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## TABLE OF CONTENTS

	<b>Page #</b>
<b>CHAPTER 1 - INTRODUCTION</b>	1
A.    OVERVIEW	1
B.    ACKNOWLEDGEMENTS	1
<b>CHAPTER 2 – AN EXCEPTION FOR THE CHOICE OF LAW RULE FOR TORT</b>	 2
<b>CHAPTER 3 - LIMITATION PERIODS</b>	10
<b>CHAPTER 4 - JURISDICTION SIMPLICITER</b>	14
<b>CHAPTER 5 - LIST OF RECOMMENDATIONS</b>	18
<b>APPENDIX A</b>	20
<b>APPENDIX B</b>	22
<b>EXECUTIVE SUMMARY</b>	44
<b>SOMMAIRE</b>	46

**CHAPTER 1**  
**INTRODUCTION**

**A. OVERVIEW**

This Report deals with two matters arising out of the Supreme Court of Canada decision in *Tolofson v. Jensen*; *Lucas v. Gagnon*, namely choice of law for tort and the characterization of limitation periods, and with jurisdiction simpliciter and the concept of real and substantial connection pertaining thereto.

**B. ACKNOWLEDGEMENTS**

The Commission thanks Professor Vaughan Black, Faculty of Law, Dalhousie University, Professor Stephen Pitel, Faculty of Law, University of Western Ontario, and John Swan, Aird & Berlis, Toronto, for commenting upon a draft of the Report. The Commission thanks Professor Emeritus Raymond Brown, Faculty of Law, University of Windsor, Professor Lewis Klar, Faculty of Law, University of Alberta, Professor Charles Mitchell, School of Law, King's College, London, Andrew Dickinson, Clifford Chance, London, James Lee, Birmingham Law School, and Phil Lister, Lister, Phillip G., Professional Corporation, Edmonton for their assistance respecting defamation.

## CHAPTER 2

### AN EXCEPTION FOR THE CHOICE OF LAW RULE FOR TORT

Generally speaking, legal issues that arise in litigation can be characterized as either procedural or substantive. In litigation in the realm of private international law (either the parties are not all resident or the ingredients of the cause of action did not all occur within the territorial jurisdiction of the court) the court invariably applies its law (the law of the forum, the *lex fori*) to procedural issues. Choice of law rules dictate whether the court applies the *lex fori* or a foreign law to govern substantive issues, sometimes called the *lex causae*.

Until 1870 the choice of law rule for tort was for the court to apply the law of the country<sup>1</sup> of the wrong, the *lex loci delicti*. In *Phillips v. Eyre*<sup>2</sup> the English Court of Queen's Bench changed the law, instituting a jurisdiction test, which, if fulfilled, had the court applying the *lex fori*. With a subsequent refinement to the jurisdiction test,<sup>3</sup> this became the tort choice of law rule in Canada,<sup>4</sup> until *Tolofson v. Jensen*; *Lucas v. Gagnon*,<sup>5</sup> hereinafter *Tolofson*. The Supreme Court of Canada decided that the choice of law for tort required reformulation. It chose to restore the *lex loci delicti*. Justice La Forest for the majority wrote:

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong.

...[this] approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities.<sup>6</sup>

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<sup>1</sup> “[“country”] ... has from long usage become almost a term of art among English-speaking writers [including jurists], on conflict of laws ...”, Dicey, Morris & Collins *The Conflict of Laws*, 14<sup>th</sup> ed. (Sweet & Maxwell, London, 2006), paragraph 1-064; it is the preferred term to “territory” and “place” and means for federations each province, state, or unit. Thus, for legislation the use of “country” requires no definition.

<sup>2</sup> (1870) L.R. 6 Q.B. 1, at 28-29.

<sup>3</sup> *Machado v. Fontes* [1897] 2 Q.B. 231.

<sup>4</sup> See *Tolofson v. Jensen*; *Lucas v. Gagnon*, *infra* note 4, at 297-302.

<sup>5</sup> (1994), 120 D.L.R. (4th) 289 (S.C.C.).

<sup>6</sup> *Ibid.* at 305.

Another choice of law rule, which the Court could have considered adopting is the proper law of the tort, i.e. the law of the country having the most substantial connection to the tort (hereinafter, the proper law). The Court only pondered adopting the proper law in its consideration of whether there should be an exception to the usual application of the *lex loci delicti*.<sup>7</sup> The Court referred to the adoption in the United States of the proper law as the general rule, although significantly understating the actual strength of the movement. Justice La Forest mused:

I leave aside for the moment the assumptions that a flexible rule better meets the demands of justice, fairness and practical results and underline what seems to be the most obvious defect of this approach – its extreme uncertainty. Lord Wilberforce in *Chaplin v. Boys*, [[1969] 2 All, E.R. 1085 (H.L.)] at p. 1103, after setting forth the complexities and uncertainties of the rule, thus summarized his view:

The criticism is easy to make that, more even than the doctrine of proper law of the contract . . . where the search is often one of great perplexity, the task of tracing the relevant contacts, and of weighing them, qualitatively, against each other, complicates the task of the courts and leads to uncertainty and dissent...

I agree with Lord Pearson, too, at p. 1116, that the...[proper law] “is lacking in certainty and likely to create or prolong litigation.”<sup>8</sup>

On whether there should be an exception to the *lex loci delicti* rule, Justice La Forest concluded:

On the whole ... there is little to gain and much to lose in creating an exception to the *lex loci delicti* in relation to domestic litigation. This is not to say that an exception to the *lex loci delicti* such as contained in the Hague Convention [on Traffic Accidents, to which Canada is not a signatory, which provides for the *lex fori* to be applied where all parties involved in an accident are residents of the forum, so to speak] is indefensible on the

international plane . . . A similar reciprocal scheme might well be arranged between the provinces.<sup>9</sup>

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<sup>7</sup> *Ibid.* at 308-314.

<sup>8</sup> *Ibid.* at 309-310.

<sup>9</sup> *Ibid.* at 314. Also, Justice La Forest, said, at 307-308, “... because a rigid [*lex loci delicti*] rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances”, at 310, “There might, I suppose, be room for an exception

Justice Major, writing also for Justice Sopinka, while agreeing with the decision of the majority, was more open to there being an exception to the general *lex loci delicti* rule, where its application works an injustice both in international and interprovincial litigation.<sup>10</sup>

Subsequent to the *Tolofson* decision, initially in a few “international level” cases, the courts applied a law other than the *lex loci delicti*, the *lex fori*, but then the exception door was shut; in only one “domestic” case has an exceptional law, the *lex fori*, been applied. (See Appendix A).

The Commission considered briefly whether it should pursue recommending legislation to supersede *Tolofson* to enact a proper law choice of law rule for tort,<sup>11</sup> but decided to pursue only the question of recommending a legislative exception to the *lex loci delicti*.

Of particular interest to the Commission is the legislation enacted by the Parliament of the United Kingdom to change its choice of law rule for tort (and delict).<sup>12</sup> The legislation is based upon a report of the (English) Law Commission and the Scottish Law Commission. In their Working Paper No. 87 and Consultation Memorandum No. 62, respectively, 1984, they proposed three general rule options for choice of law in tort, namely the *lex fori*, (subject to displacement), the proper law, and the *lex loci delicti* (subject to displacement). In their report, Law Commission No. 193, Scottish Law Commission No. 129, 1990, they recommended a general rule, for personal injury and personal injury causing death, the law of the country where the person was when the injury was sustained, for damage to property, the law of the country where the property was when the damage was sustained, and for other situations either the law of the country where the most significant elements of the events constituting the subject matter of the proceedings took place, or, if the country is not identifiable, the law of the country with which the subject matter of the proceedings has the most real and substantial connection, all three general rules subject to a proper law exception. The United Kingdom Parliament enacted the

*Private International Law, (Miscellaneous Provisions) Act 1995* (UK),<sup>13</sup> hereinafter *PILMPA*, Part III, sections 9 and 11-15, provides in part:

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where the parties are nationals or residents of the forum”, and at 312, “With the general rule of *lex loci delicti*, in cases involving parties from two or more jurisdictions, chances are that the lawsuit will take place in the country in which the tort took place. But when all the parties are from another state, the likelihood is that the lawsuit will take place in their home jurisdiction. There is some merit to allowing judges in this situation to apply their own law. This factor is, however, of less concern in matters arising within Canada”.

<sup>10</sup> *Ibid.* at 326.

<sup>11</sup> A proper law choice of law rule for tort, such as contained in Proceedings of the Forty-Eighth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1966, at 62, *A Tentative First Draft of a Foreign Torts Act*, is favoured by three commentators to an early draft of this report.

<sup>12</sup> Delict is in Scottish law the counterpart of tort in English law.

<sup>13</sup> 1995, c. 42. Incidentally, Part III of the *Private International Law (Miscellaneous Provisions) Act 1995* (U.K.) will cease to be the law of the United Kingdom in January, 2009; it will be replaced by Regulation (EC) 864/2007 of the European Parliament and of the Council of July 11, 2007, on the Law Applicable to Non-Contractual

- 9(1) The rules in this Part apply for choosing the law (in this Part referred to as “the applicable law”) to be used for determining issues relating to tort...
  - (2) The characterisation for the purposes of private international law of issues arising in a claim as issues relating to tort... is a matter for the courts of the forum.
  - (3) The rules in this Part do not apply in relation to issues arising in any claim excluded from the operation of this Part by section 13 below.
  - (4) The applicable law shall be used for determining the issues arising in a claim, including in particular the question whether an actionable tort... has occurred.
  - (5) The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the law of the country or countries concerned.
  - (6) For the avoidance of doubt (and without prejudice to the operation of section 14 below) this Part applies in relation to events occurring in the forum as it applies in relation to events occurring in any other country.
- 
- 11(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort... in question occur.
  - (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being -
    - (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;
    - (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
    - (c) in any other case, the law of the country in which the most significant element or elements of those events occurred.
  - (3) In this section “personal injury” includes disease or any impairment of physical or mental condition.
- 
- 12(1) If it appears, in all the circumstances, from a comparison of -
    - (a) the significance of the factors which connect a tort... with the country whose law would be the applicable law under the general rule; and
    - (b) the significance of any factors connecting the tort... with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be

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Obligations (the Rome II Regulation). This Regulation provides, *inter alia*, a general choice of law rule of “the law of the country in which the damage occurs irrespective of ... [where] the event giving rise to the damage occurred or ...[where] indirect consequences of that event occur[red].”, article 4(1). Two exceptions are provided, where the parties “both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply”, article 4(2), and “where it is clear from all the circumstances ... that the tort... is manifestly more closely connected with a country other than that indicated in paragraphs (1) or (2), the law of that other country shall apply.”, article 4 (3). By article 1(2)(g) the Regulation does not apply to non-contractual obligations arising out of privacy and rights of personality, including defamation, an exclusion “which gave rise to considerable controversy”, but “strongly advocated by the press and other media, the views of which eventually prevailed”, Dicey, Morris, & Collins *The Conflict of Laws*, First Supplement to the 14th ed. (Sweet & Maxwell, 2007), paragraph section 35-178.

