# Interprovincial Product Liability Litigation:

## Jurisdiction, Enforcement and Choice of Law

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Consumer and Corporate Affairs Canada

Consommation et Corporations Canada

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# INTERPROVINCIAL PRODUCT LIABILITY LITIGATION: JURISDICTION, ENFORCEMENT AND CHOICE OF LAW

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**The analysis and conclusions of this study do not necessarily reflect the views of the Department.**

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## FOREWORD

The legal problems which may confront, and ultimately confound, the consumer who purchases a defective product in province A which was manufactured in province B are complex. Such problems can be further complicated by numerous other factors such as the relocation of the consumer to province C or the occurrence of the defect in yet another province. If the disgruntled consumer wishes to pursue a legal claim against the manufacturer, in which province does he do so? Who has jurisdiction? Where and to what extent can the consumer enforce any judgment? And, which provincial laws apply?

Ultimately, there are very real and substantial considerations of cost-benefit which any potential consumer litigant must face in pursuit of his claim.

Professor Sharpe of the University of Toronto Faculty of Law was invited to address these and related questions in the study which follows. Professor Sharpe brings to this task an extensive background in litigation. The result is a worthwhile and timely contribution to the continuing product liability law reform debate.

It should be noted that the perspective of this study is from that of the common law provinces. A separate study concerning interprovincial litigation in the context of Quebec's civil law is expected to be released at the end of this year -- 1981.

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## SUMMARY

This paper canvasses three legal issues which arise in the context of litigation involving goods which have entered the flow of interprovincial trade.

This entire area of concern may be conveniently broken down into three areas which correspond with the three chapters of this study.

### 1. Jurisdiction

The first issue is to determine when an injured party may invoke the machinery of a court in one province against a defendant who is outside the borders of that province. Under present law, there are two possibilities. First, if a corporate defendant "carries on business" in the province, service may be made upon him at that place of business. However, the courts have given this rule a narrow construction, and unless the defendant has a substantial presence in the province with officers capable of making binding decisions on its behalf, service will not be permitted.

If the defendant cannot be served within the jurisdiction, the plaintiff will have to satisfy the rules of court relating to service outside the jurisdiction. The provincial rules in this area vary. All provinces except Nova Scotia and Prince Edward Island have "pigeon-hole" rules, in other words, rules which list certain categories into which the plaintiff must be able to fit his particular situation to justify service upon the extra-provincial defendant. The categories relevant in products cases are discussed in detail, and provincial variations are noted.

As the result of the Supreme Court decision in Moran v. Pyle in 1975, a plaintiff suing in tort will be able to serve an extra-provincial defendant if the plaintiff suffered damage within the jurisdiction, and that jurisdiction was one which was reasonably foreseeable to the foreign defendant.

On the other hand, contract claims will not be resolved on the same basis as the contract is usually considered to have been breached at the point of shipment. This forces the plaintiff to sue elsewhere.

While there has been a marked tendency to liberalize service out of the jurisdiction rules and to interpret them broadly, a plaintiff still must be able to fit his case within one of the "pigeon-holes." Failing this, he will have to sue the extra-provincial defendant elsewhere.

Chapter I concludes with a recommendation that service out of the jurisdiction rules be modified to take into account the modern realities of products which freely cross interprovincial borders to make sure that in all consumer cases, an injured plaintiff is able to sue in a domestic forum foreign manufacturers and suppliers who should reasonably foresee the entry of their product into the markets of the consumer's province. As between an injured consumer and a manufacturer or distributor who exploits a market, it seems more reasonable to impose the risk of extra-provincial litigation on the latter.

## 2. Enforcement

The second issue is to determine when the courts of one province will enforce a judgment rendered by the courts of another province. In this area, the judgments of another province are treated as being as foreign as the judgments of a truly foreign state. The issue of enforcement is determined by the law and in the courts of the province in which enforcement is sought. A separate action or proceeding must be brought in that province. While reciprocal enforcement legislation is in force in the common law provinces, it is purely procedural and does not extend the grounds for enforcement beyong common law principles.

Common law enforcement rules have remained unchanged since they were developed in nineteenth century England. A foreign judgment or the judgment of another province will only be recognised when the defendant was physically present within the province rendering judgment when the action was commenced (in the case of a corporation, carrying on business in that province), or where the defendant voluntarily submitted to the jurisdiction of the courts of the other province. It is completely irrelevant that the province in which enforcement is sought would have taken jurisdiction in a similar case under its own service out of the jurisdiction rule.

Clearly, these narrow enforcement rules take no account of Confederation. They have remained unchanged since their evolution in nineteenth century England when fundamentally different commercial and political forces were involved. The practical effect of narrow enforcement rules is that unless the out-of-province defendant agrees to defend in the plaintiff's province, the plaintiff is compelled to sue in the defendant's province.

This chapter concludes with a recommendation that steps be taken to develop a cooperative scheme of enforcement throughout Canada based on the broad principle that a judgment from the courts of a sister province should be recognised where there was a reasonable basis for assertion of jurisdiction over the out-of-province defendant. This would mean that the plaintiff would have not only initial access to his domestic courts, but also that such access would be meaningful. It is argued that foreign manufacturers who market their goods, reasonably foreseeing that they would reach the province of the plaintiff, should be required to defend their conduct in that province. As between an injured plaintiff and a manufacturer or distributor, it is argued that the latter is in a better position than the former to bear and spread the risk of litigation in another province.

### 3. Choice of Law

The third issue is to determine which provincial substantive law rule will be applied to determine liability. Legal rules distinguish between the assumption of jurisdiction, and the application of substantive law (i.e., the rules which determine the issue of liability). Although a court considers itself competent to hear a case, the circumstances will often require that the dispute be resolved according to the law of some other state or province.

In product liability cases, two "choice of law" rules, fundamentally different in nature, must be considered. With respect to tort claims, the rule is that the tort must be: (a) actionable according to the law of the province where suit is brought, and (b) not justifiable by the law of the province where the tort is committed. While there is doubt as to the actual meaning of aspects of this rule, the net result of its application is that the plaintiff can do no better than the law of the province in which he sues. As indicated in Chapter II, because of narrow enforcement rules, the plaintiff often must sue the defendant in his own province. This means then that the plaintiff must not only bear the expense of suit in another province, but also that he will find himself bound by the law of that province, even though his claim relates to a product consciously marketed in the plaintiff's province by the foreign defendant.

In the case of contractual claims the rule is considerably more flexible. The courts apply the "proper law of the contract," or the law of the province which has the most significant relationship with the transaction.

The problem of choice of law has been dormant in product liability cases because of uniformity of law across the common law provinces. However, it is bound to become significant as a varying pattern of provincial statutes imposing stricter forms of liability emerges.

The third chapter contains a detailed review of the common law position and then considers solutions offered by American choice of law doctrine and the Hague Convention on the Law Applicable to Products Liability.

The conclusion reached is that the most satisfactory solution would be to permit the plaintiff to have the benefit of the most favourable law, i.e., a choice of the law of the place of manufacture of the product, the place at which the product was acquired or the place in which injury occurred. To prevent hardship or harshness to manufacturers and distributors, this rule could be qualified by providing that only a jurisdiction which was reasonably foreseeable to the defendant should have its law applied.

The general conclusion of the study is that because nineteenth century legal rules have been retained, an injured plaintiff will often be forced to sue in the defendant's province and have his rights determined by the law of the defendant's province, notwithstanding the fact that the defendant knew or encouraged the sale of products in the plaintiff's province. It is suggested that this situation is unsatisfactory and that the reforms suggested would redress this imbalance.

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## INTRODUCTION

The purpose of this paper is to examine certain problems which arise in the context of litigation involving goods which have entered the flow of interprovincial trade.

This entire area of concern may be conveniently broken down into three areas:

1. Jurisdiction

In what circumstances is it permissible to invoke the machinery of a court in one province against a defendant who is outside the borders of that province?

2. Enforcement

When will the courts of one province enforce a judgment rendered by the courts of another province?

3. Choice of Law

In cases involving a foreign (i.e., other province) factual element such as manufacture, distribution, purchase, use or damage, what are the principles and legal rules employed to determine the appropriate legal regime to govern the lawsuit?

The significance and interaction of these three major areas of concern may be conveniently introduced by examining the problems raised in the following factual example:

> P, an Ontario resident, is given a camping stove for Christmas by his aunt, who purchased the stove in Ontario. The stove is manufactured by D, a British Columbia company with no offices, assets or agents outside British Columbia, but which distributes its camping stoves to retailers nationally. While on vacation in Manitoba, P attempts to light the stove but it explodes because of a defective fuel tank, and causes P serious injury. P, now back in Ontario, wishes to sue D for damages for personal injury.

The first problem P faces is that of selecting the province in which to sue D. All else being equal, P would undoubtedly prefer to sue in Ontario, his home province, for

reasons of his own convenience and economy, and P will want to know whether or not he can invoke the machinery of the Ontario courts against D in British Columbia. The jurisdiction of the Ontario courts will depend upon whether the Ontario rules permit service upon D in British Columbia in the circumstances. In Ontario (and in other provinces) there is a rule of court which defines the circumstances in which a plaintiff will be able to achieve valid service out of the jurisdiction. As P has no contractual relationship with D, his claim will be classified as lying in tort and, on the facts presented, he will have to satisfy the court that his claim arises from a "tort committed within Ontario."[1]

The question of locating the place where the tort was committed has greatly vexed the courts in cases such as this. On the facts presented, there was negligent manufacture or design in one province, distribution of a defective product in a second province and damage sustained in a third province. The traditional interpretation of this service ex juris rule has been that the tort is considered to have been committed in the place where the negligent conduct occurred -- i.e., on these facts, British Columbia, where the stove was manufactured. However, a recent decision of the Supreme Court of Canada broadens the scope of such a rule considerably and interprets it as follows:

> where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness, a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant.[2]

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1. Rule 24 (1)(g). Ontario also permits service where damage was sustained in the province by virtue of a tort committed elsewhere: if P returned to Ontario for treatment or convalescence, resort might be had to that rule: see below, pp. 43-6.

2. Moran v. Pyle (National) Canada Ltd., [1975] 1 S.C.R. 393 at 409 per Dickson J.

One may ask whether this principle is broad enough to permit the Ontario Court to assume jurisdiction over D on the facts presented. Although damage was sustained in Manitoba rather than Ontario, Ontario was a "foreseeable forum" as the product was distributed there. It might be hoped that the fortuitous occurrence of damage in Manitoba would not impair the right of P to sue in Ontario, but the test formulated by the Supreme Court of Canada is cast in terms of place of injury.

P's other choice is to sue D in British Columbia. As D is in British Columbia and can be sued there, the foreign factual elements in the case present no jurisdictional impediments. D could be readily served without any concern for the British Columbia rules for service ex juris. However, it would obviously be much more inconvenient and expensive for P to be involved in litigation in British Columbia. Suing in British Columbia would involve retaining a British Columbia lawyer, going to British Columbia for pre-trial discovery and then for the trial itself, possibly having to get medical expert witnesses who have treated P for his injury in Ontario to go to British Columbia for the trial, usually posting security for costs, and possible difficulty in obtaining legal aid if impecunious.

Assuming that P does have a choice of bringing his action in either Ontario or British Columbia, he will want to consider his position with respect to enforcement and choice of law before he commences suit in either jurisdiction. Ought he simply to follow the dictates of convenience and economy and sue in Ontario, or do other considerations militate against selecting his home province as the forum?

If D has assets physically located in Ontario, the question of enforcement will pose no problem. The Ontario judgment could be enforced in Ontario without the need to invoke the machinery of the courts of another province. However, if D possesses no exigible assets in Ontario, P will have to take his Ontario judgment to British Columbia to collect his damages. Unfortunately for P, the matter of enforcement will turn solely upon British Columbia common law rules for recognition of foreign judgments. Under those rules, which prevail across the common law provinces, the Ontario judgment would be treated in the same way as a judgment from a truly foreign jurisdiction. The fact that P has satisfied the Ontario rule for service ex juris merely determines the question of Ontario jurisdiction for Ontario

purposes. Assumption of such jurisdiction by the courts of Ontario does not determine the question of enforcement in British Columbia, even though British Columbia may have a similar service ex juris rule and itself assume jurisdiction for its own purposes over foreign defendants in similar situations.

Under the common law rules for recognition and enforcement of money judgments, a judgment of a court of another province or of another foreign jurisdiction will be recognised only if: (1) the defendant was resident within the jurisdiction of the court rendering the judgment when the action was commenced (i.e., practically speaking, D served in Ontario); or (2) the defendant had agreed to Ontario exercising jurisdiction or voluntarily appeared or submitted to that court's jurisdiction (i.e., here, D elected to defend the Ontario action). In other words, on the facts under examination, P will only be able to enforce his judgment in British Columbia against D if D, for his own reasons, chooses to participate in the Ontario proceedings. If D does not defend the Ontario action, and a default judgment is obtained, non-recognition of the Ontario judgment means that P will have to litigate the entire dispute again in British Columbia. The problem of enforcement on these facts is so severe from P's point of view that even if he can satisfy the Ontario ex juris rule, he will probably be forced to sue in British Columbia.[3]

Finally, one must consider the question of choice of law. In a case presenting factual elements which are linked with a jurisdiction other than that of the court in which suit is brought (the forum), it will often be inappropriate simply to apply the law of the forum. Choice of law refers to the process whereby courts determine the appropriate legal regime to govern disputes presenting foreign factual elements. In the example presented, there are three possible regimes: Manitoba, Ontario or British Columbia. The choice of law question has obvious significance to the extent that there is variation in provincial substantive law. For example, if P will have difficulty in proving fault or negligence on the part of D, and if one legal regime imposes strict liability on manufacturers and another does not, the selection of the governing regime will be determinative of P's claim.

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3. Indeed, it is astonishing to find that P would have a much better chance had he been suing an American defendant in the Ontario courts. The American courts tend to be much more willing to enforce judgments on these facts than do sister provinces. See below, pp. 110-11, for further discussion.

In an ideal world, choice of law rules would be such that the same result would be achieved wherever the suit was brought. Choice of forum may be motivated and governed by one set of concerns (economy, efficiency, and convenience to parties, witnesses and the courts) which should not necessarily determine the distinct question of choice of law. However, as will be seen later in this study, it is quite likely that an Ontario court would feel constrained to decide this dispute according to one legal regime, and a British Columbia court according to another. Moreover, under the prevailing Canadian choice of law rule in such cases, the Ontario court would tend to apply Ontario law and the British Columbia court would tend to apply British Columbia law.

The overall result is disquieting. P is driven to sue in British Columbia because an Ontario judgment would not be enforced by the British Columbia courts. By suing in British Columbia, P brings upon himself British Columbia law. Accordingly, P faces the considerable inconvenience and expense of suing in British Columbia where British Columbia law would be applied, although he is suing a manufacturer which distributes its products in Ontario knowing that they will be used by Ontario consumers.

This study discusses an area of law which is largely procedural rather than substantive. Procedure is often said to be the "handmaiden of justice": the policy objectives of the substantive law cannot be implemented in a practical way without adequate procedure. The aims of procedural rules are twofold: (1) to provide a cheap, efficient and speedy means of translating policy objectives of the rules of substantive law into practical remedies; and (2) at the same time, to ensure that basic principles of procedural justice are observed (i.e., right to notice, right to know the case one has to meet, right to present a full case, right to a fair and impartial hearing, etc.). There is often a tension between these two aims of procedure. Fairness usually comes with its price.

In short, procedural rules should always be up to the task of translating substantive law policies into practical remedies for individual litigants; they should never defeat substantive law objectives, and they should reflect the basic notions of economy, efficiency, speed and fairness.

In the context of product liability litigation, there can be little doubt that the policy of substantive law over the past 50 to 60 years has moved steadily and unrelentingly in the direction of greater protection for consumers. The substantive law has clearly shifted from the nineteenth century pro-defendant stance to a twentieth century pro-plaintiff position. The

unmistakable trend is towards stricter liability rules imposed upon manufacturers and retailers to protect consumers.[4]

Moreover, the nature of interprovincial and international trade has obviously changed dramatically over this same period. Goods flow freely and rapidly over borders; the consumer market of the 1970s is not nearly so circumscribed by geography as was the consumer market of the nineteenth century pro-defendant era.

Procedural rules must be assessed against this background. As will be seen, the procedural rules being examined here originated in England in the nineteenth century and reflect not only the substantive law policies of that century, but also the practical problems posed by international litigation then. There has been remarkably little change to these rules after their transplantation to Canada, where they have been uniformly applied to interprovincial litigation in the twentieth century. They are unquestionably still strongly pro-defendant and take little or no account of the special concerns presented by litigation involving the concerns of sister provinces which share a common nationality and legal tradition.

There is, however, a recent trend towards a more liberal treatment of service ex juris. As will be seen, both the actual content of service ex juris rules and the interpretation afforded those rules by the courts are beginning to reflect a more sympathetic approach to the problems of plaintiffs in interprovincial litigation. It is suggested in this study that a similar trend must be encouraged in the areas of enforcement and choice of law. While concern for the legitimate interests of manufacturers and retailers may well preclude a facile and invariably pro-plaintiff position, the conclusion reached in this study is that a major shift away from the nineteenth century rules is called for.

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4. The drift in the common law towards stricter liability means that legislation imposing a strict liability regime in place of the fault-based system may be described as clearing up anomalies. Waddams, Products Liability (2d ed. 1980), p. 259:

> It can be truly said that strict liability is in practice accepted in many instances, but there are serious gaps and anomalies in its operation. The open acceptance of strict liability will enable those anomalies to be eliminated.

In summary, the aim of this study is to assess the rules relating to service out of the jurisdiction, enforcement of foreign judgments and choice of law in the context of interprovincial product liability litigation. The standard applied is: do these rules provide a cheap, efficient, speedy and fair means of implementing the substantive law policy objectives? It is concluded that a major shift is required to bring these rules into line with modern legal principles and economic conditions, and that these changes will require joint cooperative action by provincial governments.

# CHAPTER I

## SERVICE OUT OF THE JURISDICTION

### Introduction

The first problem to be addressed is that of jurisdiction over extra-provincial defendants. In the common law provinces, the notion of jurisdiction in this context is wholly dependent upon the plaintiff satisfying the procedural requirements for service of process upon the defendant.[1] In other words, the court will have jurisdiction (for its own purposes) to adjudicate any claim against the defendant so long as its procedural rules relating to the service of process upon the defendant have been satisfied.

The service of process requirement can be satisfied in three different ways where an extra-provincial defendant is concerned: (1) service of process upon the defendant or some agent or branch of the defendant within the territorial jurisdiction of the forum; (2) service of process upon the defendant beyond the territorial jurisdiction of the forum in compliance with the rules relating to service ex juris; and (3) voluntary submission or appearance by the defendant to the jurisdiction of the court. The first possibility, service on a resident agent, has been construed narrowly by the courts, as will be discussed later, and the third, voluntary submission, is totally dependent upon the whim of the defendant. Therefore, the most important of the three possibilities in the context of product liability litigation is the second, namely, the rules relating to service ex juris.

It must be emphasised at the outset that the matter of service ex juris relates only to the question of the jurisdiction of the forum <u>for its own purposes</u>. The assumption of jurisdiction by the forum over an extra-provincial defendant has been viewed in Canada as a question distinct from that of recognition and enforcement. Recognition and enforcement depend not upon the law and procedural system of the forum, but upon the rules of recognition and enforcement of the jurisdiction in which

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1. Cheshire and North, <u>Private International Law</u> (10th ed.), p. 77: "The most striking feature of the English rules relating to this matter [jurisdiction] is their purely procedural nature."

enforcement is sought. The rules of recognition and enforcement adopted by the common law provinces are narrow in scope and service of process upon the defendant in compliance with the forum's service ex juris rule is uniformly rejected as a basis for recognition in Canada. All provinces assume much broader jurisdiction for their own purposes than they recognise as being valid when asserted by a sister province.

General Principles -- The Traditional Approach

Legal rules tend to retain and reflect aspects of their historic origins. The rules relating to service ex juris are no exception. The common law initially did not recognise the effectiveness of judicial process served outside the territorial jurisdiction of the court.[2] The first legislation permitting a court to exercise its jurisdiction over someone found outside its territorial limits was introduced in 1852, and this legislation is the forerunner of modern service ex juris rules.[3]

As might be expected, these nineteenth century rules reflected contemporary concerns. The law of service ex juris was marked by a deep concern over interference with the sovereignty of another state.[4] This concern was reflected on a purely mechanical level by the provisions in the early rules, continued in many Canadian provinces,[5] requiring that only notice of the writ, rather than the writ itself, be served on non-British foreigners in non-British dominions, thereby avoiding the presumptuous

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2. See Re Busfield (1886), 32 Ch. D. 123 at 131; Lenders v. Anderson (1893), 12 Q.B.D. 50 at 56.

3. Common Law Procedure Act (15 and 16 Vict. c. 76, s. 18) permitting service out of the jurisdiction on British subjects if the cause of action arose in England or was in respect of a breach of contract made within the jurisdiction.

4. See Collins, "Some Aspects of Service Out of the Jurisdiction in English Law" (1972), 21 I.C.L.Q. 656 at 657-8.

5. New Brunswick, Ord. 11, r. 6; Newfoundland, Ord. 22, r. 5; Ontario, n. 26.

command of the sovereign contained in the writ.[6] The early legislation of 1852 permitting service out of the jurisdiction if the cause of action arose in England was later narrowed, the circumstances in which this might be allowed being restricted out of respect for foreign sensibilities.[7]

While some concern for the inconvenience or possible injustice to individual foreign litigants was expressed,[8] the

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6. See Frith v. De La Rivas (1893), 69 L.T.R. 666 at 667 per Esher M.R.; Hewitson v. Fabre (1888), 21 Q.B.D. 6 at 8 per Field J.:

> the governments [of foreign countries]...resent the service on their subjects without their leave of the process of the Courts of other nations, and for this reason the alteration has been made in the rule, and a specific distinction between serving the process itself and giving a courteous notice of it has been drawn by Order XI r. 6. Under that rule, if the defendant be a British subject residing abroad, the jurisdiction which the Courts of this country possess over British subjects wherever resident would authorize the service upon him of the writ; but, if he be not a British subject, notice only of the writ is to be given to him, so that he may be under no compulsion to obey it, but may be able to exercise an option in that respect.

7. Field v. Bennett (1886), 3 T.L.R. 239 at 240 per Coleridge C.J.:

> [Order 11] was passed after and in consequence of remonstrances as to the practices of the English Courts in this matter, and to bring that practice into accordance with well-written rules of international law, or, at all events, comity.

8. See, for example, Cresswell v. Parker (1879), 11 Ch. D. 601 at 603-4 per James L.J.

focus for restraint was clearly the fear of causing offence to foreign states and the corresponding concern that similar incursions might be made by foreign courts into English territory.[9]

Concern over infringement of sovereignty affected judicial interpretation of the rules as well as their actual content. Respect for the sensibilities of the foreign jurisdiction has always been said to require that the matter fall squarely within the spirit and purpose of the rule as well as its letter. The whole substance of the matter must be examined to make sure that the spirit is satisfied.[10] The cases often reiterated that extreme caution ought to be exercised when determining the appropriateness of service ex juris.[11] It was frequently said that "if there

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9. Vaudrey v. Nathan, [1928] W.N. 154 at 155 per Scrutton L.J.: "in some countries it is looked upon with great disfavour"; George Munroe v. American Cyanamid, [1944] K.B. 432 at 435 per Scott L.J.: "I have known many continental lawyers of different nations in the past criticize very strongly our law about service out of jurisdiction. Service out of the jurisdiction at the instance of our court is necessarily prima facie an interference with the exclusive jurisdiction of the sovereignty of the foreign country where service is to be effected." Several Canadian cases have reflected this concern: Jenner v. Sun Oil Co. Ltd. et al., [1952] O.R. 240 at 244 per McRuer C.J.H.C.; Abbott-Smith v. Governors of the University of Toronto (1964), 45 D.L.R. (2d) 672 at 676 per Isley C.J.; Empire Films Ltd. v. Rank, [1948] O.R. 235.

10. Ibid.; see also Johnson v. Taylor Brothers, [1920] A.C. 144 at 153.

11. Société Genéral de Paris v. Dreyfus Brothers (1885), 29 Ch. D. 239 at 242-3 per Pearson L.J.:

> But of course it becomes a very serious question, and ought always to be considered a very serious question, whether or not...it is necessary for the jurisdiction of the Court to be invoked, and whether this Court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this Court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.

is any doubt as to whether the discretion should be exercised it should be resolved in favour of the foreigner."[12]

The courts retained an undoubted discretion to refuse leave to serve the writ outside the jurisdiction even where the plaintiff had satisfied the black letter of the rule.[13] In addition, the power to decline jurisdiction on the grounds of "forum non conveniens" (i.e., the jurisdiction in question is inconvenient in light of all the circumstances) has provided a broad basis upon which cases falling within the rule can be excluded.

While the courts have exercised this discretion to refuse permission to allow service ex juris even in cases which did fall within the rule, they consistently disclaimed any power to extend the meaning of the rules in favour of the plaintiff when the case fell within the spirit but without the letter of the rule.[14] The plaintiff had to apply for leave to serve out of the jurisdiction before actually serving the defendant. His application had to be supported by affidavit evidence showing not only that the claim fell within the rules, but also that there was substance to the

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12. Jenner v. Sun Oil Co. Ltd., [1952] O.R. 240 at 244; Brenner v. American Metal Co. (1920), 48 O.L.R. 525 (aff'd 50 O.L.R. 25); The Hagen, [1908] P. 189 at 201.

13. See especially The Hagen, [1908] P. 189.

14. Trower & Sons Ltd. v. Ripstein, [1944] 4 D.L.R. 497 per Lord Wright at 503 (J.C.P.C.), referring to the articles of the Quebec Civil Code governing service ex juris:

> The court is strictly bound by the terms of these articles. It has no general power to proceed on what might be described as the "equity" of the articles. It cannot, because in a particular case before it, it would be more convenient to apply some other rule than can be found on the true interpretation of the articles, depart from or amplify their meaning. It has no discretionary power to go outside the terms of the articles, merely because in its opinion it would be the forum conveniens.

claim itself so that at this preliminary stage the court could screen the validity of the plaintiff's claim.[15] This preliminary screening of the merits of the case by the court before permitting the plaintiff to proceed with his case is unheard of apart from the service ex juris cases.

These traditional procedures and principles of interpretation are undoubtedly pro-defendant in nature. It is remarkable that Canadian courts should have applied similar reasoning to cases involving Canadian defendants. Clearly, there are many factors which call for a different approach in Canada. The concern over offending foreign sovereignty is simply inappropriate in a federal state. Not only are the provinces members of the same federation, but each of them has service ex juris legislation in more or less the same terms. Moreover, in the common law provinces at least, there is a shared legal tradition, and a Canadian defendant from one province is not faced with a totally foreign legal regime when called upon to defend his conduct in another province.

## The Modern Trend

The recent trend in the law of service ex juris is away from this restrictive approach. The situation has been liberalized from the plaintiff's point of view both by changes to the rules themselves and through judicial interpretation. The most dramatic departure from the traditional approach has occurred in Nova Scotia and Prince Edward Island, where there are now no restrictions whatsoever imposed by the service ex juris rule on the service of originating process on defendants in Canada or the United States. In all other cases, leave must be obtained prior to service, but there are still no categories provided for within which the claim must fall. It has been held in one Nova Scotia decision that the new rule was intended to bring about "a marked departure in the procedure relating to service ex juris." In that case, the judge saw "no necessity to import the former provisions" in considering an application to strike out service on a foreign defendant and held that "under the Rules the plaintiff is entitled to serve the originating notice as of right." Indeed, when faced with an argument that the court should decline to exercise jurisdiction on the grounds of forum non conveniens, the

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15. Empire-Universal Films Ltd. v. Rank, [1948] O.R. 235 at 250; Castel, Canadian Conflict of Laws, vol. 1, pp. 227-8.

judge indicated that "in view of our rule, I have some reservations as to the weight to be given to the argument."[16]

In British Columbia, there is now a catch-all provision permitting the court to grant leave to serve outside British Columbia in any case not specifically provided for.[17] New Brunswick has had for some time a similar provision permitting the court to grant leave for service where "the plaintiff has any good cause of action against the defendant and that it is the interest of justice that the same should be tried in this jurisdiction."[18] As is discussed later, several provinces permit service out of the jurisdiction in contract actions where the defendant is shown to have assets within the jurisdiction.[19]

Most provinces retain the traditional "pigeon-hole" approach: the rule sets out a list of fixed categories within which the plaintiff must be able to slot his case. In Ontario, where the "pigeon-hole" approach has been retained, a provision added in 1975 greatly extends the scope of the service ex juris rule. It is now provided that service out of the jurisdiction may be allowed where the claim is "in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere."[20] As will be seen in the discussion of the specific rules relating to tort and breach of contract, this provision very much expands the scope of the Ontario ex juris rule. In two provinces, there are now specific provisions relating to product liability actions. In British Columbia, rule 13(1)(o) specifically permits service where "the claim arises out of goods or

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16. Benedict et al. v. Antuofermo (1975), 60 D.L.R. (3d) 469 at 470-2 per Jones J.

17. Rule 13(3). For a recent example of its application, see McDonald & Sons Ltd. v. Export Packers Co. Ltd. (1979), 95 D.L.R. (3d) 174.

18. Order 11, r. 1(2). Cases interpreting this rule are: Roy v. St. John Lumber Co. (1916), 44 N.B.R. 88; Paradis v. King (1957), 6 D.L.R. (2d) 277; McCully v. Barber (1970), 14 D.L.R. (3d) 216.

19. See below, pp. 51-5.

20. Rule 25(1)(h).

merchandise sold or delivered in British Columbia." In Saskatchewan, the Consumer Products Warranties Act, 1977 contains broad provisions permitting service ex juris in disputes arising under that Act.[21]

There has also been a significant change in the practice relating to service ex juris applications which has been enacted in all but three of the common law provinces (Alberta, New Brunswick and Newfoundland). As indicated above, under the traditional practice, the plaintiff had to apply to the court for permission to serve process out of the jurisdiction. This application was made ex parte (i.e., without notice to the defendant) and the plaintiff was required to submit affidavit evidence outlining the nature of his claim and the basis for his assertion that the case was one which fell within the ambit of the service ex juris rule. The court then decided whether the case was a proper one for service ex juris. If leave were granted, the defendant could apply, upon being served, to the court to discharge the ex parte order and, if successful, bring the action to an end.

At present, it is only in Alberta, New Brunswick and Newfoundland that prior leave to serve ex juris must be obtained. In all other provinces, the plaintiff simply serves the foreign defendant and it is then up to the foreign defendant to bring an application to strike out the service if he feels that the case does not fall within the rule.[22]

It has been held in Manitoba[23] and Nova Scotia[24] that this change removes the court's discretion, apart from forum

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21. Discussed below, p. 64. For a comprehensive discussion of the Saskatchewan Act in the present context, see Romero, "The Consumer Products Warranties Act (Part II)" (1980), 44 Sask. L.R. 261.

22. In Prince Edward Island and in Nova Scotia, leave must be obtained for service on defendants outside Canada and the United States.

23. Selan v. Neumeyer (1959), 29 W.W.R. 542 (appeal dismissed 33 W.W.R. 48) per Monnin J. at 548: "if the plaintiffs, by their pleadings, come within the four corners of any subparagraph of [the rule], they are entitled to service out of Manitoba without any application to the court."

24. Benedict et al. v. Antuofermo, above note 16.

non conveniens, to refuse service ex juris. However, in Singh v. Howden Petroleum Ltd.,[25] the Ontario Court of Appeal reaffirmed the court's "discretion to control its own process" and the need to ensure that the court respect the sovereignty of other states "with the same solicitude and care that was exercised" before this change in practice occurred.[26]

This procedural change may, then, merely simplify the mechanics of service ex juris. However, the concern for the respect for foreign sovereignty, emphasised by the Singh decision, has been of diminishing significance to many courts, especially where the case involves service in another Canadian province.

In a number of recent cases, judges have questioned the validity of the principle which required that any doubt be resolved in favour of the foreigner in cases of contested service ex juris. In an earlier Ontario Court of Appeal decision,[27] Brooke J.A. said as follows:

> [The defendant] is a member of the Canadian business community. It seems quite unrealistic to treat as a foreigner one who lives in a Province of this country and does business in his own and other Provinces. Having regard to business by residents of the Provinces with another, neither the boundaries of the country nor the political divisions or judicial divisions are such as to make joinder as defendants in an action, as here sought, of parties to a business transaction who do not reside in the same province oppressive and unfair per se.
>
> ...in cases such as this one...the fact that a defendant resident in another Province is a

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25. (1979), 24 O.R. (2d) 769, overruling an earlier case to the contrary, John Ewing & Co. v. Pullmax (Canada) Ltd. (1976), 13 O.R. 587.

26. Ibid., at 779-80 per Arnup J.A.

27. (1975), 8 O.R. (2d) 622 (leave to appeal to S.C.C. refused, ibid., 622 n.) at 632.

> "foreigner" should not be given any significant weight....[The learned Judge of first instance erred]...in failing to give little weight to the view expressed in the older cases respecting foreigners in their application to persons who live in other Provinces in this country.[28]

Finally, as will be seen from the discussion of the specific rules relating to tort actions especially, the courts are giving the old rules new life. Restrictive interpretations curtailing the scope of the rules are gradually being relaxed by the courts so that plaintiffs are better able to invoke the machinery of the courts of their home province against extra-

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28. See also E.S.B. Canada v. Duval Corp. of Canada, [1973] 3 O.R. 781 at 783-4 per Lieff J.:

> It has been laid down as a general rule that any doubt ought to be resolved in favour of the defendant by not granting the order for service ex juris. However, this rule originated in cases involving foreign defendants, and it is doubtful whether it would apply in a case like the instant one where the defendant merely [sic] domiciled in another Province, since the reason for it would not exist.

See also McDonald & Sons Ltd. v. Export Packers Co. Ltd. (1979), 95 D.L.R. (3d) 174 (B.C.) at 175 per Bouck J.:

> it is unrealistic in this day and age to slavishly follow restrictions on service of process within Canada when the Rules were originally designed to govern disputes between English residents and those in continental Europe or other foreign countries.

provincial defendants.[29]

The unmistakable trend in Canada, while recent in origin, is to expand the scope of assumed jurisdiction and gradually to shift away from the traditional pro-defendant orientation. It

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29. Further examples of broad interpretation of the rule are the following. Cadillac Exploration Ltd. (N.P.L.) v. Penarroya Canada Ltée (1972), 30 D.L.R. (3d) 326 at 336 per Morrow J.:

> I think that today the Courts must take a realistic and modern approach to the application of the time-honoured doctrines. The advent of fast jet transportation making it easy for corporations and persons to move about, to be in Europe one day and on the next to be at the opposite end of the earth, has afforded an impetus to an increase in international commerce. It is quite true that the authorities speak of one of the rules that is usually followed here, namely, that any doubt should be resolved in favour of the foreigner....With the new freedom that seems to be enjoyed by citizens of other countries to have free intercourse and do business in our country I do not think the above rule should be enlarged upon.

In the Cadillac case, Morrow J. quoted with approval from the decision of Wright J. in Brewer v. Hadley Manufacturing Co. et al., [1969] 2 O.R. 756 at 760-1:

> This court has no right to stretch its arm beyond provincial boundaries an inch beyond that reasonably and fairly required to administer justice in this Province. It has, on the other hand, a duty to take promptly and effectively every step properly opened to it to do justice to citizens who appeal to their Sovereign for justice....
>
> In considering the range of the process of the Court, we should be mindful of the sovereignty and jurisdiction of others and of the graceful comity and civility which it would be pleasant to see universal among all called upon to be Judges. But this seemly and literally courtly urbanity must take second place to our doing

appears that in this area at least, nineteenth century concerns are being properly relegated so that modern policies may be satisfied.

There is a natural and understandable inclination to provide plaintiffs with liberal access to domestic courts. Remedies should be available as conveniently and cheaply as possible. Indeed, the procedural framework is merely reflecting the same concerns that have produced the drift towards stricter liability and a more solicitous concern for injured or damaged plaintiffs.[30]

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> justice in the cases fairly brought before us by the citizens of our land and Province, and by others. To do this is our surpassing purpose. If this purpose guides us in exercising our discretion under rule 25 we shall have no cause to apprehend hurt feelings nor resentment in other jurisdictions by those there dedicated to the same noble ends.
>
> The work here of the Court, not its dignity there, comes first. The second is to help, not hinder the first. Times have changed and ancient solemnities no longer command the same reverence, neither there nor here.

30. James, Civil Procedure (1965), p. 648:

> In products liability cases, at least, the broadening of the possible forum in a way which is likely to include the injured consumer's (or user's) home state may be viewed as complementary to the broadening of the maker's and supplier's substantive liability, and the crumbling of the defense of privity of contract. It is all part of the increasing concern for consumer protection and the shifting of consumer losses from defective products to those who make and market those products in the course of business for profit. A manufacturer's liability in negligence of warranty may not be worth very much to a consumer who must cross a continent to pursue it. The hardship on him is likely to exceed the hardship put on the maker, whose products are distributed across the continent as a result of his own efforts, by compelling him to stand suit wherever he sends his products or knows that they regularly go.

