial connection test. Based on the location of the fault, initial damages, evidence, reports and witnesses, Quebec likely will be the most appropriate forum under Canadian law. However, the United States court could assert jurisdiction if substantial damages continued in the plaintiff's home state, if a critical juridical advantage to the plaintiff would be lost in Quebec (under application of the American *forum non conveniens* standards), or under the rules of a particular state's long-arm statute. (Rules applied in individual states would best be answered by American counsel.)
3. If the United States were to assert jurisdiction, the Montreal defendant could argue *forum non conveniens* in an attempt to persuade that court to exercise its discretion to decline its jurisdiction on grounds of comity. In that case, the action would likely be dismissed and recommenced in Quebec. However, the defendant must prove that Quebec is clearly the more appropriate forum. Unfortunately, not all states follow the doctrine of "forum non conveniens" (e.g., Texas). Accordingly, notions of comity will not resolve these jurisdictional disputes.

4. Since this is an international aviation tort, Article 28 of the Warsaw Convention must be considered. According to this provision, since Montreal is the domicile of the airport and the passenger's place of destination, Montreal would exercise jurisdiction over the matter. However, plaintiff could also use this provision to argue that the contract was made in the state where he or she bought the ticket. If the foreign court allowed this argument, the factors affecting subject matter would have to be considered because the contract alone would be insufficient to meet the substantial connection test. Once again then, Quebec would be viewed as the most appropriate forum. (Note: this would cover actions against an airline with multiple business locations all over the world.)

D. American Passenger Falls When Deplaning While Retractable Ramp Is Moved

The foregoing analysis can be used for any such passenger-related accident.

E. Passenger Departs Vancouver And Is Injured on Aircraft that Later Arrives in Montreal

The resolution to this dilemma depends on the plaintiff's citizenship:

1. If the passenger-plaintiff is Canadian, then the domicile of the defendant would assume jurisdiction. Since the injury occurred on the aircraft, assu-

ming the fault of the aircraft and/or its employees, jurisdiction would lie at the domicile of the business center of the airline. Montreal Airport would not be implicated.

2. If the plaintiff is American, and personal jurisdiction over the defendant is constitutionally proper, plaintiff might commence suit in its own domicile. The airline defendant, if Canadian, could argue *forum non conveniens* on grounds that the chosen forum did not have a substantial connection to the case based on factors relating to the subject matter. If the airline were American and its jurisdiction did not follow the doctrine of *forum non conveniens*, then the relevant long-arm statutes would control, as noted.
3. It could also be argued that the air space over a certain jurisdiction in which the plaintiff was injured is a forum within which the plaintiff could assert jurisdiction. However, such an argument would be tenuous because all of the *MacDonald* factors, which must be considered, would invariably lead to a choice of either the plaintiff's domicile or the airline's domicile as the most appropriate. If the air space involved one of these two jurisdictions, this factor would enhance that jurisdiction's argument of a greater real and substantial connection to the case.
4. The Warsaw Convention does not apply between a Canadian plaintiff and a Canadian airline, but it would as between

either a Canadian plaintiff and an American Airline or an American plaintiff and a Canadian Airline.

F. Canadian Aircraft or Private Aircraft Crashes in Montreal

1. The accident occurred in Montreal; thus, according to Article 3148(3) CCQ, Montreal would have jurisdictional competence to hear the matter.
2. Under Canadian law, the defendant's domicile will have jurisdiction. For Canadian passengers, the pilot's domicile and the airline's domicile also would be competent to assert jurisdiction. For American passengers, each of their domicile states might assert jurisdiction if personal jurisdiction could be obtained over the relevant defendants. This creates the potential for multiple concurrent jurisdictions, and the doctrine of *forum non conveniens* could be used (where applicable) to establish the most appropriate forum to hear the case, thereby avoiding a multiplicity of suits.
3. Plaintiff might also bring suit as a passenger against the pilot. If the passenger is Canadian, then the pilot's domicile would be competent to hear the case. If the passenger is American, then his or her domicile might be appropriate as well, but only if the pilot was somehow subject to personal jurisdiction in that domicile. As indicated elsewhere, a Canadian pilot could assert the doctrine of *forum non conveniens* to prove that his or

her jurisdiction is the most appropriate. If the pilot is not Canadian, then he or she could use either *forum non conveniens*, if it is available, or argue the limitations of the applicable long-arm statute.