- the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
- (2) The factors that may be taken into account in connecting a tort... with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort... in question or to any of the circumstances or consequences of those events.
- 13(1) Nothing in this Part applies to affect the determination of issues arising in any defamation claim.
- (2) For the purposes of this section “defamation claim” means -
- (a) any claim under the law of the United Kingdom for libel or slander or for slander of title, slander of goods or other malicious falsehood... and
  - (b) any claim under the law of any other country corresponding to or otherwise in the nature of a claim mentioned in paragraph (a) above.
- 14(1) Nothing in this Part applies to acts or omissions giving rise to a claim which occur before the commencement of this Part.
- ...
- (3) Nothing in this Part -
- (a) authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so -
    - (i) would conflict with principles of public policy; or
    - (ii) would give effect to such a penal, revenue or other public law as would not otherwise be enforceable under the law of the forum; or
  - (b) affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.
- (4) This Part has effect without prejudice to the operation of any rule of law which either has effect notwithstanding the rules of private international law applicable in the particular circumstances or modifies the rules of private international law that would otherwise be so applicable.
- 15 (1) This Part applies in relation to claims by or against the Crown as it applies in relation to claims to which the Crown is not a party.
- ...
- (3) ...nothing in this section affects any rule of law as to whether proceedings of any description may be brought against the Crown.

Section 10 of the *PILMPA* abolishes the common law, which would not be appropriate for Manitoba given *Tolofson*.

Section 13 of the *PILMPA*, exempts the tort of defamation, (an exemption not provided in the *Tolofson* decision). Why? Its provenance is the Law Commission and the Scottish Law Commission Working Paper and Consultative Memorandum, *supra*, paragraphs 5.30-55, their report, Law Commission No. 193 and Scottish Law Commission No. 129, paragraphs, 3:28-33,

and Draft Bill. However, the Bill introduced in Parliament contained no section 13 exempting defamation; subsequently, it was included by amendment, resulting from hostile media comment expressing fear that the legislation without section 13 would compromise freedom of expression, exposing the media to liabilities pursuant to more claimant-friendly foreign law for statements either not a wrong by English law, such as invasion of privacy, or for which a privilege or other defences exist by English law.<sup>14</sup>

The Commission agrees with the *Tolofson* restoration of the *lex loci delicti* as a certain, easy, general rule for the law to be applied to substantive tort issues. However, the Commission thinks that the specificity of section 11 of the *PILMPA* is an improvement to what Justice La Forest wrote in *Tolofson*.<sup>15</sup>

The Commission also has concluded that the *Tolofson* general rule needs an exception for both “international level” cases and “domestic” cases and that a legislative nudge, enabling courts to apply some other law than the *lex loci delicti* to do justice, would be salutary.<sup>16</sup> The Commission agrees with one commentator, who was provided with an early draft of this report, that the *PILMPA* adapted for Manitoba should be stream-lined. Professor Stephen Pitel wrote:

Some of the preliminary provisions of the *PILMPA* 1995 are unnecessary or undesirable. Section 9(2) is trite law and is unnecessary. Section 9(3) is only necessary if you are going to exclude defamation and in any case is unnecessary given the language of section 13. Section 9(4) does not add anything, except perhaps some confusion as to whether “the issues arising in a claim” refers only to tort claims or something broader. Section 9(5) is correct in its exclusion of *renvoi*, though the wording could be improved: see Stephen G.A. Pitel, “*Choice of Law in Tort: A Role for Renvoi?*” (2006) 43 C.B.L.J. 171.<sup>17</sup> Section 9(6) is true for choice of law rules generally and so is unnecessary.

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<sup>14</sup> Dicey, Morris & Collins *The Conflict of Laws*, *supra* note 1, paras. 35-124-125, P.B. Carter, (1996) 112 L.Q.R. 190, at 194, C.G. Morse, (1996) 45 I. & C.L.Q. 888, at 891-93. A. Briggs, [1995] LMCLQ 519, n. 12, wrote: “The exception was added “as a sop to the press, which will be safe if it publishes under the umbrella of justification or privilege, whatever a foreign law may say. But, the exception is probably confined to liability for statements, and actions against the press and others for breach of privacy and the like will be exposed to the full vigour of the new choice of law rules””.

<sup>15</sup> *Supra* note 5.

<sup>16</sup> This has been advocated by several critics of *Tolofson*, including J.P. McEvoy, *Choice of Law in Torts: The New Rule*, (1995) 44 U.N.B.L.J. 211, at 226. Note that the Civil Code of Quebec in article 3126 provides “... In any case when the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies”; similarly, while the Model *Conflict of Laws (Traffic Accidents) Act* of the Conference of Commissions on Uniformity of Legislation in Canada in s. 3 and the Hague Convention on Traffic Accidents in article 3 provide for the governing law to be the “law of the state where the accident occurred” (the Hague Convention includes the word internal), each in s. 4 and article 4, respectively, contain an exception like article 3126.

<sup>17</sup> Briggs is critical of the *PILMPA* exclusion of *renvoi*, [1995] L.M.C.L.Q. 519, at 524; the Commission agrees with Professor Pitel.

The most contentious part of section 11 is the use of the presumptions in section 11(2). The common law, without such rigid presumptions, has been able to identify the place of a tort in such circumstances, so it is questionable what the presumptions add. However, any rigidity they create can be offset by proper use of the flexible exception. The more flexible the exception, the less important the presumptions. But if, contrary to the suggestions below, the exception is a narrow one, then more thought needs to be given to these presumptions.

The formulation of the flexible exception is the most important part of the overall rule. ... it is critical that the law of the forum must not be the only law that can be applied under an exception. The exception must be broad enough to allow any other country's law, beyond the one initially indicated, to be applied in the proper circumstances.

As to the specifics of the exception in the *PILMPA* 1995, section 12(1) is overly lengthy, and also raises problematic interpretation issues by using the phrase "substantially more appropriate". It is difficult to accept that courts will be able to develop a spectrum of degrees of appropriateness, ranging from slightly more appropriate to overwhelmingly more appropriate, and to then put cases onto that spectrum. Instead, the tendency for courts will be to seek simply to determine if one legal system is more appropriately applied than is another. Section 12(2) does no harm but one would expect these to be among the factors the court would consider in any event. A revised, and much shorter, section 12 might therefore provide that "Where it appears in all the circumstances that any or all of the issues in tort are more closely connected with another country than they are with the country indicated in section 11, the law of that other country shall apply to those issues.

The Commission is not persuaded that defamation should be exempted legislatively from the *Tolofson* general rule or from a legislative exception to the general rule.<sup>18</sup> The Commission is not persuaded by the Law Commission and Scottish Law Commission Working paper and report, nor by the media lobbying, which resulted in the defamation exemption being included in the *PILMPA*. The Commission thinks that the matter of whether defamation should be treated differently than other torts is best left ultimately to the Supreme Court of Canada.

## **RECOMMENDATION 1**

*Legislation should be enacted providing that:*

- (1) The general rule is that the applicable law is the law of the country in which the elements constituting the tort in question occur.*
- (2) Where elements of the tort occur in different countries, the applicable law under the general rule is to be taken as being:*

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<sup>18</sup> All of the commentators on an early draft of this report (see Acknowledgements, above) and Professor Brown advised the Commission not to exempt defamation. The Commission received no response from the Media and Communications Law Section of the Manitoba Bar Association to our request for commentary on the early draft of this report.

- (a) *for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when the individual sustained the injury;*
  - (b) *for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and*
  - (c) *in any other case, the law of the country in which the most significant element or elements of the tort occurred.*
- (3) *In this section “personal injury” includes disease or any impairment of physical or mental condition.*
  - (4) *Where it appears in all the circumstances that any of the issues in tort are more closely connected with another country than they are with the country indicated in (1) or (2), the law of that place shall apply to those issues,*
  - (5) *The applicable law determined by either (1), (2) or (4) shall include only the internal law of the country and not any of its rules of private international law.*

## CHAPTER 3

### LIMITATION PERIODS

Every country has statutory limitations respecting litigation. Most limitations bar suing after the expiry of stipulated period of time; some limitations extinguish rights. Historically, the former have been characterized as procedural, while the latter are substantive. For example, *The Limitations of Actions Act of Manitoba*<sup>1</sup> provides:

#### Limitations

2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

...

- (h) actions for taking away, conversion or detention of chattels, within six years after the cause of action arose;
- (i) actions for the recovery of money ... on a simple contract ... within six years after the cause of action arose ...

#### Termination of title to chattel on expiry of right of action

54(2) Where any such cause of action has accrued to any person, and the period prescribed for bringing that action and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has expired, and he has not during that period recovered possession of the chattel, the title of that person to the chattel is extinguished.

According to conventional dogma s. 2(1)(i) is a procedural limitation; ss. 2(1)(h) and 54(2) comprise a substantive limitation. Since, as stated in the first paragraph of Chapter 2, courts always apply the *lex fori* respecting procedural issues, and most limitations only bar suing, throughout the common law world usually it is the limitation of the *lex fori* which governs. A second change in the law for Canada made by the Court in *Tolofson* is to declare that all limitations are substantive<sup>2</sup> and thus for tort actions it is the limitation of the *lex loci delicti*, not the *lex fori*, which governs.

Following the *Tolofson* characterization of limitation periods as substantive, not procedural, a few provinces reacted legislatively.

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<sup>1</sup> R.S.M. 1987, c. L150.

<sup>2</sup> *Supra* Chapter 2, note 4 at 317-322.

### British Columbia<sup>3</sup>

Section 13(1). If it is determined in an action that the law of a jurisdiction other than British Columbia is applicable and the limitation law of that jurisdiction is, for the purposes of private international law, classified as procedural, the court may apply British Columbia limitation law or may apply the limitation law of the other jurisdiction if a more just result is produced.

