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Inside or Out: Jurisdiction in the Context of Copyright

The application of the test for jurisdiction in the copyright context can sometimes be an exercise in gut feel. Luckily for litigants who prefer to make decisions based more on case law than feelings, the Divisional Court recently provided clarification on the application of the test for jurisdiction for statutory torts, like copyright infringement. The Ontario Divisional Court's decision in *Pourshian v Walt Disney Company* ("*Pourshian*"), an appeal of a motion for an order to stay the plaintiff's copyright infringement action on the basis of lack of jurisdiction, will hopefully take some of the guess work out of jurisdictional issues in the future.

Mr. Pourshian claims that, in 1998, when he was a student, he conceived the idea for a film in which five of the protagonist's anthropomorphized organs guide the protagonist's behaviour. Two years later, in 2000, while a student at the Faculty of Film and Television of Sheridan College, Mr. Pourshian wrote and produced a short film based on his idea. The film was titled *Inside Out* and it widely screened at Sheridan College.

In June 2015, Pixar released a feature-length film of the same name (referred to as "INSIDE OUT" to distinguish it from Pourshian's film), in which five anthropomorphized emotions guide the behaviour of an 11-year-old girl after her family upends her life and moves across the United States. The film was both a commercial and critical success, winning various awards including the Academy Award for Best Animated Feature.

In July 2018, Mr. Pourshian commenced an action, suing nine American corporate defendants for infringing the copyright of his film. The Defendants brought a motion seeking an order staying the action on the basis of a lack of jurisdiction. In this appeal from decision, Associate Justice Graham stayed the action against all but three of the Defendants, finding that Ontario did not have jurisdiction over the claims against them.

Mr. Pourshian appealed the order staying the action against six of the Defendants, and the Defendants Pixar and Walt Disney Pictures Inc. brought a cross-appeal from the order dismissing the motion for a stay.

In *Pourshian*, the Divisional Court dismissed the cross-appeal and allowed the Plaintiff's appeal in part, allowing the action to proceed against seven of the Defendants, save for the Walt Disney Company and American Broadcasting Company Inc. The Court found that the Associate Judge failed to properly apply the requisite legal test in determining the issues on the motion. Specifically, he made at least three legal errors: 1) the Associate Judge did not analyze what "carrying on a business" in Ontario means, 2) the Associate Judge failed to consider the allegations in the statement of claim *and* the evidence to determine whether there was a good arguable case for assuming jurisdiction, and 3) while the Associate Judge identified "property" in Ontario as a valid connecting factor, he did not identify which of the Defendants this factor might apply to.

The threshold question on a jurisdiction motion is whether there is a good arguable case that a real and substantial connection exists. The Court applied the three-part analytical framework established by the Supreme Court of Canada in *Club Resorts Ltd v Van Breda* ("*Van Breda*") to determine whether the claim against each of the Defendants was sufficiently connected to Ontario.

On the first step, Mr. Pourshian did not allege that any of the Defendants were incorporated or domiciled in Ontario and did not plead that there was any contract connected with the dispute, so the Court did not consider these factors. Likewise, the claim did not plead facts or evidence to establish that any of the Defendants, with the exception of Disney Shopping Inc., had an actual presence in Ontario.

The question of whether the tort was committed in Ontario – and whether copyright infringement should be considered a tort at all – was contested. The Divisional Court turned to the Supreme Court's decision in *SOCAN v Canadian Association of Internet Providers* for guidance, finding that copyright infringement is essentially a statutory tort and that a single tort can occur in more than one jurisdiction.

Canadian courts will generally have jurisdiction where Canada is the "country of transmission" or "the country of reception". In *Pourshian*, there was no dispute that INSIDE OUT was distributed, received, and viewed in Ontario. The issue to be decided in the context of the jurisdiction motion was whether the Plaintiff's claim and/or evidence established a good arguable case that each individual Defendant played a role in authorizing the "transmission" or distribution of the allegedly infringing film into Ontario, contrary to ss. 3 and 27 of the *Copyright Act*.

The Divisional Court accepted that property in the jurisdiction was a presumptive connecting factor. The Court found that intangible property is property for the purpose of the jurisdiction motion and was satisfied that Mr. Pourshian's claim is in respect of property in Ontario since he lives in Ontario and created his film in Ontario.

Being satisfied that the presumptive connecting factors of copyright infringement in Ontario and property in Ontario provided a real and substantial connection between the Plaintiff's claim and Ontario, the Court reviewed the claim against each Defendant. The focus of the analysis in respect of each was whether the allegations in the statement of claim and evidence established a good arguable case for assuming jurisdiction on the basis of copyright infringement in Ontario and/or property in Ontario, including an analysis at the third step of the *Van Breda* framework of whether each Defendant had rebutted the presumption because the connection to Ontario is too weak to justify assuming jurisdiction.

Ultimately, the Divisional Court found that Mr. Pourshian had made out a good arguable case that Ontario had jurisdiction over the claims against eight of the Defendants and that the applicable presumptive connecting factors had not been rebutted by seven of these. The action was allowed to proceed against these seven Defendants and stayed against the other two.

Pourshian provides clarity with respect to the threshold issue of jurisdiction and the factors that are required to pursue a claim against foreign defendants in the context of a statutory tort. Potential litigants should look to this decision for guidance when seeking to either establish or rebut the proposition that a good arguable case that a real and substantial connection exists in the specific context of copyright infringement.