On the other hand, every jurisdiction also has an interest in curtailing jurisdictional overreaching by its courts. The motivation for restraint is twofold. First, there is a genuine desire to act in a manner which is fair to foreign defendants. If the foreign defendant has had no contact with the jurisdiction nor any reason to suspect that he might be involved in litigation in that jurisdiction, unrestrained pro-plaintiff jurisdictional rules could operate harshly. Secondly, a policy of jurisdictional restraint may be motivated by self-interest. There is always the fear that jurisdictional overreaching in favour of domestic plaintiffs will provoke similar measures in other jurisdictions which will adversely affect the interests of domestic defendants when sued by foreigners. The task of a service ex juris rule is to achieve a proper balance between fostering the interests of domestic plaintiffs and acting fairly to foreign defendants.

However, the narrow recognition and enforcement rules, examined in Chapter II, mean that there is less reason for restraint in assuming jurisdiction over extra-provincial defendants. Because the issues of assumed jurisdiction and enforcement are determined independently, and because a judgment against a foreign defendant will not be enforced elsewhere in Canada unless he voluntarily submits to the jurisdiction, the policy of fairness to defendants can largely be satisfied without undue concern for jurisdictional restraint. It may safely be assumed that a defendant will only appear voluntarily to defend his conduct in a foreign jurisdiction if he has assets in that jurisdiction. By the same token, the existence of assets in the jurisdiction may act as a rough indication that the defendant's contact and interest in the jurisdiction are sufficiently strong to justify the assertion of jurisdiction over him.[31] There is, then, every incentive to extend the scope of assumed jurisdiction: the policy of providing plaintiffs with ready access to domestic courts is thereby satisfied; the policy of acting fairly to defendants is answered by the restrictive enforcement rules themselves -- a defendant will only appear and defend on the merits if he has interests worthy of protection within the rendering jurisdiction.

It should also be noted that the reach of ex juris rules designed to favour plaintiffs can be controlled effectively

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31. It is argued later, however, pp. 51-5, that the presence of assets is often an insufficient jurisdictional link.

through the doctrine of forum non conveniens. Broadening the scope of service ex juris rules need not necessarily operate harshly on defendants since they can still call upon the court to exercise its discretion to decline jurisdiction in cases of real hardship.

The inevitable conclusion is that while the modernizing of service ex juris rules is to be welcomed, in the absence of reform to facilitate enforcing foreign judgments the desire to assist domestic plaintiffs in suits against foreigners will be unfulfilled in a great number of cases. Moreover, until the rules relating to enforcement are reformed, the trend towards broader assumed jurisdiction may be expected to continue.

The approach taken in this study is that the questions of assumed jurisdiction and enforcement of foreign judgments must be dealt with together.

## A Suggested Approach

The approach advocated here is that the question of jurisdiction in both contexts should be based upon the following principle: that it is proper to assert jurisdiction over an extra-provincial defendant, and that such assertion of jurisdiction should be recognised by the courts of other provinces if, in the light of all the circumstances, it is more reasonable to require the defendant to come to the plaintiff's province to defend than to require the plaintiff to go to the defendant's province to prosecute the claim. That principle is admittedly imprecise but, in the context of product liability litigation, the factors which emerge from the following discussion bear upon the choice of "the most reasonable jurisdiction."

Satisfying the objectives of the substantive law, which is intended to protect consumers, requires that jurisdiction rules afford the plaintiff ready access to the courts of the province in which he elects to sue, provided that province bears some significant relationship to the litigation. The plaintiff's choice will almost invariably be the province in which he resides. On the other hand, fairness to the defendant requires some control to be imposed upon the plaintiff's choice. It is suggested that the dictates of fairness are clearly satisfied if the defendant has engaged in any purposeful conduct relating to this or a similar product within the jurisdiction. Examples of such conduct are: the maintenance of any place of business, office, warehouse, agent, salesman, or any distribution, advertising or encouragement of sales within the jurisdiction by the defendant. Even in the absence of such conduct, it is suggested that as between an injured consumer and an extra-provincial

defendant, it is more appropriate to afford suit in the plaintiff's jurisdiction where the defendant should reasonably have foreseen distribution or use of its products within the jurisdiction. Moreover, it is suggested here that "foreseeability" should be given a broad and liberal meaning. Where the defendant puts the product within the normal channels of interprovincial trade, it will be rare that distribution or use within any one province should be considered unforeseeable. Unless the defendant has taken positive steps to ensure that the product would not reach the province in question, he should not be heard to say that this particular province was not within his contemplation.

Between an unsuspecting consumer, who can hardly be expected to ascertain the province of origin of each product he buys or uses, and a defendant who elects to exploit the interprovincial market, it seems clear that the risk of litigating in a distant place is more appropriately placed on the defendant.

However, care must be taken in particular cases. For example, there are strong grounds to distinguish an ordinary consumer transaction from one where a primarily local distributor responds to a solicitation for the purchase of his product from a primarily interprovincial commercial purchaser. The balance in favour of the plaintiff's jurisdiction will also be tipped by the existence of a claim against another defendant properly sued where the extra-provincial defendant is a necessary or proper party to that litigation. Finally, matters of practical convenience such as the availability of witnesses, the applicable law and the relative capacity of the parties to bear the cost of extra-provincial litigation ought to be considered.

It is in light of this basic approach that the existing rules of service ex juris are examined.

## Application of Existing Service Ex Juris Rules to Product Liability Cases

In the provinces which retain the "pigeon-hole" approach to service ex juris, there are three possibilities for product liability claims.[32] These are the rules relating to tort claims,

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32. Only Saskatchewan and British Columbia have rules specifically designed to deal with claims arising from goods sold or delivered in the province.

contract claims and claims involving multiplicity of parties. If the plaintiff's claim is against a manufacturer, designer or other such party with whom the plaintiff has no contractual relationship, it will ordinarily be categorized as sounding in tort. If the claim is against a retailer or some other party with whom the plaintiff has a direct contractual relationship for breach of an expressed or implied warranty, it will ordinarily be categorized as contractual. Finally, the rules of all provinces recognise that although the claim against the defendant in question may not otherwise fall within the scope of the service ex juris rules, jurisdiction may be asserted over that defendant if he is a necessary and proper party to a lawsuit brought against someone who is within the jurisdiction of the court.

What follows is an analysis of the provincial rules as interpreted by the courts in each of these three categories.

Tort Committed Within the Jurisdiction

All provinces provide for service out of the jurisdiction where the plaintiff's claim is based upon a tort committed within the jurisdiction.[33] Until the 1975 decision of the Supreme Court of Canada in Moran v. Pyle National (Canada) Ltd.,[34] the Canadian courts had taken an entirely narrow and mechanical view of the scope of ex juris rules based on a tort committed within the jurisdiction. Attempts by resident plaintiffs to sue in their home jurisdiction foreign or extra-provincial manufacturers of products made outside that jurisdiction but causing damage to the plaintiff within the jurisdiction were uniformly rejected.

The tort of negligence, especially insofar as it encompasses liability for defective products, is of relatively recent origin. There can be no doubt that the significance of modern negligence and product liability law was totally unforeseen when the words "tort committed within the jurisdiction" were first employed.

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33. The Ontario rule permitting service out of the jurisdiction where damage is sustained in Ontario as a result of a tort or breach of contract committed elsewhere is discussed below, pp. 43-6.

34. Discussed in detail below, pp. 30-2.

Negligence involves three distinct ingredients: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; and (3) actual damage suffered by the plaintiff. It is often said that there is no such thing as negligence in the air -- until the plaintiff actually suffers damage, there is no tort -- the gist of the action lies in the sustaining of actual damage.

When these essential ingredients of the tort of negligence are considered, it will be readily appreciated that the words "tort committed within the jurisdiction" are inapt to cope with the problems posed by product liability claims. There are at least three possible interpretations which the literal definitions of the words permit, but the rule itself does very little to guide the court in selecting the appropriate meaning.

The first possibility is the so-called "last event" theory.[35] Since the tort is not complete until damage has been sustained, it is argued that the tort can only be said to have been "committed" when and where the last event occurs, i.e., the sustaining of damage. Secondly, it is literally possible to read the rule as saying all ingredients of the tort, i.e., duty, breach and damage, must occur within the jurisdiction -- no tort is committed without all ingredients, and therefore, no tort is committed within the jurisdiction unless all ingredients actually occur within the jurisdiction.[36] Thirdly, it is possible to place emphasis on the word "committed" as connoting actual conduct on the part of the defendant. On this view, the one traditionally favoured by the courts, the tort is "committed" where the negligent act of which the plaintiff now complains occurred. While this amounts to saying that the tort is "committed" before it is actionable, it is admittedly possible to read the language of the rule as focussing on conduct rather than actionability.[37]

It is apparent, however, that none of these three possibilities affords a satisfactory test.

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35. These various possibilities are canvassed in the decision of Dickson J. in the Moran case.

36. See the Abbott-Smith case, discussed below, pp. 26-7.

37. Compare Dicey, Conflict of Laws (6th ed.), p. 804: "There is some difficulty in holding that a tort is committed in New York, when there is no possible liability in tort until injury is suffered in England."

The "last event" analysis allows for purely fortuitous and unacceptable results. For example, an Ontario manufacturer markets a product in Manitoba which causes damage to a Manitoba resident on vacation in British Columbia. Applying the last event theory, the Manitoba resident would have to sue in British Columbia, a forum inconvenient both to him and the defendant, and which bears no real relationship to the case apart from the mere circumstance of having been the place of injury. He could not sue in Manitoba, the convenient forum from his own point of view, and a forum which may well be more satisfactory than British Columbia, even from the Ontario manufacturer's view.

The interpretation requiring that all elements of the tort have occurred within the jurisdiction is obviously too narrow. This reading of the rule would effectively preclude ever suing a foreign or extra-provincial manufacturer in a product liability case, unless, of course, there had been some negligent act committed within the jurisdiction, as in the Distillers case discussed below (pp. 28-9).

The prevalent theory adopted by the courts until the Moran decision in 1975 was the "place of acting" theory. The leading case was the decision of the Nova Scotia Court of Appeal in Abbott-Smith v. Governors of the University of Toronto.[38] The plaintiff, a resident of Nova Scotia, alleged that he had been injured by the administration to him in Nova Scotia of a dosage of polio vaccine negligently manufactured in Ontario. The Nova Scotia court held, unanimously, that the Nova Scotia rule then in force permitting service out of the jurisdiction "whenever the action is for tort committed or wrong done within the jurisdiction," did not permit service on the Ontario defendant.[39]

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38. (1964), 45 D.L.R. (2d) 672.

39. Although the claim against the Ontario defendant was joined with the claim against the city of Halifax, presumably the party responsible for administering the vaccine, the claim against the city had been dismissed for want of compliance with a notice provision (see 41 D.L.R. (2d) at 62) and no argument based on the "necessary and proper party" rule could be advanced vis-à-vis the Ontario defendant.

The most restrictive possible view of the rule was taken by MacDonald J. (with whom MacQuarrie J. concurred) holding that the rule required that all ingredients of the tort must have occurred within the jurisdiction. Isley C.J., while also inclining to this view, rested his decision on the place of acting theory[40] and, having canvassed the authorities and arguments against that theory, said as follows:

> It may be that the tort of negligence is not committed until the damage is sustained, but this does not, in my opinion, necessarily mean that for the purpose of Order XI the tort should be regarded as having been committed at the place where the damage was sustained....
>
> It seems to me that it smacks of artificiality or technicality to consider that where an intended defendant is not alleged to have done anything within the jurisdiction, the fact that what he did outside the jurisdiction should be regarded as the commission of a tort or the doing of wrong within the jurisdiction.[41]

The view taken by the Nova Scotia Court of Appeal was supported by the earlier decisions.[42] In the first of three

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40. Currie J., the fourth member of the court, while clearly stating his preference for a more flexible view which would have permitted the Nova Scotia plaintiff to sue at home, reluctantly felt bound by authority to concur with the majority view.

41. At 680, 687.

42. The leading English case was George Monro Ltd. v. American Cyanamid & Chemical Corporation, [1944] K.B. 432, where the English Court of Appeal held that a claim for damage sustained in England by virtue of a product negligently manufactured in the United States did not constitute a tort committed in England (per du Parcq L.J. at 441): "The principle of the rule is plain. Looking at the substance of the matter without regard to any technical consideration, the question is: Where was the wrongful act, from which the damage flows in fact done? The question was not where was the damage suffered, even though damage may be the gist of the action."

early Canadian cases, Anderson v. Nobels Explosive Co.,[43] an Ontario resident had been injured by a defective fuse manufactured by the Scottish defendant. The court, dubious about the validity of the plaintiff's cause of action in the first place, held that "it must be established...that the wrongful act or omission of the tortfeasor which caused the injury to the plaintiff, took place in this Province"[44] and indicated that, even if that view were wrong, leave to serve the writ on the Scottish defendant would be declined on discretionary grounds. A similar approach was taken in two cases decided in 1924. In the first, Paul v. Chandler and Fisher Ltd.,[45] the Ontario court refused leave to serve a Manitoba manufacturer of cat gut used in surgery which brought on tetanus and caused death. In the second, Beck v. Willard Chocolate Co. Ltd.,[46] the Nova Scotia court declined to permit a Nova Scotia plaintiff who had broken his tooth on a piece of copper found in a chocolate bar manufactured in Ontario from suing the Ontario defendant in Nova Scotia.[47]

The first indication of any liberalization in the Anglo-Canadian jurisprudence occurred with the decision of the Privy Council in Distillers Company (Bio-Chemicals Ltd.) v. Thompson.[48] Action was brought in New South Wales against the English manufacturer of thalidomide for damages to compensate for the tragic effect that drug had had upon an Australian infant. In holding

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43. (1906), 12 O.L.R. 644.

44. At 651 per Anglin J.

45. (1924), 54 O.L.R. 410.

46. (1924), 2 D.L.R. 1140.

47. It is worth noting that Mellish J. would have been willing to permit service had the case been based in contract:

> If the application for service abroad had been based upon the breach of an implied warranty on the defendant's behalf to any purchaser of its goods that the same was free from concealed contents dangerous to customers, possibly such an Order might properly have been made....(at 1143).

48. (1971), A.C. 458.

that the English manufacturer could be sued in New South Wales, Lord Pearson reviewed the three possible theories discussed above and expressed the view that none of those theories was acceptable in light of modern conditions:

> the search is for the most appropriate court to try the action, and the degree of connection between the cause of action and the country concerned should be the determining factor.
>
> The right approach is, when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?[49]

In the actual result, the issue was skirted in that the Privy Council found that the British-based defendant had in fact committed a tortious act within the jurisdiction of New South Wales by distributing the drug with improper instructions.[50]

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49. At 467-8.

50. For a Canadian case foreshadowing this result, see Custovich v. Kruger: Clairol Inc. and Clairol Inc. of Canada, [1955] 16 W.W.R. 303 (B.C.) at 304 per Coady J.:

> It seems to me that if it can be established as alleged that a representative of the third parties advertised and demonstrated the product within British Columbia, and that this was done by the third party to promote sales of the product in this jurisdiction, then failure to make known the dangerous nature of the preparation was a failure to perform a duty owing to the defendant. That failure would constitute a wrongful act within the jurisdiction, and in an action for damage occasioned as a result of that failure the court has jurisdiction to make the order.

See also Leigh Marine Services Ltd. v. Harburn Leasing Agency Ltd. (1972), 25 D.L.R. (3d) 604 (B.C.) and Original Blouse Co. Ltd. v. Buick Mills Ltd. (1963), 42 D.L.R. (2d) 174 at 182 per Craig J. holding that letters and telephone calls from Quebec to British Columbia constituted tortious acts committed within British Columbia.

Moran v. Pyle (National) Canada Ltd. The decision of the Supreme Court of Canada in Moran v. Pyle (National) Canada Ltd.[51] has transformed the law in this area. The facts were as follows. The plaintiffs, the widow and children of an electrician fatally injured while removing a spent light bulb, alleged that the light bulb had been negligently manufactured by the defendant Pyle. The defendant did not carry on business within Saskatchewan and had no property or assets there. All of its operations took place in Ontario. The defendant sold its products to distributors and had no direct contact with consumers and no salesmen or agents within Saskatchewan.

The judgment of Dickson J., speaking for a unanimous Court and holding that the facts constituted a "tort committed within Saskatchewan," represented a significant departure from previous authority both in result and in approach. In his reasons, Dickson J. abandoned the search for a literal and mechanical solution and chose to focus squarely on the policy question raised by the jurisdictional problems of suits against extra-provincial manufacturers.

Having thoroughly reviewed the previous authorities, Dickson J. rejected in turn three theories which had been propounded (and which are discussed above) and opted for the following test:

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be

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> I think that in these circumstances that the lack of any act literally done by an officer or servant of the defendant in this jurisdiction is immaterial because such officer or servant of the defendant wrote or spoke on the telephone was putting in motion a chain of events which he knew would result in a representation reaching the plaintiff in Vancouver.

For a similar English case, see Diamond v. Bank of London and Montreal, [1979] 2 W.L.R. 228 (C.A.).

51. [1975] 1 S.C.R. 393.

> recognized in contemporary jurisprudence.... Cheshire [Private International Law] 8th ed. 1970, p. 281...says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce.[52]

The Moran decision clearly coincides with an important shift in the law of service ex juris towards affording greater access to domestic courts on the part of injured plaintiffs in

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52. At 408-9.

product liability litigation. It is worth noting that the test propounded by the Court is a flexible one and, while constituting an important advance, its precise application will depend very much upon case by case development. On the one hand, the courts could take a relatively restrictive view and require some positive act of distribution or promotion in the jurisdiction in question before finding that the use and damage within the jurisdiction had been foreseeable. On the other hand, it could readily be argued that within the context of Canadian trade patterns, placing any product into the "normal channels of trade" makes it reasonably foreseeable that the product will reach consumers in all provincies.

It is submitted that the latter approach is to be preferred, and the use of the phrases "normal distributive channels" and "interprovincial flow of commerce" suggests that this approach was intended by Dickson J.

Another area open to further elaboration is the significance of the actual place of injury where the product was acquired or regularly used in the forum. In a recent Ontario case,[53] where a helicopter owned by an Ontario company was damaged in a crash in Quebec, the court properly applied the spirit of the Moran test and upheld service ex juris on a foreign component manufacturer.

> ...it was reasonably foreseeable that such product would be used or consumed by the plaintiff and that the result of such carelessness in manufacture could cause damage to the plaintiff in the present jurisdiction.[54]

On the other hand, an Alberta court took a narrower view on similar facts and declined to permit service ex juris.[55] It is submitted that the Ontario approach is to be preferred and that the Moran rationale is met in such cases where the actual place of injury is fortuitous and bears no significant relationship to the parties.

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53. Skyrotors Ltd. v. Carriere Technical Industries Ltd. (1979), 26 O.R. (2d) 207.

54. At 211, per Osler J. The plaintiff was able to rely on the "damage sustained within Ontario" as well as the necessary and proper party rule.

55. Klondike Helicopters v. Fairchild Republic Co. (1979), 96 D.L.R. (3d) 374.

Contractual Claims

The provisions of the various provincial rules relating to service out of the jurisdiction in actions founded in contract may be summarised as follows:

1. in respect of a contract, wherever made, where a breach is alleged to have been committed within the jurisdiction -- Alberta, British Columbia, Manitoba, Ontario, New Brunswick, Newfoundland and Saskatchewan;

2. in respect of a contract, wherever made, where a breach is alleged to have been committed within the jurisdiction, even though such breach was preceded by or accompanied by a breach out of the jurisdiction which rendered impossible the performance of that part of the contract which ought to have been performed within the jurisdiction -- Alberta, British Columbia, Manitoba, Ontario;

3. in respect of a contract made within the jurisdiction -- Alberta, Manitoba;

4. in respect of a contract made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction -- Alberta, Manitoba;

5. in respect of a contract which by its terms or by implication is to be governed by the law of the jurisdiction -- Alberta, Manitoba;

6. in respect of damage sustained within the jurisdiction arising from a breach of contract committed elsewhere -- Ontario;

7. where the parties have agreed that the courts of the jurisdiction shall have jurisdiction -- Alberta, British Columbia, Manitoba, Ontario, New Brunswick and;

8. in respect of any contractual claim where the defendant has assets within the jurisdiction to a certain specified amount -- British Columbia, Manitoba, New Brunswick and Saskatchewan.

It will be recalled that Prince Edward Island and Nova Scotia have abandoned the "pigeon-hole" approach, that the Saskatchewan legislation contains specific provisions relating to cases falling within its ambit, and that British Columbia's rules

specifically provide for service out of the jurisdiction where "the claim arises out of goods or merchandise sold or delivered in British Columbia."

Breach of contract committed within the jurisdiction There is a technical difference between the accrual of causes of action in tort and contract.[56] In contract, the cause of action is complete before damage is sustained; the plaintiff may sue upon the defendant's breach. This means that the analysis adopted to determine whether the breach of contract was committed within the jurisdiction varies from that adopted for tort claims. Moreover, in a contractual action, reference must be made to the the contract itself to determine the precise terms of the vendor's obligation. In the absence of any specific contractual provision, the purchaser's cause of action for breach of warranty arises on delivery of the non-conforming goods. The quality of fitness of the goods sold is determined at the date of delivery; while defects appearing later are "evidence which goes to show [the goods were] not reasonably fit for the purpose at the time [they] were sold," it is clear that "the relevant time is the time of sale."[57]

Fixing the place of delivery will turn upon the terms of the contract, express or implied, and in certain cases upon provincial Sale of Goods legislation. Accordingly, to take typical examples, where the parties have agreed to a c.i.f. contract, physical delivery is made when the goods are put on board ship and the seller's duty to deliver is fulfilled by the delivery of the necessary documents to the buyer.[58] On the other hand, in the case of an f.o.b. contract, delivery will be complete upon arrival at the point of intended arrival specified by the f.o.b.

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56. There may be a "characterization" problem similar to that discussed in the context of choice of law; see below, pp. 128-30. For an example in the context of jurisdiction, see Spencer v. Centurion Truck Equipment Ltd. (1978), 86 D.L.R. (3d) 40 (N.B.C.A.), holding that negligent performance of an agreement to repair could only be considered contractual.

57. Crother v. Shannon, [1975] 1 All E.R. 139 at 141 per Denning M.R.

58. See Fridman, Sale of Goods in Canada (2d ed. 1979), p. 243.

terms.[59] In the absence of specific agreement between the parties, the Sale of Goods Act provides that the place of delivery is the seller's place of business, if he has one and, if not, his residence unless the sale is one of specific goods which are known to be at some other place when the contract is made, in which case that place is the place of delivery.[60] The Act further provides that where the seller is to send the goods to the buyer, delivery to a carrier is prima facie delivery of goods to the buyer.[61]

There have been several cases which have applied these rules to the problem of service ex juris. For instance, in Frost Machinery Co. Ltd. v. Wagner Tractor Inc.[62] the Manitoba plaintiff was a dealer representative for heavy earth-moving machines manufactured or assembled by the defendant, an Oregon corporation. The plaintiff, faced with a claim brought by a purchaser of one of the machines alleging it was unfit, brought the action in question against the Oregon manufacturer to recover indemnity for any loss to the original claimant. Ferguson J. held that the claim of Frost Machinery against the Oregon defendant did not come within the rule permitting service ex juris in respect of breach of contract committed within Manitoba. The tractor had been shipped f.o.b., the warehouse at Portland, Oregon, and it was held that the place of breach was the point of delivery in Oregon, fixed by the f.o.b. clause.

A similar result was reached in an old Ontario case, Gildersleeve v. McDougall,[63] where an Ontario plaintiff attempted to serve the Quebec manufacturer of an engine part which had been

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59. Ibid., p. 244.

60. Sale of Goods Act: Alberta, s. 30; B.C., s. 34; Manitoba, s. 31; New Brunswick, s. 27; Newfoundland, s. 31; N.W.T., s. 28; Nova Scotia, s. 30; Ontario, s. 28; P.E.I., s. 29; Saskatchewan, s. 29; Yukon, s. 28.

61. Alberta, s. 33; B.C., s. 37; Manitoba, s. 34; New Brunswick, s. 30; Newfoundland, s. 33; N.W.T., s. 31; Nova Scotia, s. 33; Ontario, s. 31; P.E.I., s. 32; Saskatchewan, s. 32; Yukon, s. 31.

62. (1963), 67 Man. R. 356.

63. (1881), 6 O.A.R. 553.

used for some time before the alleged defect was discovered. The terms of the contract had been simply that the engine part was to be shipped to Ontario "as soon as finished per Grand Trunk Railway." The court held unequivocally that the breach had occurred at Montreal at the point of shipment of the defective article:

> His contract was to deliver at Montreal a reasonably sufficient article; and it was not, in form at all events, an agreement to indemnify the defendant [S.C. plaintiff] in case the beam broke from defective work or bad material, which might have carried forward the contract to the date of the casualty.[64]

The same result was reached by the English court in Cordova Land Co. Ltd. v. Victor Bros.[65] holding that a British plaintiff could not obtain leave to serve an American defendant for breach of a contract to sell skins, the terms being c.i.f. delivery to Hull, and the skins being found badly damaged on arrival. In that case, the court followed an earlier English decision, Crozier, Stevens & Co. v. Auerbach,[66] another case involving goods found to be defective on arrival, where the following was said:[67]

> the defendant's duty was to ship the goods at Hamburg c.i.f.; the plaintiff's duty was to pay cash against bill of lading, which they did, and to accept the goods if satisfactory, when they reached here, with the right to a reasonable time to inspect. But their acceptance or refusal had nothing to do with the performance by the defendant of his part of the contract; the defendant's contract was performed or broken when the goods had been shipped; the property and the right to possession then passed to the plaintiffs, and, as

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64. At 558 per Patterson J.A.

65. [1966] 1 W.L.R. 793.

66. [1908] 2 K.B. 161 (C.A.).

67. At 167 per Farwell L.J.

> the plaintiffs paid for them, without any possibility of stoppage in transitu, the defendant could not have withdrawn them from the ship; the goods were thenceforward at the plaintiffs' risk, the insurance was theirs, and nothing remained to be done by the defendant. If this was a case of non-delivery, the case is covered by authorities binding upon us, and I am unable to see any difference between non-delivery and faulty delivery. The time and place at which proper delivery ought to take place is the same in both cases, and the fact that the performance of the plaintiff of his part of the contract is postponed in time and different in place appears to me to have no bearing on the defendant's performance.[68]

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68. Compare Fisher v. Cassady (1892), 14 P.R. 577, a case involving sale of lumber by sample from the British Columbia vendor to a Toronto purchaser in which the purchaser sued for damages for defective product. While the contract specified f.o.b. Toronto, Boyd C. chose to put his decision to permit service ex juris on the following basis: "The lumber, being bought by sample, the purchaser had the right to make inspection of the bulk before accepting; this inspection would naturally be at Toronto and prior to the time and payment...." (at 580)

    See also Empire Oil Co. v. Vallerand (1895), 17 P.R. 27, an action for non-delivery of goods to be shipped by a Quebec defendant to an Ontario plaintiff where service ex juris was refused on the grounds that the breach occurred in Quebec where the defendant would have given the goods for delivery to a common carrier. "In the absence of express agreement, it is not implied that the vendor is to send or carry the goods to the vendee. It is sufficient if he have the goods so disposed that the vendee shall have the right of access to and control over them. If the contract expresses that the seller is to deliver the goods, this is construed to mean that he is to carry or send them to the buyer, but if he places them in the hands of a common carrier to carry them to the buyer, this is, in the ordinary case, delivery within the meaning of the contract, the carrier being considered in such a case the agent of the buyer and not of the seller" (at 32 per Osler J.A.).

The result of basing the service ex juris rule on the place of breach is unsatisfactory. In the absence of an express contractual term, the legal presumptions are such that service on a foreign defendant who has sold defective products will be precluded. Where, on the other hand, there has been an express agreement as to time and place of delivery, the result will turn upon contractual terms which did not contemplate the jurisdictional question.[69]

Moreover, the analysis is at odds with that now adopted by the Supreme Court of Canada in Moran with respect to tort claims. It is inconsistent to permit jurisdiction in tort claims on the basis that the defendant should reasonably have foreseen that his goods would reach the plaintiff and cause damage within the jurisdiction and, on the other hand, refuse service out of the jurisdiction in contractual actions where the defendant clearly knows that his goods are going to the foreign jurisdiction. Alternatively, a rule which encompassed other than consumer contractual claims could hardly provide for the Moran test in all cases. Consider, for example, the difference between a consumer sale made by a large company with extra-provincial activities which advertises in the province to a localised plaintiff versus a contract for the sale of some specialised product manufactured by a small localised firm which has been solicited by a national non-resident company. The test should reflect whether it is more reasonable to require the plaintiff to go to the defendant's jurisdiction or to require the defendant to come to the plaintiff's

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69. Waddams, Products Liability (2d ed. 1980), p. 198 observes that:

> This result, though perhaps inevitable under the relevant rules of court, is, in my view, unfortunate, in that it associates two quite separate issues. There is no rational reason, for example, why the jurisdictional question in the case of an acceptance by mail should be determined in the same way as the question of which party should take the risk of non-delivery of a letter.

jurisdiction, and one would expect that different answers would be given to these two situations.[70] It should also be recognised that the current rules dealing with contract actions cover actions for non-payment or non-delivery which involve different concerns. In cases of non-delivery, the purchaser's rights will be determined according to the same analysis described above.[71] In cases of non-payment, however, the unpaid vendor is in effect given a choice of forum in the vast majority of cases. In the absence of express contractual provision, the courts have almost invariably applied the common law rule that it is for the debtor to follow his creditor and make payment at the creditor's place of business.[72] In re-drafting the contract rule, these considerations ought to be borne in mind, and a rule specifically related to claims for defective products may be preferable.

It should also be noted that the operation of the traditional "breach of contract within the jurisdiction rule" could be altered by varying the nature of the contractual obligation itself. For example, if the vendor was charged with the obligation to provide goods of a certain durability, such an obligation could be phrased in terms that would make a cause of action for its

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70. See Disselliss, "Louisianna Limits its Jurisdiction Over Non-Resident Sellers" (1971-72), 18 Loyola L.R. 452 at 459:

> No formula can be derived to solve all cases. The essence of due process is fairness and reasonableness, which requires a subjective judgment based on the facts of each particular case.

71. See Empire Oil Co. v. Vallerand, above note 68; Volansky Clothing Co. v. Vanockburn Clothing Co., [1919] 3 W.W.R. 913 (Alta.); Moritz v. Canada Wood Speciality Co. (1909), 17 O.L.R. 53, affirmed 42 S.C.R. 237.

72. International Power and Engineering Consultants Ltd. v. Clark (1963), 41 D.L.R. (2d) 260 (B.C.S.C.); E. Leonard and Sons v. Cushing Bros. Co. Ltd. (1914), 30 O.L.R. 646. Compare, however, the Australian cases collected by Watson, Borins, Williams, Canadian Civil Procedure (2d ed. 1977), pp. 4-57, indicating that the rule is otherwise where the foreign debt is concerned.

breach rest upon the discovery that the product was, in fact, not sufficiently durable.[73]

The inevitable conclusion is that the rule relating jurisdiction in product liability cases to the place of breach of the contract is unsatisfactory. It fails to identify the reasonable jurisdiction and should therefore be abandoned in favour of a rule which accords with the Moran result and which takes into account the variety of factors outlined in the introduction to this chapter.

Contract to be performed within the jurisdiction: breach of contract outside the jurisdiction rendering performance within the jurisdiction impossible All provinces except New Brunswick, Newfoundland and Saskatchewan permit service out of the jurisdiction where a breach of contract occurs within the jurisdiction even though the breach was preceded by or accompanied by a breach out of the jurisdiction which rendered impossible the performance of that part of the contract which ought to have been performed within the jurisdiction. The purpose of this rule is to overcome the effect of the decision of the House of Lords in Johnson v. Taylor Bros. & Co.[74] holding that a rule which merely speaks of a breach of contract within the jurisdiction does not encompass the situation where breach outside the jurisdiction removes the whole substratum of the contractual obligation, rendering performance within the jurisdiction impossible.[75]

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73. For a discussion of the substantive point, see Atiyah, The Sale of Goods (5th ed. 1975), p. 90; Ontario Law Reform Commission, Report on Consumer Warranties and Guarantees in the Sale of Goods, 1972, pp. 37-8; see also Mash and Murrell Ltd. v. Joseph I. Emanuel Ltd., [1961] 1 W.L.R. 862 at 866-7 per Diplock J. Compare Cordova Land Co. Ltd. v. Victor Bros. Inc., [1966] 1 W.L.R. 793, where Winn J. held that even assuming merchantability includes durability, it could not be said that a breach arose upon failure of the goods to last rather than on delivery.

74. [1920] A.C. 144.

75. The decision has been followed in Canada in provinces without the provision indicated: Plant Maintenance Equipment Co. Ltd. v. American Lincoln Corp. (1965), 53 W.W.R. 680; Smith & Osberg Ltd. v. Hollenbeck (No. 2), [1939] 4 D.L.R. 119, both British Columbia cases occurring before the change to the British Columbia rule; Anderson v. McIntyre, [1924] 2 D.L.R. 911 (Alberta).

However, the absence of such a provision is unlikely to affect product liability claims. As a result of the Johnson case, the court is directed to look to the substance of the contract and the substance of the breach. This means, for example, in cases of non-delivery that failure to perform an obligation, such as tendering of documents, within the jurisdiction will not constitute a breach where the delivery point is outside the jurisdiction (as in Johnson) or where a contract providing for delivery within the jurisdiction is repudiated outside of the jurisdiction.[76]

Contract made within the jurisdiction Alberta and Manitoba have adopted the English rule which allows the court to assume jurisdiction where the contract is made within its jurisdiction. The case law sets out technical rules to determine the place in which a contract is made. The general principle is that the contract is made when the last act necessary to contract formation has taken place. In the technical and traditional language of contract law, this is when the offer has been accepted. The following rules have been laid down in cases involving communication across borders. In a case of instantaneous communication (i.e., telephone or telex), the contract is made at the place where the acceptance is received by the offeror.[77] Where communications involve a delay between dispatch and receipt of the message, the contract is considered to be completed as soon as the message is dispatched. Accordingly, a contract which is completed by acceptance by mail or telegram will be made at the place where the letter or telegram was sent.[78]

It may well be questioned whether the place of the making of the contract should ever be regarded as a reliable jurisdictional guideline. These rules were developed by the courts to

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76. See Plant Maintenance Equipment, above note 75.

77. Entores Ltd. v. Miles Far East Corporation, [1955] 2 Q.B. 327 at 334 per Denning L.J.; Re Modern Fashions Ltd. (1969), 8 D.L.R. (3d) 590 (Manitoba); McDonald & Sons Ltd. v. Export Packers Co. Ltd. (1979), 95 D.L.R. (3d) 174 (B.C.); Smith and Osberg Ltd. v. Hollenbeck, [1938] 3 W.W.R. 704 (B.C.).

78. Wansborough Paper Co. Ltd. v. Laughland, [1920] W.N. 344; Cowan v. O'Connor (1888), 20 Q.B.D. 640; see also Cheshire and North, above note 1, pp. 220-1; Dicey and Morris, The Conflict of Laws (9th ed.), p. 180.

cope with the problem of contractual formation rather than jurisdiction, and when applied with respect to the latter, can only be expected to produce arbitrary results.[79]

Contract made by or through an agent within the jurisdiction

Alberta and Manitoba have followed the English rule which provides that service out of the jurisdiction may be had where the claim relates to a contract "made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction."[80] While there do not appear to be any Canadian cases dealing with this rule, it has received a broad interpretation in one English Court of Appeal decision,[81] allowing an English plaintiff to serve a Belgian company which had an agent in England who passed from his principals to the plaintiffs prices for certain items and passed back to his principals in Belgium the plaintiffs' orders for those items, the agent himself having no authority whatsoever to bind his principal:

> Formerly, proceedings for service of writs abroad would not be granted unless the breach complained of had occurred within the jurisdiction, but a new principle had now been adopted, as it was considered that if foreigners chose to carry on business here by means of agents it would only be right and proper to serve them although they were out of the jurisdiction. In order to carry out that principle it was thought necessary to include cases in which a foreigner who carried on his business abroad had an agent in this country to obtain orders, although he had no authority to accept them.

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79. See, for example, McDonald & Sons Ltd. v. Export Packers Co. Ltd., above note 77, at 178 per Bouck J. cautioning against the application of these rules "in any dogmatic fashion."

80. The Nova Scotia and P.E.I. rule permitting service on such an agent without resort to service ex juris is discussed below, p. 63.