Paul Mitchell opines that the section will never be invoked because it requires a B.C. court to classify the foreign limitation as procedural, which it will never do, applying *Tolofson*.<sup>4</sup>

### Newfoundland and Labrador<sup>5</sup>

Section 23. This Act applies to actions in the province to the exclusion of laws of all other jurisdictions which (a) impose limitation periods for bringing actions; or (b) in another manner prohibit or restrict the bringing of an action because of a lapse of time or a delay.

### Alberta<sup>6</sup>

12. The limitations law of the Province shall be applied whenever a remedial order is sought in this Province, notwithstanding that, in accordance with conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction.

### Saskatchewan<sup>7</sup>

27. The limitations laws of Saskatchewan shall be applied to any proceeding commenced or sought to be commenced in Saskatchewan notwithstanding that, in accordance with conflict of law rules, the claim is to be adjudicated pursuant to the substantive law of another jurisdiction.

### Ontario has codified *Tolofson*,<sup>8</sup>

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<sup>3</sup> R.S.B.C. 1996, c. 266.

<sup>4</sup> (2005) 42 B.L.J. 97, n. 10.

<sup>5</sup> S.N.L. 1995, c. L-16.1.

<sup>6</sup> R.S.A. 2000, c. L-12.

<sup>7</sup> S.S. 2004, c. L-16.1.

23. For the purposes of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is substantive law.

Alberta's section 12 has been litigated, *Castillo v. Castillo*,<sup>9</sup> and the result may be neither what the Legislature intended, nor what an initial casual reading might suggest. The facts of *Castillo* are simple. An Alberta couple was involved in a car crash in California. The wife sued her husband in the Alberta Court of Queen's Bench after the expiry of the California limitation, but within the Alberta limitation. All of the courts and all of the judges construed section 12 to include first a consideration of the California limitation as a component of the applicable *lex loci delicti*, according to *Tolofson*, and second a consideration of the Alberta limitation only if by the California limitation the action was not statute barred; in other words, while a shorter Alberta limitation closes the door, a longer Alberta limitation does not revive an action statute-barred by the applicable foreign law. The majority of the Supreme Court of Canada considers section 12, thus construed to be constitutionally valid.<sup>10</sup> The majority declined to comment on the constitutionality of legislation, such as sections 12 as the appellant submitted it be construed, that purports "to breathe life into an action that was time-barred by the applicable substantive law".<sup>11</sup> Justice Bastarache, writing for himself, while agreeing with the majority on the construction to be made of section 12, disagreed that it is constitutionally valid and, similarly, if section 12 were to be construed as the appellant contended, to have the courts consider only the Alberta limitation, he said that it would be unconstitutional. Presumably, Justice Bastarache would say the same about Saskatchewan's section, which is almost identical to Alberta's section 12, and about the Newfoundland and Labrador section.<sup>12</sup>

The historical distinction of limitations, which bar suing, and those which extinguish rights, strikes the Commission as a distinction without a significant difference. The Commission accepts the advice of Professor Stephen Pitel that the *Tolofson* characterization of all limitation periods to be substantive "is consistent with modern choice of law thinking"<sup>13</sup> and that the Ontario codification of *Tolofson* should be followed by Manitoba.<sup>14</sup>

## **RECOMMENDATION 2**

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<sup>8</sup> S.O. 2002, c. 24, Sch. B, s. 23.

<sup>9</sup> (2004), 376 A.R. 224 (S.C.C.) See also J. Walker, *Castillo v. Castillo*; Closing the Barn Door (2006) 43 C.B.L.J. 487.

<sup>10</sup> *Ibid.* at para. 5.

<sup>11</sup> *Ibid.* at para. 10.

<sup>12</sup> Alberta has amended section 12 attempting to bring it into line with the *Castillo* decision, S.A. 2007, c. 22. New Brunswick is following suit, Bill 28, 3d sess. 56<sup>th</sup> Leg., 2008, s. 24.

<sup>13</sup> And, it is what the Uniform Law Conference of Canada proposes in section 15 of its *Uniform Limitations Act*.

<sup>14</sup> The Commission is working on a sweeping revision of *The Limitations of Actions Act*, *supra* note 1, and recommends the inclusion in a revised Act of a section codifying the Supreme Court decision in this regard.

**The Limitations of Actions Act *should be amended to include a section the same as section 23 of The Limitations Act of Ontario.***

## CHAPTER 4

### JURISDICTION SIMPLICITER

The jurisdiction of a court to try an action is called either local jurisdiction or now, usually, jurisdiction simpliciter. It is based upon the defendant being properly served either within the territory of the court or beyond the territory of the court (service ex juris); these services are provided in Manitoba by Queen's Bench Rules 16 (service within Manitoba), 17.02 (service ex juris as of right), and 17.03 (service ex juris with leave of the court). The recognition of a court's judgment by courts of another country (the jargon for which is recognition of foreign judgments) is based upon the court having, not only jurisdiction simpliciter, but also international jurisdiction. Prior to 1990 Canadian common law of international jurisdiction, in concert with the common law throughout the common law world, so to speak, was based upon the presence of the defendant within the territory of the trial court or the submission of the defendant to the jurisdiction of the trial court.<sup>1</sup>

In *Morguard v. De Savoye*<sup>2</sup> the Supreme Court of Canada added a basis for the recognition of judgments of Canadian courts by other Canadian courts. To the existing and continuing various discrete components of international jurisdiction *Morguard* added a real and substantial connection between the trial court and the action.<sup>3</sup> Also, the Court stated the obvious corollary that, for a court to have jurisdiction simpliciter when a defendant is served ex juris it must be established that there is a real and substantial connection between the court and the action.<sup>4</sup> Unfortunately, the court in *Morguard* did not elaborate on what comprises a real and substantial connection. Notwithstanding considerable musing<sup>5</sup> and several cases,<sup>6</sup> uncertainty

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<sup>1</sup> The leading articulation being that of Lord Buckley in *Emanuel v. Symon* [1908] 1K.B. 302, at 309.

<sup>2</sup> (1990), 76 D.L.R. (4th) 256 (S.C.C.).

<sup>3</sup> The *Morguard* additional basis for international jurisdiction has been extended to U.S. judgments, e.g. *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C.C.A.) and *Beals v. Saldanha* (2003), 234 D.L.R. (4th) 1 (S.C.C.).

<sup>4</sup> *Supra* note 2, at 267; if a defendant is served within the territory of the trial court this constitutes an implicit real and substantial connection, apparently however casual the defendant's presence may be.

<sup>5</sup> *Inter alia*, J. Blom, *Conflict of Laws: Enforcement of Extra provincial Default Judgment*, Real and Substantial Connection; *Morguard v. De Savoye*, (1991) 70 C.B.R. 733.

<sup>6</sup> *Inter alia*, *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.) and *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* (2002), 220 D.L.R. (4th) 54 (S.C.C.).

prevails.<sup>7</sup>

In 1992, the Uniform Law Conference of Canada (ULCC) adopted a *Uniform Enforcement of Canadian Judgments Act*, which deals with money judgments. In 1997 the ULCC adopted a *Uniform Enforcement of Canadian Decrees Act* to deal with non-money judgments and in the same year consolidated the two Acts into one Act, a *Uniform Enforcement of Canadian Judgments and Decrees Act*. In 1994 the ULCC adopted a *Uniform Court Jurisdiction and Proceedings Transfer Act*.<sup>8</sup> This package of Acts comprises a harmonized system for granting and enforcing judgments throughout Canada. Manitoba has enacted an Act comparable to the *ULCC Uniform Enforcement of Canadian Judgments and Decrees Act*.<sup>9</sup> The *Uniform Court Jurisdiction and Proceedings Transfer Act* has been enacted in British Columbia, Saskatchewan, Nova Scotia, and Yukon, and is under consideration in Alberta<sup>10</sup> and Ontario; Quebec has comparable legislation. Manitoba should follow suit. Particularly section 10 of the *Uniform Court Jurisdiction and Proceedings Transfer Act*,<sup>11</sup> which largely mirrors Queen's Bench Rule 17.02, but does not supplant it, provides, as comment 10.1, states, "guidance to the meaning of 'real and substantial connection' ... [and] plaintiffs will be able, in a great majority of cases to rely on ... "it to establish jurisdiction simpliciter without having to deal with the existing conflicting case law."<sup>12</sup>

In its Report,<sup>13</sup> the Alberta Law Institute agrees with two improvements to the ULCC *Uniform Court Jurisdiction and Proceedings Transfer Act*, which have been made by Yukon and Saskatchewan and with which we agree:

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<sup>7</sup> *Inter alia*, E. Edinger, Spar Aerospace: A Reconciliation of Morguard with the Traditional Framework for Determining Jurisdiction, (2003) 61 The Advocate 511, V. Black & J. Walker, The Deconstitutionalization of Canadian Private International Law, (2003) 21 S.C.L.R. 181, N. Rafferty, Jurisdiction Simpliciter and Rules for Service Ex Juris, <[www.albertacourts.ab.ca/jdb/2003-/qb/civil/2008abqb0070.pdf](http://www.albertacourts.ab.ca/jdb/2003-/qb/civil/2008abqb0070.pdf)>, S. Pitel & C. Dusten, Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction (2006) 85 C.B.R. 61, and T. Monestier, A Real and Substantial Mess: The Law of Jurisdiction in Canada, (2007) 33 Queen's L.J. 179.

<sup>8</sup> See Appendix B.

<sup>9</sup> S.M. 2005, c. 50. All of the other provinces and Yukon have enacted either the *ULCC Uniform Act* or essentially identical legislation.

<sup>10</sup> The Alberta Law Institute in its Report No. 94, 2008, Enforcement of Judgments recommends enactment of ULCC package of Acts, including the *Uniform Court Jurisdiction and Proceedings Act*.

<sup>11</sup> See Appendix B.

<sup>12</sup> *Muscutt v. Courcelles*, *supra* note 6, was decided before *Spar Aerospace Ltd. v. American Mobile Satallite Corp.*, *supra* note 6; *Muscutt* set out an eight point analysis for real and substantial connection, which was, arguably, repudiated in *Spar*. The only subsequent Manitoba jurisdiction simpliciter case, *Whirlpool Canada Co. v. Nat'l Union Fire Ins. Co.* (2005), 198 Man. R. (2d) 18 (Q.B.), applied *Muscutt* without referring to *Spar*; the enactment of the *Uniform Court Jurisdiction and Transfer Proceeding Act* obviates the exercise.

<sup>13</sup> *Supra* note 10.

[70] The Yukon has added a section 10(2), which reads as follows:  
10(2) Despite the presumption established by subsection (1) a party may prove that there is no real and substantial connection between the Yukon and the facts on which the proceeding is based.

