Double Counting the Place of the Tort?

In common law Canada there is a clear separation between the question of a court having jurisdiction (jurisdiction *simpliciter*) and the question of a court choosing whether to exercise or stay its jurisdiction. One issue discussed in the Supreme Court of Canada's recent decision in *Haaretz.com v Goldhar* (available here) is the extent of that separation. Does this separation mean that a particular fact cannot be used in both the analysis of jurisdiction and of *forum non conveniens*? On its face that seems wrong. A fact could play a role in two separate analyses, being relevant to each in different ways.

Justice Cote, with whom Justices Brown and Rowe agreed, held that "applicable law, as determined by the *lex loci delicti* principle, should be accorded little weight in the *forum non conveniens* analysis in cases where jurisdiction is established on the basis of the *situs* of the tort" (para 90). She indicated that this conclusion was mandated by the separation of jurisdiction and staying proceedings, which extends to each being "based on different factors". So if the place of the tort has been used as the basis for assuming jurisdiction, the same factor (the place of the tort) should not play a role in analyzing the most appropriate forum when considering a stay. And since the applicable law is one of the factors considered in that analysis, if the applicable law is to be identified based on the connecting factor of the place of the tort, which is the rule in common law Canada, then the applicable law as a factor "should be accorded little weight".

In separate concurring reasons, Justice Karakatsanis agreed that the applicable law "holds little weight here, where jurisdiction and applicable law are both established on the basis of where the tort was committed" (para 100). In contrast, the three dissenting judges rejected this reason for reducing the weight of the applicable law (para 208). The two other judges did not address this issue, so the tally was 4-3 for Justice Cote's view.

As Vaughan Black has pointed out in discussions about the decision, the majority approach, taken to its logical conclusion, would mean that if jurisdiction is based on the defendant's residence in the forum then the defendant's residence

is not a relevant factor in assessing which forum is more appropriate. That contradicts a great many decisions on *forum non conveniens*. Indeed, the court did not offer any supporting authorities in which the "double counting" of a fact was said to be inappropriate.

The majority approach has taken analytical separation too far. There is no good reason for excluding or under-weighing a fact relevant to the *forum non conveniens* analysis simply because that same fact was relevant at the jurisdiction stage. Admittedly the court in *Club Resorts* narrowed the range of facts that are relevant to jurisdiction in part to reduce overlap between the two questions. But that narrowing was of jurisdiction. *Forum non conveniens* remains a broad doctrine that should be based on a wide, open-end range of factors. The applicable law, however identified, has to be one of them.