81. National Mortgage and Agency Co. of New Zealand v. Gosselin et al. (1922), 38 T.L.R. 832 at 833 per Atkin L.J.

Accordingly, while the rule allowing for service on an agent of a corporation within the jurisdiction has been narrowly construed,[82] it is likely that the above rule would be given broad scope in Canada. As indicated, it seems clear on principle that the maintenance of an agent, sales office or distribution centre within the province constitutes a proper basis upon which jurisdiction may be based.

Contract governed by the law of the forum Alberta and Manitoba have also copied the English rule permitting service out of the jurisdiction in cases in which the contract is governed by domestic law. Choice of law in contract is discussed in detail below and, under this rule, the test is simply that of the choice of law rule. Such a rule has been criticised as being excessive in terms of accepted international principles.[83] It is argued elsewhere in this study that the considerations of choice of law and jurisdiction ought to be distinguished and segregated.[84] Choice of law turns upon the expectation of the parties and the degree of relationship between the transaction itself and the jurisdiction. While these are obviously factors to be taken into account in determining jurisdiction, they tend to ignore the element of convenience at the time of the suit, an important jurisdictional factor.

Damage sustained in Ontario by virtue of a breach of contract committed elsewhere Only Ontario has a rule allowing for service ex juris on the basis of damage sustained in Ontario by virtue of a breach of contract or tort committed elsewhere.[85]

This rule was undoubtedly prompted by the restrictive view taken prior to Moran on the place of commission of torts. It overcomes the pre-Moran reasoning, but less elegantly than the Moran case itself. It amounts to an adoption of the last event theory discussed above[86] and may, in certain cases, produce an

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82. See below, pp. 61-4.

83. F.A. Mann, "The Doctrine of Jurisdiction in International Law," [1964] 1 Recueil de Cours: Académie de Droit International, 1 at 78.

84. See below, pp. 137-9.

85. R. 25 1(h).

86. See above, p. 26.

arbitrary result. Situations can easily be imagined which would be determined one way by the Moran test and quite another way by the Ontario rule. For example, suppose a British Columbia resident acquires in British Columbia a product manufactured in Alberta and sold only in the provinces of Alberta and British Columbia. While on vacation in Ontario, the British Columbia resident sustains injury from the product. Should he wish to sue in Ontario (perhaps because of availability of witnesses), the British Columbia resident would not likely be able to serve out of the jurisdiction under the Moran test. His case would, however, fall under the literal wording of the Ontario damage rule and he would be permitted to resort to the Ontario courts unless jurisdiction was declined on the basis of forum non conveniens.

A more difficult case might be posed by a situation where the British Columbia resident moved permanently to Ontario and, after moving, sustained injury by virtue of the Alberta product. Again, there is a good possibility that the Moran test would exclude jurisdiction whereas the Ontario test would allow it. On the other hand, in cases where an Ontario litigant sustained injury outside Ontario, the Moran test might be more generous. Provided the product was distributed in Ontario and Ontario was a foreseeable forum, it is possible that under the Moran test service ex juris would be allowed. This situation would escape the literal and more mechanical approach of the Ontario rule (although, of course, Ontario has retained the "tort committed within the jurisdiction" rule and, with it, the Moran result as well).

The impact of this rule in the context of product liability cases may be significant. It has now been held in a personal injury suit that although the actual injury occurred outside the province, the plaintiff still sustained damage in the province when he returned for treatment and convalescence.[87] Another case interpreting the rule said that an Ontario company sustained damage within the province for the purposes of the rule where a helicopter it owned was damaged in a crash occurring in Quebec.[88]

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87. Vile et al. v. Von Wendt (1979), 25 O.R. (2d) 513 (Div'l Ct.), overruling Mar v. Block (1976), 13 O.R. 422.

88. Skyrotors Ltd. v. Carriere Technical Industries Ltd. (1979), 26 O.R. (2d) 207.

In the contractual context, the Ontario rule obviously broadens significantly the service ex juris rule. In Lummus Co. Canada Ltd. v. International Alloys Inc.,[89] it was held that the plaintiff, an Ontario purchaser of defective pipe supplied by the defendant, an American company, had sustained damage in Ontario by virtue of breach of contract where the pipe was shipped f.o.b. Pennsylvania to a job site in Ontario. As the contract provided for shipment f.o.b. Pennsylvania, the breach of contract would have occurred in Pennsylvania when the defective product was shipped. Master Sandler held that while the measure of damages would be the difference between the value of the pipe at the time of delivery in Pennsylvania and the value it would have had had it met the warranty as to quality of fitness, the damages were sustained in Ontario where the pipe had to be replaced:

> In breach of contract cases, it seems to me that the breach could occur in one jurisdiction and the damage could be sustained in another....In the case before me, while the breach occurred in Pennsylvania, the damage, or harm, or injury, was not sustained by the plaintiff until the defective pipe was discovered in Ontario after payment, and remedial steps were then taken, causing the damage now claimed. In my view, the damage was sustained in Ontario.[90]

The rule has also been given broad interpretation in the case of non-payment. In Canadian General Electric Co. Ltd. v. C.M. Windows & Stained Glass Ltd.,[91] it was held that non-payment by a Quebec defendant for goods sold under invoice requesting payment at the plaintiff's Quebec office could constitute a claim for damages sustained in Ontario arising from a breach of contract committed elsewhere, in that the plaintiff's head office was in Ontario and the company as a whole had suffered damage by virtue of non-payment.

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89. (1977), 17 O.R. (2d) 322. See also John Ewing & Co. Ltd. v. Pullmax (Canada) Ltd. (1976), 13 O.R. (2d) 587.

90. At 327-8.

91. (1977), 16 O.R. (2d) 188.

The Ontario rule basing jurisdiction on damage sustained within the jurisdiction relieves against the harshness of the pre-Moran tort cases and against the existing situation with respect to breach of contract. Tempered with the doctrine of forum non conveniens, the rule is a "rough and ready" solution to these problems. Obviously, however, sustaining damage in the jurisdiction is not always a reliable jurisdictional test and, by relying so heavily for its satisfactory operation on forum non conveniens, the rule itself may fail to articulate a satisfactory test for jurisdiction. Moreover, as noted above, it will fail to catch certain cases which properly belong to the Ontario Courts merely because the injury or accident fortuitously occurred outside Ontario.

Contractual provisions relating to jurisdiction Agreements between the parties as to jurisdiction can have the following effects:

1. establishing a basis to justify the assumption of jurisdiction over a foreign defendant;

2. excluding service ex juris which would otherwise be appropriate; and

3. providing a basis for the court ordering a stay of a suit brought against a party within the jurisdiction.[92]

All provinces except Newfoundland and Saskatchewan have a provision in their service ex juris rules to permit the court to assume jurisdiction over a foreign defendant who has agreed that the court should have jurisdiction.[93] It is clear that in the absence of a specific statutory provision permitting service in

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92. See generally Cowen and Mendes Da Costa, "The Contractual Forum: A Comparative Study" (1965), 43 C.B.R. 453.

93. In Prince Edward Island and Nova Scotia, where there are no pigeon-holes, the general power would include this category as well.

such cases, the agreement of the parties will not by itself be sufficient to permit the court to assume jurisdiction.[94]

In the second and third categories, namely, excluding jurisdiction of the domestic court which is otherwise available through service within or without the jurisdiction, courts have maintained an undoubted discretion to override such exclusions. However, the prevailing view is that caution should be exercised in this area and that the courts should be very slow to permit one of the parties to go back on an agreement reached as to jurisdiction. The general principles in this area have been well expressed by Brandon J. in The Elefetheria:[95]

> The principles established by the authorities can, I think, be summarized as follows:
>
> 1) Where the plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
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> 2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
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> 3) The burden of proving such strong cause is on the plaintiffs.
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> 4) In exercising its discretion the court should take into account all the circumstances of the particular case.

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94. Ontario Power Co. of Niagara Falls v. Niagara Lockport & Ontario Power Co. (1922), 52 O.L.R. 168 at 173-4 (C.A.); see also British Wagon Co. v. Gray, [1896] 1 Q.B. 35 (C.A.). Compare, however, the situation where the foreign defendant has agreed that service may be made on his agent or person otherwise appointed within the jurisdiction, in which case the agreement and service will be upheld and jurisdiction assumed: Montgomery Jones & Co. v. Liebenthal & Co., [1898] 1 Q.B. 487 (C.A.); Tharsis Sulphur v. la Société des Métaux (1889), 58 L.J.Q.B. 435.

95. [1970] P. 94 at 99-100, 103.

> 5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relevant convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applied and, if so, whether it differs from English law in any material respect. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.
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> I think that it is essential that the court should give full weight to the prima facie desirability of holding the plaintiffs to their agreement. In this connection I think that the court must be careful not just to pay lip service to the principle involved, and then fail to give effect to it because of a mere balance of convenience.

There are several Canadian cases which have ordered a stay of action brought in violation of such a foreign jurisdiction clause on these principles.[96]

On the other hand, there are many instances where the domestic courts have permitted one party to back out of a jurisdiction agreement, and it must be said that the standard applied has been somewhat uneven. In A.S. May & Co. Ltd. v.

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96. See E.K. Motors Ltd. v. Volkswagen Canada Ltd., [1973] 1 W.W.R. 466 (Sask. C.A.); Birks Crawford Ltd. v. The Strombolini, [1955] Ex. C.R. 1; Poly-Seal Corp. v. John Dale Ltd., [1958] O.W.N. 432; see also Castel, vol. 1, pp. 328-30.

Robert Reford Co. Ltd.,[97] Keith J. followed the decision of the English Court of Appeal in The Fehmarn:[98]

> a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them....I do not regard the choice of law in the contract as decisive. I prefer to look to see with what country is the dispute most closely concerned.[99]

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97. (1969), 6 D.L.R. (3d) 288.

98. [1958] 1 W.L.R. 159 at 162 per Denning L.J.

99. However, it should be pointed out that in both the English and Canadian cases there were strong reasons to permit suit in a domestic forum. In the Ontario case, the defendant had entered an unconditional appearance and this would have allowed jurisdiction to be asserted notwithstanding the plaintiff's agreement to sue elsewhere. In The Fehmarn, it is clear that the court was of the view that the defendant was seeking to rely on a foreign jurisdiction clause, which referred disputes to the courts of the U.S.S.R. between the English holder of a bill of lading and the owners of a German vessel which frequently called in London, merely to avoid having to give security to obtain the release of the vessel arrested in England rather than out of a genuine desire to litigate in the U.S.S.R. See also Westcott v. Alsco Products of Canada Ltd. (1960), 26 D.L.R. (2d) 281 (Newfoundland C.A.) where it was held that an agreement providing that "the courts of the province of Ontario shall have jurisdiction in reference to any matters herein" was not sufficient to deprive the Newfoundland courts of jurisdiction. It was held that express language was required to oust the courts' jurisdiction and, in the absence of a clause providing exclusive jurisdiction in the Ontario court, the agreement merely conferred concurrent jurisdiction on the Ontario court. Note that The Fehmarn is

It is submitted that the general rule will be that the foreign jurisdiction clause will be observed and a stay will be granted unless there is very strong reason shown by the plaintiff why he should be exculpated from his agreement. In the context of service ex juris, the foreign jurisdiction clause provides a strong argument which may be advanced by a defendant to preclude service ex juris in a case which otherwise falls within the rule.[100]

A matter which has not been canvassed in the reported cases but which may well arise in the context of product liability claims is that of inequality of bargaining power. While there is no express authority in support, it may be assumed that a

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criticised by Bisset-Johnson in "The Efficacy of the Choice of Jurisdiction Clauses in International Contracts in English and Australian Law" (1970), 19 I.C.L.Q. 541 at 546. Cf. the decision of the United States Supreme Court upholding a foreign jurisdiction clause: The Bremen (1972), 407 U.S. 1.

100. See Mackender v. Feldia A.G., [1967] 2 Q.B. 590 at 598 per Denning M.R. holding that a foreign jurisdiction clause "is a strong ground why discretion should be exercised against leave to serve out of the jurisdiction" and, at 604, "where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reasons to induce me to permit one of them to go back on his word." See also The Chaparrall, [1968] 2 Ll. L.R. 158 (C.A.). Compare, however, Lewis Construction Co. Pty. Ltd. v. M. Tichauer Société Anonyme, [1966] V.R. 341 (Victoria), where it was held that a clause providing for exclusive jurisdiction in the French courts could be overridden. The claim was introduced by the purchaser of cranes manufactured by the defendant in France for indemnity against claims advanced in Australia by parties injured when the crane collapsed. Jurisdiction was available under the ex juris rule as the contract was "made within the jurisdiction." The court held that the exclusive jurisdiction clause could be overridden as, following the Fehmarn case, "the questions to be litigated in this action are much more closely concerned with Victoria than those with France and that the action is one which properly belongs to the courts of this State." At 349 per Hudson J.

court would be much less willing to give effect to a jurisdiction clause unilaterally inserted by one party.[101] The power to control unconscionable overreaching in consumer contracts is well established and undoubtedly would be employed if necessary.[102]

Contractual claims and assets within the jurisdiction Four provinces maintain the power to allow service out of the jurisdiction in contractual cases where the defendant has assets within the jurisdiction. In British Columbia, no leave is required in such a case and no specified amount of assets must exist within British Columbia.[103] In Saskatchewan, where the rules provide that ordinarily no leave prior to service need be obtained, the plaintiff must obtain leave and the defendant must have assets within the jurisdiction to the value of $200. It is further provided that in the event of non-appearance by the defendant, "the court shall require the plaintiff before obtaining judgment to prove his claim in such matter as may seem proper."[104] The New Brunswick Rule[105] specifies no amount of assets and merely

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101. See Bisset-Johnson, above note 99, p. 555:

> A discretion resides in the court to disregard a choice of venue clause and this may be used where exceptional hardship or inconvenience would result if the case were heard in the chosen venue. This is more likely to occur where the parties are not of equal bargaining power, but it could also involve a situation in which, even though the parties are of equal bargaining power, the only result of holding the parties to their original choice of jurisdiction would be greatly to increase costs and inconvenience or to force litigation in a foreign forum with which neither of the parties had any real connection.

102. See below, pp. 165-9, for further discussion of this point in the context of choice of law.

103. Rule 13(1)(m). The rule also permits service out where the claim is for alimony and the defendant has assets in British Columbia.

104. Rule 29(b), also covering alimony claims.

105. Order 11, Rule 1(1)(h).

provides that service may be allowed on any contractual claim where it "appears to the satisfaction of a court or judge that it is in the interests of justice that the same should be tried in this jurisdiction and that there are or probably will be property or assets or rights or credits or income within the province of New Brunswick which are or may be made or may become available to satisfy in whole or in part any judgment." The Manitoba Rule[106] parallels that of Saskatchewan in requiring leave before service is effected,[107] and in providing that, in the event of default, "the plaintiff shall prove his claim to the satisfaction of the court before judgment shall be entered." The Manitoba Rule does specify that the assets in Manitoba must be to the value of at least $200.

These rules are the closest thing in Canadian law to what is often referred to as quasi-in-rem jurisdiction, or jurisdiction based solely upon the presence of assets within the jurisdiction.[108] It has been suggested above that the underlying motivation and practical result of broadly worded service ex juris rules is to permit the plaintiff to sue in his home court if the defendant has assets within the jurisdiction. The difficulty is that this jurisdictional base will often operate harshly upon defendants. If the substance of the claim relates in some way to the assets or reason for the assets being within the jurisdiction, then there can be no objection. However, the mere presence of assets does not, by itself, always indicate sufficient connection within the jurisdiction to justify the assumption of jurisdiction over the defendant. Indeed, jurisdiction based upon the presence of assets operates much more harshly than other instances of jurisdictional overreaching because the defendant's option to defend is much more circumscribed. As the judgment will be effective within the jurisdiction, the defendant will have to decide between defending those assets, and thereby submitting to the jurisdiction, making the judgment enforceable in other jurisdictions, and simply abandoning the assets located

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106. Rule 30.

107. Robinson v. Mickelson (1936), 44 Man. R. 174.

108. Cf. Santa Marina Shipping Co. S.A. v. Lanham & Moore Ltd. (1978), 18 O.R. (2d) 315, refusing jurisdiction although the defendant had assets of 3.6 million dollars in Ontario.

within the jurisdiction to avoid submission.[109]

In light of the obvious difficulty such rules place upon defendants, it is not surprising that the courts have given them narrow scope. While, on the one hand, the courts have been willing to interpret broadly the meaning of assets within the jurisdiction,[110] on the other, there is a strong tendency in these cases to decline jurisdiction on the grounds of forum non conveniens. In the leading Ontario case (which arose when Ontario had such a rule), Brenner v. American Metal Co.,[111] Middleton J. said as follows:

> Where our court assumes to exercise an extra-territorial jurisdiction, and the foreigner has not in any way attorned to our jurisdiction, and the only excuse or justification for the assertion of jurisdiction over him is the existence within the Province of assets which may be reached by execution (Rule 25(h)), manifestly the situation is one of delicacy and one calling for the exercise of the most careful judicial discretion. It is not seemly that a command should

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109. See below, pp. 80-90, for discussion of submission to the jurisdiction.

110. The plaintiff will have actually to prove existence of assets with evidence before he gets his order for service out: Gardner v. Eaton (1914), 17 D.L.R. 637 (Manitoba); Gullivan v Cantelon (1907), 16 Man. R. 644; D.C. Miller Ltd. v. Miramich Air Services Ltd. (1960), 44 M.P.R. 287 at 291 (N.B.C.A.). The courts have been willing to consider that a debt owed by someone within the jurisdiction to the foreign defendant, even though payable outside the jurisdiction, may be considered to be an asset within the jurisdiction for the purpose of the rule: Woodward v. Koeford (1918), 29 Man. R. 184 (C.A.); Brand v. Green (1900), 13 Man. R. 101; J.J. Gibons Ltd. v. Beliner Gramaphone Co. Ltd. (1913), 28 O.L.R. 620 (C.A.); see Castel, vol. 1, p. 263, note 213; Contra Love v. The Bell Piano Co. (1909), 10 W.L.R. 657 (Alberta).

111. (1920), 48 O.L.R. 525 at 526.

> issue from our Sovereign to the subject of another State calling upon him to submit himself to the jurisdiction of our Courts, save in the clearest possible cases....It is a mere accident...[the facts are not disclosed in the report of the decision] that there is some transient property in this country; and convenience, as well as the exercise of due respect for the rights and preference of foreigners to litigate in the Courts of their domicile, points out the Courts of New York as the proper place for this litigation.

The decision was upheld with a slight variation on appeal where Meredith C.J.O. said as follows:

> The Rule is an extraordinary one; it is a Rule that does not exist in any other country; and if my recollection is right, it has been said to be contrary to international practice.[112]

The decision has been followed in a number of instances,[113] and the application of discretionary principles and the doctrine of forum non conveniens appear to be capable of effectively curtailing the scope of the assets rule to cases where there is some reason in addition to the mere presence of assets to justify service on the foreign defendant.

It is certainly arguable that jurisdiction based on the presence of assets should, unless there is some other strong or valid reason for asserting jurisdiction, be limited to the amount of the assets actually present within the jurisdiction as well as

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112. 50 O.L.R. 25 at 26-7.

113. Denton Mitchel and Duncan Ltd. v. Jacobs (1923), 23 O.W.N. 677; Nenna v. Glass Coffee Brewer Inc., [1935] O.W.N. 553; O'Brien v. Raynauld, [1959] O.W.N. 173.

to those situations where the assets have something to do with the plaintiff's claim.[114]

Necessary and Proper Parties

In all provinces service ex juris is permitted where the foreign defendant is a "necessary and proper party" to an action properly brought against another party who has been duly served within the jurisdiction. This simply means that to serve the foreign defendant, the plaintiff must be able to link the claim against the foreigner with his claim against a domestic defendant for whom resort to the service ex juris rule is unnecessary.

It has been uniformly held that the question of whether the foreign defendant is a "necessary and proper party" within the meaning of these service ex juris rules turns on whether it would be proper to join that party as a defendant in purely domestic litigation. The leading case in this area is the decision of the English Court of Appeal in Massey v. Heynes,[115] where Lord Esher M.R. held that "the question, whether a person out of

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114. The American quasi-in-rem jurisdiction is limited to the value of assets present and the Supreme Court of the United States has held that the "minimum contacts" test, discussed below, pp. 106-9, must be met to meet the constitutionally imposed due process requirement: Shaffer v. Heitner (1977), 97 S. Ct. 2569. For a theoretical discussion of quasi-in-rem jurisdiction, see Von Mehren and Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966), 79 Harv. L. Rev. 1121. The German rule allowing an unlimited jurisdiction in terms of subject matter and amount by virtue of the mere presence of assets has long been criticised. See Nadelmann, "Jurisdictionarily Improper Fora" in XXth Century Comparative and Conflicts Law -- Legal Essays in Honour of Hessel E. Yntema at 329: "To use an example given in an article in a German journal many years ago, a Russian may leave his galloshes in a hotel in Berlin and be sued in Berlin for a debt of 10,000 Mark because of presence of assets within the jurisdiction."

This jurisdiction has been abolished for purposes of suits against domiciliaries of the members of the European Economic Community but is still available against others: see below, pp. 102-3.

115. (1888), 21 Q.B.D. 330 at 338.

the jurisdiction is a 'proper party' to an action against a person who has been served within the jurisdiction, must depend on this, -- supposing both parties had been within the jurisdiction would they both have been proper parties to the action?"

Accordingly, to understand this aspect of service ex juris practice, it is necessary to have some familiarity with the general principles which lie behind the rules relating to joinder. Rules permitting joinder of parties are motivated by considerations of economy, efficiency and consistency. There is a strong modern tendency to avoid a multiplicity of litigation and to encourage, so far as possible, the resolution of the entire dispute in one lawsuit. The parties, judicial system and society at large have a distinct interest in saving the time, expense, inconvenience and waste of scarce judicial resources which result from a fragmented series of lawsuits where one action can properly resolve the entire dispute.

The considerations of efficiency and economy are obvious. Multiplicity of proceedings involves considerable extra expense on the part of the plaintiff, especially if he has to bring a series of lawsuits in a variety of jurisdictions. The concern favouring consistency derives from the doctrine of res judicata which, as a general rule, provides that a finding in one lawsuit is only binding between the actual parties to that lawsuit. This means, for example, that if A sues B in one lawsuit and the court determines that C rather than B was at fault, that finding will not bind C in a subsequent suit by A; indeed, in most jurisdictions, the earlier result cannot even be admitted in evidence.[116] Absence of witnesses or brilliance of argument may enable C to convince the second court that B was at fault. Although clearly entitled relief against someone, A may be faced with flatly inconsistent results. Joinder rules avoid this possibility and enable one court to determine the issues between all parties.

This policy of liberal joinder and avoidance of multiplicity of lawsuits is seen to be strong enough to justify a service ex juris rule which permits assumption of jurisdiction over a defendant who does not otherwise fit the categories of the service ex juris rule. In cases of undue hardship to the foreign defendant, the court will exercise its discretion and decline to assume jurisdiction.

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116. See Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), pp. 27-9.

In the past, there was a tendency to take a somewhat narrow view of the "necessary and proper party" rule. The traditional reticence, noted above, in the matter of service ex juris was especially strong where the defendant did not fit one of the substantive categories, such as contract or tort. In addition, a narrower view was taken of joinder of defendants, even in domestic litigation.[117] However, the modern trend is to take a broader view of joinder rules,[118] and there is a willingness to apply such rules liberally in the context of litigation against foreign defendants.

In product liability litigation, there will be frequent resort to these joinder rules. The most common situation is where a product manufactured outside the jurisdiction is purchased from a local retailer and causes injury. The injured purchaser is able to sue the local retailer without any concern for the rules relating to service ex juris and may also sue the

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117. Examples of this are Beaver, Lamb & Shearling Co. Ltd. v. Sun Life Insurance Office of London, England, [1951] O.R. 401 per Schroeder J. at 409: "However desirable it may be to avoid a multiplicity of proceedings, the Court must always keep present to its mind considerations that apply when it is asked to make an order under the provisions of Rule 25 (1)(i)."

    See also Boston Law Book Co. v. Canada Law Book Co. Ltd. (1918), 43 O.L.R. 13, appeal quashed at 233.

118. See Canadian Steel Corporation Ltd. v. Standard Lithographic Co. Ltd., [1933] O.R. 624 at 630 per Fisher J.A.: "The object of this rule is to avoid, if possible, the expense and delay of the bringing of two actions, if relief without inconvenience, expense or embarrassment can be given in one action." See also Thomas Sayle Transport Ltd. v. Rivers, [1955] O.W.N. 321 per Judson J.: "These cases [referring to a series of decisions following the Canadian Steel decision, above] have brought about a definite extension of the Rule. A plaintiff has been allowed to join different causes of action against different questions if a common question of law or fact is involved."

foreign manufacturer as a necessary and proper party.[119] Especially before the Moran decision expanding the scope of the tort rule, this possibility was particularly significant.

There may be many reasons for wanting to bring in the foreign manufacturer despite the availability of action against the local retailer. The local retailer may be of insufficient substance to pay the judgment. The theory of recovery may vary and there may be procedural advantages, especially in the area of discovery, in having the manufacturer present. An example of such a case is provided by Colonna v. Healy Motors Ltd.,[120] where it was held that an Alberta purchaser of an English motor vehicle, who alleged that he had suffered injury by reason of a defective brake drum, could justify service ex juris on the Ontario distributor and English manufacturer of the motor vehicle as necessary and proper parties to his action against the Alberta retailer. The reasons of McLaurin J. provide a rationale for involving foreign manufacturers generally, as well as in the specific context of the necessary and proper party rule:

> The Rover Company evidently seeks a market in Alberta for this product and, if this accident was due to a mechanical defect at the point of manufacture, resulting in loss to the plaintiff, it should answer for the damages sustained, and it is quite manifest that the plaintiff would be under a very substantial expense in bringing suit in England. Thus, between the parties, the Rover Company, in all probability, is better able to meet the cost of litigation in Alberta than

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119. The plaintiff will, in such a case, still have to demonstrate the bona fides of his action against the local party and, should it appear that the action against the local party is without merit and undertaken simply to bring in other defendants, service on these defendants will not be allowed. See Witted v. Galbraith, [1893] 1 Q.B. 577 (C.A.); see also Chaney v. Murphy (1948), 64 T.L.R. 489 at 493: "any risk that the two defendants would fail to satisfy the judgment, does not, in our opinion, warrant the taking of the most inconvenient course by allowing them to be served out of the jurisdiction."

120. (1952), 5 W.W.R. 466 (Alta.)

> the plaintiff would be to underwrite the expense of litigation in England. Even though the claim against the defendant Healy Motors Ltd. [the Alberta retailer] is for a breach of contract, the facts connected with the sale of the car, the nature of the accident and the alleged defect in the break drum are all connected, and it is my view that the forum conveniens is Alberta.[121]

A recent decision of the Ontario Court of Appeal is also significant in the context of product liability litigation. In Jannock Corporation Ltd. v. R.T. Tamblyn & Partners Ltd.,[122] it was held that an Ontario plaintiff complaining of a defective refrigeration system was able to join the British Columbia boat builder which had installed the system in its action against the designer of the system, Tamblyn. Tamblyn's defense was that the defect was caused by the negligence of Yarrows, the B.C. builder, and the plaintiff sought to invoke the service ex juris rule, notwithstanding an agreement between the plaintiff and Yarrows that any disputes arising from the contract to build the ship would be decided in the courts of British Columbia. Brooke J.A. held, for the majority, that the choice of forum clause was truly irrelevant as it did not contemplate an Ontario action against another defendant which required the involvement of the British Columbia defendant, and explained the basis for permitting service ex juris as follows:[123]

> If Tamblyn succeeds in its defence that Yarrows was at fault and Yarrows is not a party, while the finding is binding on the appellant and Tamblyn, it is of no moment, for the appellant must sue Yarrows in British Columbia where Yarrows may successfully defend by heaping the blame on Tamblyn.

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121. At 469.

122. (1976), 8 O.R. (2d) 622 (leave to appeal to S.C.C. dismissed at 622).

123. At 630-1.

> The result is the possibility of two trials with different results, both finding that the plaintiff suffered loss by reason of the faulty brine tanks but without final judgment against the wrongdoer. To me this is an important reason why the defendants would be joined if all were in Ontario and it is an important consideration as to whether one can conclude that the defendant Yarrows is a necessary and proper party in an action against Tamblyn under Rule 25(1)(j). In cases such as this where persons, whose work and skill are combined to fashion a unit for a purchaser, defend its suit by seeking to blame each other when the plaintiff seeks to allege fault on the part of each other or all of them, each and all of them are necessary and proper parties[124].

To the extent that products are made of various components or involve the activities of various parties, the necessary and proper party rule as interpreted by these cases is of obvious significance.[125] It may well be that the manufacturer or designer of a component part would not fall within the Moran test in that it may be difficult to bring home foreseeability of use in the jurisdiction in question. The necessary and proper party rule provides a simpler basis for the involvement of such a defendant in favour of an injured purchaser.

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124. This case also established the principle that as between Canadians, the residents of one province ought not to benefit from any presumption traditionally extended in favour of foreigners in cases of doubt as to the propriety of service ex juris: see above, pp. 17-18.

125. Cf., however, Klondike Helicopters v. Fairchild Republic Co. (1979), 96 D.L.R. (3d) 374 (Alta.), holding that a foreign manufacturer was not a "necessary and proper party" to an action against a domestic repairer sued in breach of contract. It is submitted that this decision takes an unnecessarily narrow view of the scope of the rule.

Service on a Non-Resident Corporation Through an Agent Within the Jurisdiction

The rules of all provinces provide for service upon resident agents of non-resident corporations in certain specified situations. In all provinces except Nova Scotia and Prince Edward Island, the rules provide for service within the jurisdiction on an agent of a non-resident corporation where that agent transacts or carries on the business of the non-resident corporation. While the literal terms of these rules are broad, they have been narrowly interpreted by the courts.

From early on the Canadian courts, like the English, have held that, to be properly served, an agent must be within the jurisdiction to carry on the very business of the corporation. As well, he must have the power and the capacity to make decisions on behalf of the corporation and his activities must be an integral part of the corporation's activities.

In an early case,[126] it was made clear that the provision for service on an agent did not significantly alter the position with respect to non-resident corporations:

> It is important to remember that it is substantially residence within the country at the time of service which confers jurisdiction, and that the spirit of the enactment is that there must be personal service, or something that is equivalent to it -- in the case of a corporation, service upon someone in their employment, notice to whom would be notice to the corporation, or whose duties would cast it upon him to bring it to their notice....[the words of the rule] clearly demand service upon some chief or principal officer, whose knowledge would be that of the corporation.
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> I think that what is meant by "a person who transacts or carries on a part of the business, or any business for, any corporation," is, at the least, some person who is an agent of the corporation, who transacts or carries on here, or

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126. Murphy v. Phoenix Bridge Co. (1889), 18 P.R. 495 at 499-501 per Osler J.A.

> controls or manages for them here, some part of the business which the corporation professes to do and for which they were incorporated.

It has been repeatedly held that "the business" carried on by the agent must be "an integral part" of the corporation's business;[127] that it will not suffice if the activity within the jurisdiction is merely incidental to business carried on or transacted elsewhere;[128] and that the person served within the jurisdiction must be of such seniority that notice to him would constitute notice to the corporation or that his duties would be such that he would be obliged to bring it to the corporation's notice.[129]

There have been several cases involving the sale of products within the jurisdiction interpreting this rule. In Dunlop Co. v. Actien,[130] it was held that where a foreign corporation had an agent in charge of a stall at an exhibition and such agent took orders for and attempted to sell the goods of the corporation, that corporation was carrying on business within England. Similarly, in Saccharin Corporation v. Chemische Fabrik,[131] service on an agent was upheld where the agent maintained an office, had authority to accept offers himself on behalf of the foreign corporation, and where the shipments of goods were made partially from a warehouse in England and payment for the goods was made

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127. Droeske et al. v. Champlain Coachlines Inc., [1939] O.R. 560 (C.A.).

128. Appel v. Anchor Insurance and Investment Corp. Ltd. (1921), 21 O.W.N. 25.

129. Murphy v. Phoenix Bridge Co., note 126 above. These principles were reviewed in some detail and approved of by the British Columbia Court of Appeal in Central Trust Co. of China v. Dolphin Steamship Co. Ltd., [1951] 1 D.L.R. 19, and were again reviewed and reiterated by the Ontario Court of Appeal in Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce (1974), 3 O.R. (2d) 70 (C.A.).

130. [1902] 1 K.B. 342.

131. [1911] 2 K.B. 516.

directly to the agent. On the other hand, where the agent has no authority to accept the offers but merely transmits them to his principal, service on him will not be upheld.[132] It has also been held in the context of a statute requiring registration of non-resident corporations which "carried on business" within Quebec, that an American company which sold its products in Quebec through a traveller who took orders from Quebec residents which were filled by a company from its American offices was not carrying on business in Quebec.[133]

In both Nova Scotia and Prince Edward Island, recently enacted rules broaden the category of case in which service may be made on the agent of a non-resident corporation. In both provinces, Rule 10.04 provides that with respect to proceedings against any principal out of the jurisdiction which "arose through doings with or through his agent who resides or carries on business within the jurisdiction," service may be made in the following manner. The agent within the jurisdiction is personally served with the document and in two days the principal must be served by ordinary mail at his address outside the jurisdiction with the same documents. While the proceedings must relate to the business of the agent, the words which allow for resort to the rule in cases of dealings "through the agent" considerably broaden the rule. This wording suggests that the agent need not have authority to act on behalf of the principal nor carry on an integral part of the corporation's business on its behalf within the jurisdiction. Presumably, a non-resident corporation would be served pursuant to the rule if it maintained a sales office or had a salesman or sales representative which acted as a conduit for orders between the corporation and a purchaser.[134]

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132. Okura & Co. Ltd. v. Forsbacka, [1914] 1 K.B. 715.

133. Standard Ideal Co. v. Standard Manufacturing Co., [1911] A.C. 78. The meaning of "carrying on business" is further discussed below in the context of enforcement of judgments: pp. 78-80.

134. The interpretation this phrase has received in service ex juris cases is discussed above, pp. 42-3.

Finally, in Saskatchewan, in cases falling within the 1977 Consumer Products Warranties Act, provision is made for service by registered mail upon the registered office of any corporation in cases which fall within the ambit of the Act. Jurisdiction is related specifically to carrying on business within Saskatchewan and s. 33 contains its own definition of that term. The defendant will be deemed to carry on business within that section if he owns any land within Saskatchewan, maintains any office, warehouse or other place of business, holds any license or registration entitling him to do business or sell securities, has his name or telephone number listed in a Saskatchewan directory, or has an agent, salesman, representative or other person conducting business in the province on his behalf. Finally, and most broadly, the foreign corporation may be served if "he directly or indirectly markets consumer products in Saskatchewan." This definition of carrying on business is obviously much broader than that found in the rules of court as interpreted by the cases, and indeed, the phrase "indirectly market consumer products in Saskatchewan" is capable of covering virtually any case involving consumer products which find their way into Saskatchewan.

## Conclusion

It is suggested that service out of the jurisdiction should be based upon the principle that it is proper to assume jurisdiction over an extra-provincial defendant if, in light of all the circumstances, it is more reasonable to require the defendant to come to the plaintiff's province to defend than to require the plaintiff to go to the defendant's province to prosecute the claim.

In the specific context of product liability litigation, it is suggested that the principles which emerge from the foregoing discussion of existing rules as to the propriety of assumed jurisdiction may be summarised as follows. Service out of the jurisdiction ought to be permitted in any case involving a product liability claim where any of the following criteria are met:

1. The defendant maintained any place of business, office, warehouse, agent, salesman, or did any act of distribution, advertising or encouragement of distribution or sale of the product or similar products within the jurisdiction;

2. The defendant knew of or could reasonably foresee distribution or use of the product within the jurisdiction;

3. The defendant put the product in question into the normal channels of interprovincial commerce or, because of the very nature of the product, ought to have foreseen that the product would enter the normal channels of interprovincial commerce, even though the particular jurisdiction in question was not contemplated; or

4. There is a claim against another party properly sued to which the defendant in question is a necessary or proper party.

Satisfaction of any of the above tests ought to be seen as prima facie justification for the assertion of jurisdiction over the extra-provincial defendant. However, it should be recognised that such rules inflexibly applied could produce arbitrary results. If the test for jurisdiction is truly to turn upon the selection of the most reasonable jurisdiction in which the lawsuit ought to be litigated, the following factors should also be considered:

1. Care should be taken to distinguish commercial and consumer transactions.[135] In the case of the former, it may be significant to inquire which party initiated the transaction. If the transaction whereby the plaintiff acquired the product was in the nature of a normal consumer transaction or a direct result of such a transaction, i.e., a gift or general family use, there is every reason to require the defendant to defend his conduct in the plaintiff's jurisdiction. On the other hand, if the plaintiff rather than the defendant solicited the product or initiated the transaction, especially where the defendant is primarily a local distributor and the plaintiff is primarily an interprovincial purchaser, then assumption of jurisdiction over such defendant may be inappropriate.