[71] This is a good improvement to the *Uniform Court Jurisdiction and Proceedings Transfer Act*, in that it more clearly expresses the ULCC's intention. The ULCC annotation to s. 10 indicates that a "defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial." It is recommended that Alberta add the additional subsection.

## **2. Ordinary residence of partnerships (s. 8)**

[72] Section 8 of the *Uniform Court Jurisdiction and Proceedings Transfer Act* provides:

8. A partnership is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if
- (a) the partnership has, or is required by law to have, a registered office or business address in [enacting province or territory],
  - (b) it has a place of business in [enacting province or territory], or
  - (c) its central management is exercised in [enacting province or territory].

[73] In contrast, s. 7 of Saskatchewan's [*Court Jurisdiction and Proceedings Transfer Act*] Act provides:

### Ordinary residence – partnerships

- 7 A partnership is ordinarily resident in Saskatchewan, for the purposes of this Part, only if:
- (a) a partner is ordinarily resident in Saskatchewan; or
  - (b) the partnership has a place of business in Saskatchewan.

[74] The ULCC annotation to section 8 specifically notes that section 8 is supposed to define the ordinary residence of a partnership "in a business sense" and exclude territorial competence over the partnership "based on the residence of an individual partner alone."

[75] Despite the fact that Saskatchewan's definition of the ordinary residence of a partnership contradicts the ULCC's intention, Saskatchewan's section 7(a) is perhaps more workable in practice than section 8(c) of the *Uniform Court Jurisdiction and Proceedings Transfer Act*. Defining a partnership as ordinarily resident in the jurisdiction if "its central management is exercised" in that jurisdiction may be a properly principled test in theory, but in practice it may be

easier to ascertain the ordinary residence of an individual partner than the location where the “central management” of the partnership “is exercised.” The latter could easily be “exercised” interjurisdictionally over the phone or the Internet, which was less likely in the early 1990s when the ULCC recommended the Act.

[76] Interestingly enough, section 9(a) of the *Uniform Court Jurisdiction and Proceedings Transfer Act* does deem an unincorporated association resident in the jurisdiction if “an officer of the association is ordinarily resident in” the jurisdiction. One could argue that if the ordinary residence of a key individual suffices for ordinary residence of an unincorporated association, then so it should for the ordinary residence of a partnership, which is similarly not incorporated.

[77] It is recommended that Alberta define the ordinary residence of a partnership in the same way as has Saskatchewan.<sup>14</sup>

### **RECOMMENDATION 3**

***Legislation should be enacted adopting the ULCC Uniform Court Jurisdiction and Proceedings Transfer Act, containing a section 10(2) as in Yukon’s Court Jurisdiction Act and Proceedings Transfer Act and the substitute for section 8 as contained in Saskatchewan’s Court Jurisdiction and Proceedings Transfer Act.***

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<sup>14</sup> Notes excluded.

## CHAPTER 5

### LIST OF RECOMMENDATIONS

1. Legislation should be enacted providing that:
  - (1) The general rule is that the applicable law is the law of the country in which the elements constituting the tort in question occur.
  - (2) Where elements of the tort occur in different countries, the applicable law under the general rule is to be taken as being:
    - (a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when the individual sustained the injury;
    - (b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and
    - (c) in any other case, the law of the country in which the most significant element or elements of the tort occurred.
  - (3) In this section “personal injury” includes disease or any impairment of physical or mental condition.
  - (4) Where it appears in all the circumstances that any of the issues in tort are more closely connected with another country than they are with the country indicated in (1) or (2), the law of that place shall apply to those issues,
  - (5) The applicable law determined by either (1), (2) or (4) shall include only the internal law of the country and not any of its rules of private international law. (p. 9)
2. *The Limitations of Actions Act* should be amended to include a section the same as section 23 of *The Limitations Act of Ontario*. (p. 13)
3. Legislation should be enacted adopting the *ULCC Uniform Court Jurisdiction and Proceedings Transfer Act*, containing a section 10(2) as in *Yukon’s Court Jurisdiction Act and Proceedings Transfer Act* and the substitute for section 8 as contained in *Saskatchewan’s Court Jurisdiction and Proceedings Transfer Act*. (p. 17)

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 21st day of January 2009.

**“Original Signed by”**  
Cameron Harvey, President

**“Original Signed by”**  
John C. Irvine, Commissioner

**“Original Signed by”**  
Gerald O. Jewers, Commissioner

**“Original Signed by”**  
Alice R. Krueger, Commissioner

**“Original Signed by”**  
Perry W. Schulman, Commissioner

## APPENDIX A

### Lex Fori Exceptions to the Lex Loci Delicti Rule

#### “International Level” Litigation

<u>Case</u>	<u>Respecting</u>	<u>Dismissed</u>
<u>Granted</u>		
<i>Hanlan v. Sernesky</i> (1998), 38 O.R. (3d) 479 (C.A.)	Pl. had no right to sue by the Lex Loci Delicti	√
<i>Wong v. Wei</i> (1999), 45 C.C.L.T. (2d) 105 (B.C.S.C.)	Lex Fori law of damages more favourable to Def.	√
<i>Lebert v. Skinner Estate</i> (2001), 53 O.R. (3d) 559 (S.C.J.)	ditto <i>Wong v. Wei</i>	√
<i>Wong v. Lee</i> (2002), 58 O.R. (3d) 398 (C.A.)	ditto <i>Wong v. Wei</i>	X
<i>Britton v. O’Callaghan</i> (2002), 62 O.R. (3d) 95 (C.A.)	Lex Fori law of damages more favourable to Pl.	X
<i>Somers v. Fournier</i> (2002), 60 O.R. (3d) 225, esp. para. 37 (C.A.)	similar to <i>Britton</i>	X
<i>Castillo v. Castillo</i> , [2005] 3 S.C.R. 870	ditto <i>Hanlan</i>	X
<i>Roy v. North American Leisure Group Inc.</i> (2004), 73 O.R. (3d) 561 (C.A.)	ditto <i>Hanlan</i>	X

**Lex Fori Exceptions to the Lex Loci Delicti Rule**

**“Domestic” Litigation**

<u>Case</u>	<u>Respecting</u>	<u>Dismissed</u>	
<u>Granted</u>			
<i>Brill v. Korpaach</i> (1997), 200 A.R. 161 (C.A.)	similar to <i>Hanlan v. Sernesky</i>	X	
<i>Lau v. Li</i> (2001), 53 O.R. (3d) 727 (S.C.J.)	Pls had no right to sue by and limited to damages provided by the Lex Loci Delicti		√
<i>Brown v. Kerr-McDonald</i> (2002), 326 A.R. 267 (Q.B.)	ditto <i>Britton</i>	X	
<i>Bezan v. Vander Hooft</i> (2004), 346 A.R. 272 (C.A.)	ditto <i>Hanlan</i>	X	
<i>Soriano (Litigation Guardian of) v. Palacios</i> (2005), 255 D.L.R. (4th) 359 (Ont. C.A.)	ditto <i>Hanlan</i>	X	

These are not all of the cases, either international or domestic; other cases are referenced in the cases included above. Regarding domestic litigation, in *Brill v. Karpaach*, paragraph 20, the court said with reference to what Justice La Forest said in *Tolofson v. Jensen* “[t]he door is closed, though perhaps not locked.”

## APPENDIX B

### UNIFORM COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT

#### TABLE OF CONTENTS

0.1 Introductory comments

#### **PART 1 INTERPRETATION**

1 Definitions  
1.1 Comments to section 1

#### **PART 2 TERRITORIAL COMPETENCE OF COURTS OF [Enacting Province or Territory]**

2 Application of this Part  
2.1 Comments to section 2  
3 Proceedings in personam  
3.1 Comments to section 3  
4 Proceedings with no nominate defendant  
4.1 Comments to section 4  
5 Proceedings in rem  
5.1 Comments to section 5  
6 Residual discretion  
6.1 Comments to section 6  
7 Ordinary residence - corporations  
7.1 Comments to section 7  
8 Ordinary residence - partnerships  
8.1 Comment to section 8  
9 Ordinary residence - unincorporated associations  
9.1 Comment to section 9  
10 Real and substantial connection  
10.1 Comment to section 10  
11 Discretion as to the exercise of territorial competence  
11.1 Comments to section 11  
12 Conflicts or inconsistencies with other Acts  
12.1 Comment to section 12

#### **PART 3**

## **TRANSFER OF A PROCEEDING**

- 13 General provisions applicable to transfers
- 13.1 Comments to section 13
- 14 Grounds for an order transferring a proceeding
- 14.1 Comments to section 14
- 15 Provisions relating to the transfer order
- 15.1 Comments to section 15
- 16 [Superior court's] discretion to accept or refuse a transfer
- 16.1 Comments to section 16
- 17 Effect of transfers to or from [superior court]
- 17.1 Comments to section 17
- 18 Transfers to courts outside [enacting province or territory]
- 18.1 Comments to section 18
- 19 Transfers to [superior court]
- 19.1 Comments to section 19
- 20 Return of a proceeding after transfer
- 20.1 Comments on section 20
- 21 Appeals
- 21.1 Comments to section 21
- 22 Departure from a term of transfer
- 22.1 Comment to section 22
- 23 Limitations and time periods
- 23.1 Comments to section 23

## **Uniform Court Jurisdiction and Proceedings Transfer Act**

### **Introductory comments**

- 0.1** This proposed uniform Act has four main purposes:
  - (1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;
  - (2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897;
  - (3) by providing uniform jurisdictional standards, to provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform *Enforcement of Canadian Judgments Act*; and
  - (4) to provide, for the first time, a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.
  
- 0.2** To achieve the first three purposes, this Act would, for the first time in common law Canada, give the substantive rules of jurisdiction an express statutory form instead of

leaving them implicit in each province's rules for service of process. In the vast majority of cases this Act would give the same result as existing law, but the principles are expressed in different terms. Jurisdiction is not established by the availability of service of process, but by the existence of defined connections between the territory or legal system of the enacting jurisdiction, and a party to the proceeding or the facts on which the proceeding is based. The term "territorial competence" has been chosen to refer to this aspect of jurisdiction (section 1, "territorial competence") and distinguish it from other jurisdictional rules relating to subject-matter or other factors (section 1, "subject matter competence").

- 0.3** By including the transfer provisions in the same statute as the provisions on territorial competence, the Act would make the power to transfer, along with the power to stay proceedings, an integral part of the means by which a Canadian court can deal with proceedings that more appropriately should be heard elsewhere. The provisions on transfer owe a great debt to the uniform Transfer of Litigation Act ("UTLA") promulgated in 1991 by the United States National Conference of Commissioners on Uniform State Laws.