4. Since the whole action occurred in Canada, the *Morguard* principle of a real and substantial connection to the jurisdiction must be followed. However, where American interests are concerned, it is important to remember that they too have a similar substantial connection test. Personal jurisdiction over the defendant again will be critical.

G. Contamination of Fuel in Montreal That Only Manifests Itself Later

1. In this scenario, the fault occurred in Montreal. According to Article 3148(3) CCQ, Quebec has jurisdictional competence.
2. Assuming the fault was committed by the airport's employees, the airport is liable. Under Canadian rules, the defendant's domicile can assert jurisdiction. This is another factor favouring Quebec's competence to hear the case.
3. The damage occurs outside Quebec, however. Assuming the damage occurs within another province, such as Ontario, Ontario can be competent to hear the case as well under Rule 17. This leads to concurrent jurisdiction in a number of provinces, which can be settled by following the *Mor-*

guard principle and the factors affecting *forum non conveniens*.

4. Assuming the flight was international and the damage occurred outside of Canada (i.e., in the United States), the plaintiff might also commence an action in the United States. The plaintiffs include the passengers (if detained or injured due to the contaminated fuel) and the airline (due to the negligence of the airport employees). Plaintiffs might sue in any state in which the defendants are subject to suit, and concurrent jurisdiction would also result. As such, the Montreal defendant might file a motion to dismiss on grounds of *forum non conveniens*, arguing that links with Montreal render that province the most appropriate forum. The foreign plaintiffs, however, would argue the breadth of any applicable United States long-arm statutes to retain jurisdiction.

H. Can a Person Who Flies from London to California Sue in Texas?

This answer depends on who is named as a party defendant:

1. If the airport is sued, then the Warsaw Convention applies since the U.K. is a Contracting Party. This means that, since California was the point of destination, California courts will decide the matter.
2. If the airline is being sued, then Texas would assume

jurisdiction because of its wide parameters on the subject. Under Texas long-arm statutes, as long as some business activity is carried on by the airline in Texas, that state has personal jurisdiction over the defendant. However, the Warsaw Convention also covers the carrier; thus, under Article 28, California would be competent to hear the case as the jurisdiction of destination.

3. If the plaintiff is Canadian, the domicile of the defendant reigns (3134 CCQ, Common Law notion of presence/submission), according to Canadian law. Thus, he or she could sue in the defendant's domicile or in London or California, depending on which is the most appropriate forum under the *Morguard* and *Amchem* determinations. However, if suing the airport, this rule will not apply. Instead, the court would examine the subject matter links based on the real and substantial connection test laid out in *Morguard* and *Hunt*.
4. If the plaintiff is American, the plaintiff might sue in his or her domicile, if the defendant is also subject to personal jurisdiction in that state. The defendant could argue *forum non conveniens*, but that doctrine is dependent upon an American court's application of various public and private interest factors. These factors are not applied in the same fashion as they are in Canada.²¹

21. See, e.g., *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

VIII. CONCLUSION

The rules regarding jurisdictional competence in aviation accidents mirror the rules regarding the assumption of jurisdiction for torts/delicts in general. The general rule in Canada is that the defendant's domicile governs the determination of jurisdictional competence. If the defendant is not Canadian, then each province provides rules relating to links with the subject matter of the case which can be used to assert jurisdiction. Despite any differences in these rules that may cause concurrent jurisdictions to exist, every province must follow the constitutionally founded *Morguard* principle requiring a real and substantial connection between the jurisdiction and the case in order to establish the appropriate forum. Where more than one jurisdiction can argue that a real and substantial connection exists, the doctrine of *forum non conveniens* can be used to establish which is clearly the more appropriate jurisdiction to adjudicate the case.

With respect to aviation accidents that cross international borders, the jurisdictional rules in both territories apply. Thus, where concurrent jurisdiction is appropriate, with differing jurisdictional rules, doctrines such as *forum non conveniens* or long-arm statutes must be used to determine the appropriate forum.

It is important to note that due to the increase in international trade, many jurisdictions have subscribed to the notion of comity. This concept may suggest that foreign jurisdictions and foreign judgments will be respected as long as they do not offend domestic jurisdictional principles. This growing need is reflected in the fact that the rules in concurrent jurisdictions are becoming more and more alike, since they are based on similar standards involving a defendant's contacts with the forum. This evolution should lead to quicker and more efficient determinations of the "clearly more appropriate" jurisdiction within which to adjudicate a dispute.