2. Convenience of litigation. The factors here are usually subsumed under the forum non conveniens rubric and include such matters as the availability of witnesses, and the relative capacity of the parties to bear the cost

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135. A suggested definition of consumer transaction is offered below, p. 171.

of interprovincial litigation. While the four indicia suggested above of jurisdiction will normally yield the appropriate result, the convenience factor should be carefully examined and, in appropriate cases, may override the prima facie choice of jurisdiction.

3. Finally, in cases of real doubt, the relevant extent of the parties' out-of-province relationships generally. All else failing, it would be appropriate to select the jurisdiction of the most localised party.[136]

Service ex juris rules based upon these principles would tend to favour plaintiffs more than do the existing rules of many provinces. On the other hand, in certain particular cases (the Ontario "damage sustained" rule is the best example), these principles would be more restrictive. The assumption of jurisdiction in cases which fall outside these principles should be avoided. Defendants should not have to face the harassment which jurisdictional overreaching entails.

Should a common reform of ex juris practice be based upon an agreed standard for jurisdiction beyond which no province should go, or should the scheme simply lay down a minimum standard? To answer this question, one must turn to the issue of recognition and enforcement. A crucial issue in that area is whether it is desirable or feasible to contemplate a common jurisdictional standard across Canada based on the principle that no province will assume jurisdiction except in cases within the agreed standard, as well as providing for recognition and enforcement where jurisdiction was based on the agreed standard. This issue is examined in the following chapter which deals specifically with recognition and enforcement.

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136. See Von Mehren and Trautman, "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968), 81 Harv. L. Rev. 1601, for development of this point.

# CHAPTER II

## RECOGNITION AND ENFORCEMENT

### Introduction

The terms recognition and enforcement refer to two distinct aspects of the same problem. Recognition refers to the extent to which courts of one jurisdiction (referred to here as the "receiving jurisdiction") will give final legal effect to the result reached in the foreign jurisdiction (referred to here as the "rendering jurisdiction"). In other words, the principle of recognition is simply that re-litigation of the dispute, once determined in the foreign jurisdiction, is precluded; the decision of the rendering jurisdiction is given conclusive effect and its correctness cannot be questioned in the courts of the receiving jurisdiction. Many decisions may be recognised with no need for enforcement. For example, decisions relating to status (such as divorce), declarations of rights, or a decision that a plaintiff is not entitled to redress against a defendant need only be recognised rather than enforced.

Enforcement, on the other hand, refers to the employment of the machinery of the receiving court to give the plaintiff some form of affirmative relief. Obviously, recognition is a pre-condition to enforcement. Enforcement merely takes the matter one step further and implements the coercive machinery of the receiving jurisdiction to give the plaintiff the actual remedy he was awarded by the courts of the rendering jurisdiction. While recognition may never require any express act or proceeding, the receiving jurisdiction will want to satisfy itself that its requirements have been met before invoking its coercive machinery against the defendant.

There is a substantial body of law relating to the various problems posed by foreign judgments. For the purposes of this study, this body of law may be divided into three parts, only the third being of real concern. In the first place, a foreign judgment must comply in certain technical ways with the requirements of the receiving jurisdiction. It must be final and conclusive, and it must be for a debt or definite sum.[1] Secondly, there are certain defenses which are available even where all

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1. Castel, vol. 1, pp. 453-71.

other aspects of the rules for recognition have been satisfied. These are that the judgment was obtained by fraud, in violation of the principles of natural justice, or that it is contrary to the public policy of the receiving jurisdiction.[2] As the focus of this study is upon judgments coming from other common law provinces, it may generally be assumed that the technical requirements will be satisfied, and that it is unlikely that the special defenses referred to above will be encountered.[3]

The third and, for present purposes, the most important aspect of recognition and enforcement, is the nature of the jurisdictional link required between the defendant and the rendering jurisdiction to satisfy the requirements of the receiving jurisdiction.

Reciprocal Enforcement Legislation

In the absence of any statutory provision, the plaintiff wishing to enforce an extra-provincial judgment must bring an ordinary action in the courts of the receiving jurisdiction upon that judgment. The action will proceed as any other lawsuit would. The issue to be tried is whether the conditions of the receiving jurisdiction for recognition have been met. If they have, re-litigation of the merits of the dispute is precluded. The extra-provincial judgment is enforced, however, only when the plaintiff obtains a judgment from the receiving jurisdiction requiring the defendant to pay him the amount specified in the extra-provincial judgment.

There have been significant statutory changes to this procedure through the enactment of Reciprocal Enforcement of Judgments legislation. In all common law provinces,[4] there is legislation based upon the model Reciprocal Enforcement of

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2. Ibid., pp. 488-511.

3. Compare, however, Ling v. Yip (1975), 54 D.L.R. (3d) 317 (Alta. S.C.), refusing to enforce a restitution order imposed purusant to the Criminal Code on the grounds that the defendant's obligation was based upon illegal consideration, namely, a gambling debt.

4. See Appendix.

Judgments Act prepared by the Commissioners on Uniformity of Legislation in Canada.[5]

The effect of existing reciprocal enforcement legislation, however, is simply to provide an alternative procedure whereby the judgments of the courts of other provinces can be enforced. The significance of the legislation is purely procedural: it does not broaden the grounds upon which extra-provincial judgments are recognised. This was explained by an Alberta court as follows:

> It seems clear that the Reciprocal Enforcement of Judgments Act does not permit of the registration of a judgment obtained in any province or territory of the Dominion of Canada to which the Act applies unless the judgment is one which could be enforced by action thereon in Alberta. The Act simply provides an inexpensive and simple method of registering and enforcing the judgments to which the Act applies instead of the more lengthy and expensive method of enforcing such judgments by action....The Act does not make the judgments to which the Act applies any less "foreign" judgments or any more directly enforceable than before the Act was passed.[6]

The procedure provided by existing reciprocal enforcement legislation is as follows. The plaintiff must apply to the court of the receiving jurisdiction for registration of the foreign judgment. If registration is granted, the judgment has the same force and effect as if it had been granted by the registering

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5. For a history of the development of this legislation, see Nadelmann, "Enforcement of Foreign Judgments in Canada" (1960), 38 Can. B. Rev. 68.

6. Canadian Creditmen's Trust Association Ltd. v. Ryan, [1930] 1 D.L.R. 280 at 281-2 per Ford J. (Alberta S.C.). See also Hausman v. Franchi, [1949] O.W.N. 695; Tangye & Smith Ltd. v. The Pelican Carbon Co. of Canada, [1935] O.R. 123; Re Traders Group Ltd. v. Hopkins (1968), 69 D.L.R. (2d) 250, appeal dismissed, 1 D.L.R. (3d) 416 (N.W.T.).

court. Where the defendant was personally served[7] or appeared or defended on the merits, the application for registration may be made without notice to the defendant. In all other cases, notice must be given to the defendant prior to registration and the defendant has the right to be heard on the application. However, even where notice need not be given initially the Act requires that notice be given to the defendant within one month of registration[8] and the defendant then has one further month to bring an application to set aside the registration. Within this interim period, no sale of any property seized under the judgment can be validly made.

The legislation specifically provides that registration shall not be granted in any case where the defendant "would have a good defence if an action were brought on the original judgment." This effectively preserves all common law defenses to any action based on the foreign judgment. However, the legislation goes beyond this and specifically lists a number of grounds upon which registration shall be refused. These matters of defense are undoubtedly incorporated within the general provision saving common law defenses and, if anything, may restrict even further the grounds for recognition. The judgment shall not be registered if:

1. the original court acted without jurisdiction;
2. the defendant, "being a person who was neither carrying on business nor was ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court";
3. the defendant, "being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court";
4. the judgment was obtained by fraud;

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7. See below, pp. 71-2, for discussion of this term.

8. Failure to bring the application within the one month period has been held to preclude the defendant from asserting that the original court lacked jurisdiction: Alcor Pacific Lumber Sale Ltd. v. Janet Lumber Trading Co. Ltd. (1977), 82 D.L.R. (3d) 19 (Alta.).

5. an appeal is pending or intended; or
6. enforcement would violate the public policy of the registering jurisdiction.

Neither of the terms "ordinarily resident" nor "carrying on business" are defined by the legislation. It might be expected that "carrying on business" will be given the meaning it has always been given in the context of enforcement as discussed below. In one case, it was held that the term "ordinarily resident" should be interpreted as follows:

> The term "ordinarily resident..." simply means that the person so described has his ordinary or usual place of living within that Province, that he lives within the Province more than he does elsewhere....If such person departs from [that Province] under circumstances which render it unlikely that he will return he is no longer ordinarily resident within the Province.[9]

The requirement that the defendant have been "duly served" in the case of a default judgment has given rise to certain difficulties. In Hoffman Lumber Supply Ltd. v. Auld,[10] it was held that "duly served" meant served within the jurisdiction of the rendering court. This means that although the defendant was ordinarily resident or carrying on business, or had agreed to submit to the jurisdiction, the judgment will only be recognised if he was actually served within the province rendering judgment.[11] The decision followed an earlier

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9. Re Reciprocal Enforcement of Judgments Act, Re Duncan and Hirsh, [1952] 3 D.L.R. 850 at 852, adopting the definition given in another context by Perdue J.A. in Emperor of Russia v. Proskourikoff (1908), 18 Man. R. 56 at 71-2, appeal quashed 42 S.C.R. 226.

10. (1958), 24 W.W.R. 552. See also Gambles Ltd. v. Kucheraway, [1978] 2 W.W.R. 645; Alberta Livestock Transplants Ltd. v. Pine Tree Rancho Ltd. (1978), 92 D.L.R. (3d) 478 (Sask.).

11. See Re Overseas Food Importers & Distributors Ltd. and Brandt (1978), 93 D.L.R. (3d) 317 (B.C.), holding that the provision requiring submission "during the proceedings" was not satisfied where the defendant had by the contract sued upon agreed to the foreign court having jurisdiction.

case[12] which held that the words "personal service" in the section prescribing when registration could be made without notice meant service within the jurisdiction of the territory. Following that earlier case, the legislation had been amended in four provinces (Alberta, Manitoba, British Columbia and Newfoundland) to provide that "service shall not be held not to be personal service merely because the service is affected outside the jurisdiction of the original court." The result is that it is arguable that the decision in the Hoffman case is unaffected by this legislation and that personal service within the rendering jurisdiction is prerequisite to registration.[13]

The net effect of existing reciprocal enforcement legislation is modest. Indeed, in many provinces, the rules of practice provide for summary proceedings when suit is brought on a foreign judgment[14] and such an action will be usually as quick and often quicker than proceeding under the Act.

Jurisdiction for the Purposes of Recognition and Enforcement

The jurisdiction which one common law province will recognise when exercised by another is exactly the same as that recognised in the case of a truly foreign judgment. The principles are relatively rigid and may be simply stated.[15]

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12. Wedlay v. Quist (1953), 10 W.W.R. 21 (Alberta C.A.).

13. See Feltham, "Reciprocal Enforcement of Judgments Act" (1960), 1 U.B.C. L. Rev. 229 at 241. See also Re Gacs and Maierovitz (1968), 68 D.L.R. (2d) 345, holding that duly served meant other than personally served and that accordingly a defendant who had been served pursuant to an order for substitutional service had been "duly served."

14. See, for example, Ontario Rule 33.

15. The following dictum of Buckley L.J. in Emanuel v. Symon, [1908] 1 K.B. 302 at 309, is often cited. The principles were first clearly enunciated by Fry J. in Rousillon v. Rousillon (1880), 14 Ch. D. 351 at 371:

> In actions in personam there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident

Jurisdiction will only be recognised where:

1. the defendant was physically present within the rendering jurisdiction at the time the proceedings were commenced, or

2. the defendant either voluntarily appeared to defend the suit on the merits in the rendering jurisdiction or agreed to submit to the jurisdiction of the courts of the rendering jurisdiction.

There are dicta to support the proposition that jurisdiction will be recognised where the defendant was domiciled in the rendering jurisdiction[16] or, more commonly, where he was a subject of that place.[17]

However, it is highly dubious that either political allegiance or domicile constitutes a basis for the assertion of

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in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.

16. Jaffer v. Williams (1908), 25 T.L.R. 12 at 13 per Bucknill J.; Gavin Gibson & Co. v. Gibson, [1913] 3 K.B. 379 at 385 per Atkin J.

17. Douglas v. Forrest (1828), 4 Bing. 686; Shibsby v. Westenholz (1870), L.R. 6 Q.B. 155 at 161 per Blackburn J.; Rousillon v. Rousillon (1880), 14 Ch. D. 351 at 371 per Fry J.; Emanuel v. Symon, [1908] 1 K.B. 302 at 309 per Buckley L.J.; Gavin Gibson & Co. v. Gibson, [1913] 3 K.B. 379 at 385 per Atkin J.; Harris v. Taylor, [1915] 2 K.B. 580 at 591 per Bankes L.J.; Forsyth v. Forsyth, [1948] P. 125 at 132 per Tucker L.J.; Bugbee v. Clergue (1900), 27 O.A.R. 96 at 108 per Osler J.A.; Fowler v. Vail (1879), 4 O.A.R. 267 at 272 per Patterson J.A.

jurisdiction which will be recognised, and more recent cases cast doubt on the dicta contained in the older cases.[18]

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18. Blohn v. Desser, [1962] 2 Q.B. 116 at 123 per Diplock J.; Rossano v. Manufacturers Life Insurance Co. Ltd., [1963] 2 Q.B. 352 at 382-3 per MacNair J.; Vogel v. R. & A. Kohnstamn, [1973] Q.B. 133 at 141. The Irish High Court (Rainford v. Newell-Roberts, [1962] I.R. 95), an Ontario County Court (Patterson v. D'Agostino (1975), 8 O.R. (2d) 367) as well as a British Columbia County Court (A.G. of B.C. v. Buschkewitz, [1971] 3 W.W.R. 17 at 21) have refused to recognise foreign judgments on the basis of political allegiance. In only one case has recognition and enforcement been actually granted on such grounds. In Marshall v. Houghton, [1923] 2 W.W.R. 553, the defendant had leased property in England and assigned the lease to the plaintiff, agreeing to indemnify the plaintiff for liability for repairs. The plaintiff, having been forced to pay the landlord at the the expiry of the lease, sued in England on the indemnity clause. At the time suit was commenced, the defendant was out of England and he was served ex juris. The plaintiff then brought an enforcement action in Manitoba, and the Court of Appeal, relying on dicta found in the English cases, recognised the English judgment on the basis that "the defendant owes allegiance or obedience to the power which legislates, the Courts of that power have jurisdiction over him, no matter where he may be found" (at 567 per Dennistown J.A.). While the ratio is clearly expressed in terms of domicile, it may have been possible to treat the defendant as ordinarily resident in England at the time the action was brought:

> if it be shown (as in this case) that by domicile of origin, and of choice, by ordinary residence, temporarily suspended, the defendant has made himself subject to the laws of England, he cannot free himself from the operation of those laws, by taking up a shifting abode, alternating between Canada and the United States, until his affairs have settled themselves, and he is able to carry out his expressly declared intention of returning once more to England, to reside there permanently. (ibid.)

In Gavin Gibson & Co. v. Gibson,[19] Atkin J. acknowledged that the dicta to the effect that recognition should be given to the judgment of a country of which the defendant was a subject were of "of great weight,"[20] but held that the judgment of a Victoria court against a subject of that colony was not entitled to recognition:

> In the absence therefore of any express authority compelling me to hold that a person born in one of the British Colonies becomes a subject of that colony so that the judgments of its Courts obtained against him in his absence are binding upon him in all other Courts, I decline to accept so far-reaching a proposition. By the principles of the English law of nationality not only the native but his sons and his sons' sons would or might be subjects. There are statutory means by which a British subject can put off his British nationality, but I know of no statute by which a Victorian subject, if such there be, can cease to be a Victorian subject and become South African, Canadian, or English. At common law nemo protest exuere patriam. As far as I can ascertain, the alleged principle has never been established or even contended for in any Colonial Court.[21]

Obviously, similar difficulties arise if one attempts to determine whether a citizen of Canada or the United States is a "subject" of a province or state.[22] The concept is simply inappropriate in the context of federal states, and it is highly unlikely that the dicta of the older English cases would now be followed.

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19. [1913] 3 K.B. 379.

20. At 393.

21. At 393-4.

22. See also Dakota Lumber Co. v. Rinder Kneiht (1905), 6 Terr. L.R. 210 at 222-4 per Scott J. refusing to enforce a Dakota judgment against an American citizen, resident in the Northwest Territories:

The text writers tend to the view that domicile, nationality, citizenship or being a subject are not sufficient grounds for jurisdiction for recognition purposes.[23]

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> a citizen of the United States would be subject to the federal laws, and those of the State in which he resides, but not to those of any other State except, perhaps, that in which he was born....
>
> As the judgment sued upon was that of a State Court, and as the defendant was residing out of its jurisdiction at the time the proceedings in the action were carried on, and the judgment obtained against him, the fact that he was a citizen of the United States would not, in my opinion...give the Court jurisdiction.

23. Read, Recognition and Enforcement of Foreign Judgments (1938), was dubious as to nationality or political allegiance (pp. 151-5) and observed as follows with respect to domicile:

> The most that can be said concerning Anglo Dominion common law at the present stage of development is that temporary presence not amounting to residence within the law district of domicile is perhaps a recognised basis for the exercise by a foreign court of jurisdiction in personam [having referred to Marshall v. Houghton supra and Armstrong v. Newey (1891), 17 Vict. L.R. 734]. Domicile alone, unaccompanied by either residence or presence, will not yet suffice. (at 160)

Both Morris, The Conflict of Laws (2d ed. 1979), p. 414 and Dicey and Morris, (above Chap. I, note 78), p. 1003, say that political allegiance or nationality "cannot...safely be relied upon today," and are dubious as to domicile.

Cheshire and North (above Chap. I, note 1), p. 641, state: "It is submitted with some confidence that nationality per se is not, and has been rejected as, a reason which, on any principle of private international law, can justify the exercise of jurisdiction"; and at p. 642: "domicile alone will not suffice as a ground of jurisdiction."

Castel, vol. 1, is equivocal as to both nationality (pp. 427-9) and domicile (pp. 431-2).

Accordingly, physical presence or voluntariness apart, extra-provincial money judgments will not be recognised under existing common law principles which have essentially stood frozen since they were first enunciated in the late nineteenth century.

Physical presence By physical presence, the courts have referred to the presence of the defendant at the time the suit was instituted. It has been clearly established that the time at which the defendant must be present is when the proceedings are instituted rather than the time at which the cause of action arose.[24] Usually, the degree of presence is put in terms of residence. While there are cases which have recognised judgments in which jurisdiction was acquired by service on the defendant temporarily present within the jurisdiction,[25] the correctness of these decisions has been questioned.[26] However, the term "residence" has never been given a specific meaning and the cases do not clarify to what extent there must be some permanence to the relationship between the defendant and the rendering jurisdiction.

In the reported cases, there has been residence both at the time the action was initiated and at the time the defendant was served. Presumably, however, should the defendant have left the jurisdiction prior to being served but after the action was commenced, the judgment would be recognised even though he was served outside the jurisdiction.[27] This situation apart, as a practical matter the common law principles allow for recognition and enforcement of judgments where service is achieved within the rendering jurisdiction and not where the defendant is served ex juris.

Compliance with the rules of the rendering court with respect to service out of the jurisdiction will in no way confer jurisdiction that will be recognised by the receiving court upon

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24. Sirdar Gurdyal Sing v. Rajah of Faridkote, [1894] A.C. 670 (J.C.P.C.).

25. See Carrick v. Hancock (1895), 12 T.L.R. 59; Forbes v. Simmons (1914), 20 D.L.R. 100.

26. Especially the leading English text, Dicey and Morris, pp. 1000-1.

27. Castel, vol. 1, p. 430.

the rendering court. This is the case even where the rules relating to service ex juris of the rendering court are identical to those of the receiving court.[28]

With respect to natural persons, the principle of residence, although hazily defined, is readily understood. In the case of corporations, the test of residence is whether or not the corporation carries on business in the jurisdiction.

There is surprisingly little authority on the question of what constitutes carrying on business for recognition purposes. It will be recalled that, for purposes of service upon agents of non-resident corporations, there is a considerable body of case law and the Canadian courts would undoubtedly follow the same rationale when the question is posed in terms of recognition.[29] In one of the very few Canadian cases,[30] the Ontario Court of Appeal quoted with approval the test set out in the Restatement on Conflicts:

> Carrying on business is doing a series of similar acts for the purpose of thereby realising pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts.

This is a broader definition than that provided by the service cases, and it may be questioned whether this dictum would be followed. The English cases have tended to derive a more restrictive principle. It has been held, for example, that where a senior company officer is temporarily within the jurisdiction to purchase raw materials for his company, moving about from

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28. See below, pp. 114-16, for discussion of this point.

29. Vogel v. R. & A. Kohnstamn Ltd., [1973] Q.B. 133, expressly held that the service cases could be applied to the enforcement problem.

30. Frederick Jones Inc. v. Toronto General Insurance Co., [1933] O.R. 428.

place to place, and is served while there, the judgment rendered following such service would not be recognised.[31]

In a latter case,[32] the court expressly followed and applied the following dictum laid down in a service case.

> A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval.[33]

Finally, in Vogel v. R. & A. Kohnstamn Ltd.,[34] an English court refused to recognise an Israeli judgment rendered in favour of a purchaser of defective goods supplied by an English defendant. The English company had an Israeli representative who was paid a commission on sales, but who had no authority to enter agreements on behalf of his principal. He acted purely as a go-between and represented other manufacturers as well. In holding that the English defendant did not carry on business in Israel despite having this representative, Ashworth J. said as follows:

> At the end of the day there is a test which the courts have used as part of the material on which

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31. See Littauer Glover Corporation v. F.W. Millington (1920) Ltd. (1928), 44 T.L.R. 746 at 747 per Salter J.: "there must be some carrying on of business at a definite and, to some reasonable extent, permanent place." Cf. Moore et al. v. Mercator Enterprises Ltd. (1978), 90 D.L.R. (3d) 590 (N.S.), where the defendant employed an exclusive sales agent within the jurisdiction.

32. Sfeir & Co. v. National Insurance Co. of New Zealand, [1964] 1 Ll. L.R. 330.

33. Jabbour et al. v. Custodian of Absentee's Property of State of Israel, [1954] 1 All. E.R. 145 at 152 per Pearson J.

34. [1973] Q.B. 133.

> to reach a conclusion, namely, is the person in question doing his business or doing the absent corporation's business? Conversely, are they doing business through him or by him?
>
> I confess, I find these aphorisms, if that is what they are, apt to lead one astray; one can find the choice phrase and fit the facts to it and so on. But they are useful and I have asked myself anxiously in this case whether in any real sense of the word the defendants can be said to have been there in Israel; and all that emerges from this case is that there was a man called Kornbluth [the representative] who sought customers for them, transmitted correspondence to them and received it from them, had no authority whatever to bind the defendants in any shape or form. I have come to the conclusion really without any hesitation that the defendants were not resident in Israel at any material time.[35]

On the basis of these cases, bolstered by the cases dealing with service on agents, it seems clear that under existing law, an extra-provincial corporation will become subject to the jurisdiction of the courts of a province only if it establishes a reasonably permanent presence in the province through agents or representatives with the power to make decisions and to legally bind the corporation in its dealings.

Agreement or submission to jurisdiction In addition to the notion of jurisdiction based on territorial presence, the common law recognises the jurisdiction of a foreign court when there has been agreement or submission to the jurisdiction on the part of the defendant. There are many cases holding that a defendant who is not otherwise subject to the foreign court's jurisdiction may contract to submit to its jurisdiction and, in that event, the

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35. At 143.

jurisdiction of the court will be recognised.[36]

In the absence of a prior agreement to submit, a defendant may become subject to the foreign court's jurisdiction for recognition purposes if he voluntarily appears or defends a lawsuit in the foreign court. In other words, by entering a general appearance, counter-claiming in the suit or in any way submitting a defense on the merits, a defendant is taken to accept jurisdiction and will be bound by a judgment for purposes of recognition and enforcement.

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36. See Castel, vol. 1, p. 439. It has been said that the agreement to submit must be express rather than implied; see Vogel v. R. & A. Kohnstamn Ltd., [1973] Q.B. 133 at 146; Matter & Saba v. Public Trustee, [1952] 3 D.L.R. 399 (Alta. C.A.); Gyonyor v. Sanjenko, [1971] 5 W.W.R. 381 (Alta.). Compare the dictum of Diplock J. and Blohn v. Desser, [1962] 2 Q.B, 116 at 123:

> It seems to me that, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident within that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by registration in a public register, he does impliedly agree with all persons to whom such a notification is made -- that is to say, the public -- to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent.

In the case of appearance to protect property, a distinction has been made between property already seized and property subject to seizure.[37] If the property has already been seized by the process of the foreign court, the appearance is not considered to be voluntary. However, an appearance to protect property which may be seized as a result of the judgment or to protect property which may be brought into the jurisdiction and thereby rendered subject to attachment has always been considered voluntary.

It has been held that a defendant who has not submitted does not do so simply by moving in the foreign jurisdiction to

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37. Voinet v. Barrett (1885), 55 L.J. Q.B. 39 (C.A.); Richardson v. Allen (1916), 28 D.L.R. 134 (Alta. C.A.); Henry v. Geoprosco International Limited, [1976] Q.B. 726. Cf., however, Huntington v. Marion (1925), 28 O.W.N. 221, aff'd 29 O.W.N. 187 (Div. Ct.), holding that where the defendant entered a general appearance, allegedly required under Quebec law to attack a "saisie-gagerie," the defendant's appearance was sufficient to render the Quebec judgment enforceable:

> Assuming this to be the law [i.e., that a general appearance was required], the defendant...knowing that to attack the saisie he must enter an appearance to the action, deliberately entered an appearance. He cannot be heard to say that his general appearance should have a special effect only; and if the law is not as stated, he entered an appearance without being obliged to do so. In either case, he is bound. (per Riddell J. at 233)

This decision appears to be out of line with authority. It says, in effect, that unless the foreign procedure provides for some limited or qualified appearance solely to contest the pre-judgment seizure, the defendant is faced with the invidious choice of abandoning whatever property he has in the foreign jurisdiction, or submitting for all purposes.

set aside a default judgment.[38] Obviously, however, should the defendant succeed in setting aside the default judgment and then defend on the merits, he will be taken to have submitted.[39] Moreover, a defendant must ordinarily show some basis for a defense to have a default judgment set aside, and in light of the recent cases discussed below there is a substantial risk that the courts now construe such action as a submission.

There is, however, in most jurisdictions a procedure whereby the defendant may contest the jurisdiction of the court without submitting entirely. Usually, this takes the form of a conditional appearance whereby the defendant is permitted to test, as a preliminary issue, whether the forum's own jurisdictional standard has been satisfied.[40] For example, if the

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38. Esdale v. Bank of Ottawa (1920), 51 D.L.R. 485 (Alta. C.A.) at 488 per Harvey C.J.:

> Before it was signed, the defendant had done nothing whatever to show any intention of submitting to the Court's jurisdiction. I fail to see on what principle his subsequent conduct should be held to indicate a willingness to submit to what had been done before when it was for the express purpose of annulling it.

See also McLean v. Shields & Leacock (1885), 9 O.R. 699.

39. Guiard v. de Clermont, [1914] 3 K.B. 145.

40. If the defendant's application contesting service ex juris can be dealt with on the basis of the affidavit evidence and other material available to the court at that preliminary stage, then no appearance will be originally required. However, in certain cases, there will be a factual issue which must be resolved before the court can determine whether or not the case is appropriate for service out of the jurisdiction. It is in these cases where the conditional appearance practice is permitted. The jurisdictional facts are left to be resolved at the trial, and the conditional appearance is permitted so that the defendant can go beyond his initial application to contest the jurisdiction down to the trial on that issue without submitting.

A classic case of conditional appearance is Canadian Brine Ltd. v. Wilson Marine Transport Co., [1964] 2 O.R. 278.

defendant has been served ex juris, it is possible under this procedure for him to argue that the standard set out in the forum's service ex juris rule has not been met, or that jurisdiction should be declined on grounds of forum non conveniens.

In this area, an important issue is the extent to which the defendant may safely contest the isolated issue of jurisdiction without having been held to have submitted for all purposes. In other words, to what extent may the defendant safely fight the preliminary jurisdictional battle in the foreign court without being taken thereby to have submitted for enforcement purposes when that judgment is brought to his home jurisdiction? It is clear that if the defendant loses that preliminary fight, and the original court upholds its own jurisdiction, that court will exercise, for its own domestic purposes, full jurisdiction over him, and hence, any judgment rendered in the action will be fully enforceable in the rendering jurisdiction, even if no further submission to the jurisdiction is made.

The effect of an unsuccessful preliminary challenge to jurisdiction is less certain where enforcement of a judgment obtained in default of further participation by the defendant is sought in a jurisdiction other than the forum.

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The plaintiff's claim was for damage occasioned to an underwater pipeline which was laid in the Detroit river and spanned the Ontario-Michigan border. The defendant owner of a vessel was sued for damage allegedly caused by the anchor of the vessel having been dropped on the pipeline. There was conflicting evidence as to whether the incident had occurred on the Ontario or Michigan side of the river and, as the court could not resolve that factual contest on the basis of conflicting affidavits, the defendant was permitted to appear conditionally to the writ. For other cases of conditional appearance, see Canadian Radiator Co. v. Cuthbertson (1905), 9 O.L.R. 126; McCowan v. Menasco Manufacturing Co., [1941] O.W.N. 133 at 138 per Urquart J.: "where the court cannot determine the facts at an early stage with any degree of certainty, the entry of the conditional appearance should be authorised"; and Superior Copper Co. Ltd. v. Perry & Sutton (1918), 44 O.L.R. 24.

As a practical matter, the defendant will almost always make an initial decision whether or not to defend. If he has no intention of defending on the merits, there is little or no reason to contest the jurisdiction of the foreign court. Indeed, by so doing, there is a substantial risk that should he lose the preliminary jurisdiction battle, he will be bound by that result and taken to have submitted to the foreign court's jurisdiction when enforcement is sought in his home province. If the defendant does have assets within the jurisdiction of the foreign court which will be seized in the event of a default judgment, a decision must be made to abandon those assets to the foreign process or to defend, knowing that the result will be that such submission will enable the plaintiff to enforce the judgment in the defendant's home jurisdiction. As noted above, broadly worded service ex juris rules, together with the rule that an appearance to defend assets from possible execution constitutes submission for all purposes, may work harshly on defendants in certain cases.

As indicated above, the most difficult and significant question in this area is to determine the effect to be given in the receiving jurisdiction to a judgment obtained in default after the defendant has contested and lost the preliminary jurisdiction issue in the courts of the rendering jurisdiction.

While the matter is not free from doubt in Canada, there is now considerable authority in favour of the proposition that a conditional appearance followed by an unsuccessful application to the foreign court on purely jurisdictional grounds will constitute a submission for the purposes of recognition and enforcement.

In Harris v. Taylor,[41] the English Court of Appeal held that where a defendent appeared conditionally in an action brought in the Isle of Man Courts, the writ having been served upon him in England, he was bound by the judgment obtained in default after his unsuccessful attempt to have the Isle of Man Court decline jurisdiction. The rationale is expressed by Buckley L.J. as follows:

> the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take, he thought it was in his interest

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41. [1915] 2 K.B. 580.

> to do. He went to the Court and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duty to appear in the action, and as he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so.[42]

The result in Harris v. Taylor has been followed in Canada[43] but has also been widely criticised,[44] and in a later

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42. At 587-8.

43. The decision was applied by the British Columbia court in Kennedy v. Trites Limited (1916), 10 W.W.R. 412, although the reasons for the decision are only briefly noted. See also Richardson v. Allen (1915), 24 D.L.R. 883, aff'd (1916), 28 D.L.R. 134 (Alta. C.A.), applying Harris v. Taylor, although the defendant had also defended on the merits after losing on the jurisdictional issue: per Hyndman J. at 884.

> By [entering a conditional appearance], however, he leaves to that Court to determine this plea and its having decided adversely and having found against him on the merits, leaves him standing in the same position as though an unconditional appearance had been entered, and he must be taken as having attorned to the jurisdiction of that Court.

The same situation occurred in McFadder v. Cobille Ranching Co. (1915), 8 W.W.R. 163 (Alta. S.C.). See also First National Bank of Oregon v. Harris (1975), 10 O.R. (2d) 516 (Co. Ct.).

44. See Collins, "Harris v. Taylor Revisited" (1976), 92 L.Q.R. 268.

decision, Re Dulles Settlement (No. 2),[45] the English Court of Appeal attempted to overcome its effect. Denning L.J. attempted to distinguish the earlier case on the inadequate basis that as the rule for service out of the jurisdiction in force in the Isle of Man corresponded with the English rules, it was upon that ground that the English courts recognised the judgment. This now seems clearly wrong. However, Denning L.J. did express a more convincing rationale for refusing to follow Harris v. Taylor in the following passage:

> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does noting and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all.[46]

This dictum was followed in a later decision,[47] but despite this authority and a considerable body of opinion to the contrary, the effect of Harris v. Taylor has been fully resurrected by a later decision of the English Court of Appeal, Henry v. Geoprosco International Limited.[48] The action was one for wrongful dismissal brought by an Alberta resident against a British company. The contract of employment had been entered in Alberta and was for services in the Trucal States. The plaintiff had been discharged by the defendant, returned to Alberta, commenced action there, and served the defendant ex juris. The defendant brought an application contesting jurisdiction upon the grounds that the case did not fall within the Alberta rule for service ex juris, that Alberta was not the forum conveniens and that the

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45. [1951] 1 Ch. 842.

46. At 850.

47. N.V. Daarnhower and Company v. Boulos, [1968] 2 Ll. L.R. 259.

48. [1976] Q.B. 726.

action should be stayed because of an arbitration clause in the agreement. The defendant was unsuccessful on all counts, the matter proceeding ultimately to the Alberta Court of Appeal on the preliminary jurisdictional point. The defendant then took no further part in the proceedings; the plaintiff obtained an Alberta judgment in default and then brought action in England upon the Alberta judgment. The Court of Appeal held that the defendant had submitted to the jurisdiction of the Alberta court, and that the judgment was therefore enforceable. While Roskill L.J., delivering the judgment of the Court, went so far as to say that "Harris v. Taylor is not a decision, the underlying principles of which should be extended,"[49] he concluded that "the decision [in Re Dulles Settlement] (whether right or wrong on its facts) leaves the authority of Harris v. Taylor wholly unshaken"[50] and, accordingly, the court was not free to depart from it. However, the court appears to have somewhat limited the actual effect of Harris v. Taylor in that it was said to be of "crucial importance" when considering its ratio to observe the following:

> first, that the Isle of Man Court had by its own local law jurisdiction over the defendant; secondly, that that court had a discretion whether or not to exercise that jurisdiction over the defendant; thirdly, that the court having heard a plea by the defendant that it could not and should not do so decided both that it could and should exercise that jurisdiction; fourthly, that it was not argued in the English action that the decision was in any way wrong by the local law, and fifthly, that the defendant, having voluntarily invited the Isle of Man Court, by the appearance which he made, to adjudicate upon his submission that jurisdiction of that court could not and should not be exercised over him and having lost, had voluntarily submitted to the jurisdiction of that court so that thereafter the defendant could not be heard to say that that court did not have jurisdiction to adjudicate

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49. At 746.

50. At 748.

> upon the entirety of the dispute between him and the plaintiff.[51]

Roskill L.J. summarised the effect of Harris v. Taylor and of the other authorities as follows:

> Taking this view of the decided cases which bind this court, it seems to us that they justify at least the following three propositions: (1) The English courts will not enforce the judgment of a foreign court against a defendant who does not reside within the jurisdiction of that court, has no assets within that jurisdiction and does not appear before that court, even though that court by its own local law has jurisdiction over him. (2) English courts will not enforce the judgment of a foreign court against a defendant who, although he does not reside within the jurisdiction of that court, has assets within that jurisdiction and appears before that court solely to preserve those assets which have been seized by that court. (3) The English courts will enforce the judgment of a foreign court against a defendant over whom that court has jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before that foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law.[52]

On the facts of Henry v. Geoprosco, it is clear that the defendant had made an appeal to the Alberta court to exercise its discretion against assuming jurisdiction either on the grounds of forum conveniens or because of the arbitration clause. Accordingly, the case, strictly speaking, is not authority for what occurs where the defendant appears solely to protest against

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51. At 738.