## **PART 1: Interpretation**

### **Definitions**

- 1** In this Act:
- "person"** includes a state;
  - "plaintiff"** means a person who commences a proceeding, and includes a plaintiff by way of counterclaim or third party claim;
  - "proceeding"** means an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion;
  - "procedure"** means a procedural step in a proceeding;
  - "state"** means:
    - (a) Canada or a province or territory of Canada; and
    - (b) a foreign country or a subdivision of a foreign country;
  - "subject matter competence"** means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;
  - "territorial competence"** means the aspects of a court's jurisdiction that depend on a connection between:
    - (a) the territory or legal system of the state in which the court is established; and
    - (b) a party to a proceeding in the court or the facts on which the proceeding is based.

### **Comments to section 1**

- 1.1** The term “**person**” is used in the generic sense throughout the statute. The term covers natural persons, corporate entities and states or Crown agencies.
- 1.2** “**Proceeding**” is broadly defined to include interlocutory matters and even motions which are brought preliminary to formal commencement of an action, for example, an anti suit injunction.
- 1.3** “**State**” is defined for two purposes. One is to complement the definition of “territorial competence”, which refers to connections with the territory or legal system of the “state” in which the court is established. The other is to make it clear that the power of transfer under Part 3 extends to transfers to and from countries outside Canada, or subdivisions of those countries. There was extensive debate at the Conference about whether the transfer provisions should extend to courts outside Canada. This debate is summarized in the comments to section 13.
- 1.4** The rationale for adopting the term “territorial competence” is noted in comment 2. The definition is the key to the legal effect of the rules in Part 2, defining Canadian courts’ territorial competence.
- 1.5** “**Subject matter competence**” is defined to include all aspects of a court’s jurisdiction other than those relating to territorial competence. It will thus include restrictions on a court’s authority relating to the nature of the dispute, the amount in issue, and other criteria that are unrelated to the territorial reach of the court’s authority. The distinction between “territorial competence” and “subject matter competence” is important in certain of the transfer provisions in Part 3.

## **PART 2: Territorial Competence of Courts of [Enacting Province or Territory]**

### **Application of this Part**

- 2** (1) In this Part, “**court**” means a court of [enacting province or territory].  
(2) The territorial competence of a court is to be determined solely by reference to this Part.

### **Comments to section 2**

- 2.1** Part 2 is drafted so as to define the territorial competence of any court of the enacting jurisdiction. This may be subject to rules in any other statute that give a particular court a wider or narrower territorial competence than the rules in this Act (see section 12). The transfer provisions in Part 3 are drafted so as to apply only to the superior court of unlimited jurisdiction (see the note after the heading of Part 3).

- 2.2** Subsection 2(2) is intended to make it clear that a court’s territorial competence is to be determined according to the rules in the Act and not according to any “common law” jurisdictional rules that the Act replaces.
- 2.3** The Act defines a court’s territorial competence “in a proceeding” (section 3). It does not define the territorial aspects of any particular remedy. Thus the Act does not supersede common law rules about the territorial limits on a remedy, such as the rule that a Canadian court generally will not issue an injunction to restrain conduct outside the court’s own province or territory.
- 2.4** The Act only defines territorial competence; it does not define subject matter competence. It is not intended to affect any rules limiting a Canadian court’s jurisdiction by reference to the amount of a claim, the subject matter of a claim, or any other factor besides territorial connections.

### **Proceedings in personam**

- 3** A court has territorial competence in a proceeding that is brought against a person only if:
- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim;
  - (b) during the course of the proceeding that person submits to the court’s jurisdiction;
  - (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
  - (d) that person is ordinarily resident in [enacting province or territory] at the time of the commencement of the proceeding; or
  - (e) there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based.

### **Comments to section 3**

- 3.1** Section 3 defines the five grounds on which a court has territorial competence in a proceeding in personam. Paragraphs (a), (b) and (c) include the three ways in which the defendant may consent to the court’s jurisdiction: by invoking the court’s jurisdiction as plaintiff, by submitting to the court’s jurisdiction during the proceedings, or by having agreed that the court shall have jurisdiction. These reflect long-standing law. Paragraphs (d) and (e) change current law, by replacing the criterion of service of process with the criterion of substantive connection with the enacting jurisdiction.
- 3.2** Paragraph (d) is effectively the replacement for the existing rule that a court has jurisdiction over any person that is served with process in the forum province or territory. Replacing service in the territory of the forum court with ordinary residence in that territory means that a person who is only temporarily in the jurisdiction will not automatically be subject to the court’s jurisdiction. For a court to take jurisdiction over a

person who is not ordinarily resident in its territory and does not consent to the court's jurisdiction, a real and substantial connection must exist within paragraph (e). The current rule, which (subject to arguments of forum non conveniens) permits a court to take jurisdiction on the basis of the defendant's presence alone, without any other connection between the forum and the litigation, will therefore no longer apply. This change in the existing rule is proposed not only on the ground of fairness, but also because the existing rule is of doubtful constitutional validity, since a defendant's mere presence in a province is probably not enough to support the constitutional authority of a province to assert judicial jurisdiction over the defendant.

- 3.3** Paragraph (e) replaces the existing rules, in the common law provinces, relating to service ex juris. Territorial competence will depend, not on whether a defendant can be served ex juris under rules of court, but on whether there is, substantively, a real and substantial connection between the enacting jurisdiction and the facts on which the proceeding in question is based. This provision would bring the law on jurisdiction into line with the concept of "properly restrained jurisdiction" that the Supreme Court of Canada, in *Morguard Investments Ltd. v. De Savoye* (1990), held was a precondition for the recognition and enforcement of a default judgment throughout Canada. The "real and substantial connection" criterion is therefore an essential complement to the uniform Enforcement of Canadian Judgments Act, which requires all Canadian judgments to be enforced without recourse to any jurisdictional test. The present Act, if adopted, will ensure that all judgments will satisfy the Supreme Court's criterion of "properly restrained" jurisdiction, which the court laid down as the indispensable requirement for a judgment to be entitled to recognition at common law throughout Canada.
- 3.4** If the present Act is adopted, rules of court will still include rules as to service of process, but these will no longer be the source and definition of the court's territorial competence. Their role will be restricted to ensuring that defendants, whether ordinarily resident in or outside the jurisdiction, receive proper notice of proceedings and a proper opportunity to be heard.

### **Proceedings with no nominate defendant**

- 4** A court has territorial competence in a proceeding that is not brought against a person or a vessel if there is a real and substantial connection between [enacting province or territory] and the facts upon which the proceeding is based.

### **Comments to section 4**

- 4.1** This section deals with several miscellaneous actions where the proceedings are "technically in personam" but there is not, or is not yet an identified "persona" whose

connection with the territory founds jurisdiction. In actions such as preliminary estate matters or correction of a corporate register, it is the proceeding rather than a nominal defendant which is the crucial factor. The section is broken out from the main section to emphasize this point.

### **Proceedings in rem**

- 5** A court has territorial competence in a proceeding that is brought against a vessel if the vessel is served or arrested in [enacting province or territory].

### **Comments to section 5**

- 5.1.1** Section 5 codifies the existing rule that jurisdiction in an action in rem, which can be brought only against a vessel, depends upon the presence of the vessel within the jurisdiction. Actions in rem are primarily brought in the Federal Court under its admiralty jurisdiction, but concurrent jurisdiction over maritime matters exists in the courts of the provinces. [The wording was amended in 1995 - see 1995 Proceedings at page 43.]

### **Residual discretion**

- 6** A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that:
- (a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding; or
  - (b) the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required.

### **Comments to section 6**

- 6.1** This section creates a residual discretion to act, notwithstanding the lack of jurisdiction under normal rules, provided that the conditions in (a) or (b) are met. Residual discretion permits the court to Act as a “forum of last resort” where there is no other forum in which the plaintiff could reasonably seek relief. The language tracks that of Article 3136 of the Quebec Civil Code. See also note 10.3.

### **Ordinary residence – corporations**

- 7** A corporation is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if:

- (a) the corporation has or is required by law to have a registered office in [enacting province of territory];
- (b) pursuant to law, it:
  - (i) has registered an address in [enacting province or territory] at which process may be served generally; or
  - (ii) has nominated an agent in [enacting province or territory] upon whom process may be served generally;
- (c) it has a place of business in [enacting province or territory]; or
- (d) its central management is exercised in [enacting province or territory].

### **Comments to section 7**

**7.1** Sections 7, 8 and 9 define ordinary residence for corporations, partnerships and unincorporated associations. They reflect, with only minor modifications, the approach that is generally taken under existing law to decide whether these defendants are present in the jurisdiction for the purposes of service.

**7.2.1** This Act contains no definition of ordinary residence for natural persons. This connecting factor is widely used in Canada (for example, as the jurisdictional criterion in the Divorce Act (Can.)), and has been judicially defined in numerous cases. It was felt that an express statutory definition would probably fail to match the existing concept and would therefore provide difficulty rather than certainty.

### **Ordinary residence – partnerships**

- 8** A partnership is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if:
- (a) the partnership has, or is required by law to have, a registered office or business address in [enacting province or territory];
  - (b) it has a place of business in [enacting province or territory]; or
  - (c) its central management is exercised in [enacting province or territory].

### **Comment to section 8**

**8.1** See comment 7.1. Partnerships are both business entities and collections of individuals. This section defines the ordinary residence of a partnership in a business sense, is analogous to the section 5 provisions on corporations, and excludes territorial competence over the partnership based on the residence of an individual partner alone.

### **Ordinary residence – unincorporated associations**

- 9** An unincorporated association is ordinarily resident in [enacting province or territory] for the purposes of this Part, only if:

- (a) an officer of the association is ordinarily resident in [enacting province or territory]: or
- (b) the association has a location in [enacting province or territory] for the purpose of conducting its activities.