52. At 746-7.

the jurisdiction. Indeed, the Court of Appeal specifically said that "we do not, therefore, consider that adherence in the present appeal to what this court decided in Harris v. Taylor compels us also to hold that an appearance solely to protest against the jurisdiction of a foreign court is a voluntary submission to that court."[53] On the other hand, the Court did go on to say that where a conditional appearance was entered, in other words an appearance to the foreign court conditional upon its determination that its own jurisdiction rules had been satisfied, such a submission was "a voluntary submission to the jurisdiction of the foreign court. The defendant need not appear there, conditionally or unconditionally. He can stay away. But as the cases say, he may prefer to take his chance upon a decision in his favour. If he does so, he must also accept the consequences of a decision against him."[54]

The Court, then, appears to be drawing a distinction between a protest against jurisdiction with no appearance of any kind and the conditional appearance procedure followed in England and most Canadian provinces. As a practical matter, in light of the Geoprosco decision, it would be extremely unwise for the defendant to enter any kind of conditional appearance or protest against the jurisdiction of a foreign court unless he does not intend to defend on the merits whatever the outcome of the preliminary jurisdiction issue.

The degree to which Geoprosco will be accepted in Canada is uncertain. In a recent decision, the Ontario Court of Appeal expressly deferred consideration of whether the case will be followed.[55] On the other hand, the result in Geoprosco may be welcomed as an indirect way of effectively overcoming the narrow common law recognition rules. However, it is submitted that a much preferable approach would be to frankly re-examine the traditional rules and to recast them according to the modern concerns expressed throughout this study.

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53. At 747.

54. At 748.

55. Re McCain Foods Ltd. (1979), 26 O.R. (2d) 758 at 769.

Interprovincial motor vehicle judgments All nine common law provinces have legislation,[56] common across North America, providing that the license of a person to drive an automobile may be suspended if he does not satisfy a judgment for damages on account of death, bodily injury or property damage occasioned by an automobile, which is rendered against him by a court of the province or the state in which he holds a license. The legislation applies on a reciprocal basis and provides for the suspension of a resident's license if he fails to satisfy a judgment obtained against him in the courts of a reciprocating jurisdiction. it has been held that the common law jurisdiction test need not be met to justify suspension for failure to satisfy the judgment in question.[57]

In addition, provincial legislation provides for direct action by an injured third party against the defendant's insurer[58] and, accordingly, even if the judgment cannot be enforced against the defendant, assuming that the defendant's insurer has assets in the rendering jurisdiction, the plaintiff will not be without redress.[59]

This means that the problems described in this study are not encountered to the same extent in motor vehicle litigation, and perhaps because the problem is not encountered in that fruitful source of interprovincial litigation, the impetus for reform has been weaker than might otherwise be expected.

## Statutory Provisions Curtailing Recognition

Manitoba Queen's Bench Act In Manitoba, S. 83 of the Queen's Bench Act provides as follows:

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56. See Watson, Borins and Williams, Canadian Civil Procedure (2d ed. 1977) pp. 4-46-7.

57. Re Thomas and Registrar of Motor Vehicles (1977), 82 D.L.R. (3d) 305 (Ont. Div. Ct.).

58. See, for example, The Insurance Act R.S.O. 1970, c. 224, s. 255(1).

59. See Watson, Borins and Williams, above note 56, pp. 4-46-7.

> Subject to the Reciprocal Enforcement of Judgments Act, a defendant in an action upon a foreign judgment may plead to the action on the merits, or set up any defence that might have been pleaded to the original cause of action for which the judgment was recovered; but the plaintiff may apply to the court to strike out any such pleading or defence on the ground of embarrassment or delay.

As pointed out in a decision in the Manitoba Court of Appeal,[60] this section is a relic of the old common law doctrine that foreign judgments were only prima facie evidence and not conclusive on their merits.[61] The effect of the section is to entitle the defendant to plead any defense he could have pleaded in the original suit when an action is brought upon the foreign judgment in Manitoba. It has been held that the provision confers a right upon the defendant to plead substantive defences, subject only to the discretion of the court.[62]

The guideline to be applied exercising the discretion to strike out a defense is as follows:

> In enabling the court to determine how to exercise properly its judicial discretion and correctly ascertain the real intention of the defendant, the fact that the case has been tried out

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60. Lesperance v. Leistikow, [1935] 3 W.W.R. 1 at 7.

61. The common law principle that foreign and extra-provincial judgments should be recognised if the requirements described above have been met was established as late as 1870: Godard v. Gray (1870), L.R. 6 Q.B. 139; and see Nadelmann, "Enforcement of Foreign Judgments in Canada" (1960), 38 Can. B. Rev. 68.

62. See Lange v. Manitoba Western Colonization Co. Ltd., [1921] 3 W.W.R. 877; Callaghan v. Nicholls, [1921] 3 W.W.R. 476; Lesperance v. Leistikow, [1935] 3 W.W.R. 1. Compare Moore v. International Securities Co. Ltd. (1916), 10 W.W.R. 378; and Sloman v. Brenton (1916), 9 W.W.R. 1466, holding that where there has been full trial in the foreign court rather than default judgment, a plea setting up the substantive defense be struck out as embarrassing.

> in a foreign Court, that an unsuccessful appeal has been taken, or that a consent judgment has been entered will have a very strong bearing, but in each case the discretion must be exercised upon the merits of that case alone, and the fact that the case has been tried out under a foreign jurisdiction will not constitute an absolute bar....[63]

It is only when the court is convinced that the pleading or defense is without merit or is advanced with an ulterior purpose that the discretion to strike out the plea can be exercised.[64]

On the other hand, while permitting the plea undoubtedly involves the plaintiff in extensive expense and inconvenience in having to be ready to prove his case all over again, the Manitoba courts have held that the effect of a prior foreign judgment on the merits is to afford the plaintiff a prima facie case. This means that unless the defendant comes forth with evidence to disprove the finding made by the foreign court, the foreign verdict will be upheld.[65]

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63. Callaghan v. Nicholls, [1921] 3 W.W.R. 476 at 478 per Dennistoun J.A.

64. Lesperance v. Leistikow, [1935] 3 W.W.R. 1 at 6.

65. See Marshall v. Houghton, [1922] 3 W.W.R. 65 at 70-1 per Dysart J.; aff'd [1923] 2 W.W.R. 553:

> The provision was apparently introduced to afford a sanctuary for debtors who cared to resort hither, by placing at their disposal, for the determination of their rights, the laws, Courts and juries of this province. But does this right to have their claims litigated afresh in this jurisdiction deprive the plaintiff of all evidential value of the judgment obtained by him in a foreign jurisdiction on that original cause of action? In my opinion it does not....The situation, therefore, is that had the plaintiff at the trial after proving his foreign judgment rested

While the section is expressly made subject to the Reciprocal Enforcement of Judgments Act, it seems clear that that Act would not preclude the re-opening of the merits, as it prohibits registration if the judgment debtor would have a good defense against an action brought on the judgment.[66] By making registration subject to the same terms as an ordinary common law action, the statutory benefit conferred upon defendants by the Queen's Bench Act is preserved even in the case of registration under the reciprocal enforcement legislation.[67]

Quebec judgments in Ontario The Ontario Judicature Act contains the following provisions with respect to Quebec judgments:

> S. 56 -- Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service on the defendant or party sued was personal, no defence that might have been set up to the original action may be made to the action on the judgment.
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> S. 57 -- Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service was not personal and in

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> his case, he would without more be entitled to judgment, unless the defendant came forward and either disproved or overcame the strength of the prima facie case. While the general onus of proving his case is always on the plaintiff, there are times at certain stages of the trial when the duty of coming forward may be shifted to the defendant, and this is so after the plaintiff has established a prima facie case. This foreign judgment, therefore, having been once proved, casts upon the defendant the onus of impeaching the judgment or breaking it down.

66. S. 3(6)(g). See Re Aero Trades Western Ltd. and Ben Hocum & Son Ltd. (1974), 51 D.L.R. (3d) 617 (Co. Ct.).

67. Castel, vol. 1, p. 476.

> which no defence was made, any defence that might have been set up to the original action may be made to the action on the judgment.

These provisions are a somewhat curious relic from legislation passed in 1860 in the United Provinces of Canada Act, which provided that judgments rendered in one province had to be fully recognised in the other so long as there had been personal service on the defendant.[68]

The above quoted sections are all that remain of this legislation in Ontario. In Quebec the legislation has been repealed in its entirety. While these provisions had at one time been read as continuing the requirement that conclusive effect be given such judgments, as intended by the original legislation,[69] this position was reversed by an Ontario court in 1907.[70] It was confirmed by a decision in the Court of Appeal in 1928[71] holding that in the light of repeal in Quebec and of the repeal of the balance of the 1860 Act in Ontario, the remaining provisions had to be given a very restricted meaning. The choice was a curious one between holding that the original intention had been continued and holding that, in fact, the effect of the sections was to reduce the terms on which Quebec judgments would be recognised. The courts chose the latter. The result is that the ordinary rules applicable to foreign judgments apply as against Quebec judgments but that there is an additional requirement imposed with respect to Quebec judgments, namely, that the defendant have

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68. See Castel, vol. 1, pp. 471-3, and cases cited below, notes 69-71.

69. Court v. Scott (1881), 32 U.C.C.P. 148.

70. Vezina v. Will M. Newsome Co. (1907), 14 O.L.R. 658.

71. Lung v. Lee (1928), 63 O.L.R. 194.

been served within Quebec with the writ.[72]

This is but a modest departure from the general rule. It excludes from recognition only those judgments obtained against a defendant who was resident in Quebec when the action was commenced but who left Quebec before being served and was served outside Quebec. This appears to be a purely academic possibility and, for practical purposes, it may safely be said that Quebec judgments are treated the same as any other extra-provincial judgments in Ontario.

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72. In so holding, Middleton J.A. said as follows:

> So read, these sections modify the rules of international law by permitting a defence to be made to an action brought upon a judgment obtained in Quebec against a person owing allegiance to the laws of that Province, in which the writ was not personally served on him.
>
> I realise that in so construing the statute a narrow view has been taken of the legislative intention, but I think it is impossible to believe that it was ever intended by the Legislature of this Province to render the jurisdiction of the Province over persons domiciled and resident here to the courts of another Province. ((1928), 63 O.L.R. 194 at 199)

See also the comments of Meredith in Vezina v. Will M. Newsome Co. (1907), 14 O.L.R. 658 at 665:

> I do not regret the conclusion to which I have come, for, if the decision in Court v. Scott were to be applied, it would lead to the anomalous and unsatisfactory result that residents of Ontario are bound by judgments of the Quebec courts when under like circumstances the judgments of the courts of this Province would in Quebec be treated as nullities.

For a criticism of the Lung v. Lee decision, see Falconbridge (1929), 7 Can. B. Rev. 131.

Recognition Practice Outside Canada

Before turning to the question of reform in the area of enforcement of extra-provincial judgments, it is useful to examine the approaches taken towards the issue in other jurisdictions and through international agreements.

Hague Draft Convention, 1966 In 1966, the Hague Conference of Private International Law produced a draft Convention on the recognition and enforcement of foreign judgments in civil and commercial matters. The draft was signed by all present members of the European Economic Community, the United States and several other nations.[73] Canada was not involved. The Convention is, perhaps, now eclipsed as a practical matter by the European Economic Community Convention discussed below, but it may be taken as representing a consensus of a broad range of international opinion on appropriate recognition practice. The treaty is an example of a simple or indirect treaty. It does not purport to curtail the exercise of assumed jurisdiction by signatories; it merely specifies the conditions under which a judgment given in the territory of another state should be enforced.[74]

The Convention specifies several jurisdictional bases which are to be recognised. These are contained in Article 10, and those relevant in the product liability context may be summarised as follows:

1. habitual residence or principal place of business within the state of origin;

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73. Austria, Finland, Greece, Israel, Japan, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Arab Republic.

74. Under the Protocol attached to the draft, the treaty goes one step further and does actually specify certain grounds of jurisdiction which should never be recognised and that a contracting party agrees never to recognise a judgment rendered on such a basis. It is interesting to note that those grounds, set out in Article 4 of the Protocol, include service of a writ on the defendant in the territory of the state rendering the judgment during a temporary presence and a unilateral specification of the forum by the plaintiff particularly when contained in an invoice.

2. branch office or other industrial, commercial or business establishment in the state of origin;
3. agreement to submit to the jurisdiction; and
4. in the case of injuries to the person or damage to tangible property, if the facts which occasioned the damage occurred in the territory of the state of origin and if the author of the injury or damage was present in that territory when those facts occurred.

To require both the facts which occasioned the damage to have occurred in the state rendering judgment and actual presence in the territory by the author of the injury is too narrow a basis to be employed satisfactorily in the product liability context. Indeed, this provision appears to correspond with the position taken by the Canadian courts with respect to service ex juris before the Moran decision. For reasons given above, this seems to be an inadequate response. It should be remembered, on the other hand, that the draft goes considerably beyond the present common law rules for recognition of foreign judgments and is directed to international rather than interprovincial judgments.

European Economic Community Treaty, September 1968 The Convention of the European Economic Community is significant in Canadian law not only as one approach to the problem of enforcement but also because it contains provisions which may affect the legal rights of Canadians. The treaty is an example of a double or direct convention: it specifies appropriate grounds for the exercise of jurisdiction, forbids contracting states to exercise jurisdiction on other grounds and requires contracting states to recognise judgments rendered on the jurisdictional grounds specified.[75] While the Convention is

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75. It is interesting to note that a committee of experts created to consider this problem in the European context discussed the possibility of a simple or indirect treaty (one which merely defines the terms for recognition), but opted in favour of the more complex and comprehensive approach for the following reasons (Bulletin of the European Communities Supplement 12, 1972, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, p. 14):

> [the Committee] felt that within the E.E.C. a Convention based on the rules of direct jurisdiction and adopting common rules of jurisdiction

detailed and complex,[76] for present purposes the salient aspects may be summarised as follows.

The predominant principle of the Convention is that persons domiciled in a contracting state can be sued only in the courts of the state in which he is domiciled unless the case falls within a specific exception, called "special jurisdiction." Unfortunately, the term domicile is not defined by the Convention and Article 52 specifically provides that the court in which suit is brought shall apply domestic law to determine domicile. The potential variation of interpretation may well be a source of considerable difficulty.

Jurisdiction may be asserted against a non-domiciliary on grounds specified in Section 2 of the Convention dealing with special jurisdiction. The grounds relevant to product liability litigation are as follows:

1. "The court of the place where the obligation has been or is to be fulfilled, in matters of contract."[77]
2. "The court where the place of a tortious act occurred, in matters of tort or quasi-tort."[78]
3. "In disputes concerning the way a firm's branch, agency or other establishment conducts its business, the court of the locality in which such branch, agency or other establishment is situated."[79]

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would allow increased harmonisation of laws, provide greater stability of the legal system, avoid discrimination and facilitate the free movement of judgments, which is after all the ultimate objective.

76. For a detailed review in the product liability context, see Tebbens, International Product Liability (1979), pp. 292-9.

77. Article 5(1).

78. Article 5(3).

79. Article 5(5).

4. "The same defendant [specified in the above cases] may also be sued where there is more than one defendant, before the court of the domicile of any one of them."[80]
5. Section 3 contains detailed provisions relating to matters of insurance, broadening the jurisdictional grounds beyond those set out above.
6. In matters of credit sales and hire purchase of tangible personal property, without prejudice to the branch office provision above, "any vendor or lender domiciled in a Contracting State may be sued either before the courts of that State or before the courts of the Contracting State in which the purchaser or hirer is domiciled."[81] This is subject to waiver by agreement and only agreements subsequent to the occurrence of the dispute.[82]
7. Agreements on jurisdiction, unless invalidated by the domestic laws of the state of whose jurisdiction they exclude, or otherwise limited by specific provisions of the treaty, are countenanced.[83]
8. "The judge of a Contracting State before whom the defendant enters an appearance shall be competent, save where the appearance is for the sole purpose of challenging the competence of the court."[84]

If special jurisdiction does exist, judgment of the rendering court must be recognised and enforced by the courts of the other contracting states unless:

1. the judgment is contrary to the public policy of the state applied to;
2. the default judgment was obtained without due notice;
3. the "judgment is incompatible with the judgment rendered in a dispute between the same parties in the State applied to"; or
4. if the court of origin has in any matter involving status, capacity, marriage regimes, wills or inheritances, contravened a rule of private international law of the state

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80. Article 6(1).

81. Article 14.

82. Article 15(1).

83. Article 17.

84. Article 18.

applied to and thereby rendered a different result than would have been reached in the receiving court.[85]

In all other cases, review on the merits of foreign judgment is precluded[86] and speedy enforcement mechanisms are required.[87] An important aspect of the Convention is the curtailment of review of jurisdictional grounds in the receiving court. While it is contemplated that the court applied to will examine the jurisdictional grounds for the judgment in the court of origin, it is specifically provided that "the authority applied to shall be bound by the de facto verifications on which the court of the State of origin based its jurisdiction."[88] Indeed, it is provided that "the party against which enforcement is applied for shall at this [request for enforcement] stage in the proceedings not be entitled to submit comments."[89] Notice of the application is only given after the judgment of the court requested is rendered[90] and there is then a right to appeal the decision to recognise and enforce the judgment.[91] The aim here is apparently to focus as much litigation as possible in the original court and to curtail re-litigation of jurisdictional competence. In effect, this means that a defendant who wishes to fight the jurisdictional grounds will, as a practical matter, be forced to litigate that issue in the plaintiff's chosen court.

The Convention will obviously have an impact on product liability litigation. However, the extent of its significance remains to be seen. While there do not appear to have been any product liability cases reported, an important decision of the European Community Court in 1976 gives broad interpretation to the Article conferring jurisdiction in matters of tort. The case

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85. Provisions all contained in Article 27.

86. Article 29.

87. Articles 31 and 49.

88. Article 28.

89. Article 34.

90. Article 35.

91. Article 36. See also Articles 19 and 20 providing for judges in the contracting state to declare ex officio lack of competence under the convention when rendering judgment in the first instance.

involved the discharge of a pollutant into a river in France which caused damage in Holland. The court held as follows:[92]

> Where the place of the happening of the event which may give rise to liability in tort, delict or quasi delict and the place where that event results in damage are not identical, the expression "place where the harmful events occurred" in Article 5(3) of the Convention...must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.
>
> The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place where the event which gives rise to and is at the origin of that damage.[93]

The implications of this ruling in the product liability context are obvious. It would confer a generous jurisdictional choice to injured plaintiffs which would have to be recognised in all other contracting states.

The Convention directly affects Canadian interests in the following way. Article 4 provides that "if the defendant is not domiciled in a Contracting State, jurisdiction is governed in each Contracting State by its own law." Articles 26 and 31 require recognition of all judgments rendered by the courts of contracting states and make no exception whatsoever for the benefit of non-domiciliaries. The result is that while the Convention imposes no limits on the assumption of jurisdiction over non-domiciliaries, the judgments rendered by the courts of a contracting state must be recognised in another contracting

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92. Handelskwekerij G.J. Vier B.V. v. Mines de Potasse d'Alsace S.A., [1976] E.C.R. 1735 at 1748-9. See Tebbens, above note 76, for an analysis of the case in the context of product liability.

93. Note that there appears to be an important difference in the translation of Art. 5(3) -- here, "place where the harmful events occurred" and, in the official version, "place where the tortious act occurred."

state, however outrageous the grounds for the assertion of jurisdiction may have been.[94] This means, for example, that a Canadian with assets in one of the contracting states, but not domiciled in any contracting state, could be sued in another contracting state and the jurisdiction in which his assets were found would be required to enforce the judgment against those assets. The only escape from this situation is provided for by Article 59 which permits a contracting state to agree with a non-member state to refuse to recognise "a judgment rendered, notably in another Contracting State, against a defendant having his domicile or usual residence on the territory of the non-member state when...it has been possible to base the judgment only on a jurisdiction specified in Article 3, 2nd paragraph." Article 3 expressly precludes certain notorious exorbitant jurisdictions from being exercised against domiciliaries of member states.

This situation and the possibility afforded by Article 59 has led to the draft United Kingdom-United States Convention, the terms of which are described below.

United States-United Kingdom Draft Treaty, 1976 The U.S.-U.K. Draft Convention, not yet ratified and undoubtedly inspired by the potential problems to United States' interests in England which might be caused by the European Community Convention,[95] is an example of a single or indirect treaty: the standard applies

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94. The best known examples are the provisions of the French civil code entitling a French national to invoke the jurisdiction in all cases against foreign defendants and the provisions of the German code which allow for unlimited civil jurisdiction if the defendant has any assets within the jurisdiction of the court. Article 3 of the Convention specifically refers to these and other unacceptable jurisdictional provisions.

95. Hay and Walker, "The Proposed Recognition of Judgments Convention between the United States and the United Kingdom" (1976), 11 Tex. Int'l L.J. 421 at 422, 444-5; Smit, "The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?" (1977), 17 Va. J. of Int'l Law 443 at 445; Alford, "The Effect of the Proposed U.S.-U.K. Reciprocal Recognition and Enforcement of Civil Judgments Treaty on Current Recognition Practice in the United States" (1979), 18 Col. J. Trans. Law 119 at 120-1.

only to the recognition and enforcement issue and does not limit the grounds upon which jurisdiction may be otherwise asserted. The basis upon which jurisdiction is to be recognised is specified in Article 10 of the draft. The provisions of present interest here are the following:

1. Habitual residence or principal place of business or head office.
2. Branch or other establishment out of which the cause of action arises within the jurisdiction.
3. "In the case of contractual claim the parties to the contract resided or, if not natural persons, had a place of business in the territory of origin at the time the contract was concluded and the obligation in issue was to be wholly or mainly performed there."
4. "In the case of a contract to supply goods or services the conclusion of the contract was preceded by an invitation to treat made by advertisement or otherwise either in or specifically directed to the territory of origin and the use of the goods or the performance of the services was in the contemplation of the parties to the contract to occur in whole or in substantial part within that territory."
5. "In the case of an action to recover damages for a physical injury to the person or for damage to tangible property, the acts or omissions that occasioned the injury or damage substantially occurred, and the injury or damage was suffered, in the contracting state in which the court of origin was exercising jurisdiction, and either of those acts or omissions substantially occurred or that injury or damage suffered in the territory of origin."

The confusing language of the provision relating to tort claims would appear to be phrased so as to take into account the problems posed by the American federal system. For example, the provision would allow enforcement where the product was manufactured in New York, caused injury in California and the judgment of the California court against the New York defendant was being enforced in England. Both injury and damage had occurred within the contracting state (i.e., the United States) and the damage was suffered within the court of origin.

However, the provision is rather restrictive with respect to fully international torts. The treaty requires both act and injury to have occurred within the state rendering judgment and, for reasons given elsewhere in this paper, is too restrictive. Indeed, it appears to be a compromise between the more generous

American position with respect to recognition and the more restrictive English position.[96]

On the other hand, the contractual provision is more generous and it is puzzling why the tort provision is so narrow by comparison. In any event, while more circumscribed than one might hope for, the draft convention marks an advance from the narrow common law position which still prevails in Canada.

Enforcement of sister-state judgments in the United States In the United States, recognition of sister-state judgments is governed by two provisions in the American Constitution. First, the "full faith and credit clause"[97] requires the courts of one state to recognise judgments rendered by the courts of a sister state. This is qualified by the due process clause[98] which effectively limits the constitutional obligation imposed by "full faith and credit" to those judgments rendered under procedures which comply with the requirements of due process. Moreover, apart from the question of recognition any attempt by the courts of one state to exercise jurisdiction over a non-resident defendant must comply with the due process requirement. This means

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96. See Hay and Walker, above note 95:

> The restrictive formulation of Article 10(10) thus assumes the existence of a substantial "connecting factor" with the other Contracting State and, despite the fact that the defendant may be out of the jurisdiction at the time of the suit, therefore is closer to traditional personal-jurisdiction notions than to the long arm jurisdiction in the American sense.

The draft convention has, however, created concern on the part of British manufacturers and insurers. For an attempt to allay such fears, see North, "Insurance and Foreign Judgments," New L.J., Mar. 30, 1978, 315; cf. Marshal, "Draft UK/US Civil Judgments Convention: A U.S. View," New L.J., Dec. 7, 1978, 1199.

97. Article IV, Section 1.

98. 14th Amendment.

that there is a coalescence of principles which apply both to assumed jurisdiction and to recognition of sister-state judgments.

There is a vast body of literature and case law on this subject; the following is merely an outline which will suffice for comparative purposes. The assumption of in personam jurisdiction against an out-of-state defendant permitted by the due process clause has been defined in three decisions of the Supreme Court of the United States. None of these deals with the product liability situation and, while there has been an enormous volume of case law dealing with the product liability issue,[99] no case involving product liability has yet reached the Supreme Court.

In the first of the leading cases, International Shoe Co. v. Washington,[100] the court held that

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fairplay and substantial justice."[101]

The nature of the "minimum contacts" required to justify the assertion of jurisdiction and thereby bring into play the "full faith and credit" clause has been only vaguely defined. A later decision, McGee v. International Life Insurance Co.,[102] held that a single act of the defendant (in that case the collection of an insurance premium) could establish a sufficient contact for the purpose of satisfying the test described in the International Shoe case:

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99. See Frumer and Fridman, Products Liability, par. 45.01. See Tebbens, above note 76, for a review of the American case law.

100. (1945), 326 U.S. 310.

101. At 316.

102. (1957), 355 U.S. 220.

> this court has held that the Due Process clause of the 14th Amendment places some limit on the power of state courts to enter binding judgments against persons not served with the process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned "consent," "doing business," and "presence" as the standard for measuring the extent of state judicial power over such corporations....Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more states and may involve parties separated by the full continent. With this increasing nationalisation of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communications have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity.[103]

The broad McGee holding was qualified somewhat by a later case. In Hanson v. Denckla,[104] the court held that there must be some purposeful institution of a relationship with the foreign state on the part of the defendant to satisfy the minimum contact requirement:[105]

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103. At 222-3.

104. (1958), 357 U.S. 235.

105. At 253.

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protection of its laws.[106]

In the cases interpreting these requirements in the context of product liability litigation there has been a definite shift towards a broad definition of legitimate jurisdiction. It seems clear that in interpreting the fairness requirement, the American courts would go at least as far as the Supreme Court of Canada went in the Moran decision. In an early case interpreting the so-called "long arm" rule of Illinois, where it was sought to invoke jurisdiction against a foreign manufacturer of a component valve which had been included in a water heater which had exploded and caused damage, it was held as follows:

> With the increasing specialisation of commercial activity and of growing inter-dependence of business it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.[107]

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106. Cf. Shaffer v. Heitner (1977), 97 S. Ct. 2569, imposing the minimum contacts test with respect to quasi-in-rem jurisdiction.

107. Gray v. American Radiator & Standard Sanitary Corp. (1961), 176 N.E. (2d) 761 at 766.

In another case, cited in a leading American text,[108] jurisdiction was upheld when asserted by a Nevada court over a Michigan manufacturer of a boat railing installed on a pleasure boat which had passed through the hands of middlemen before ultimately reaching the plaintiff in Nevada:

> a manufacturer of a component part of a boat can presume or reasonably foresee that its potential market would be Lake Mead or Lake Tahoe, in Nevada, as well as the lake areas of Minnesota, Wisconsin, Michigan, or any other part of the United States where navigable lakes or waters are located....Where it is reasonably foreseeable that a product will enter the flow of commerce, the manufacturers of that product can expect to be sued in any state where the product is alleged to have caused any injury....Whether it be labelled a minimum contact in the forum state if the litigation concerns a commercial transaction, or a one act tort, the effect is the same, i.e., jurisdiction in the forum state attaches. This has become a fact of legal life.[109]

There can be little doubt, then, that in the United States, any systematic or continuous activity in the way of seeking a national market for distribution of a product will render a manufacturer liable to the jurisdiction of any state.[110] Indeed, the "flow of commerce" approach probably means that so long as the goods are being used for their intended purpose, the manufacturer may still be liable even where the consumer himself has brought them into the jurisdiction and even where the manufacturer did not actively solicit business within that state.[111]

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108. Leflar, American Conflicts Law (1968 ed.), p. 84.

109. Metal Matic Inc. v. District Court (1966), 415 P. (2d) 617 at 618-19.

110. See Frumer and Fridman, above note 99, par. 45.01.

111. Ibid.

The result is that sister-state judgments in product liability cases will be recognised when rendered on the basis of jurisdiction supportable on the Moran analysis, and probably in a broader range of cases as well.

Recognition of foreign judgments in the United States The American courts have tended to assimilate the principles developed with respect to sister-state judgments to the problem of foreign judgments. There is, however, a considerable variation in state law in this regard, and it will be recalled that the constitutional "full faith and credit" requirement applies only to sister-state judgments and not to foreign judgments. While the standards vary, there can be little doubt that the practices of most states tend to be significantly more generous than those of the Canadian common law provinces.

The jurisdictional test applied is essentially the same as that for sister-state judgments as a general rule and jurisdiction will be recognised in many states on the basis of "presence of contacts or relations with the jurisdiction that make it reasonable to require the defendant to litigate in its courts."[112]

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112. Von Mehren, "Enforcement of Foreign Judgments in the United States" (1977), 17 Va. J. of Int'l Law 401 at 409; see also Von Mehren and Trautman, "Recognition of Foreign Adjudications" (1968), 81 Harv. L. Rev. 1601 at 1606-7. See also Re-Statement on Conflicts, p. 299, where it is pointed out that while contested proceedings are usually recognised on the same basis as sister-state jurisdiction, default judgments pose more problems:

> The foreign court must have had jurisdiction under the rules relating to the recognition of foreign nation judgments of the State where recognition of the judgment is sought. It is possible that a given basis of jurisdiction, such as the doing of an act with the causing of consequences in a state [bases recognised for sister-state judgments], might not meet the requirements of a particular State of the United States for the recognition of a foreign nation judgment even though the given basis did meet

It is clear that the treatment given by American courts to Canadian judgments is generally much more generous than that given by Canadian courts to those of the United States.[113] Indeed, it is probably safe to say that the American tendency is more generous with respect to truly foreign judgments, such as those coming from Canada, than the courts of one Canadian province are with respect to the judgments of the courts of another Canadian province. In the product liability context, this leads to the startling conclusion that a plaintiff may well be better off suing an American defendant than a defendant located in another Canadian province.

## Reforming the Law of Enforcement of Extra-Provincial Judgments

It is clear that the existing Canadian rules tend to favour defendants sued by extra-provincial plaintiffs. In the context of product liability litigation, manufacturers, wholesalers and retailers are able consciously to develop marketing policies and strategies within a given province without having the judgments of the courts of that province enforceable against them. Short of establishing a permanent presence in a jurisdiction through an agent who is authorised to act on behalf of the defendant rather than merely to encourage its sales, or electing to defend lawsuits within that jurisdiction, foreign manufacturers are effectively immune to the impact of judgments by the courts of that jurisdiction. As will be seen from the discussion of choice of law in the following chapter, there is a strong tendency in tort cases for application of the substantive law of the forum. The result is that the defendant can effectively determine both where the suit is to be tried and the law which is to be applied.

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> the requirements of due process and under the rules of competence of the particular State would authorise an assumption of jurisdiction in a similar case by the courts of that State.

113. See especially Ram, "Reciprocal Recognition of Foreign Country Money Judgments: The Canada-United States Example" (1977), 45 Fordham L.R. 1456 (reprinted (1977) 8 Man. L.J. 473), which compares the Canadian and American practices. See also Zaphiriou, "Transnational Recognition and Enforcement of Civil Judgments" (1978), 53 Notre Dame Lawyer 734, comparing American and English recognition practices.

It is submitted that this situation is unjustifiable and inadequate. The rules relating to recognition and enforcement are clearly a relic of nineteenth century jurisprudence. The justification for narrow recognition and enforcement rules must be to protect domestic defendants from unfairness and harassment in foreign courts.

In the case of judgments from sister provinces, these concerns are surely misplaced. Where significant amounts are involved, the judge in all provinces will have been appointed by the federal government; appeals are available to a common appellate court; there is a common legal tradition and legal profession, a similarity if not virtual identity of notions of fairness, procedural propriety and, in most cases, substantive law. This is obviously the case with the nine common law provinces. In the case of Quebec, where there may be variation in the origins and doctrine of substantive law, there is less variation at a practical level[114] and virtual identity of notions of procedural justice and fairness clearly allow for a more liberal approach.

Moreover, in the specific context of product liability litigation, the policy of all provinces seems clear. Modern substantive law and the rules of service ex juris both indicate the desire to afford injured plaintiffs a remedy. It is clear, however, that this policy cannot be achieved by any one province alone in the context of extra-provincial litigation. It is beyond the power of one province to control directly the effect given to its judgments in a sister province; only by some form of common or reciprocal arrangement can this be achieved. The choice that a province must face is that of balancing the advantages to be gained by its domestic plaintiffs against the disadvantages that will be suffered by domestic defendants. In other words, in order to enable its domestic plaintiffs to enforce their judgments elsewhere, a province will have to concede advantages presently enjoyed by its domestic defendants and agree to recognise sister-province judgments against such defendants.

It seems clear that a shift towards the plaintiffs' interests is called for. Adopting a modest position and assuming that all provinces would consider that the interests of consumers should receive equal weight to the interests of manufacturers and distributors, it is submitted that the guiding principle should

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114. See, for example, Cohen v. Coca Cola, [1967] S.C.R. 469; Consumer Protection Act, 1978, s. 53.

be that referred to above in the discussion of service ex juris. That is, a province should recognise any judgment rendered by the courts of another province where it was more reasonable to require the defendant to litigate the dispute in that province than it was to require the plaintiff to litigate the dispute in the province of the defendant.

There are three approaches which might be taken. The first is usually referred to as reciprocity but perhaps may be more properly labelled the "mirror image" approach. Under this arrangement, there is no agreement between the various provinces as to what constitutes an appropriate jurisdictional base for purposes of recognition. All provinces would simply agree to recognise judgments rendered in circumstances in which they themselves would have asserted jurisdiction over the non-resident defendant. In other words, the domestic service ex juris rule becomes the standard for recognition. To the extent that ex juris rules vary from province to province there would be variation in recognition practice but, within any province, a common standard will be applied to both problems.

The second possibility is the double, or direct, approach which involves the application by all provinces of a common standard to the assertion of jurisdiction for domestic purposes and to recognition of judgments. In other words, agreement is reached upon the situations in which jurisdiction will be invoked against an extra-provincial defendant and, in those same situations, it is agreed that judgments rendered in compliance will be recognised. The best example of this approach is contained in the agreement in force in the European Economic Community, examined above. While not the result of an agreement, the law of the United States relating to sister-state judgments may also be placed in this category. The constitutional requirement of due process is imposed upon jurisdiction asserted against out-of-state defendants, but the full faith and credit requirement means that any judgment rendered in accordance with the constitutional standard of fairness will be recognised throughout the United States.

The third method which could be adopted is the simple, or indirect, approach where only the standard for recognition is agreed upon. No limits are imposed upon assertion of jurisdiction over non-residents and the agreement is limited to defining those situations in which such jurisdiction will be recognised in the other state. There are several bilateral treaties in existence which have adopted this approach, although Canada has not entered any such agreements.

The implications of each of these approaches can now be considered.

Reciprocity, or the "mirror image" approach The theory that the receiving jurisdiction should recognise any judgment rendered on a jurisdictional basis upon which it would itself assert against a foreign defendant has been advocated by many commentators.[115]

The mirror image approach is to be distinguished from reciprocity per se. Reciprocity, strictly speaking, refers to the practice whereby the receiving jurisdiction bases its decision on whether to recognise the foreign judgment upon the effect the foreign jurisdiction would give to a similar judgment coming from the receiving jurisdiction. This requirement has never been a part of the English common law.[116] A reciprocity requirement tends to curtail drastically the effect given to foreign judgments and has been criticised because

> it arbitrarily penalises private individuals for positions taken by foreign governments and...such a rule has little if any constructive effect, but tends instead to a general breakdown of recognition practice.[117]

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115. See Falconbridge, Essays on the Conflict of Laws, p. 629:

> In an ideal system of conflict of laws the cases in which a court exercises jurisdiction should correspond exactly with the converse cases in which it recognises the binding force of judgments rendered by foreign courts.

See also Kennedy, "'Reciprocity' in the Recognition of Foreign Judgments" (1954), 32 Can. B. Rev. 359; Castel, vol. 1, p. 446.

116. Luther v. Sagor, [1921] 3 K.B. 532 at 558-9 per Scrutton L.J. It was a principle used by the American courts with respect to foreign judgments (Hilton v. Gruyoe (1895), 159 U.S. 113 at 228) and is commonly found in civil law jurisdictions. The majority of American States do not now follow the reciprocity requirement; see Leflar, American Conflicts Law (1968 ed.), at 171-2.

117. Von Mehren and Trautman, "Recognition of Foreign Adjudication: A Survey and Suggested Approach" (1968), 81 Harv. L. Rev. 1601 at 1661.

The mirror image approach did have a brief period of judicial acceptance in the recognition of foreign divorces. In Travers v. Holley,[118] the English Court of Appeal held that "it must surely be that what entitles an English court to assume jurisdiction must equally be effective in the case of a foreign court."[119] This principle was extended by a later decision[120] which held that the actual basis for the rendering court's jurisdiction did not have to correspond with that of the receiving court if, on those same facts, the receiving court would have taken jurisdiction over the case. The only judicial support for the application of the mirror image approach to foreign money judgments is found in a dictum of Denning L.J. in Re Dulles' Settlement[121] indicating that a defendant served out of the jurisdiction in accordance with service ex juris rules of the Isle of Man, which corresponded with the English rules, would be bound in England by the result reached by the Man Court.