## **Comment to section 9**

**9.1** See comment 7.1.

## **Real and substantial connection**

- 10** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if the proceeding:
- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in [enacting province or territory];
  - (b) concerns the administration of the estate of a deceased person in relation to:
    - (i) immovable property of the deceased person in [enacting province or territory]; or
    - (ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in [enacting province or territory];
  - (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to:
    - (i) immovable or movable property in [enacting province or territory]; or
    - (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [enacting province or territory];
  - (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
    - (i) the trust assets include immovable or movable property in [enacting province or territory] and the relief claimed is only as to that property;
    - (ii) that trustee is ordinarily resident in [enacting province or territory];
    - (iii) the administration of the trust is principally carried on in [enacting province or territory];
    - (iv) by the express terms of a trust document, the trust is governed by the law of [enacting province or territory];
  - (e) concerns contractual obligations, and:
    - (i) the contractual obligations, to a substantial extent, were to be performed in [enacting province or territory];
    - (ii) by its express terms, the contract is governed by the law of [enacting province or territory]; or
    - (iii) the contract:

- (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession; and
- (B) resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller;
- (f) concerns restitutionary obligations that, to a substantial extent, arose in [enacting province or territory];
- (g) concerns a tort committed in [enacting province or territory];
- (h) concerns a business carried on in [enacting province or territory];
- (i) is a claim for an injunction ordering a party to do or refrain from doing anything:
  - (i) in [enacting province or territory]; or
  - (ii) in relation to immovable or movable property in [enacting province or territory];
- (j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [enacting province or territory];
- (k) is for enforcement of a judgment of a court made in or outside [enacting province or territory] or an arbitral award made in or outside [enacting province or territory]; or
- (l) is for the recovery of taxes or other indebtedness and is brought by the Crown [of the enacting province or territory] or by a local authority [of the enacting province or territory].

## **Comment to section 10**

- 10.1** The purpose of section 10 is to provide guidance to the meaning of “real and substantial connection” in paragraph 3(e). Instead of having to show in each case that a real and substantial connection exists, plaintiffs will be able, in the great majority of cases, to rely on one of the presumptions in section 10. These are based on the grounds for service ex juris in the rules of court of many provinces. If the defined connection with the enacting jurisdiction exists, it is presumed to be sufficient to establish territorial competence under paragraph 3(e).
- 10.2** A defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial. Conversely, a plaintiff whose claim does not fall within any of the paragraphs of section 10 will have the right to argue that the facts of the particular case do have a real and substantial connection with the enacting jurisdiction so as to give its courts territorial competence under paragraph 3(e). For example, a plaintiff may argue that the “place of contracting” is such a significant factor in a contract action that the forum in which the contract was formed should exercise territorial competence. In many cases, questions of validity and performance arise at the same time and are intermingled. In an appropriate case, where only the question of formal validity of a contract is an issue, it would open to the plaintiff to argue that the court should take jurisdiction even though the plaintiff cannot invoke the presumption set out for other factors.

**10.3** One common ground for service ex juris is not found among the presumed real and substantial connections in section 10, namely, that the defendant is a necessary or proper party to an action brought against a person served in the jurisdiction. The reason is that such a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction. If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present under paragraph 3(d). Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person. The proceeding against the second person will have to meet the real and substantial connection test in paragraph 3(e).

Section 4.1, residual discretion, also provides a basis upon which jurisdiction can be exercised over a necessary and proper party who cannot be caught under the normal rules. A plaintiff seeking to bring in such a party would argue first, that there is a real and substantial connection between the territory and the party, or secondly that there is no other forum in which the plaintiff can or can reasonably be required to seek relief against that party.

**10.4** Section 10 does not include any presumptions relating to proceedings concerned with family law. Since territorial competence in these proceedings is usually governed by special statutes, it was felt that express rules in section 10 would lead to confusion and uncertainty because they would often be at variance with the rules in those statutes, which may have priority by virtue of section 10. For this reason it was felt better to leave the matter of territorial competence for the special family law statutes. If the question of territorial competence in a particular family matter was not dealt with in a special statute, the general rules in section 3 of this Act, including ordinary residence and real and substantial connection, would govern.

**10.5** Section 8 lists only those factors which give rise to the presumption. Factors such as “the defendant has property within the Province” which now exist as a basis for service ex juris, are deliberately excluded from the list and the operation of the presumption.

### **Discretion as to the exercise of territorial competence**

- 11(1)** After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
- (2) A court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including:
- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
  - (b) the law to be applied to issues in the proceeding;

- (c) the desirability of avoiding multiplicity of legal proceedings;
- (d) the desirability of avoiding conflicting decisions in different courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole.

### **Comments to section 11**

- 11.1** Section 11 is meant to codify the doctrine of forum non conveniens, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia* (1993). The language of subsection 11(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 11(2) as relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past.
- 11.2** The discretion in section 11 to decline the exercise of territorial competence is defined without reference to whether a defendant was served in the enacting jurisdiction or ex juris. This is consistent with the approach in Part 2 as a whole, which renders the place of service irrelevant to the substantive rules of jurisdiction. It is also consistent with the Supreme Court's statement in the *Amchem* case that there was no reason in principle to differentiate between declining jurisdiction where service was in the jurisdiction and where it was ex juris.

### **Conflicts or inconsistencies with other Acts**

- 12** If there is a conflict or inconsistency between this Part and another Act of [enacting province or territory] or of Canada that expressly:
- (a) confers jurisdiction or territorial competence on a court; or
  - (b) denies jurisdiction or territorial competence to a court, that other Act prevails.

### **Comment to section 12**

- 12.1** This section is square bracketed so that the enacting jurisdiction will consider the following matters. The Uniform Act is intended to be a comprehensive statement of the substantive law of Court Jurisdiction. The statute codifies the rules and is looked to as the source of those rules. Exceptions clearly compromise that comprehensiveness. However, there may be special provisions, particularly in the family law area, which are inconsistent with the Act and are to be preserved. Those statutes can be listed specifically as exceptions to the operation of the Act. As a last resort, where an enacting jurisdiction cannot specifically list the exceptions, but is convinced that they exist, this section may be included.

- 12.2** As noted above (comment 2.1), section 12, if enacted, preserves any limitation or extension of the territorial competence of a particular court that is provided, either expressly by implication, in another statute.

### **PART 3: Transfer of a Proceeding**

**[Note: For “[superior court]” throughout this Part, each [enacting province or territory] will substitute the name of its court of unlimited trial jurisdiction]**

#### **General provisions applicable to transfers**

- 13(1)** The [superior court], in accordance with this Part, may:
- (a) transfer a proceeding to a court outside [enacting province or territory]; or
  - (b) accept a transfer of a proceeding from a court outside [enacting province or territory].
- (2) A power given under this part to the [superior court] to transfer a proceeding to a court outside [enacting province or territory] includes the power to transfer part of the proceeding to that court.
- (3) A power given under this Part to the [superior court] to accept a proceeding from a court outside [enacting province or territory] includes the power to accept part of the proceeding from that court.
- (4) If anything relating to a transfer of a proceeding is or ought to be done in the [superior court] or in another court of [enacting province or territory] on appeal from the [superior court], the transfer is governed by the provisions of this Part.
- (5) If anything relating to a transfer of a proceeding is or ought to be done in a court outside [enacting province or territory], the [superior court], despite any differences between this Part and the rules applicable in the court outside [enacting province or territory], may transfer or accept a transfer of the proceeding if the [superior court] considers that the differences do not:
- (a) impair the effectiveness of the transfer; or
  - (b) inhibit the fair and proper conduct of the proceeding.

#### **Comments to section 13**

- 13.1** Part 3 sets up a mechanism through which the superior court of general jurisdiction in the enacting province or territory can - acting in cooperation with a court of another province, territory or state - move a proceeding out of a court that is not an appropriate forum into a court that is a more appropriate forum. Under current law, if a court thinks the proceeding would be more appropriately heard in a different court, its only option is to decline jurisdiction and force the plaintiff to recommence the proceeding in the other court if the plaintiff wishes and is able to do so. The transfer mechanism would accomplish the same purpose more directly, by preserving whatever has already been

done in the old forum and simply continuing the proceeding in the new forum. It is therefore designed to avoid waste, duplication, and delay.

- 13.2** The present draft Act, like the Uniform Transfer of Litigation Act (UTLA) promulgated by the Uniformity Commissioners in the United States, allows for transfers not only to and from courts within Canada but also to and from courts in foreign nations. There was extensive debate at the Conference on whether this was appropriate. Two principal arguments were made against it. First, Canadian courts should not, it was argued, be given the power to relegate litigants to foreign legal systems that might be very different from our own, where the standards of justice might not be comparable, and which could not be openly evaluated by a Canadian court without the risk of embarrassment to Canada. Secondly, cooperation between a Canadian court and a foreign court should not be possible in the absence of authorization, in a treaty, by the two nations involved.

The primary response made to the first argument was that the transfer mechanism could not force a litigant into a foreign legal system any more than the present law does. It will nearly always be a plaintiff who is forced to accept a transfer. There is no practical difference between a plaintiff being “forced” into a foreign court by means of a stay of Canadian proceedings, as the current law allows, and being “forced” there by a transfer. Arguments about the suitability of the foreign court, and the likelihood of justice being done there, can arise under the present system just as they could under the transfer mechanism. And, of course, plaintiffs can never be “forced” to pursue the proceeding in another court if they do not wish to do so. In a small minority of cases it may be, not the plaintiff, but the defendant (or a third party) who is “forced” into a foreign court by a transfer (for example, at the behest of a co-defendant). Even in those cases there is no practical difference, in terms of the effect on the defendant’s rights, between being transferred into the foreign court and being sued there in the first place.

As for the second argument, the main response was that the proposed transfer mechanism did not by-pass the proper route of a treaty any more than do the present uniform statutes on the reciprocal enforcement of judgments and of maintenance orders. These result in the enforcement of foreign court orders in Canada, and vice-versa, through the combined operation of foreign and Canadian court systems, each operating by authority of the legislature in its jurisdiction.

It was also argued, in support of the present scope of the draft, that a transfer mechanism would be much more valuable if it allowed a Canadian court to request transfers to, and accept transfers from, courts in the United States and elsewhere. In each case the Canadian court would have a completely free discretion to decide whether the ends of justice would be served by requesting the outbound transfer or accepting the inbound transfer. The Conference, by a majority, decided not to restrict the present draft Act to transfers within Canada.

- 13.3** Section 13 provides the framework for all the other provisions of Part 3. Whether the transfer is from the domestic court to the extraprovincial court (paragraph 13(1)(a)) or from an extraprovincial court to the domestic court (paragraph 13(1)(b)), the Act only

purports to regulate those aspects of the transfer that relate to the domestic court (or a court on appeal from the domestic court, referred to in subsection 13(4)). The provisions of Part 3 are drafted so that they do not purport to lay down any rules for the courts of the other jurisdiction that is involved in the transfer. It may be that the other jurisdiction's rules for accepting or initiating transfers differ from those in the present Act. In that event, subsection 13(5) provides that the domestic court can transfer (i.e. initiate the transfer) to, or accept a transfer from, the other jurisdiction if the differences do not impair the effectiveness of the transfer or the fairness of the proceeding.

### **Grounds for an order transferring a proceeding**

- 14(1) The [superior court] by order may request a court outside [enacting province or territory] to accept a transfer of a proceeding in which the [superior court] has both territorial and subject matter competence if [superior court] is satisfied that:
  - (a) the receiving court has subject matter competence in the proceeding; and
  - (b) under section 13, the receiving court is a more appropriate forum for the proceeding than the [superior court].
- (2) The [superior court] by order may request a court outside [enacting province or territory] to accept a transfer of a proceeding, in which the [superior court] lacks territorial or subject matter competence if the [superior court] is satisfied that the receiving court has both territorial and subject matter competence in the proceeding.
- (3) In deciding whether a court outside [enacting province or territory] has territorial or subject matter competence in a proceeding, the [superior court] must apply the laws of the state in which the court outside [enacting province or territory] is established.

### **Comments to section 14**

- 14.1 A key feature of the transfer provisions, which is taken from UTLA, is a transfer may be made so long as either the transferring or the receiving court has territorial competence over the proceeding. The receiving court must always have subject matter competence; in other words it cannot, by virtue of a transfer, acquire jurisdiction to hear a type of case that it usually has no jurisdiction to entertain. But it can, by virtue of a transfer, hear a case over which it would not otherwise have territorial competence, so long as the court that initiated the transfer did have territorial competence. It should be noted in this connection that all that Part 3 does is to make a transfer to the receiving court possible. It does not guarantee that the receiving court's eventual judgment will be recognized in the transferring court – or anywhere else – as binding on a party who refuses to take part in the continued proceeding in the receiving court. As a practical matter, a transferring court would be most unlikely to grant the application for a transfer in the first place, if it appeared that the outcome might be a judgment that was unenforceable against a party opposing the transfer.

- 14.2** Subsection 14(1) deals with an outbound transfer where the domestic court has territorial as well as subject matter competence. The receiving court need only have subject matter competence, and be a more appropriate forum under the principles in section 11.
- 14.3** Subsection 14(2) authorizes an outbound transfer where the domestic court lacks territorial or subject matter competence, but the receiving court is possessed of both.
- 14.4** In relation to subsection 14(2), it may seem curious that a court that lacks competence to hear the case can nevertheless “bind” the parties by requesting a transfer. In reality, however, the transferring court’s request does not “bind” anyone. It only sets in motion a process whereby the receiving court can agree to take the proceeding. It is the receiving court’s acceptance of the transfer that “binds” the parties - which, since it has full competence (under its own rules - subsection 14(3)), is no more than that court could have done if the proceeding had originally started there.

### **Provisions relating to the transfer order**

- 15(1)** In an order requesting a court outside [enacting province or territory] to accept a transfer of a proceeding, the [superior court] must state the reasons for the request.
- (2) The order may:
- (a) be made on application of a party to the proceeding;
  - (b) impose conditions precedent to the transfer;
  - (c) contain terms concerning the further conduct of the proceeding; and
  - (d) provide for the return of the proceeding to the [superior court] on the occurrence of specified events.
- (3) On its own motion, or if asked by the receiving court, the [superior court], on or after making an order requesting a court outside [enacting province or territory] to accept a transfer of a proceeding, may:
- (a) send to the receiving court relevant portions of the record to aid that court in deciding whether to accept the transfer or to supplement material previously sent by the [superior court] to the receiving court in support of the order; or
  - (b) by order, rescind or modify one or more terms of the order requesting acceptance of the transfer.

### **Comments to section 15**

- 15.1** Section 15 deals with the order of the superior court of the enacting jurisdiction, requesting another court to accept a transfer. Rules of court will provide the procedure for a party to apply for a transfer, as referred to by paragraph 15(2)(a). The rules of court

will also deal with matters such as notice to the other parties and the opportunity to be heard.

- 15.2** The superior court is free to attach whatever conditions it thinks fit to the request for a transfer. These may be conditions precedent to the transfer's taking place (paragraph 15(2)(b)) or terms as to the further conduct of the proceeding (paragraph 15(2)(c)). The superior court may also stipulate that the proceeding is to return to it on the occurrence of certain events (paragraph 15(2)(c)). The receiving court is free to accept or refuse the transfer on those conditions. Subsection 15(3) contemplates that the receiving court may ask the superior court if it will modify a term of the transfer as requested, and gives the superior court the power to do so.

### **[Superior court's] discretion to accept or refuse a transfer**

- 16(1)** After the filing of a request made by a court outside [enacting province or territory] to transfer to the [superior court] a proceeding brought against a person in the transferring court, the [superior court] by order may :
- (a) accept the transfer, subject to subsection (4), if both of the following requirements are fulfilled:
    - (i) either the [superior court] or the transferring court has territorial competence in the proceeding ;
    - (ii) the [superior court] has subject matter competence in the proceeding; or
  - (b) refuse to accept the transfer for any reason that the [superior court] considers just, regardless of the fulfillment of the requirements of paragraph (a).
- (2) The [superior court] must give reasons for an order under subsection (1)(b) refusing to accept the transfer of a proceeding.
- (3) Any party to the proceeding brought in the transferring court may apply to the [superior court] for an order accepting or refusing the transfer to the [superior court] of the proceeding.
- (4) The [superior court] may not make an order accepting the transfer of a proceeding if a condition precedent to the transfer imposed by the transferring court has not been fulfilled.

### **Comments to section 16**

- 16.1** Section 16 provides for the superior court's response to a request to accept a transfer from another court. It may accept the inbound transfer, provided that it is satisfied that the requirements of territorial and subject matter competence are satisfied. Those requirements, contained in paragraph 16(1)(a), parallel those in section 16 dealing with the superior court's requesting an outbound transfer. Either the transferring court or the (receiving) superior court must have territorial competence, and the superior court must have subject matter competence.

- 16.2** The superior court is completely free to refuse the transfer even if the requirements of territorial and subject matter competence are met (paragraph 16(1)(b)), but must give reasons for doing so (subsection 16(2)).
- 16.3** Rules of court will supplement the provision in subsection 16(3) under which a party may apply to the superior court to have it accept or refuse a transfer.
- 16.4** If a condition precedent to the transfer, as set by the transferring court, is not fulfilled the superior court may not accept the transfer (subsection 16(4)). It would need to ask the transferring court to modify or remove the condition precedent, as contemplated (for outbound transfers) in paragraph 15(3)(b).

### **Effect of transfers to or from [superior court]**

- 17** A transfer of a proceeding to or from the [superior court] takes effect for all purposes of the law of [enacting province or territory] when an order made by the receiving court accepting the transfer is filed in the transferring court.

### **Comments to section 17**

- 17.1** The time when a transfer – whether inbound or outbound – takes effect is **Transfers to courts outside [enacting province or territory]**.
- 18(1)** On a transfer of a proceeding from the [superior court] taking effect :
- (a) the [superior court] must send relevant portions of the record, if not sent previously, to the receiving court; and
  - (b) subject to section 17 (2) and (3), the proceeding continues in the receiving court.
- (2) After the transfer of a proceeding from the [superior court] takes effect, the [superior court] may make an order with respect to a procedure that was pending in the proceeding at the time of the transfer only if:
- (a) it is unreasonable or impracticable for a party to apply to the receiving court for the order; and
  - (b) the order is necessary for the fair and proper conduct of the proceeding in the receiving court.
- (3) After the transfer of a proceeding from the [superior court] takes effect, the [superior court] may discharge or amend an order made in the proceeding before the transfer took effect only if the receiving court lacks territorial competence to discharge or amend the order.

### **Comments to section 18**

- 18.1** See the comments to section 19.

### **Transfers to [superior court]**

- 19(1) On a transfer of a proceeding to the [superior court] taking effect, the proceeding continues in the [superior court].
- (2) A procedure completed in a proceeding in the transferring court before transfer of the proceeding to the [superior court] has the same effect in the [superior court] as in the transferring court, unless the [superior court] otherwise orders.
- (3) If a procedure is pending in a proceeding at the time of the transfer of the proceeding to the [superior court] takes effect, the procedure must be completed in the [superior court] in accordance with the rules of the transferring court, measuring applicable time limits as if the procedure had been initiated 10 days after the transfer took effect, unless the [superior court] otherwise orders.
- (4) After the transfer of a proceeding to the [superior court] takes effect, the [superior court] may discharge or amend an order made in the proceeding by the transferring court.
- (5) An order of the transferring court that is in force at the time the transfer of a proceeding to the [superior court] takes effect remains in force after the transfer until discharged or amended by:
  - (a) the transferring court, if the [superior court] lacks territorial competence to discharge or amend the order; or
  - (b) the [superior court], in any other case.

## **Comments to section 19**

- 19.1** An instantaneous transfer, in all respects, of a legal proceeding from one court to another would be ideal but obviously cannot be fully realized in practice. Sections 18 and 19 deal with the procedures that are completed before the transfer, procedures that are pending at the time of transfer, and orders that have been made before the transfer takes effect.
- 19.2** Subsection 18(1)(b) and subsection 19(1) define the effect of a transfer for, respectively, outbound and inbound transfers: the proceeding continues in the receiving court.
- 19.3** A procedure that is completed before the transfer takes effect is simply given the same effect in the receiving court as it had in the transferring court, subject to the receiving court's right to change that effect (subsection 19(2)). (There is no need for an equivalent for outbound transfers.)
- 19.4** If a procedure is pending at the time a transfer takes effect, the transferring court retains power to make an order in respect of that procedure only in the limited circumstances defined in subsection 18(2) (for outbound transfers). The general rule is that the procedure must be completed in the receiving court. Subsection 19(3) provides (for inbound transfers) that it must be completed according to the rules of the transferring court and that relevant time limits run from 10 days after the transfer takes effect unless the court orders otherwise.
- 19.5** An order made before the transfer takes effect continues in effect until the receiving court discharges or amends it (subsections 19(4) and (5) for inbound transfers). The

transferring court has no power to discharge or amend such an order unless the receiving court lacks the territorial competence to do so (subsection 18(3), for outbound transfers, and paragraph 19(5)(a) for inbound transfers). The latter situation might arise, for example, with respect to injunctions relating to things to be done or not done in the territory of the transferring court.