The mirror image approach, however, was rejected by the House of Lords in Indyka v. Indyka.[122] While approving of the result in Travers v. Holley, Lord Reid explicitly refuted the mirror image doctrine and suggested that the decision had to be based on "wider grounds":

> The Travers v. Holley doctrine would not lead to a rational development of the law. Too frequently when Parliament is legislating to remove a particular injustice the provisions of the Bill are drafted as narrowly as possible to achieve that result so that they introduce an anomaly into the existing law rather than making any general reform. And the main reason for this is that such piecemeal changes can be enacted more speedily with less demands on the time of

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118. [1953] P. 246.

119. At 256 per Hodson L.J.

120. Robinson-Scott v. Robinson-Scott, [1958] P. 71.

121. [1951] 1 Ch. 842 at 851.

122. [1969] 1 A.C. 33.

> Parliament than a more general reform would require. Parliament only has in mind the particular circumstances in this country and it would be quite unrealistic to suppose that when Parliament entrusts a new jurisdiction to our courts it has any intention to affect our rules for the recognition of foreign judgments. With rare exceptions Parliament has left the courts free to develop those rules and I see no reason why, by adopting the doctrine of Travers v. Holley, we should tie that development to what Parliament has done with quite a different object in view.[123]

Lord Wilberforce, in agreement with Lord Reid, said:

> I am unwilling to accept either that the law as to recognition of foreign divorce (still less other) jurisdiction must be a mirror image of our own law or that the pace of recognition must be geared to haphazard movement of our legislative process. There is no reason why this should be so, for the courts' decisions as regards recognition are shaped by considerations of policy which may differ from those which influence Parliament in changing the domestic law.[124]

The mirror image approach, advocated by Lord Denning in the Dulles case as a basis for recognition of foreign money judgments, has been specifically rejected in several English cases.[125] While rejecting the reasoning of Travers v. Holley,

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123. At 59 per Lord Reid.

124. At 106.

125. Re Trepca Mines Ltd., [1960] 1 W.L.R. 1273 at 1281-2 (C.A.); Henry v. Geoprosco Ltd., [1976] 1 Q.B. 726 at 745 (C.A.); Société Co-Opérative Sidmétal v. Titan International, [1960] 1 Q.B. 828; Sharps Commercials Ltd. v. Gas Turbines Ltd., [1956] N.Z.L.R. 819 at 823. See also Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957), 35 Can. B. Rev. 123, discussing an unreported decision of the British Columbia High Court, Archambault v. Solloway.

the Indyka decision went beyong the notion of mirror image to a broader doctrine. The House of Lords adopted the principle that a foreign divorce should be recognised where the petitioner had a "real and substantial connection" with the courts of the rendering jurisdiction. Indeed, there has been a much more fluid development in the area of recognition of foreign divorce decrees than has been the case with respect to foreign money judgments, where the law has remained static. Obviously different interests are at stake. Divorce decrees are matters of status which affect a broader range of parties than the actual litigants, and there is a strong policy against "limping" marriage. Jurisdiction has always been based upon the nature of the relationship between the parties and the rendering jurisdiction rather than territorial presence or agreement. Accordingly, it is suggested that while the specific test enunciated by the House of Lords is of little assistance in solving the problem of foreign money judgments, the notion that changing circumstances require changing attitudes towards foreign judgments is extremely noteworthy.[126]

It would seem from the cases that the mirror image approach will not be adopted with respect to foreign money judgments without specific legislation. The willingness of the

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126. Compare Castel, vol. 1, p. 446:

> there is no doubt that the principle of jurisdictional reciprocity more than that of real and substantial connection can be an excellent method for facilitating the recognition and enforcement of foreign judgments in the forum. This principle should at least be followed in federal states where statutory as well as common law jurisdictional principles are not substantially different. It may even result in an indirect unification of the rules of jurisdiction without the usual obstacles and inconveniences to direct unification. To adhere strictly to the principles enunciated almost fifty years ago...is a sign of backwardness and not in the tradition of the Anglo-Canadian system. Whether the principles should be extended to judgments rendered outside Canada is a more delicate question.

courts to develop new rules for recognition, referred to above by Lords Reid and Wilberforce, may be present with respect to foreign divorce decrees but simply cannot be counted on in the area of foreign money judgments.

The arguments in favour of the mirror image approach can be summarised in three words: honesty, simplicity and flexibility.

In the first place, there is honesty and consistency in the mirror image approach. The assumption of jurisdiction under service ex juris rules which goes much beyond that which the courts will recognise when exercised in another jurisdiction has long been criticised.[127] Matching assumption of jurisdiction over non-residents with the willingness to recognise similar jurisdiction when asserted by others would extend substantial benefit to plaintiffs and, at the same time, would provide a check on jurisdictional overreaching. The draftsman of service ex juris rules and the judge called upon to decide upon the scope of such rules would automatically be subjecting domestic defendants to the same treatment that was being dealt out to foreign defendants on behalf of domestic plaintiffs. It may well be that through such an approach there would be indirectly a steady movement towards unification of jurisdictional principles which seems difficult to achieve in the abstract.

Secondly, the mirror image approach is extremely simple. There is no need for extensive legislation or prolonged debate about details. Rather, there is the acceptance of a basic principle which can be readily and quickly implemented. Obviously, acceptance of this principle would go beyond the scope of this study and the product liability situation, but this is perhaps the case with any approach which might be taken to the overall problem.

Thirdly, the mirror image approach is extremely flexible and fluid. The law is not frozen in any way but left free to

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127. See Cheshire and North (above Chap. I, note 1), p. 89; Castel, vol. 1, especially p. 446; Kennedy, above note 125. Swaizie v. Swaizie (1899), 31 O.R. 324 at 330-1 per Meredith J.: "with what may seem some inconsistency, English courts sometimes assert the jurisdiction in themselves which they deny the right of a foreign tribunal to exercise in like circumstances." See also Phillips v. Batho, [1913] 3 K.B. 25 at 29-30 per Scrutton J.

develop through rule changes and judicial interpretation. Each province is free to vary specific items unilaterally without in any way violating the spirit of the overall scheme. The province need merely vary its jurisdictional base to alter recognition within its courts. It is in no way tied down to an elaborate and detailed formulation of when it may not assert jurisdiction over a non-resident or when it must recognise a judgment against a resident defendant.

Among the arguments that can be made against this approach is that it assumes an identity of interest between assumption of jurisdiction and recognition of foreign judgments which simply does not exist. It may well be that this should have been the principle and that any province should be willing to recognise the propriety of what it does itself. However, this has never been the case and ex juris rules have evolved with this background. Provinces have regularly seen fit to benefit their own plaintiffs without having to give up advantages enjoyed by their own defendants. As the House of Lords pointed out in the Indyka case,[128] jurisdictional rules simply have not been thought out on the basis of enforcement but have developed in a patchwork manner and, because of this, may not be suitable as standards for recognition. There can be little doubt that a province may well have a diversity of interests which do not coincide on both sides of this question. For example, a province with a predominantly consumer population which consumes products manufactured outside the jurisdiction may well have an interest in extending benefits to those purchasers without wishing to subject a fledgling manufacturing sector to the same treatment when sued in other provinces. While it is argued that such self-regarding conduct should be condoned,[129] as a practical matter, it must be recognised and dealt with.[130]

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128. Above, pp. 115-17.

129. Below, p. 121.

130. Von Mehren and Trautman, "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968), 81 Harv. L. Rev. 1601 at 1621, note 65, reject the notion of equivalence between assumption of jurisdiction and recognition:

> Recognition practice may thus suggest the need for reforming some traditional approaches to the

The second main argument is the want of uniformity which would be produced. This argument has two aspects. First, as has been noted above, there is a substantial variation at present in service ex juris rules in Canada. While one argument in favour of the approach is that this would indirectly achieve some form of unification, it would have to be recognised that, while hoping for that development to occur, there would be a period of substantial difference in the rights accorded in terms of recognition to plaintiffs depending on where the defendant happened to be resident. This means that while a province would know what it was giving in terms of domestic defendants' rights when expanding a jurisdictional rule, it would have no idea and could not in any way control what it was getting from other provinces in terms of benefits accorded to its own plaintiffs. Perhaps more significant, however, is the matter of discretion. It is clear that forum non conveniens will continue to play an important role in service ex juris practice and that the courts will retain an overriding discretion to control assumed jurisdiction. If service out of the jurisdiction remains discretionary, it would have to follow that recognition of extra-provincial judgments would become discretionary. Because provincial service ex juris rules do vary from province to province, the receiving court would have to scrutinise the decision and decide for itself whether it would, on the basis of its own rule, exercise jurisdiction in any given case. It is inconceivable that this would not include the forum non conveniens consideration, and the introduction of discretion to the area of recognition would be potentially destructive. While initially the mirror image approach would unquestionably expand the rights plaintiffs now have, it may have a weak underpinning. The discretionary element might well introduce uncertainty and sow the seeds of an unhealthy approach to recognition.

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> assumption of jurisdiction. However, since a forum may properly assume jurisdiction in some cases on grounds that are self-regarding and hence not appropriate for universal and reciprocal application, a complete equivalence test would be inappropriate even in a more ideal world than we now have.

The authors do, on the other hand, agree that the jurisdictional base asserted by the forum may be quite relevant as a factor in determining its own practice with respect to recognition but they reject the notion that the jurisdictional base should govern.

The third general argument that can be made against this image approach follows from what has just been said, namely, the costly nature of the re-litigation which would be required in enforcing jurisdiction. This approach would clearly force the plaintiff to litigate his case twice. He would first of all have to win at home and then go to the foreign jurisdiction and fight the recognition battle on the defendant's own ground and strictly on terms of the defendant's domestic law. This element of increased cost and inconvenience to plaintiffs, which is of course present in current recognition practice, can be avoided or at least minimised under two of the remaining three approaches to reform in this area.

The direct approach The essence of the direct approach is the formulation of a single standard for jurisdiction which is uniformly applied by the rendering court in deciding whether to assume jurisdiction over the defendant, and by the receiving court in deciding whether to recognise a judgment based upon such assertion of jurisdiction.

The advantages of this approach are both theoretical and practical. Theoretically, it is surely sound to impose a common standard to both sides of the jurisdiction-enforcement question. Indeed, one of the most common criticisms of the existing state of the law is the inconsistency, of which all provinces are guilty, in asserting jurisdiction on a much broader basis than they are willing to recognise. It is difficult to justify this inconsistent approach, and the ultimate object of reform should be eradication of this problem.

From a practical point of view, the direct approach tends to curtail re-litigation of the issue of jurisdiction and to save the plaintiff from fighting the question once in his own province on its standard for assertion of jurisdiction and then again in the defendant's province on the standard for recognition imposed there. As a common test would be applied, the initial determination by the rendering province would be, at the very least, a prima facie finding that the judgment would be recognised in the receiving province. A considerable saving of expense and judicial resources would result.

The problem with the direct approach, however, is that it would unquestionably be difficult for all provinces to reach agreement on a common jurisdictional test applicable to both assumed jurisdiction and recognition. While one wishes to avoid undue pessimism, in light of the present state of the law, the difficulty in achieving agreement on both sides of this complex question should not be underestimated.

In short, while a common jurisdictional test should remain the ultimate aim of reform in this area, it may simply be expecting too much to hope that such a scheme would emerge in the immediate future.

The indirect approach The considerations related to the indirect approach, i.e., the formulation of a jurisdictional standard which only relates to the question of enforcement, will be obvious from the foregoing. It would be easier, as a practical matter to achieve agreement on a one-sided test but such an approach would involve the greater expense on the part of litigants which inevitably flows from litigating the jurisdictional question twice.

However, the significance of reform along these lines should not be minimised. The pressure that an indirect approach would put upon the defendant to come to the plaintiff's province to defend the merits would be significant. In most cases, it would be reasonably clear at the outset whether or not the case was one which met the standard for recognition and enforcement. If a judgment would obviously be enforced under the test for enforcement, the defendant would defend on the merits in the plaintiff's province. However, even in cases where recognition is questionable, there would still be considerable pressure on the defendant to defend in the province of the plaintiff. By letting judgment go by default and not defending on the merits, the defendant would run the obvious risk that the recognition and enforcement question might be decided against him in his own province, thereby precluding him from ever raising his substantive defense. As a practical matter, the defendant's choice would be between the certainty of having his day in court in the plaintiff's own jurisdiction or taking the risk that a default judgment would be recognised, thereby precluding him from ever defending the case.

A fourth approach The above analysis leads to the conclusion that both the plaintiff's and the defendant's interests call for an early determination of the recognition issue. The interest of the plaintiff is in knowing from the outset whether or not his judgment will be enforced and saving the expense of re-litigating the jurisdictional issue in the defendant's forum. The interest of the defendant is in not having to guess about where he should defend and being able to know with certainty in cases of jurisdictional overreaching that he incurs no risk in letting the proceedings go by way of default.

This points to a possible fourth approach which would combine the advantages of the various techniques for reform which have been described while avoiding some of the difficulties. The essence of this approach would be, first, that the provinces would agree upon a reformed standard for recognition of extra-provincial judgments. By so agreeing, they would not in any way affect their own ability to provide for assumed jurisdiction over extra-provincial defendants which did not conform with this jurisdictional standard. The test would be in the nature of the indirect approach, one which merely defined the circumstances in which recognition and enforcement would be afforded. Secondly, however, the scheme would provide for a binding determination of the recognition issue in the rendering court at the instance of either party. In other words, it would be open to either the plaintiff or the defendant to raise the question of whether or not the case complied with the common standard for recognition imposed in all provinces. This would occur at an early stage in the proceedings and certainly before the defendant was required to defend on the merits in the original court. Thirdly, enforcement of sister-province judgments would be available in two ways. If the recognition issue had not been raised in the courts of the rendering jurisdiction, then it would be incumbent upon the plaintiff to establish that the case fell within the standard in a proceeding in the courts of the receiving jurisdiction. However, if the issue of recognition was determined by the courts of the rendering province, then enforcement would be available if the receiving province, upon filing of the order made by the rendering jurisdiction, held that the standard for recognition had been met.

## Conclusion

This study suggests that significant changes are called for in the law of recognition and enforcement of sister-province judgments. The existing rules are a relic of the nineteenth century and do not take into account the realities of Canadian federalism. In the modern context of product liability litigation, the effect of existing rules is often to force the plaintiff to litigate in the province of the defendant. This situation not only fails to reflect the realities of modern commercial life, but also fails to reflect the apparent policy of all provinces to ensure that injured plaintiffs have ready access to remedies. It is recommended that the law of recognition and enforcement move away from its invariable pro-defendant orientation and be based upon the principle that a judgment should be recognised where the circumstances are such that it was more reasonable to require the defendant to litigate in the plaintiff's province than to require the plaintiff to go to the defendant's province to prosecute his claim.

It is proposed that the criteria for jurisdiction described in the preceding chapter on service out of the jurisdiction should be applied to recognition and enforcement. While it is unnecessary to require that this same jurisdictional standard be applied to limit assumed jurisdiction, it is suggested that the ultimate aim of reform should be the development of jurisdictional principles commonly applied both to service ex juris and recognition and enforcement.

However, if reform encompasses only the question of recognition without limiting the assumption of jurisdiction, it is in the interest of both plaintiffs and defendants that there be an early determination of whether the facts are within the common standard for recognition and which determination should be treated as binding when the plaintiff seeks to enforce the judgment in the province of the defendant.

# CHAPTER III

## CHOICE OF LAW

### Introduction

The third general area of concern in interprovincial product liability litigation is that of choice of law: what is the appropriate provincial substantive law regime to apply to cases involving extra-provincial factual elements?

While choice of law rules applicable to products cases are identifiable, authority on the choice of law question in the specific context of a product liability suit is sparse. There are several reasons for this. The most obvious is that until recently there has been virtual uniformity of the substantive law of product liability in the common law provinces. Generally accepted common law principles govern suits founded in tort, and uniformity of provincial sale of goods legislation has meant that contractual suits have also been governed by identical substantive law provisions.

Secondly, as noted in the Introduction to this study, the traditional restrictive view of service ex juris meant that the plaintiff ordinarily could sue only in the defendant's province. Even where an extra-provincial defendant could be reached through service ex juris, the narrow rules for enforcement of judgments militated against selecting any jurisdiction other than one where the defendant had assets. While there is a clear distinction to be drawn between choice of law and jurisdiction rules, the common law choice of law rule in tort, examined in detail below, is forum oriented.

The result was that by forcing the plaintiff to sue in the defendant's jurisdiction through narrow service ex juris and enforcement rules, the choice of law consideration evaporated and the suit became, in effect, a purely domestic one. In short, while the problem of an appropriate choice of law rule has long existed it has not surfaced in product liability litigation because there have been uniform substantive rules and because of the practical problems imposed by narrow jurisdiction rules.

It may be expected, however, that this situation will rapidly change and that the choice of law question is bound to emerge as an area of concern. Two provinces have already altered the substantive basis of product liability law and other provinces are in the process of law reform. While motivated by a

common spirit, a patchwork of provincial reform measures is bound to produce certain substantive law differences and the selection of one provincial rule or regime over another will have practical consequences.

As well, while the jurisdictional standard for purposes of recognition remains static, the rules relating to service ex juris are being significantly altered. The opportunity for a plaintiff to sue an extra-provincial defendant in the plaintiff's home province is now much broader. While narrow recognition rules may curtail the impact of modern sevice ex juris standards, it may still be expected that the trend signalled by the Moran case (discussed in detail in Chapter I) will produce a significant number of suits in the province of the injured plaintiff against the extra-provincial defendant.

Accordingly, the choice of law question may be expected to emerge as a real problem of practical significance in the immediate future. It is clearly a question which deserves immediate and careful attention.

## The Problem of Choice of Law in Product Liability

The problem of developing an appropriate choice of law rule in the context of product liability is the potentially wide diversity of contacts with a variety of jurisdictions, each having a relatively strong claim for the application of its own law. These may be described as follows. The first and major part of this chapter is devoted to the question of choice of law in the tort area as it is there that the most severe problems are encountered.

Place of manufacture The place of manufacture will lay down standards for domestic producers which producers exploiting foreign markets will ordinarily follow. These standards will provide a minimum basis for pricing and insurance. In addition, there may be an element of consumer reliance based upon the place in which the product is manufactured. If the domestic rule is pro-producer rather than pro-plaintiff, the province of manufacture has an interest in protecting its own domestic producers from the full brunt of liability. The question then becomes whether it is legitimate to apply a place of manufacture no-liability rule in all cases, especially where a manufacturer has deliberately gone beyond his own jurisdiction and actively sought markets in another jurisdiction. While the claim of the place of manufacture to have its law applied is strong, it is by no means clear that that claim should prevail as against the law of the place of injury or acquisition.

Place of acquisition The place of acquisition of the product also has strong reason to have its own law applied. The reliance factor is particularly strong where consumers will have relied upon domestic laws stipulating minimum standards or stricter liability to protect consumers. On the other hand, if the law of the place of acquisition is less generous than, say, the law of the place of injury it is difficult to see why the restrictive rule should always be applied. The purpose behind such a rule may well be to protect domestic producers. It is highly unlikely that it is intended to punish domestic consumers, especially if the case does not involve a domestic producer, and equally unlikely that there is any intention to have domestic consumers lose the benefit of more favourable law enacted by other relevant jurisdictions.

Place of injury The place of injury can also make a strong case for the application of its own law in certain circumstances. The purely territorial element perhaps produces some level of expectation on the part of the plaintiff, absent purely fortuitous circumstances. It also can be argued that the interests of any state to protect persons within its own territory may be furthered by the application of a pro-consumer rule. As well, it has been suggested that the place of injury may have an interest in guaranteeing compensation or payment of medical and hospital expenses as it is likely the place where those expenses will be incurred. On the other hand, the place of injury will often be a purely fortuitous jurisdiction as, for example, where the plaintiff is injured while vacationing or simply passing through the province. If the law of the place of injury is pro-producer, then it is hard to see how the purposes identified above in favour of application are furthered in any way. It is highly unlikely that the place of injury has any interests or desire to deprive persons injured within its territory of the benefit of a more favourable law.

Plaintiff's residence The fourth jurisdiction which has a contact of sorts with a product liability claim is that of the plaintiff's residence. To a certain extent, the arguments advanced in favour of the application of the law in the place of injury or place of acquisition apply in favour of applying the law of the plaintiff's residence. However, of the four possibilities, the plaintiff's place of residence has the weakest claim. The notion of a personal law is foreign to the common law. It is only in matters relating to status, such as divorce, that the notion of personal law is accepted. There seems to be no strong reason why the concept should be introduced uniquely in the product liability area. Indeed, the matter of the plaintiff's residence may be relevant insofar as it enforces the choice towards one or other jurisdiction mentioned above.

As can be seen from the foregoing discussion, product liability cases present difficult choice of law problems. Strong arguments can be made in favour of applying the place of manufacture, place of acquisition and place of injury. It is difficult, indeed impossible, simply to choose one of those contacts as being the appropriate connecting factor pointing to a substantive law regime for all cases. It seems clear that the diversity of contacts presented by product liability cases requires a more flexible solution.

Against this outline of the choice of law problems posed by product liability claims, the balance of this section examines the traditional common law solution; existing provincial schemes which alter the common law position; the solution offered by the 1972 Hague Conference; and, finally, the policy-oriented analysis adopted in the United States.

## The Traditional Choice of Law Approach

Under the traditional approach to choice of law, the court must first "characterize" the cause of action.[1] This simply means that the court must assess the nature of the action in light of its established conflict of law categories and slot the case into one of those categories.

In product liability cases, the characterization question is by no means straightforward.[2] This almost invariably means deciding whether the claim sounds in contract or in tort. At first blush, this appears to involve a relatively simple matter of determining whether there is any contractual relationship or

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1. Castel, vol. 1, pp. 27-44; Cheshire and North, pp. 42-6; Dicey and Morris, pp. 19-33; Hertz, Introduction to Conflict of Laws, pp. 85-8. Hertz, at p. 87, describes the literature on characterization as "vast but unsatisfactory."

2. The issue of characterizing product liability claims is discussed in Note, "Products Liability and the Choice of Law" (1965), 78 Harv. L. Rev. 1452 at 1453; Goldring, "Product Liability and the Conflict of Laws in Australia (1978), 6 Adelaide L. Rev. 413 at 423-5; Kuhne, "Choice of Law in Products Liability" (1972), 60 Cal. L. Rev. 1 at 11. This issue is discussed with specific reference to the Saskatchewan legislation by Romero, "The Consumer Products Warranties Act (Part 11)" (1980), 44 Sask. L.R. 261 at 295.

privity between the plaintiff and the defendant. If so, the matter is considered to be contractual and, if not, the plaintiff will be asserting a claim grounded in tort. However, the demarcation between tort and contract is blurred by doctrines such as "collateral contract"[3] or the civil law concept of "near vendor."[4] Both doctrines provide a basis for a contractual type of recovery against a manufacturer on the part of a plaintiff who acquired the product through an intermediary. The matter becomes even more complicated where statutory standards are imposed. For example, where a statute uses warranty language in establishing a manufacturer's duty of care, the court may be tempted to view the matter as contractual. Should the court characterize the cause of action or should it take into account the view of the competing jurisdiction? The traditional approach is to accomplish characterization according to the law of the forum.[5] This has tended

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3. See, for example, Shanklin Pier Ltd. v. Detel Products Ltd., [1951] 2 K.B. 854; Murray v. Speery Rand (1979), 23 O.R. (2d) 456.

4. See, for example, General Motors Products of Canada Ltd. v. Kravitz (1979), 93 D.L.R. (3d) 481 (S.C.C.).

5. It should, however, be done in an "international spirit": Cheshire and North, pp. 44-5:

> since the classification is required for a case containing a foreign element, it should not necessarily be identical with that which would be congenial to a purely domestic case. Its object in this context is to serve the purposes of private international law and, since one of the functions of this department of law is to formulate rules applicable to a case that impinges upon foreign laws, it is obviously incumbent upon the judge to take into account the accepted rules and institutions of foreign legal systems. It follows, therefore, that the judge must not rigidly confine himself to the concepts or categories of English internal law, for if he were to adopt this parochial attitude, he might be compelled to disregard some foreign concept merely because it was unknown to his own law. The concepts of private international law, such as

to produce awkward results in other areas,[6] and the same could occur in the context of product liability.

After the matter has been characterized, the court looks to the choice of law rule appropriate to the category of case in order to select the appropriate regime. The factual element which the choice of law rule seizes upon as pointing to the correct regime is referred to as the "connecting factor."[7] In other words, the choice of law rule consists of a definition of the significant factual element or elements which are to be used to determine what regime of law should be applied. As will be seen below, in tort cases, reference is made in part to the law of the forum and in part to the law of the place where the tort was committed. On the other hand, in matters of contract, under the "proper law of the contract" choice of law rule, the connecting factor is more flexible. No single fact is determinative but rather a variety of relevant facts are taken into account in accomplishing the search for the regime with the most significant relationship to the contract in question.

The final point to note relates to the proof of foreign law.[8] It is incumbent upon the party relying on a foreign substantive law to plead and prove such foreign law as a fact. In the absence of proof, ordinarily made by calling an expert witness qualified as a practitioner of the foreign regime, the forum will presume foreign law to be the same as its own. Many provinces have rules which permit the court to look directly to extra-provincial statutory material without the benefit of expert guidance[9] but the general rule is that proof of the foreign law

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"contract," "tort," "corporation," must be given a wide meaning in order to embrace "analogous legal relations of foreign type."

6. See, for example, Hertz, pp. 85-8.

7. Castel, vol. 1, pp. 43-4; Cheshire and North, pp. 46-7; Hertz, pp. 88-91.

8. Castel, vol. 1, pp. 633-56; Cheshire and North, pp. 125-30; Dicey and Morris, pp. 1127-33.

9. The Evidence Acts of seven provinces permit judicial notice of other provincial statutes:

British Columbia, s. 27(2)(e), (3); Manitoba, s. 31(f); New Brunswick, s. 70(1)(d); Newfoundland, s. 23(1); Nova Scotia, s. 2(3); Prince Edward Island, s. 21(2)(e), (3); Saskatchewan s. 3(2).

must be made through a witness.[10] Thus, as a practical matter, the process by no means ends with the selection of the appropriate choice of law rule; content of the foreign law must be proven to the satisfaction of the domestic court.

Substantive law and procedural law In applying foreign law pursuant to the choice of law rule, a distinction is drawn between foreign substantive law and foreign procedural law.[11] The principle behind the distinction is clear. While the domestic court can readily import a foreign definition of the legal relationship between the parties, it would be quite another matter to use foreign mechanics for processing the dispute through the courts. Matters such as the manner of commencing the action, pleading, discovery, methods of trial and evidence clearly fall within the province of procedure and the impracticality and inappropriateness of applying such foreign rules is apparent. However, the distinction between substance and procedure is an exceedingly difficult one to draw. The precise line between the two has long perplexed courts and scholars.

Procedure may generally be defined as "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer; the machinery as distinguished from its product."[12]

In the specific context of product liability suits, this distinction between substance and procedure may be significant in two areas. First, there is some difficulty in distinguishing rules relating to damages as falling within the bounds of either substance or procedure. Quantifying damages often raise important policy choices which will only be obscured by attempts to classify the matter as one of either substances or procedures.[13]

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10. Above, note 8.

11. Castel, vol. 1, Chap. 15; Cheshire and North, Chap. 20; Dicey and Morris, Chap. 36.

12. Poyser v. Minors (1881), 7 Q.B.D. 329 at 333 per Lush L.J.; Livesly v. Horst Co., [1924] S.C.R. 605 at 608 per Duff J.

13. Cf. Cheshire and North, pp. 707-13.

Thus, for example, a foreign rule that economic loss consequent upon a product liability claim is recoverable should be treated as substantive and such a foreign rule should be applied if the foreign law is generally applicable. It is part and parcel of the nature of the substantive right extended by the foreign law. On the other hand, the precise method of calculating that loss, i.e., mode of proof, quantification, etc., would fall within the scope of procedure and be governed by domestic law.

Secondly, the substance procedure distinction is significant in the area of presumptions and burden of proof. In the case of presumptions "it is necessary to distinguish between three kinds of presumptions: presumptions of fact, irrebuttable and rebuttable presumptions of law. Presumptions of fact arise when, on proof of certain basic facts, the trier of fact may, but need not, find the existence of the presumed fact. Presumptions of fact have, strictly speaking, no legal effect at all, and need not be considered....Irrebuttable presumptions of law arise when, on proof of the basic facts, the trier of fact must find the presumed fact in any event."[14] The tendency with respect to burden of proof is to treat it as a matter for domestic law.[15]

Thus, in the case of a foreign rule making manufacturer's fault or negligence a necessary ingredient to recovery but placing the onus of disproving fault on the manufacturer, it is possible that the forum would simply apply the substantive law fault requirement and employ its own notion of the appropriate burden of proof. That is, in the case of the common law provinces, that the burden of proof lies with the plaintiff. On the other hand, if the foreign rule stipulated that upon proof of certain facts (for example, that the product was of a certain type) liability followed as a matter of law, then the domestic court would ordinarily apply the foreign liability rule once the necessary facts required by the foreign rule had been established to its satisfaction. Clearly, this first example is an incidence of domestic procedure substantially impinging upon the purpose of the foreign substantive rule, and a strong argument can be made for treating burden of proof in such a context as being substantive.[16]

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14. Dicey and Morris, p. 1110.

15. Ibid.

16. Ibid.

Before proceeding with specific choice of law rules relevant to product liability, a general observation on the traditional approach might be appropriate. When faced with suggestions in favour of newer, more flexible and policy-oriented approaches, traditionalists invariably reply that such theories are too uncertain and that the mechanical approach has the advantage of certainty and predictability. From the foregoing discussion, it seems clear that there are significant areas of uncertainty in the general nature of the traditional approach. From the following discussions of the common law tort rule and the contractual rule, it is clear that in the specific rules as well there are substantial areas of doubt and uncertainty.[17]

Choice of Law -- Tort

The traditional choice of law rule of Anglo-Canadian law has been the subject of a continuing barrage of criticism.[18] It is founded upon the following dictum of Willes J. in the case of Phillips v. Eyre:

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17. See Hertz, p. 116:

> The current structure of Canadian choice of law relies on formal rules. In fact, they are not particularly easy to apply or predict, are not particularly uniform, and do not control very well. We only need examine, for example, cases involving the "proper law of the contract" to discover how difficult it is for a court to choose applicable law. The supposed advantages of our simple, formal rules are lacking; at the same time we lose the opportunity of seeing clearly when conflicts in policy do not really exist.

Even some traditional conflict scholars admit that manipulation occurs. See, for example, Chesire and North, pp. 281-2, discussing the ways to avoid the Phillips v. Eyre rule.

18. The literature is vast and ranges from Hancock, Torts in the Conflict of Laws (1942), to Hertz, Introduction to Conflict of Laws (1978), pp. 99-123. See, for example, Lown, "A Proper Law of Torts in the Conflict of Laws" (1974), 12 Alta. L. Rev. 101; Carr, "Torts in the Conflict of Laws in

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England....
>
> Secondly, the act must not have been justifiable by the law of the place where it was done.[19]

The first branch, obviously entirely parochial in nature, is at the purely mechanical level, readily understood and applied. The court simply decides the case upon the purely domestic standard.[20] Foreign rules of conduct (for example, speed limits of the road) are relevant at the factual level to determine whether there was negligence,[21] but the standard of liability against which the defendant's actions are measured is purely domestic.

The second branch gives rise to more difficulty in interpretation, and its exact meaning in Canada is at the moment uncertain. The point of uncertainty is whether the word "justifiable" is restricted to "actionable" or whether it also includes conduct which is subject to some legal sanction other than civil liability as, for example, liability to criminal sanction. An early decision of the English Court of Appeal, Machado v. Fontes,[22] held that justifiable meant "innocent."

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British Columbia: La Van v. Danyluk" (1971), 6 U.B.C. L. Rev. 353; Baer, "Conflict of Laws-Torts: A Blind Search for a Proper Law" (1970), 48 Can. B. Rev. 161; Swan, "Tort Liability in the Conflict of Laws: The Case for and an Outline of a New Approach" (1967), 3 U.B.C. L. Rev. 185; Swan, "New Principles in the Law of Torts: The Conflict of Laws" (1973), L.S.U.C. Special Lectures 505.

19. (1870), L.R. 6 Q.B. 1 at 28-9.

20. See, for example, O'Connor v. Wray, [1930] S.C.R. 231; Gagnon v. Lecavalier, [1967] 2 O.R. 197; Canadian National Steamships v. Watson, [1939] S.C.R. 11.

21. Castel, vol. 2, p. 615; Dicey and Morris, p. 951.

22. [1897] 2 Q.B. 231.

In that case, the plaintiff was able to recover damages for a libel published in Brazil on the grounds that, while Brazilian law did not provide a civil cause of action for libel, it did provide for a criminal sanction. This decision, while often criticised, was followed by the Supreme Court of Canada in MacLean v. Pettigrew,[23] in an action between two Quebec residents for personal injury damages arising from a motor vehicle accident in Ontario. The plaintiff was a passenger in the defendant's car and, while Ontario law precluded such an action by a gratuitous passenger, the Court held that the defendant's conduct was not justifiable in the sense that he was subject to criminal prosecution under the Ontario Highway Traffic Act for careless driving. However, in Chaplin v. Boys,[24] the House of Lords reconsidered this question and held by a majority that "not justifiable" must be given the more restrictive meaning of "actionable." Three of the five members of the Lords expressly overruled Machado v. Fontes and interpreted the Phillips v. Eyre rule to require double actionability. That is, the conduct must give rise to a civil cause of action according to both the law of the forum and the law of the place of commission. This version of the Phillips v. Eyre rule has yet to be examined by the Canadian courts and it remains an open question whether the Supreme Court decision in MacLean v. Pettigrew, resting as it does on Machado v. Fontes, will survive.

The differing interpretations of the "not justifiable" branch of Phillips v. Eyre are significant in the product liability area. If, on the one hand, the rule is read as requiring double actionability, the plaintiff will obviously have to establish his claim under both the law of the forum and the law of the place of commission. On the other hand, the broader meaning adopted by the Supreme Court in MacLean v. Pettigrew would permit recovery where the defendant's conduct was not tortious but was in violation of some other legal standard. For example, a plaintiff suing in a strict liability jurisdiction could recover if the defendant was subject to some regulatory or quasi-criminal sanction in the absence of fault according to the law of the place of commission, even though that jurisdiction did not have a strict liability regime.

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23. [1945] S.C.R. 62. See also Canadian National Steamships Co. Ltd. v. Watson, [1939] S.C.R. 11 at 13 per Duff C.J.

24. [1971] A.C. 356.

Localisation of the tort It will be recalled from Chapter I that the question of locating the place of commission of a tort has frequently arisen in the context of service ex juris. There appear to be no reported cases dealing with this issue in the specific context of choice of law. Clearly, there may be sound reasons for adopting one test for jurisdictional purposes and quite another for choice of law. Not only is the question of jurisdiction a matter for discretion but "a court may be prepared to hold that a tort is committed in several places for the purposes of a jurisdictional rule but insist on one single locus delicti in the choice of law context."[25]

However, it is significant that in the Moran case, dealing with jurisdiction, Dickson J. expressly applied a passage from a leading English text dealing with the choice of law issue. Indeed, it would not be surprising to see the courts apply the more flexible Moran reasoning to the choice of law question in preference to the narrow "place of acting" theory developed in the earlier jurisdiction cases.

The effect of such reasoning would be significant in product liability actions. If the "place of acting" theory is to apply, a foreign defendant will benefit under the second branch of the Phillips v. Eyre rule from defenses available under his own domestic law. For example, even though the forum is a strict liability jurisdiction and accordingly would apply its own rule under the first branch, the defendant could avoid liability under the second branch by showing that his conduct was "justifiable" at the place of manufacture. On the other hand, if following Moran, the tort is considered to have been committed where the injury occurred, assuming such place to have been a foreseeable jurisdiction by the manufacturer who had put the product into the normal flow of trade, then in a case where suit was brought in the courts of that province, the strict liability rule would be applied under both branches of Phillips v. Eyre whatever the law of the place of manufacture.

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25. Cheshire and North, p. 289; Abbott-Smith v. Governors of University of Toronto (1964), 45 D.L.R. (2d) 672 at 680, 684. See also Castel, vol. 2, p. 636, arguing that for choice of law purposes there can be only one place of commission.

Phillips v. Eyre -- conclusion It is perhaps surprising that after 100 years, there are still substantial areas of uncertainty with the Phillips v. Eyre test. It seems reasonably clear that however these grey areas may be solved, the test is inappropriate in the context of modern product liability litigation. The effect of the first branch of the test is to say that the plaintiff can never do better than the law of the place in which he sues. The effect of the second test is to provide the defendant with defenses available under the law of the place where the tort is considered to have been committed. As Lord Pearson observed in Chaplin v. Boys, the plaintiff has the "worst of both laws."[26] It is difficult to see how these rules can be justified on rational grounds. The effect of the first is to equate choice of law with jurisdiction.