### **Return of a proceeding after transfer**

- 20(1)** After the transfer of a proceeding to the [superior court] takes effect, the [superior court] must order the return of the proceeding to the court from which the proceeding was received if:
- (a) the terms of the transfer provide for the return;
  - (b) both the [superior court] and the court from which the proceeding was received lack territorial competence in the proceeding; or
  - (c) the [superior court] lacks subject matter competence in the proceeding.
- (2) If a court to which the [superior court] has transferred a proceeding orders that the proceeding be returned to the [superior court] in any of the circumstances referred to in subsection (1) (a), (b) or (c), or in similar circumstances, the [superior court] must accept the return.
- (3) When a return order is filed in the [superior court], the returned proceeding continues in the [superior court].

### **Comments on section 20**

**20.1** A return of a transfer may be necessary for two reasons. The terms of the original order requesting the transfer may require the return if certain events occur (paragraph 20(1)(a), dealing with the return of inbound transfers; compare paragraph 15(2)(c), giving power to impose such terms in outbound transfers). Or it may appear, after the receiving court has accepted the transfer, that the transfer was in fact unauthorized because a requirement of territorial or subject matter competence was not satisfied (paragraphs 20(1)(b) and (c), dealing with the return of inbound transfers).

**20.2** A return may not be refused by the court to which the proceeding is returned (subsection 20(2), dealing with the return of outbound transfers), because the receiving court cannot retain the proceeding and the only place the proceeding can therefore be located is the transferring court. If that court lacks territorial or subject matter competence over the proceeding, the return of the proceeding may be simply for the purposes of dismissal.

### **Appeals**

- 21(1)** After the transfer of a proceeding to the [superior court] takes effect, an order of the transferring court, except the order requesting the transfer, may be appealed in [enacting province or territory] with leave of the court of appeal of the receiving court as if the order had been made by the [superior court].

- (2) A decision of a court outside [enacting province or territory] to accept the transfer of a proceeding from the [superior court] may not be appealed in [enacting province or territory].
- (3) If, at the time that the transfer of a proceeding from the [superior court] takes effect, an appeal is pending in [enacting province or territory] from an order of the [superior court], the court in which the appeal is pending may conclude the appeal only if:
  - (a) it is unreasonable or impracticable for the appeal to be recommenced in the state of the receiving court; and
  - (b) a resolution of the appeal is necessary for the fair and proper conduct of the continued proceeding in the receiving court.

### **Comments to section 21**

- 21.1** Some provinces do not require leave to appeal in respect of interlocutory orders. For those provinces, the section introduces a leave requirement in a small defined class of cases, namely, interlocutory orders granted before the transfer order takes effect. Such orders can be appealed in the receiving court only if leave of the Court of Appeal of the receiving court is obtained. An interlocutory order granted by the receiving court, after the transfer order, may be appealed in the normal manner appropriate to the appeal of interlocutory orders in that province or territory.
- 21.2** Section 21, like sections 18 and 19, deals with a practical difficulty when a transfer takes effect. In principle, consistently with the policy of a complete continuance of the proceeding in the receiving court, appeals from any order made in the proceeding must be taken there (subsection 21(1), dealing with inbound transfers). The order requesting the transfer, however, can be appealed only in the transferring court, not the receiving court (the exception in subsection 21(1)). Likewise, the order accepting the transfer can be appealed only in the receiving court, not the transferring court (subsection 21(2), dealing with outbound transfers).
- 21.3** Pending appeals raise the same kind of difficulty as the pending procedures dealt with by subsections 18(2) and 19(3). The solution adopted in subsection 21(3) (dealing with outbound transfers) is the same as that adopted in those sections for pending procedures, namely, that the appeal court in the transferring jurisdiction should be able to complete an appeal if, and only if, that is a practical necessity.

### **Departure from a term of transfer**

- 22** After the transfer of a proceeding to the [superior court] takes effect, the [superior court] may depart from terms specified by the transferring court in the transfer order, if it is just and reasonable to do so.

## **Comment to section 22**

**22.1** Once a transfer has taken effect, it is appropriate to give the receiving court a discretion to depart from terms specified in the transfer order by the transferring court. Circumstances may arise that the transferring court had not anticipated, or the terms in its transfer order may turn out to be impractical, or the parties may agree on the alteration of a term of the transfer.

## **Limitations and time periods**

- 23(1)** In a proceeding transferred to the [superior court] from a court outside [enacting province or territory], and despite any enactment imposing a limitation period, the [superior court] must not hold a claim barred because of a limitation period if:
- (a) the claim would not be barred under the limitation rule that would be applied by the transferring court; and
  - (b) at the time the transfer took effect, the transferring court had both territorial and subject matter competence in the proceeding.
- (2) After a transfer of a proceeding to the [superior court] takes effect, the [superior court] must treat a procedure commenced on a certain date in a proceeding in the transferring court as if the procedure had been commenced in the [superior court] on the same date.

## **Comments to section 23**

**23.1** Subsection 23(1), dealing with inbound transfers, ensures that a limitation defence that would have been unavailable in the transferring court cannot be invoked in the receiving court after the transfer takes effect. The rule is limited to cases where the transferring court could itself have heard the case; in other words, where it had both territorial and subject matter competence.

**23.2** Subsection 23(2), also dealing with inbound transfers, is needed so that the sequence of dates on which procedures were commenced in the transferring court is preserved intact after the transfer takes effect. If, however, a procedure is pending at the time of transfer, the special rule of subsection 19(3) applies to determine the time when the procedure must be completed.

## **PRIVATE INTERNATIONAL LAW**

### **EXECUTIVE SUMMARY**

#### **A. INTRODUCTION**

This Report deals with two matters arising out of the Supreme Court of Canada decision in *Tolofson v. Jensen*; *Lucas v. Gagnon*, namely choice of law for tort and the characterization of limitation periods, and with jurisdiction simpliciter and the concept of real and substantial connection pertaining thereto.

#### **B. AN EXCEPTION FOR THE CHOICE OF LAW RULE FOR TORT**

Until 1994 in tort actions, which are actions having to do with civil wrongs, such as negligence, trespass, and defamation, Canadian courts applied the law of the forum to the determination of substantive (as opposed to procedural) issues; that is to say, a Manitoba court applied the law of Manitoba.

In 1994 the Supreme Court of Canada decided that courts are to apply the law of the country of the wrong, without exception. The decision has been criticized for not including a flexible exception of the general rule, where applying the law of the country of the wrong results in an injustice. The Commission recommends enactment of legislation codifying the *Tolofson* general rule, with some greater specificity, and empowering Manitoba courts in exceptional circumstances to apply some other law than the law of the country of the wrong in order to do justice.

#### **C. LIMITATION PERIODS**

The 1994 decision of the Supreme Court of Canada also changed the law regarding limitation periods within which civil actions can be commenced. Prior to 1994 courts applied the limitation period of the law of the forum, in other words, their own law, even if foreign law, so called, was applicable to decide the dispute. Now, the governing limitation period is that of the law to be applied to decide the dispute. The Commission is working on a sweeping revision of *The Limitation of Actions Act of Manitoba*, and recommends the inclusion in a revised Act of a section codifying the Supreme Court decision in this regard.

#### **D. JURISDICTION SIMPLICITER**

Thirdly, the Report deals with the establishment of jurisdiction of the Court of Queen's Bench in cases where a defendant has had to be served with the Statement of Claim somewhere other than in Manitoba. Currently, the case law is in an uncertain state, resulting in costly contestations, which could be obviated by clarifying legislation.

The Report recommends that Manitoba follow British Columbia, Saskatchewan, Nova Scotia, Yukon, and likely Alberta and Ontario, to enact the model Act of the Uniform Law Conference of Canada titled the Uniform Court Jurisdiction and Transfer Proceedings Act.

# DROIT INTERNATIONAL PRIVÉ

## SOMMAIRE

### A. INTRODUCTION

Le présent rapport traite de deux questions découlant de la décision de la Cour suprême du Canada dans les affaires *Tolofson c. Jensen* et *Lucas c. Gagnon*, soit le choix de la loi applicable aux délits et la qualification des délais de prescription. Le rapport traite également de la simple reconnaissance de compétence et du concept du lien réel et substantiel qui s'y rapporte.

### B. UNE EXCEPTION À LA RÈGLE DU CHOIX DE LA LOI APPLICABLE AUX DÉLITS CIVILS

Jusqu'en 1994, dans les actions en responsabilité délictuelle, qui sont des actions liées à des délits civils tels que la négligence, l'atteinte directe et la diffamation, les tribunaux canadiens appliquaient la loi du for pour le règlement des questions de fond (par opposition aux questions de procédure). En d'autres termes, les tribunaux du Manitoba appliquaient la loi du Manitoba.

En 1994, la Cour suprême du Canada a décidé que les tribunaux doivent appliquer la loi du pays où le préjudice est survenu, sans exception. La décision a été critiquée, car elle ne comporte pas d'exception souple à la règle générale pour les cas où l'application de la loi du pays dans lequel le préjudice est survenu entraînerait une injustice. La Commission recommande l'adoption d'une loi codifiant la règle générale issue de l'affaire *Tolofson*, mais avec plus de détails. Elle recommande aussi d'autoriser les tribunaux manitobains à appliquer, dans des circonstances exceptionnelles, une loi autre que celle du pays où le préjudice est survenu pour que justice soit faite.

### C. DÉLAI DE PRESCRIPTION

La décision de 1994 de la Cour suprême du Canada a aussi changé la loi à l'égard du délai de prescription dans lequel une poursuite civile peut être intentée. Avant 1994, les tribunaux appliquaient le délai de prescription selon la loi du for, c'est-à-dire, selon leur propre loi, même si la loi « étrangère » était la loi applicable pour régler la dispute. Aujourd'hui, le délai de prescription applicable est celui découlant de la loi qu'on doit appliquer pour régler la dispute. La Commission est en train d'examiner en entier la *Loi sur la prescription* du Manitoba, et recommande l'inclusion dans la *Loi* modifiée d'une section codifiant la décision de la Cour suprême à cet égard.

### D. SIMPLE RECONNAISSANCE DE COMPÉTENCE

Troisièmement, le rapport porte sur la reconnaissance de la compétence de la Cour du Banc de la Reine dans les cas où un défendeur se voit signifier une déclaration à

l'extérieur du Manitoba. Actuellement, la jurisprudence à cet égard est incertaine, ce qui mène à des contestations coûteuses qu'on pourrait éviter en éclaircissant la loi.

Dans le rapport, la Commission recommande que le Manitoba suive l'exemple de la Colombie-Britannique, de la Saskatchewan, de la Nouvelle-Écosse, du Yukon et possiblement de l'Alberta et de l'Ontario, en adoptant la loi type de la Conférence pour l'harmonisation des lois au Canada intitulée la *Loi sur la compétence des tribunaux et le transfert des actions*.