In many respects, the factors relevant to jurisdiction coincide with those of concern at the level of choice of law. As noted above,[27] in the specific context of tort, the Moran jurisdictional analysis will undoubtedly be applied with respect to choice of law as well. On the other hand, the present state of jurisdiction rules, both from the point of view of assumed jurisdiction and enforcement, often force plaintiffs to sue in an inappropriate province, and until jurisdictional rules are further refined, it is regrettable to have an inevitable coincidence between jurisdiction and choice of law.[28]

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26. [1971] A.C. at 405.

27. Above, p. 136.

28. Many conflict scholars argue strenuously against the law of the forum approach: see, for example, Hertz, p. 94:

> Should there necessarily be a parallelism between a court's ability to require a defendant's presence before it and its ability to impose its own law to resolve a legal issue? The answer should surely be 'no,' because the function of the two acts are so different. An injury occurring within a province may be sufficient reason for that province to allow an injured plaintiff a forum to spare him the necessity of bringing his suit in a less convenient court elsewhere. The fact that a defendant acted in a second province to cause the injury in the first may likewise be

From the plaintiff's point of view, it has been observed that enforcement rules often require the plaintiff to go to the jurisdiction in which the defendant has assets. It is difficult to see why that jurisdiction should automatically apply its own law to the dispute when the manufacturer has put his products into the normal channels of trade in the plaintiff's province.

It seems unlikely at this point that Canadian courts will take the initiative towards developing a more appropriate tort choice of law rule.[29] The task, it would appear, is one

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> a ground for the second province to offer a forum there as well. Jurisdiction may, in other words, be taken by a number of courts, based on different factors. On the other hand, the choice of law should -- if possible -- be the same regardless of the forum selected. In choosing the applicable law, a factor which would permit the taking of jurisdiction may be balanced by another factor which would not have to be considered in the issue of providing a forum.
>
> For that reason, it may well be that a court could reasonably take jurisdiction over a case but be quite unreasonable in attempting to apply its own law.

Compare, Ehrenzweig, Conflict of Laws (1962), p. 309 et seq.

29. Dicey and Morris, p. 938 (rule 178), state that while the Phillips v. Eyre rule governs "as a general rule," the effect of Chaplin v. Boys is to add the following qualification:

> But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

It would seem unlikely, however, that this "flexibility" will bear fruit in the product liability area: Dicey and Morris, p. 947:

> The case for displacement [of Phillips v. Eyre] is perhaps weakest when the issue is that of the

for the legislature. It is also becoming widely accepted that the diversity of tort renders a single choice of law test for all tort claims inappropriate.[30] Product liability has been recognised as one area of tort which calls for its own discrete solution.[31]

Provincial Statutes Altering the Choice of Law Test

Both New Brunswick and Saskatchewan have made specific provision in their product liability legislation for the application of the statute as against foreign suppliers or manufacturers. It is important to note that these provisions are limited

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> quality of the act or of standards of conduct, for example, whether the defendant is strictly liable or liable only for negligence or gross negligence.

Cheshire and North, p. 265, describe the divergent views of the various members of the House of Lords as a "bewildering variety of opinion [which] has produced a wide spectrum of views as to whether the concept of the proper law has survived the decision." The author concludes, however, that "there would appear to be a majority of their Lordships opposed to the introduction into English Law of the concept of the proper law of the tort, on the ground, particularly, that it produces uncertainty." (Referring to Lord Guest at 381; Lord Donovan at 383 and Lord Pearson at 405-6.)

30. See, for example, Castel, "Conflict of Laws -- Torts -- Time for Change" (1971), 49 C.B.R. 632, 636:

> the courts and the legislatures should realize that it is no longer possible to have only one general rule of conflict of laws in the field of foreign torts. Traffic accidents, products liability, defamation, invasion of privacy and other types of wrongful conduct require special conflict rules as the issues they raise are not always of the same nature.

31. In particular, by the Hague Convention, discussed in detail below, pp. 143-6. See also Tebbens, International Product Liability (1979), pp. 188-90.

to stipulating when the Act applies in suits brought in the courts of that province. The provisions do not go so far as to say what law a New Brunswick or Saskatchewan court should apply when suit is brought upon a claim which does not fall under the statutory provisions. Nor, of course, do they govern the choice of law question in actions brought in other provinces involving New Brunswick or Saskatchewan parties.

The other general matter to note is that both provisions exhibit a natural tendency to apply the legislation to as many disputes as possible. The understandable approach of any law reformer, having conceived of the best substantive law rule, is to wish that rule to apply in as broad a range of situations as possible. The perspective is necessarily inward. It may well be expected that similar motivations will govern in the case of reformed product liabilty laws in other provinces.

New Brunswick The Consumer Product Warranty and Liability Act provides as follows with respect to its application vis-à-vis foreign suppliers:

> 27(1) A supplier of a consumer product that is unreasonably dangerous to person or property because of a defect in design, materials or workmanship is liable to any person who suffers a consumer loss in the Province because of the defect, if the loss was reasonably forseeable at the time of his supply as liable to result from the defect and
>
> (a) he has supplied the consumer product in the Province;
>
> (b) he has supplied the consumer product outside the Province but has done something in the Province that contributes to the consumer loss suffered in the Province; or
>
> (c) he has supplied the consumer product outside the Province but the defect arose in whole or in part because of his failure to comply with any mandatory federal standards in relation to health or safety, or the defect caused the consumer product to fail to comply with any such standards.
>
> 27(2) For the purposes of paragraph (1)(b), where a person has done anything in the Province to further the supply of any consumer product that is similar in kind to the consumer product that

> caused the loss, it shall be presumed that he has done something in the Province that contributed to the consumer loss suffered in the Province, unless he proves irrefragably that what he did in the Province did not in any way contribute to that loss.

It is obvious from the report which prompted this legislation[32] that these provisions were framed in light of the apparent constitutional constraint imposed upon choice of law rules by the Interprovincial Co-operatives[33] case. The legislation requires that the defendant have done something in the province which bears a causal relationship to the harm suffered.

It is clear that the section is also framed in light of the Phillips v. Eyre rule and the interpretation of that rule by the Supreme Court of Canada in MacLean v. Pettigrew.[34] Section 27(1)(c) represents an attempt to fasten on to the broad meaning attributed to "not justifiable" in MacLean v. Pettigrew and to avoid the constitutional impediment which may be imposed by the Interprovincial case. The only connecting factor to New Brunswick under this provision is the sustaining of a "consumer loss" in the province. Failure to comply with federal standards for such products renders the foreign defendant's conduct not justifiable by virtue of a constitutionally sound standard, and liability is then imposed by virtue of the New Brunswick statute.

Clearly, these provisions are framed in broad language and their application will turn upon judicial interpretation. What constitutes supplying a product in the province is not defined. It will also require judicial interpretation to derive a more precise meaning of what constitutes doing "something in the province that contributes to the consumer loss suffered in the province." What seems clear from the report which preceded the legislation[35] is that the draftsman intended that, where

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32. Third Report of the Consumer Protection Project, pp. 75-92.

33. Discussed below, pp. 172-5.

34. Above, p. 135

35. Above, note 32.

damage was suffered in New Brunswick, the legislation should apply as against foreign suppliers and that the applications of the legislation should be limited only by the constitutional constraints, if any, imposed by Interprovincial Co-operatives and the British North America Act.

Saskatchewan The Consumer Products Warranties Act makes the following provision with respect to the application of its terms:

> 33. (1) Subject to any regulations made by the Lieutenant Governor in Council pursuant to section 37, consumers, persons mentioned in subsection (1) of section 4 and persons mentioned in section 5 who buy or use consumer products in Saskatchewan, and manufacturers, retail sellers or warrantors who carry on business in Saskatchewan, are subject to the provisions of this Act and to the jurisdiction of the courts of Saskatchewan.
>
> (2) For the purposes of this Act, a manufacturer, retail seller or warrantor shall be deemed to carry on business in Saskatchewan if one or more of the following conditions are met:
>
> (a) he holds title to land in Saskatchewan or any interest in land in Saskatchewan for the purposes of carrying on business in Saskatchewan;
>
> (b) he maintains an office, warehouse or place of business in Saskatchewan;
>
> (c) he is licensed or registered under any statute of Saskatchewan entitling him to do business or to sell securities of his own issue;
>
> (d) his name and telephone number are listed in a current telephone directory and the telephone is located at a place in Saskatchewan for the purposes of carrying on business in Saskatchewan;
>
> (e) an agent, salesman, representative or other person conducts business in Saskatchewan on his behalf;

(f) he directly or indirectly markets consumer products in Saskatchewan; or

(g) he otherwise carries on business in Saskatchewan.

Clearly, the ambit of this provision is intended to be broad and presumably aims to bring within its scope all manufacturers and suppliers who exploit the Saskatchewan market. It specifies certain indicia of "carrying on business" in Saskatchewan which almost certainly have a broader scope than any common law definition.[36] Even if the defendant does not meet one of the specific tests, he will be subject to the Act if he "directly or indirectly markets consumer products in Saskatchewan." This phrase would appear to leave the courts considerable latitude to develop the reach of the Act in situations which fall outside the specific tests but within the spirit of the legislation.

Hague Convention on the Law Applicable to Products Liability

The most ambitious and sophisticated jurisdiction selection method of choice of law is represented by the Hague Convention.[37] The key articles are the following:

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36. See above, p. 64.

37. For comment on the Convention, see Fischer, "Convention on the Law Applicable to Products Liability" (1974), 20 McGill L.J. 44; Fischer, "Conflict of Laws -- Products Liability -- Hague Conference" (1972), 50 Can. B. Rev. 330; Durham, "Hague Convention on the Law Applicable to Products Liability" (1974), 4 Ga. J. Int. & Comp. L. 178; Reese, "The Hague Convention or the Law Applicable to Products Liability" (1974), 8 Int. Law 606; Reese, "Products Liability and Choice of Law" (1972), 25 Vand. L. Rev. 29; Sanders, "An Innovative Approach to International Products Liability: The Work of the Hague Conference on Private International Law" (1972), 4 Law & Policy in Int'l Business 187; De Ment, "International Products Liability: Towards a Uniform Choice of Law Rule" (1972), 5 Cornel Int. L.J. 75.

Note that by virtue of Art. 1, the Convention does not apply "where the property in, or the right to use, the product was transferred to the person suffering damage by the person claimed to be liable." Tebbens, above note 31, pp. 333-60.

Article 4

The applicable law shall be the internal law of the State of the place of injury, if that State is also:

a. the place of the habitual residence of the person directly suffering damage, or
b. the principal place of business of the person claimed to be liable, or
c. the place where the product was acquired by the person directly suffering damage.

Article 5

Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also:

a. the principal place of business of the person claimed to be liable, or
b. the place where the product was acquired by the person directly suffering damage.

Article 6

Where neither of the laws designated in Articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

Article 7

Neither the law of the State of the place of injury nor the law of the State of the habitual residence of the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels.

The operation of these provisions may be described as follows. The first step is to look to the state of the habitual residence of the injured party. If that is also the state where the defendant had his principal place of business or where the plaintiff acquired the product, then the law of that state applies. If this fails to produce a result, one looks to the place of injury. The law of that state applies if it is also the plaintiff's habitual residence, the defendant's principal place of business or the place where the plaintiff acquired the

product. If neither of these tests yields a result, then the Convention affords the plaintiff a choice.[38] The applicable law will be the law of the defendant's principal place of business unless the plaintiff decides to base his claim upon the law of the state where the injury was suffered.

In no case, however, is it permissible to apply either the law of the place of injury or the law of the plaintiff's habitual residence if the defendant can establish "that he could not reasonably have foreseen that the product or his own product of the same type would be made available in that state through commercial channels." Thus, the scheme of the Convention maintains the law of the defendant's principal place of business as the residual system, applicable unless the required combination of connecting factors points to another regime and a foreseeability requirement is met.

This scheme will undoubtedly produce anomalous results. For example, assume a case of a plaintiff resident in state A, the law of which would impose liability, who purchases a product manufactured in state B, the law of which would also impose liability, injured while on vacation in state C, where the law imposes no liability. The coincidence of the effect of the laws of state A and B would presumably not avail the plaintiff as the test is one of jurisdiction selection rather than result selection. The coincidence of injury and acquisition in state C would require the court to apply the law of that state, but it is difficult to see why the plaintiff should be deprived of the benefit of the more favourable law of either state A or B. If the facts are varied by assuming that the plaintiff purchased the product at an airport in state A before leaving on his vacation, then the coincidence of residence and acquisition in state A would impose liability.

The heavy reliance that the Convention places on residence is foreign to the common law. As indicated above,[39] residence seems relevant only insofar as it reinforces other factors.

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38. There are fifteen conceivable combinations of the connecting factors identified by the Convention: in only two (viz. all four connections diverse, place of acquisition and defendant's business coinciding, habitual residence and place of injury located in second and third states respectively) will the plaintiff's option arise: see Tebbens, above note 31, p. 344.

39. Above, pp. 127-8.

Nonetheless, the Hague Convention represents a significant advance and merits close attention. It is clearly geared to the needs of truly international conflicts rather than the problems posed by interprovincial conflicts, but is perhaps more suited to the latter than the former. It is argued that a compelling case can be made in favour of considering underlying purposes and policies of competing rules in resolving the choice of law problem.[40] The Hague Convention rejects this approach as inappropriate in the case of international conflicts. It is suggested here that in the context of interprovincial conflicts such an approach is both possible and desirable.

Centre of Gravity; Grouping of Contacts; "Proper Law of the Tort"

The centre of gravity or grouping of contacts approach perhaps lies somewhere between the traditional mechanical choice of law technique and that of the more flexible and policy-oriented government interests analysis.[41] This approach has found considerable American support. A version of this approach is formulated in the following terms by the Restatement (Second), Conflict of Laws:

> 145. The General Principle
>
> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in s. 6.[42]

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40. Below, pp. 149-51 and ff.

41. See Morris, "The Proper Law of a Tort" (1951), 64 Harv. L. Rev. 881.

42. The Choice of Law Principles of par. 6 are as follows:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

(2) Contacts to be taken into account in applying the principles of s. 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred;
(b) the place where the conduct causing the injury occurred;
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

This approach also formed the basis for the Uniform Law Commissioners Tentative Draft Foreign Torts Act, proposed in 1966:

1. When deciding the rights and liabilities of the parties to an action in tort, the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties, regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.

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(a) the needs of the interstate and international systems;

(b) the relevant policies of the forum;

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

(d) the protection of justified expectations;

(e) the basic policies underlying the particular field of law;

(f) certainty, predictability and uniformity of result; and

(g) ease in the determination and application of the law to be applied.

> 2. When determining whether a particular state has a substantial connection with the occurrence and the parties, the court shall consider the following important contacts:
>
> (a) the place where the injury occurred;
> (b) the place where the conduct occurred;
> (c) the domicile and place of business of the parties; and
> (d) the place where the relationship, if any, between the parties is centered.
>
> 3. When deciding which state, among the states having any contacts within Section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied.

The difficulty with a centre of gravity approach in the product liability context is its lack of precision. The diversity and variety of contacts with various jurisdictions is so significant in this area that it is difficult to see how the court can find a focus or centre of the dispute. The assumption that there is, in fact, a centre of gravity in one particular jurisdiction may well not be met in product liability cases.

> Products liability cases, predominantly tortious in nature, present many situations in which the place of manufacture (harmful conduct) and the place of sale (and resultant injury) are in different jurisdictions. Both elements being indispensable and interrelated requirements of liability, the determination of a centre of gravity in most cases would imply an arbitrary and often tortured process of nationalization.[43]

The centre of gravity approach has the advantage of flexibility but it offers flexibility at a substantial price: imprecision and uncertainty. Indeed, as the approach is that

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43. Kuhne, "Choice of Law in Products Liability" (1972), 60 Cal. L. Rev. 1 at 16.

suggested for all torts, its generalised nature can be readily appreciated. It is, in truth, more a means of orientation rather than a specific test. It may, however, be used with profit as pointing to factors which ought to be considered in the formulation of a more specific product liability rule.

## Jurisdiction Selection or Rule Selection

At the heart of the current debate on choice of law is the question of whether choice of law rules should be designed to select an entire system of law or to choose between competing rules.[44] The former approach is that of the traditional English and Canadian choice of law process. There are relatively mechanical rules stipulating a requisite factual link which, once identified, points to a substantive law regime as being applicable to that dispute. However, there has been a revolution in conflict of laws thinking over the past forty years. The newer, predominantly American view (in its many variations) is clearly policy oriented. It is argued that one cannot properly choose an appropriate substantive law rule in cases presenting foreign elements without looking to the content and effect of that substantive law rule in the particular circumstances of the case. Unlike the traditional, mechanical, approach which is blind to the result, proponents of the various policy-oriented theories argue that attention must be paid to the underlying purposes and policies behind substantive law rules. Once these policies and purposes are identified, the case then before the court can be analysed to determine whether or not those purposes would be furthered by application in the case.[45]

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44. Cavers, "A Critique of the Choice of Law Problem" (1933), 47 Harv. L. Rev. 173 at 189: "The court is not idly choosing a law, it is determining a controversy. How can it choose wisely without considering how that choice will effect that controversy?"

45. For a review of the various theories from an English perspective, see Morris, Conflict of Laws (2d ed. 1980), pp. 507-26. An in-depth perspective on the development of these theories is presented in Lawson, "Policy in Choice of Law: The Road to Babcock" (1977), 7 G.G.L.R. 469. For a concise and readable assessment of their applicability in Canada, see Hertz, pp. 99-123. For a detailed review of European choice of law practices and theories in the context of product liability, see Tebbens, above note 31, pp. 292-311 and 322-32.

Perhaps the most influential theory is Currie's government interest analysis which would require a court to "inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies."[46]

Professor Cavers identified "principles of preference" to be applied by courts in resolving "true" conflicts which could not be readily avoided.[47] Professors Cheatham and Reese elucidated a set of "choice influencing factors" which have been largely adopted by the American Restatement.[48] Professor Ehrenzweig favours an approach which would give primacie to the forum's policy,[49] while Professor Leflar has proposed that the court should select what it conceives to be the "better law."[50] The influence of these theories on American judges has been dramatic and the assimilation of the various theories by the courts eclectic. There is an abundant body of American literature in this area. This is not the place to review each theory in detail; the aim here must be more modest, more practical, and clearly focused on the precise problems posed by product liability claims.

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46. "Comments on Babcock v. Jackson" (1963), 63 Col. L. Rev. 1233 at 1242. See generally, Currie, Selected Essays on the Conflict of Laws (1963).

47. The Choice of Law Process (1965). The reformulation of these principles as they apply to product liability is set out below, note 53.

48. "Choice of the Applicable Law" (1952), 52 Col. L. Rev. 959. See above, note 42, for the statement of these principles in the Restatement (Second).

49. Conflict of Laws, pp. 307-26. For the application of Prof. Ehrenzweig's thinking to product liability, see "Products Liability in the Conflict of Laws -- Toward a Theory of Enterprise Liability under 'Foreseeable and Insurable Laws'" (1960), 69 Yale L.J. 794.

50. "Choice -- Influencing Considerations in Conflicts Law" (1966), 41 N.Y.U. L. Rev. 267; "Conflicts Law -- More on Choice -- Influencing Considerations" (1966), 54 Cal. L. Rev. 1584.

As indicated above, the essence of this approach is to focus directly upon the purposes and policies of the competing rules, and to select the rule of the state which, in light of those purposes and policies, has the most significant interest in having its law applied. Under this approach, the question of characterization is insignificant; what matters is simply the purposes which lie behind the competing rules, the interests of the respective states and the appropriateness of having one rule or another applied in the circumstances.

The result of focusing on purposes and policies is that many conflicts are, in fact, "false." In a significant number of cases, analysis of purposes and policies demonstrates that there really is no conflict in the sense that one of the competing rules can be eliminated because its purpose would not be furthered by application in the particular case.[51]

Obviously, the significant point of departure for this approach is the insistence upon looking to the content of the competing rules. The more mechanical choice of law approach is to remain blind to the content of rules and select and apply the entire substantive law regime of the appropriate jurisdiction. As will be seen from examples offered in product liability, if consideration is given to underlying purposes the selection of one rule or another is properly seen to turn upon the result that would be reached.

The central problem with the policy-oriented approach is that it is exceedingly difficult to know with any degree of certainty just what policy or purpose any legislature had in mind in enacting a law. In the case of judge-made law the problem of identifying interests or policies is even more severe. One can analyse and speculate on the policies and purposes that probably lie behind any given substantive law rule, but it is quite another matter to adopt confidently this necessarily speculative analysis as the whole basis for choice of law. Critics of the approach argue that it is based upon such subjective underpinnings that it is tantamount to an ad hoc and purely result-oriented analysis. Proponents of the policy-oriented school argue that it is one which "can be utilized by courts and lawyers and not only by conflicts professors,"[52] and indeed the merits of

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51. See, for example, Hertz, pp. 111-15, describing a "false conflict" as an instance "where only one law can rationally be applied to facts at issue."

52. Weintraub, "Choice of Law for Products Liability" (1966), 44 Texas L. Rev. 1429 at 1441.

considering policies and purposes seem obvious. In their day-to-day work in purely domestic cases, courts are guided by these factors in shaping the development of the law in deciding individual cases. While judges often achieve this without full articulation of the purposes which underlie the rules they are applying, it is a process which undeniably occurs. It hardly seems surprising, then, that in the conflict area as well, the purposes motivating competing rules ought to be considered.

Choice of law and competing policies in product liability While cautioning that "an attempt to identify the purposes of internal products liability laws risks some embarrassment of riches,"[53] Professor Cavers offers the following list of five most likely purposes underlying pro-plaintiff rules:

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53. Cavers, "The Proper Law of Producers Liability" (1977), 26 Int. & Comp. L.Q. 703 at 709. Cavers' "principles of preference" applicable to product liability are as follows (728-9):

    (a) Where a person claims compensation from the producer of a defective product for harm it caused to the claimant or his property, the claimant should be entitled to the protection of the liability laws of the State where the defective product was produced (or where its defective design was approved).

    (b) If, however, the claimant considers the liability laws of that State: (i) less protective than the laws of the claimant's habitual residence where either he had acquired the product or it had caused harm, or (ii) less protective than the laws of the State where the claimant had acquired the product and it had caused harm, then the claimant should be entitled to base his claim on whichever of those two States' liability laws would be applicable to his case.

    (c) The claimant, however, should not be entitled to base his claim on the laws of one of the States specified in the preceding paragraph if the producer establishes that he could not reasonably have foreseen the presence in that State of his product which caused harm to the claimant or his property.

(1) reinforcing general security by providing civil sanctions against those impairing it by producing and selling defective products;
(2) compensating injured persons (or their dependants) with meritorious claims, claims for economic as well as for physical harms;
(3) according financial protection to persons providing health care to injured persons or extending credit to damaged enterprises;
(4) attaining a more efficient allocation of the economic costs of harms resulting from defective products;
(5) constraining producers to minimize the risk and severity of injuries from their products, thereby enhancing the safety and quality of goods in use in the State and for sale in its markets.[54]

Three purposes of pro-producer rules are identified:

(1) protecting producers from excessive risks of liability and the resulting economic burdens in safety measures, insurance costs, and damages;
(2) encouraging reliance on contract and the market to allocate the economic costs resulting from defective products;
(3) encouraging greater vigilance and precautions by consumers in selecting and using products.[55]

These competing policies and interests may be analysed as follows when located in the various competing jurisdictions.[56]

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54. Ibid., at 710-11.

55. Ibid., at 711.

56. The following analysis is based in part upon the discussion contained in the following articles: "Products Liability and the Choice of Law" (1965), 78 Harv. L. Rev. 1452; Weintraub, above note 52; Cavers, above note 53; Reese, Products Liability and Choice of Law: The United States Proposal to the Hague Conference" (1972), 25 Vand. L. Rev. 29, especially pp. 33-5.

Place of injury In the context of jurisdiction, the Supreme Court of Canada recognised in the Moran case "the important interest the state has in injuries suffered by persons within its territory."[57] This interest may be expressed in a variety of ways. On a general level, each province has an interest and responsibility to preserve general security for persons found within its territory. While product liability rules may only indirectly relate to general security, the compensatory nature and rationale for stricter liability rules "pertains to the general security, if that term is taken in the broad sense that includes not only the avoidance of injury but also the alleviation of the sufferings that follow injury: in short, a concern for the general welfare of persons within the state's jurisdiction."[58]

It is submitted that there is a strong reason to apply the law of the place of injury from this point of view. The very policy behind a stricter liability rule is met by application in favour of persons injured within the territory of the province enacting such a rule.

Similarly, to the extent that pro-plaintiff standards are intended to impose the risk of accidents upon producers to achieve more efficient allocation of resources and encourage higher product standards, such policies and purposes are furthered by imposition of liability in favour of the injured plaintiff. On the other hand, where the place of injury would not impose liability and the law of one of the other competing jurisdictions would impose liability, a strong argument can be made that the purposes of the pro-producer rule are not furthered by application. Where such a rule is competing with a pro-plaintiff rule of either the place of acquisition or the place of manufacture, the case for its application is weak. The protective purposes of a non-liability rule can hardly have been aimed at foreign producers whose own jurisdiction is less solicitous of their protection.

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57. [1975] 1 S.C.R. 393 at 409, discussed in detail above, Chap. I.

58. "Products Liability and the Choice of Law" (1965), 78 Harv. L. Rev. 1452 at 1461.

As against a pro-plaintiff rule of the place of acquisition, it is difficult to see how the protective purposes of a non-liability place-of-injury rule are furthered. Even if the product was produced in the place where injury occurs, that province can hardly expect its protective law to be applied in favour of producers who market their goods in strict liability jurisdictions.

Put bluntly, the argument is that while the province of the place of injury has a strong interest in seeing that persons injured within its territory receive the full benefit of the stricter liability rule, it has very little or no interest in having those persons penalised by being deprived of the benefit of a more stringent regime enacted in another province.

Place of acquisition A similar analysis may be made with respect to the place of acquisition. The security or compensatory policy behind a strict liability rule is furthered by application of the law of the place of acquisition of the product even if injury or manufacture has occurred in another province. The province of acquisition may not only wish to provide protection to consumers within its boundaries but may also wish to avoid discrimination against domestic producers or distributors in the case of out-of-province manufacturers or distributors who consciously market their goods within the province of acquisition.

On the other hand, where such other province would impose liability in a situation where the place of acquisition would not, there seems to be little or no interest that may be asserted on the part of the province of acquisition to have its law applied. As was argued in the case of place of injury, it is difficult to imagine that the province of acquisition which does not impose liability would wish to see persons acquiring products deprived of a more beneficial regime as against an out-of-province manufacturer.

Province of manufacture The interests and policies underlying the regime of the province of manufacture are perhaps the most difficult to analyse and deal with. Ironically, the combined effect of narrow enforcement rules and the rule in Phillips v. Eyre means that at present, there is a strong tendency to apply the law of the province of manufacture.

In the case of a non-liability rule, it has already been argued that there can be no justification for application of such rule to the detriment of consumers in jurisdictions where the producer markets his wares. In terms of policy analysis, this might be expressed as follows. The policy of protecting domestic producers from the damage claims of injured users or

consumers of their products ought to yield to the much stronger policy of the provinces in which such users or consumers acquired or were injured by such products, in favour of protection and compensation.

Where, on the other hand, the place of manufacture would impose liability but neither the place of acquisition nor the place of injury would, it appears that there is very little to choose between competing policies. The place of manufacture would have an interest in seeing its standards of care applied by its domestic producers in all cases. On the other hand, it would not wish to put domestic producers at a competitive disadvantage when their products are marketed in other provinces. However, as argued above, the province of acquisition or injury has little interest in having its restrictive rule applied so as to penalise the consumer of an out-of-province product.

Accordingly, a policy analysis suggests, if anything, a slight edge against applying the law of manufacture when it is more favourable than other laws.[59] However, the element of competitive disadvantage seems somewhat remote and it must not be forgotten that the traditional common law choice of law rule would invariably have applied to the law of the place of manufacture as being the law of the place where the tort was committed.

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59. Commentators have had conflicting views on this point. "Products Liability and the Choice of Law" finds a balance against recovery, while Ehrenzweig, Conflict of Laws, p. 591, would permit recovery, as would Cavers, above note 53, p. 728. Proponents of the "plaintiffs choice" rule, below note 60, would agree. Weintraub, above note 52, concludes as follows:

> The answer...should turn on whether [the place of manufacture] places a desire to encourage manufacture of safe products above the possibility of putting its own manufacturers at a competitive disadvantage. If [that place] does strike a balance in favour of recovery for harm caused abroad by products made [there], then no policy of [the place of acquisition or injury] would be sufficiently undermined for [there to be] any rational hesitation in applying [the law of the place of manufacture to permit recovery]. (at 1446)

A Suggested Approach

It may be possible in the context of interprovincial product liability litigation to suggest a choice of law rule which combines the advantages of certainty of application attributed to mechanical rules with the merits of considering the content and purposes of competing rules as a factor.

One should perhaps commence this attempt at reconciliation on a pessimistic note. Plainly, there is no easy solution to the choice of law problem; there is no approach which avoids the pitfalls of either anomalous results on the one hand, or the uncertainty inherent in basing a rule on policy or judgmental factors on the other. One can only hope to minimise the risks of either extreme.

The result of the policy-oriented analysis in the product liability area is to produce two striking features. The first is that there is a compelling case for considering the actual result in rejecting a jurisdiction selecting and result-blind rule. It seems clear that the policies of provincial product liability rules will often be frustrated unless strong consideration is given to the actual impact of applying this rule or that in any given case. The second feature is the extent to which this analysis yields the law most favourable to the plaintiff.

This suggests that choice of law rule could properly be framed to give the plaintiff a choice and allow the application of the most favourable rule. The benefit of such a rule would be twofold. First, it would be certain in application and would avoid prolonged and costly litigation over the nature of each province's interest, the purposes and policies of competing rules or the location of the centre of gravity in each individual case. Secondly, to the extent that such a rule would produce anomalous results, as any mechanical rule tends to do, such anomalies would favour the plaintiff. The risk of such anomalies in this area, and such a risk seems inevitable, should be imposed on manufacturers and distributors who are better able to absorb and spread such risk than are injured plaintiffs.

To avoid harsh results for defendants, two qualifications should be considered. The first would be to include a foreseeability qualification similar to that discussed in the context of service ex juris. Admittedly, this introduces a more subjective, judgmental element but the discussion of its application in the service ex juris chapter of this study suggests that it is not an unduly difficult test to apply. A second would be to reformulate the proposal along the following lines. The plaintiff would be afforded a choice in the first instance, but

that choice could be displaced by the defendant showing that the regime selected bears no substantial or reasonable connection to the cause of action. While this would introduce an element of uncertainty, it would have the advantage of eliminating what may be seen as fortuitous results in certain situations: for example, (1) the plaintiff acquires the product while passing through the province; (2) injury occurs while the plaintiff is temporarily in the province; or (3) place of manufacture seems unduly favourable.

The situation which is most difficult to justify under the "most favourable to the plaintiff" rule is where the plaintiff's contacts (acquisition and/or injury) are with provinces which would not impose liability but the province of manufacture would. The result in favour of the plaintiff seems fortuitous. On the other hand, such a result could, in appropriate cases, be avoided by applying the qualification (suggested above as a possibility) that such choice be rejected as bearing no substantial connection to the cause of action. In any event, it is suggested that it may not be unreasonable to expect the manufacturer to have priced the product and insured himself according to his stricter domestic standard.

As indicated, any choice of law rule in the context of product liability must aim to minimise the risks of anomalous results and uncertainty of application. The proposal of applying the rule most favourable to the plaintiff with a foreseeability qualification maximises certainty while imposing risks of anomalies on defendants on the grounds that they are better able to bear and spread the burden of such risk.

The "most favourable" to the plaintiff rule has garnered support from commentators,[60] and was the proposal put by

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60. Waddams, Products Liability (2d ed. 1980), p. 205; Kuhne, "Choice of Law in Products Liability" (1972), 60 Cal. L. Rev. 1; Reese, "Products Liability and Choice of Law: The United States Proposals to the Hague Conference" (1972), 25 Vand. L. Rev. 29; Ehrenzweig, "Products Liability in the Conflict of Laws -- Toward a Theory of Enterprise Liability under 'Foreseeable and Insurable Laws'" (1960), 69 Yale L.J. 794 at 802; Cavers, "The Proper Law of Producers Liability" (1977), 26 Int. & Comp. L.Q. 703 at 723, sympathises with the view, and his principles would yield a similar result. Cavers, at 717, points out that under both German and Swiss law the plaintiff is given an option. Several European writers have favoured this approach: see Tebbens, above note 31, pp. 328-32, for a review. Tebbens, however, argues against it: ibid., pp. 364-8.

the United States to the 1972 Hague Conference.[61]

To summarise, it may be useful to set out the advantages of this proposed rule.

1. Certainty and Ease of Application The proposed rule would have the advantage attributed to mechanical choice of

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61. Reese, above note 60. The precise terms of the United States formulation were as follows (reproduced in Reese, pp. 31-2):

> The plaintiff should be given the choice of several designated laws. For example, it is suggested that in the case of manufacturers it would be fair to permit the plaintiff to choose between (a) the law of the state of manufacture, (b) the law of the state where he received possession of the product (by reason of purchase or otherwise) provided that the defendant had reason to foresee that this particular product, or similar products manufactured by the defendant, would be taken to this state or (c), subject to the same proviso as in (b), the law of the state where the plaintiff suffered injury by reason of the use or consumption of the product. By "state of manufacture" in the case of a component part is meant either the state where work on the component part is completed or the state where is completed work on the final product which includes the component part. The plaintiff should be permitted to choose between these two laws.
>
> In the case of sellers, the state where the sale was made should be substituted for the "state of manufacture" in the rule suggested above.
>
> In the case of repairers, the state where the repair was made should be substituted for the "state of manufacture" in the rule suggested above.
>
> A bystander injured by a defective product should have the choice of either (a) the law of the state of manufacture, sale or repair or (b) the law of the state where he suffered injury, provided the manufacturer, seller or repairer had reason to foresee that the particular product, or similar products manufactured, sold or repaired by him, would be taken to this state.

law rules, that of certainty and ease of application, while avoiding the "mechanistic and arbitrary quality for which choice of law rules so frequently have been reproached."[62]

2. Accurate Reflection of Provincial Interests and Policies As the discussion above indicates, the proposed rule is based upon analysis of the purposes, policies and interest of provincial product liability rules. It has often been suggested that "result blind" mechanical rules may be manipulated, whether consciously or not, by the courts to reach a result which accords with underlying policy goals. Because the plaintiff would be favoured, the rule would also accord with the undeniable policies underlying product liability substantive rules.

3. Fairness to Both Plaintiff and Defendant Under such a rule, obviously no plaintiff could complain of unfairness. Since the plaintiff's choice would be limited by the foreseeability qualification, the rule would not operate harshly as against suppliers and producers. It is surely not asking too much of defendants that they be rendered subject to the rules of the provinces in which their goods are marketed. Producers and suppliers are in a position to spread the risks of liability through pricing and insurance and this justifies imposing upon them any added risks inherent in trading outside their own province.

## Choice of Law -- Contracts

The existing common law choice of law rule for contractual claims is a flexible one. It simply requires the court to take into account all relevant factors in order to determine the legal regime with the most significant relationship to the contract. The following formulation of the "proper law" test given in a leading English text[63] summarises the approach adopted by the Canadian courts:

> [The proper law of the contract is] the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the

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62. Ibid., p. 33.

63. Dicey and Morris, p. 721.

> transaction has its closest and most real connection.[64]

There are, then, two possible situations. The first is where the contract specifically or inferentially provides for the application of a system of law, and the second is where the contract is silent and the court is left to weigh the contacts and find the system of closest connection.

Before examining these two situations in detail, it should be noted that there are virtually no decided cases in the specific context of liability for defective products. As noted above, this is undoubtedly accounted for by the virtual uniformity of provincial sale of goods legislation.[65]

System with the closest and most real connection It is impossible to lay down any precise rules whereby the courts will determine the "proper law." The list of factors to be considered is long, as demonstrated by the following litany described in a passage from a leading English text[66] which has been adopted by the Supreme Court of Canada:

> The court must take into account, for instance, the following matters: the domicil and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it

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64. See, for example, Etler v. Kertesz, [1960] O.R. 672 at 682-3 (C.A.).

65. The few cases are discussed below, p. 164. The same situation prevails with respect to international transactions:

> It is not often that an issue of conflict of laws is considered in English cases dealing with the sale of goods. The principal reason for this is that in many aspects of international sale of goods the law and the practice amongst individual countries have become standardized to a high degree. (Benjamin's Sale of Goods (1974), p. 1159)

66. Cheshire (7th ed.), p. 190.

> is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another;...the economic connexion of the contract with some other transaction;...the nature of the subject matter or its situs; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.[67]

At one time, it was common for the courts to speak of certain presumptions as indicating the proper law;[68] however, in light of the weight of authority, the notion of presumption is probably too strong. Such considerations are more properly seen as matters "to which a court...may turn for assistance, but they are not conclusive."[69]

While it is inaccurate to speak of presumptions, there can be no doubt that both the place of contracting and the place of performance will be very important factors to be considered in determining the proper law. The common law rules fixing the place of contracting and the place of performance in a contractual

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67. Imperial Life Assurance Co. of Canada v. Colmenares, [1967] S.C.R. 443 at 448.

68. See, for example, Rosencrantz v. Union Contractors Ltd. (1960), 23 D.L.R. (2d) 473 (B.C.) at 475-6 (citing 7 Hals. (3d ed.), p. 74):

> The primary presumption is that the proper law of a contract is the lex loci contractus [place of a contracting]; but in the case of a contract which is to be executed wholly or in part in a country other than that in which it was made, there is a presumption that the parties intended to adopt the law of that country.

69. Mt. Albert Borough Council v. Australian Temperance and General Mutual Life Assurance Society Ltd., [1938] A.C. 224 at 240 per Lord Wright.

context have been reviewed in the chapter of this study dealing with service ex juris.[70] As indicated there, in the absence of express stipulation in the contract, the place of performance will ordinarily be the point of delivery. Moreover, in the vast majority of cases, the point of delivery will be the place of shipment, and this of course means that performance will be fixed in the place where the vendor carries on business. With respect to place of contracting, the technical common law rules stipulate that the contract is made when there has been a meeting of minds between the parties. This is interpreted as being the place where the acceptance is received by the offeror in the case of instantaneous communications and the dispatch of the acceptance in the case of communications which involve a delay between dispatch and receipt. As indicated above, these rules tend to produce somewhat arbitrary results in the context of jurisdiction and the same may be said for choice of law. In the few cases there have been, the place of contracting and especially the place of performance have often been decisive in fixing the proper law. The tendency is to place stronger reliance on place of performance than place of agreement.[71]

Several cases have dealt with the selection of the proper law to determine the proprietary effects of contracts for the sale of goods.[72] While this issue is not necessarily to be resolved on the same basis as that of contractual obligations as to quality or durability, it is instructive to note that in virtually all of these cases the province of shipment (i.e., the

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70. Above, pp. 40-2.

71. N. V. Handel v. English Exporters (London) Ltd., [1955] 2 Ll. L.R. 317 at 323 (C.A.); Sayers v. International Drilling Co., [1971] 1 W.L.R. 1176 at 1187.

72. See Fridman, Sale of Goods in Canada (2d ed. 1979), p. 518, defining proprietary effects as "questions of risk, whether the buyer acquires title that is good against third parties, and the seller's rights of lien and stoppage in transit, where property has or has not been transferred."

vendor's place of business) has been held to be the proper law.[73]

There have been but a few cases dealing with product quality. In Benaim & Co. v. Debono,[74] it was held that in a case of a contract for the sale of anchovies, f.o.b. Gibraltar, for shipment to the purchaser in Malta, Gibraltar law should govern, thus confirming the tendency to apply the law of the point of shipment as the proper law. In a later decision of the English Court of Appeal,[75] despite an "f.o.b. Rotterdam" term, it was held that English law should apply, but on the grounds that the parties must have intended English law to apply as the contract was in part contrary to Dutch law.

While the existing case law indicates a tendency to apply the law of the vendor's province, it would be dangerous to suggest that this result would invariably follow. Indeed, the courts have long guarded against the suggestion that stereotyped rules can produce a ready answer.[76]

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73. Sanitary Packing Co. Ltd. v. Nicholson and Bain (1916), 33 W.L.R. 594; Re Viscount Supply Co. Ltd. (1963), 40 D.L.R. (2d) 501; Re Modern Fashions Ltd. (1969), 8 D.L.R. (3d) 590, applying Manitoba law to contract for sale of goods shipped from Montreal on the grounds that the contract had been made in Winnipeg through a telephone call.

74. [1924] A.C. 514 (J.C.P.C.).

75. N.V. Handel v. English Exporters (London) Ltd., [1955] 2 Ll. L.R. 317 (C.A.).

76. See, for example, Jacobs v. Credit Lyonnais (1884), 12 Q.B.D. 589 at 601 per Bowen L.J.:

> Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard and fast rule by which to construe the multiform commercial agreement with which in modern times we have to deal.

To the extent that a result can be predicted, it does not seem at all unlikely that, in the case of a vendor marketing his goods in another province, the proper law of the contract would be found to be that of the province of the consumer. On the other hand, it is quite possible that if the purchaser had relied on more stringent standards imposed by the vendor's province, then that would be found to be the "proper law."

There are perhaps two conclusions to be drawn. The first is that the very flexibility of the "proper law" rule does allow for the possibility of protracted and expensive litigation. The second is, however, that because of this flexibility, it is not at all unlikely to expect that the courts would come up with satisfactory solutions, which probably would correspond in spirit, if not in letter, with the "most favourable law" rule suggested above with respect to tort actions.

The New Brunswick and Saskatchewan Acts will clearly apply to out-of-province vendors sued in those provinces.[77] However, as has been repeatedly stressed throughout this study, narrow enforcement rules may force the injured plaintiff to sue in the province where the vendor carries on business or has assets and, in that province, the ordinary common law rule rather than the statutory standard for choice of law will be applied.

Choice expressed by parties The second possibility is that the contract in question itself specifies the system of law by which any disputes are to be determined. It is well established that the parties may, either directly or impliedly, stipulate the regime which is to govern their contractual relationship.

As varying provincial statutory schemes emerge, a question of potential significance in this area is the extent to which the court will control party choice and refuse to apply the law of the province chosen by the parties. The traditional view is that strong reason must be shown for the courts to depart from the regime selected. One of the leading cases in this area, Vita Food Products Inc. v. Unus Shipping Co. Ltd.,[78] indicates that the parties are in fact free to select a regime which bears no other relationship with the contract in question. However, it

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77. Above, pp. 139-43.

78. [1939] A.C. 277.

has always been accepted that the courts will refuse to apply a regime, the selection of which was other than "bona fide and legal." The position appears to be that the parties will not be permitted to evade or avoid mandatory provisions of the system of law with which the transaction has its most real and substantial connection.[79]

A leading English text puts it as follows:

> But the statement that the claim must be bona fide and legal is not free from ambiguity. What it presumably means is that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has its closest connection with another law. If, after having discovered that one particular provision was void under the proper law, they were to try to evade its consequences by claiming that the provision was subject to another legal system, their claim should not be considered as a bona fide expression of their intention.[80]

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79. See Castel, vol. 2, pp. 536-7; Falconbridge, Essays on the Conflict of Laws (2d ed. 1954), p. 413.

80. Cheshire and North, p. 201. See also: Boissevain v. Weil. [1949] 1 KB 482 at 490-1 per Denning L.J.; Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Aktiengesellschaft, [1939] 2 KB 678 at 698 per Du Parq L.J. Two Australian cases provide examples of the courts overriding the party selection of a regime. In Golden Acres Limited v. Queensland Estates Pty. Limited, [1969] Qd. 378 (affirmed on other grounds, 1970 123 C.L.R. 418), the court refused to apply Hong Kong law, as selected by the parties, so as to avoid the need for the agent-plaintiff to be licensed so as to entitle himself to collect a commission. In Kay's Leasing Corporation Proprietary Limited v. Fletcher (1964), 116 C.L.R. 124, the High Court of Australia indicated that mandatory terms of hire purchase legislation could not be

In the case of product liability claims, it is not at all unlikely that the courts would control the standard form imposition of unreasonable choice of law clauses. There has been a growing body of case law in which courts have protected the reasonable expectations of consumers despite contrary language in standard form agreements.[81] Professor Waddams summarises the effect of these cases as follows:

> These cases...lay down as the criterion of relief an immoderate gain or undue advantage taken of inequality of bargaining power....It appears that

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avoided by the specification of the law of another state where the "proper law" of the agreement was in fact the state with the mandatory legislation (at 143 per Kitto J.):

> Where a provision renders an agreement void for non-compliance by the parties or one of them with statutory requirements, especially where the requirements can be seen to embody a specific policy directed against practices which the legislature has deemed oppressive or unjust, a presumption that the agreements in contemplation are only those of which the law of the country is the proper law according to the rules of private international law has no apparent appropriateness to recommend it, and indeed, for a reason of special relevance here, it would produce a result which the legislature is not in the least likely to have intended. It would mean that provisions enacted as salutary reforms might be set at nought by the simple expedient adopted in the present case of inserting in an agreement a stipulation that validity should be a matter for the law of some other country.

Cf. Nike Information Systems Ltd. v. Avae Systems Ltd. and Wallace, [1980] 1 W.W.R. 528 (B.C.), upholding an agreement which avoided the effect of an Alberta Statute on the ground that the stipulation of British Columbia law was bona fide.

81. For a recent example, see Tilden Rent-a-Car Co. Ltd. v. Clendenning (1978), 18 O.R. (2d) 601 (C.A.).

> any situation that results in the weaker party's being "overmatched and overreached" will qualify for relief if the stronger party secures an immoderate gain.[82]

It must be admitted, however, that this entire area of controlling express contractual terms is a difficult one and, once again, invites the possibility of protracted and expensive litigation.[83]

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82. Waddams, The Law of Contracts (1977), p. 320.

83. In this connection, it is useful to refer to the United Kingdom Supply of Goods (Implied Terms) Act 1973, which specifically limits the selection of a foreign regime to obtain exemption from sale of goods provisions dealing with implied undertakings as to title and quality in the case of "Consumer Sales," defined to mean a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods: (a) are of a type ordinarily bought for private use or consumption; and (b) are sold to a person who does not buy or hold himself out as buying them in the course of a business. The provision limiting party selection is as follows:

> 55A. Where the proper law of a contract for the sale of goods would, apart from a term that it should be the law of some other country or a term to the like effect be the law of any part of the United Kingdom, or where any such contract contains a term which purports to substitute, or has the effect of substituting, provisions of the law of some other country for all or any of the provisions of the law of some other country for all or any of the provisions of sections 12 and 15 and 55 of this act, those sections shall, not withstanding that term but subject to section 61(6) of this act, apply to the contract.

Section 61(6) provides as follows:

It is important to note that, in the Canadian context, provincial provisions making certain terms mandatory may not be applied when the case is litigated in some other province.[84]

Even where provincial legislation had the effect of forbidding a certain term, if suit is brought in another province that prohibition may not be upheld. Illegality according to the place of contracting is not ordinarily a ground for refusing the enforcement of the contract which is valid by its proper law.[85]

Thus, so long as the forum is able to construe the contract as having some place other than the province containing the prohibition as its "proper law," then the legislative intention in that province would be ineffectual. Once again, because of the flexibility of the proper law concept, it is difficult to predict the actual results which might be expected in this area.

Proper law of the contract -- conclusion Clearly, the existing choice of law rule governing contractual claims gives less cause for concern than does the rule of Phillips v. Eyre. A strong argument can be made that where an out-of-province manufacturer or supplier markets consumer goods in a province, the proper law of the contract will be found to be that of the consumer's province. It is also quite possible that attempts to evade that regime by the stipulation of some other law will be controlled by

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> Nothing in section 55 or 55A of this act shall prevent the parties to a contract for the international sale of goods from negativing or varying any right, duty or liability which would otherwise arise by implication of law under section 12 and 15 of this act.

The interpretation and application of this statutory provision is by no means free from doubt. See Mann, "The Amended Sale of Goods Act 1893 and the Conflict of Laws" (1974), 90 L.Q.R. 42; compare, Kelly, "Reference, Choice, Restriction and Prohibition" (1977), 26 Int. and Comp. L.Q. 857 at 871-80.

84. See Kelly, above note 83, pp. 878-80.

85. Ibid.; Dicey and Morris, pp. 777-8; Cheshire and North, p. 226.

the courts. However, because of the flexibility inherent in the proper law approach and the want of authority in the specific context of sale of goods cases, these propositions cannot be stated with certainty.

The conclusion must be, then, that while the traditional "proper law of the contract" approach appears to produce satisfactory results with respect to ordinary commercial transactions, its application to consumer purchases cannot be stated with certainty.

A Suggested Approach

Where one of the parties to a transaction for the sale of goods is a consumer purchasing a product for domestic consumption, it is difficult to see why such a purchaser should ever be deprived of the full benefit of the protection of domestic law if he is dealing with an out-of-province supplier who markets his goods in the purchaser's locale. That province surely has a strong interest in having its protective measures applied, an interest which parallels those identified in the discussion of tort claims. The interest of the province of the supplier in having its pro-defendant standard applied must surely yield where the supplier consciously markets his products outside that province. Similarly, the supplier's province has an interest in upholding standards relied upon by out-of-province purchasers, a policy which can be upheld in favour of such a purchaser without undercutting domestic rules designed to protect suppliers.

A further important consideration is the desirability of having a similar approach for all products claims whether the plaintiff's cause of action is in tort or in contract. It is difficult to justify the phenomenon of one result for the purchaser who acquired a product directly from the defendant and another for the purchaser who obtained the product through an intermediary. An important factor motivating law reform in the products area to make tort liability as strict as that imposed by contract is to remove just such anomalies.[86] Accordingly, it is suggested that the choice of law rule governing the contractual claims should parallel that proposed with respect to tort claims.

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86. See above, Introduction, note 4.

As indicated above, the "proper law" approach probably will yield this very result. Accordingly, one option would be to leave untouched the common law choice of law rule governing contractual claims. A second option would be, of course, to legislate a contracts choice of law rule similar to that suggested for tort.

Because of the diversity of contractual relationships, however, it would be desirable to limit such a choice of law rule specifically to consumer purchases. The definition of consumer purchase contained in the United Kingdom sale of goods legislation could be adopted:

> a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods (a) are of a type ordinarily bought for private use or consumption and (b) are sold to a person who does not buy or hold himself out as buying them in the course of a business.[87]

This would provide consumers with the added protection of a common product liability choice of law rule, while leaving ordinary commercial transactions for the sale of goods governed by the proper law of the contract rule which appears to operate satisfactorily in the purely commercial setting.

Accordingly, under a legislated solution a consumer would be given a choice between the law of the place of acquisition, the law of the province of the supplier or the law of the place of injury or loss. Admittedly, a rule in such stark terms could produce harsh results. For example, if an out-of-province purchaser were to acquire a product from a local retailer and then suffer loss or injury in another province, the justification for the imposition of the stricter standards of that province on the supplier would be highly suspect. Therefore, in the case of contractual claims there is stronger reason to impose the qualification suggested above with respect to tort claims, and to reformulate the test as follows. The plaintiff's choice would be prima facie rule, subject to the defendant showing that the regime selected bore no substantial or reasonable connection to the transaction.

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87. Above, note 83.

The Constitutional Question[88]

The question of possible constitutional constraints has been omitted from the above analysis of choice of law. This issue, however, merits some discussion especially in light of the Supreme Court of Canada's decision in Interprovincial Co-operatives Ltd. v. The Queen.[89] The matter is by no means straightforward. The nature of possible constitutional constraints on provincial choice of law rules in the product liability context is, at present, ill-defined. However, for reasons which follow, the constitutional question appears to be manageable.

Interprovincial Co-operatives Ltd. v. The Queen The Interprovincial case involved a suit in the Manitoba courts against the owners of two chlor-alkali plants, one in Saskatchewan and the other in Ontario. Both plants discharged pollutants into rivers which flowed into Manitoba. The Crown in right of Manitoba sued as assignee of over 1,500 Manitoba fishermen who had received financial assistance under the Fishermen's Assistance and Polluters Liability Act[90] due to disruption of fishing attributed to the pollutants discharged by the out-of-province defendants. The Act not only created a statutory liability against any person who discharged a contaminant "into waters in the province or into any waters whereby the contaminant is carried into waters in the province"[91] but went on to provide that

> it is not a lawful excuse for the defendant to show that the discharge of the contaminant was permitted by the appropriate regulatory authority having jurisdiction at the place where the

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88. For a detailed examination of the impact of constitutional law on conflicts, see Hertz, "Interprovincial, the Constitution, and the Conflict of Laws" (1976), 26 U. Toronto L.J. 84; Hertz, "The Constitution and the Conflict of Laws: Approaches in Canadian and American Law" (1977), 27 U. Toronto L.J. 1.

89. [1976] 1 S.C.R. 477.

90. 1970 (S.M.) c. 32.

91. Ibid., s. 4(1).

> discharge occurred, if that regulatory authority did not have jurisdiction at the place where the contaminant caused damage to the fishery.[92]

Both Saskatchewan and Ontario had authorised the discharge in question.

While no challenge was brought as to the jurisdiction of the Manitoba courts, the defendants did bring a preliminary motion to strike out the portions of the Crown's claim based on the Act. The Supreme Court upheld the defendants' objection by a 4 to 3 majority. Because of the variety of opinions expressed in the Court's judgment, it is extremely difficult, if not impossible, to discern a governing ratio for the decision.

Pigeon J.[93] held that the Manitoba legislation was ultra vires and that the matter of pollution of interprovincial rivers was one of exclusive federal competence. According to Pigeon J., the injurious acts could not be justified by legislation in the province where the discharge took place, but neither was it competent for Manitoba to create a cause of action on the basis of injury or damage sustained within its borders. Rather, "Manitoba is restricted to such remedies as are available at common law or under federal legislation,"[94] and because the conflict between Manitoba and the other provinces as to the propriety of the pollution could not be resolved by resort to any provincial law, the matter was one for the federal Parliament.

The fourth member of the majority, Ritchie J., expressly disagreed with the reasoning of Pigeon J.[95] and based his decision squarely on what he regarded as the illegitimate attempt of the Manitoba legislature to abrogate the "rights" acquired by the defendants in their respective provinces. In the view of Ritchie J.:

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92. Ibid., s. 4(2).

93. Martland and Beetz JJ. concurred.

94. [1976] 1 S.C.R. at 516.

95. Ibid., at 525.

> while the control of pollution of such rivers is a federal matter, the legislation here impugned has to do with its effect in damaging property within the province of Manitoba and it only becomes inapplicable by reason of the extra territorial aspect to which I have made reference... [i.e., the purported nullification of the effect of permission granted in Ontario and Saskatchewan].[96]

The opinion of the three dissenters was delivered by Laskin C.J.[97] The Chief Justice said that Manitoba's constitutional power to apply its own law was valid under "choice of law principles relative to the place of commission of the tort."[98] Rather than viewing the legislation as an attempt to overreach provincial borders or to nullify rights acquired elsewhere, Laskin C.J. characterised the matter as one which properly fell within the competence of the Manitoba legislature:

> Manitoba's predominant interest in applying its own law, being the law of the forum in this case, to the question of liability for injury in Manitoba to property interest therein is undeniable. Neither Saskatchewan nor Ontario can put forward as strong a claim to have their provincial laws apply in the Manitoba action; in other words the wrong in this case was committed, or the cause of action arose in Manitoba and not in Saskatchewan or in Ontario.[99]

While the analogy between discharging a pollutant into an interprovincial river and sending a product into the flow of interprovincial trade is obvious, the Interprovincial decision can hardly be taken to exclude the application of provincial

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96. Ibid., at 525-6.

97. Judson and Spence JJ. concurred with Laskin C.J.

98. Ibid., at 500.

99. Ibid.

product liability legislation simply on the basis that the product in question has an extra-provincial provenance. In the first place, it seems quite possible that absent the attempt to override the permission to pollute granted in Ontario and Saskatchewan, Ritchie J. would have decided the case the other way. Thus, there may well be a majority view in favour of allowing the province of injury to apply its own law in cases where the extra-provincial defendant is without a license to perpetrate the harm. Moreover, even Pigeon J.'s analysis is unlikely to be applied in the context of product liability. To suggest that liability for goods in the flow of interprovincial trade is a matter within exclusive federal legislative competence, while not impossible, would certainly attribute novel vigour to the trade and commerce power. Accordingly, it is submitted that the Interprovincial case should not by itself be taken to necessarily limit the ambit of provincial choice of law rules in the product liability context.

Royal Bank v. The King The matter does not, however, rest with Interprovincial alone. In a line of cases relied on by the majority in Interprovincial, the courts have denied to a province the right to modify contractual rights of out-of-province creditors. In what is usually taken to be the leading case, The Royal Bank of Canada v. The King,[100] the Privy Council struck down Alberta legislation designed to alter a scheme to finance the construction of a rail line in the province. The Royal Bank held on deposit in New York the proceeds of bonds sold in London and guaranteed by the Alberta government. An account was opened in Alberta but the funds remained in New York and were dispersed under the control of the Royal Bank's head office in Montreal. The Alberta legislature, considering the railway company to be in default, purported to appropriate all funds on deposit to general provincial revenue. The Privy Council held this legislation to be ultra vires in that it abrogated a right held by the London lenders against the Royal Bank for the return of their money, a right which existed outside of the province:

> when the action of the government in 1910 altered [the conditions under which the money was to be advanced to the provincial treasurer] the lenders in London were entitled to claim from the bank at its head office in Montreal the money which they had advanced solely for a purpose which had

100. [1913] A.C. 283.

> ceased to exist. Their right was a civil right outside the province, and the legislature of the province could not legislate validly in derogation of that right.[101]

While Royal Bank has been criticised,[102] it has also been followed in provincial appellate decisions,[103] and indeed has produced some surprising results.[104] However, a later decision of the Privy Council, Ladore v. Bennett,[105] described by Professor Hogg as exemplifying "the correct approach,"[106] is perhaps helpful in the product liability context. In that case, an Ontario statute amalgamating four municipalities into the City of Windsor retired existing debentures and issued new ones at a reduced rate. As many debenture holders were out of province, it was contended that the legislation was ultra vires in that it destroyed or altered a civil right existing outside of the province. However, this argument was rejected by the Privy Council. Lord Atkin concluded that if in pursuing the valid provincial purpose, old debts were to be destroyed and new ones created it was inevitable and acceptable that creditors outside the province should be affected:

> nothing has emerged even to suggest that the legislature of Ontario at the respective dates had any purpose in view other than to legislate in times of difficulty in relation to the class of subject which was in special care -- namely, municipal institutions....[Although the statutes]

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101. Ibid., at 297-8, per Viscount Haldane.

102. Hogg, Constitutional Law of Canada (1977), pp. 208-11.

103. Credit Foncier Franco-Canadian v. Ross, [1937] 3 D.L.R. 365 (Alta. S.C.); Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission, [1937] O.R. 796 (Ont. C.A.); Ottawa Valley Power Co. v. Hydro-Electric Power Commission, [1937] O.R. 265 (Ont. C.A.).

104. See Hogg, above note 102.

105 [1939] A.C. 468.

106 Above, note 102, p. 210.

> affect rights outside the province they only so affect them collaterally, as a necessary incident to their lawful powers of good government within the province.[107]

It is submitted that insofar as provincial product liability legislation affects out-of-province manufacturers or suppliers, it does so in the sense described in the Ladore case. Such legislation has a valid provincial objective, namely, provision of protection and compensation to injured consumers within the province, a matter squarely within the property and civil rights power. The incidental impact upon provincial parties who purvey their goods in the province should be regarded as permissible.

Agricultural marketing cases More recently, provincial agricultural marketing legislation which depends, to a certain extent, upon controlling the resale within the province of products acquired outside has come under close scrutiny. While earlier cases had suggested "very extensive power to regulate marketing within the province, notwithstanding the burdens incidentally placed on the residents of other provinces,"[108] in two recent decisions such schemes have been struck down. In the Manitoba Eggs Reference[109] and in Burns Foods v. A.G. Manitoba,[110] marketing schemes which controlled the resale within the province of agricultural products acquired outside were struck down as interfering with interprovincial trade, a matter within exclusive federal competence under its trade and commerce power.

However, as with the Interprovincial case, these decisions rest upon the court's determination that the schemes in question were directed at a subject matter within exclusive federal legislative competence. In the Manitoba Eggs Reference, it was held that while, on the principle of the earlier cases, provincial marketing schemes could "affect" interprovincial trade, the legislation in question went beyond that limit and was

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107. [1939] A.C. at 482-3.

108. Above, note 102, p. 311.

109. [1971] S.C.R. 689.

110. [1975] 1 S.C.R. 494.

> made in relation to the regulation of interprovincial trade and commerce....It is my opinion that the plan now in issue not only affects interprovincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between the provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce. [Emphasis added.][111]

It is suggested that there is a fundamental difference between the impact of a product liability choice of law rule upon out-of-province manufacturers and suppliers and a comprehensive marketing scheme requiring certain classes of interprovincial products to be distributed and sold through a certain agency at a certain price. The latter is "designed to restrict or limit the free flow of trade between provinces as such," while the former is aimed at a valid provincial objective, the protection and compensation of domestic consumers, and merely has an incidental effect upon interprovincial trade.

R. v. Thomas Equipment A recent decision of the Supreme Court of Canada in R. v. Thomas Equipment[112] lends some support to the view that a product liability choice of law rule such as that suggested in this study may be valid. That case held that a New Brunswick manufacturer, not registered in Alberta and having no office there, was liable to a quasi-criminal penalty imposed by Alberta legislation establishing a regulatory scheme to control certain aspects of distributorship agreements. The New Brunswick defendant had entered into a distributorship agreement with an Alberta company which violated this statute. The defendant sold machinery to the Alberta company for resale in Alberta, although

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111. [1971] S.C.R. 689 at 703 per Martland J.

112. (1979), 96 D.L.R. (3d) 1.

the sale was made in New Brunswick, and the agreements specifically designated New Brunswick law as being applicable. The Court held that the Alberta legislation could be applied to the out-of-province defendant on the following basis:

> When Thomas entered into the agreement and, carrying it into effect sold the farm implements to Suburban for resale in Alberta, it rendered itself subject to the provisions of the regulating statute. As Sinclair J.A. [dissenting in the Alberta Court of Appeal] put it:
>
> "One of these rules clearly covers the manufacturer's responsibility when his agreement with a dealer is terminated. If a manufacturer wants to have his farm implements sold here he must comply with the rules of the game, as it were, established by the legislature of Alberta."[113]

For present purposes, the authority of this case is weakened by two factors. First, the Court expressly indicated that the case had not been argued as a constitutional one. Secondly, the Alberta legislation did not, strictly speaking, alter or determine the contractual rights between the parties, but rather imposed a penalty for failure to comply with the statute. Nevertheless, the case does lend some support to the present analysis. The Court was able to find that an out-of-province manufacturer dealing in a province through a non-agent intermediary had sufficient presence within the province to be liable to sanctions of general application.

## Conclusion

In the cases described above, the issue has been whether a province may apply its own law to an out-of-province party. These cases have not, strictly speaking, arisen in the context of choice of law in the sense described here. The constitutional propriety of one province applying the law of another province or jurisdiction to a dispute pursuant to its own choice of law rule appears never to have been questioned. Presumably, the forum's choice of law rule is a valid aspect of "property and civil rights" in the province and the foreign law is applied in a formal sense as part of the forum's domestic law. Accordingly,

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113. Ibid., at 12.

the validity of the scheme proposed here may be tested by simply asking whether there are limitations on the extent to which the forum could apply its own law when it is the place of manufacture, acquisition or injury. If there is no such infirmity, then presumably there will be no objection when that law is applied by the courts of another province pursuant to a similar choice of law test.

The choice of law test suggested in this chapter is to allow the plaintiff to select the law most favourable to him, subject to that jurisdiction being foreseeable on the part of the defendant.

If the forum is the place of manufacture, there can surely be no challenge on the part of the defendant as to the constitutional competence of the forum to apply its own law. The problem, if there is one, occurs where the forum is either the place of acquisition or the place of injury. However, in these situations it is submitted that it can hardly be argued that provincial law aimed at protecting and compensating consumers within the province is invalid simply because the provenance of the product is extra-provincial. As indicated, the Interprovincial case can be distinguished on the grounds that three of the judges found the subject matter to be exclusively federal, while a fourth rested his decision on the license to pollute granted in the province of origin. It is highly unlikely to imagine that either of these factors are or could be present in the product liability context. Similarly, the marketing scheme cases have struck down legislation found to be aimed at interprovincial trade, an area of exclusive federal concern. Product liability legislation may affect interprovincial trade, but it is not, in "pith and substance," legislation in respect of that matter.

Insofar as contractual rights are concerned, it is submitted that the Ladore case establishes that the mere fact that a provincial law has an incidental impact upon the rights and obligations of individuals outside the province will not render inoperative otherwise valid provincial legislation. The approach advocated above with respect to contractual claims is to impose a limitation on the plaintiff's option where the regime selected bears no substantial or reasonable connection to the transaction. Such a qualification would, it is submitted, preclude a choice which would run afoul of the Royal Bank principle, i.e., where the application of the law of one province would unduly impair contractual rights acquired beyond the borders of that province.

Finally, it will be recalled that the choice of law proposals are premised upon an analysis of the respective interests of competing jurisdictions in having their laws applied. This analysis coincides with what is seen in this paper as the fundamental requirement imposed by the British North America Act, namely, that the pith and substance of provincial legislation must aim at a valid objective within the province.

# APPENDIX

I. Rules of Court Relating to Service Ex Juris and Service on Foreign Corporations

Alberta

On individual or corporation

15. (1) Personal service is effected on an individual by leaving with him a true copy of the document to be served.

(2) Personal service is effected on a corporation either

(a) in the manner provided by statute, in which case these Rules as to mode of service do not apply, or

(b) by leaving a true copy of the document to be served with the mayor, reeve, president, chairman or other head officer by whatever name he is known, or upon the manager, office manager, cashier, secretary or agent.

(3) Personal service is effected upon a firm where persons are sued as partners in the name of their firm by leaving the document to be served either with one or more of the partners or with any person at the principal place of business of the firm within the jurisdiction who appears to have management or control of the partnership business there, but if the partnership, to the knowledge of the plaintiffs, has been dissolved before the action was commenced the document shall be served on every person sought to be made liable.

(4) If a person being personally served so requests, he shall be shown the original, a concurrent copy or a certified copy of the document being served upon him.

On agent within jurisdiction

20. If the defendant is out of the jurisdiction but has an an agent, manager, office manager or other representative resident and carrying on his business within the jurisdiction, if the cause of action arose in respect of that business, service made upon the agent, manager, office manager or other representative is good service upon the defendant.

Agreement between parties

21. (1) When the Court has jurisdiction in any action or other proceeding in respect of a contract and in the contract the parties have agreed on

(a) a place for service, or

(b) a mode of service, or

(c) a person upon whom service can be effected, service of any document in the action may be made in accordance with the agreement and, notwithstanding anything in this Part, service when so made is good service.

(2) If the place for service is without the jurisdiction, Rule 30 shall be complied with.

(3) No contractual stipulation as to service of a document invalidates a service thereof that would otherwise be valid and effective.

## PART 4

## SERVICE OUT OF THE JURISDICTION

By order

30. Service outside of the jurisdiction of any document by which any proceeding is commenced, or of notice thereof, may be allowed by the Court whenever:

(a) the whole subject matter is land situated within the jurisdiction (with or without rents or profits) or the perpetuation of testimony relating to lands so situated;

(b) any act, deed, will, contract, obligation or liability affecting land situated within the jurisdiction is sought to be construed, rectified, set aside or enforced;

(c) relief is sought against a person domiciled or ordinarily resident within the jurisdiction;

(d) the proceeding is for the administration of the estate of a person who died domiciled within the jurisdiction, or for any relief or remedy which might be obtained in any such proceeding;

(e) the proceeding is for the execution as to property situated within the jurisdiction of the trusts of a written instrument that ought to be executed according to Alberta law, and of which the person to be served is a trustee, or the proceeding is for any relief or remedy which might be obtained in any such proceeding;

(f) the proceeding is to enforce, rescind, resolve, annul or otherwise affect a contract or to recover damages or obtain any other relief in respect of the breach of a contract, being (in any case) a contract

(i) made within the jurisdiction, or

(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(iii) which is by its terms, or by implication governed by Alberta law, or

(iv) in which the parties thereto agree that the courts of Alberta shall have jurisdiction to entertain any action in respect of the contract;

(g) the action is in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if that is the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;

(h) the action is founded on a tort committed within the jurisdiction;

(i) in the action an injunction is sought ordering a defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(j) a person out of the jurisdiction is a necessary or proper party to an action properly brought against another person served within the jurisdiction;

(k) the action is by a mortgagee of property (other than land) situated within the jurisdiction and seeks the sale of the property, the foreclosure of the mortgage or delivery by the mortgagor of possession of the property (but not an order for the payment of any monies due under the mortgage);

(l) the action is brought by a mortgagor of property (other than land) situated within the jurisdiction and seeks redemption of the mortgage, reconveyance of the property or delivery by the mortgagee of possession of the property (but not a personal judgment);

(m) the proceeding is founded upon a judgment of any court of Alberta;

(n) the proceeding is a matrimonial cause;

(o) the proceeding is an action brought under the Carriage by Air Act (Canada);

(p) it appears that the person initiating the proceeding has a good cause of action upon a judgment or for alimony or maintenance, and the person against whom the proceeding is initiated has assets in the jurisdiction of the value of at least $500 which may be rendered liable for the satisfaction of any judgment or order pronounced in the proceeding; but in that case, if no defence is filed, no judgment shall be entered except by leave of the Court and upon such conditions as it considers proper.

Affidavit

31. Every application for leave to serve any document, or to give notice thereof, out of the jurisdiction shall be supported by affidavit or other evidence,

(a) stating that in the belief of the deponent the applicant has a reasonable cause of action,

(b) showing in what place or country the person to be served is, or probably may be found, and

(c) giving the grounds upon which the application is made;

and every order allowing such service shall limit the time within which the proceedings may be answered or opposed, and in limiting the time regard shall be had to the place where service is to be effected.

British Columbia

RULE 11

SERVICE AND DELIVERY OF DOCUMENTS

Service of Writ of Summons

(1) Service of a writ of summons is required unless the defendant enters an appearance. (MR 48; ER 10/1.)

How Service Effected

(2) Service of a document is effected on

(a) an individual by leaving a copy of the document with him,

(b) a corporation by leaving a copy of the document with the President, Chairman, Mayor, or other chief officer of the corporation, or with the City or Municipal Clerk, or with the manager, cashier, superintendent, treasurer, secretary, clerk, or agent of the corporation or of any branch or agency thereof in the Province or in the manner provided by the Companies Act or any enactment relating to the service of process; and for the purpose of serving a document upon a corporation whose chief place of business is outside British Columbia, every person who within the Province transacts or carries on any of the business of, or any business for, that corporation shall be deemed its agent,

(c) an unincorporated association, including a trade union, by leaving a copy of the document with any officer thereof, or in the case of a trade union, with a business agent.

Service on Agent

(4) Where a contract has been entered into within the Province by or through an agent residing or carrying on business within the Province on behalf of a principal residing out of the Province, by leave of the Court given before the determination of the agent's authority or of his business relations with the principal, a writ of summons or other document in a proceeding relating to or arising out of the contract may be served on the agent. A copy of the order giving leave and of the writ of summons or

other document shall be sent forthwith by registered mail to the principal at his address out of the Province. (MR 55a; ER 10/2.)

RULE 13

SERVICE OUTSIDE BRITISH COLUMBIA

Service Outside British Columbia Without Order

(1) Service of an originating process or other document on a person outside British Columbia may be effected without order whenever

(a) the whole subject-matter of the proceeding is land in British Columbia (with or without rents or profits); or the perpetuation of testimony relating to land in British Columbia,

(b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments in British Columbia is sought to be construed, rectified, set aside, or enforced,

(c) it is sought to construe a will affecting personal property if the testator was at the time of his death domiciled in British Columbia,

(d) relief is sought against a person domiciled or ordinarily resident in British Columbia,

(e) the proceeding is for the administration of the personal estate of a deceased person who, at the time of his death, was domiciled in British Columbia,

(f) the proceeding is for the execution (as to property in British Columbia) of a trust which ought to be executed according to the law in force in British Columbia and the person to be served is a trustee,

(g) the proceeding is in respect of a breach, committed in British Columbia, of a contract wherever made, even though the breach was preceded or accompanied by a breach outside British Columbia which rendered impossible the performance of the part of the contract which ought to have been performed in British Columbia,

(h) the proceeding is founded on a tort committed in British Columbia,

(i) an injunction is sought as to anything to be done in British Columbia, or a nuisance in British Columbia is sought to be prevented or removed, whether or not damages are also sought in respect thereof,

(j) a person outside British Columbia is a necessary or proper party to a proceeding properly brought against some other person duly served in British Columbia,

(k) the proceeding is by a mortgagee or mortgagor in relation to a mortgage of property in British Columbia and seeks relief of the nature of sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, or delivery of possession by the mortgagee; but does not seek personal judgment or an order for payment of money due under the mortgage, except as permissible under paragraph (g),

(l) the proceeding is brought by or on behalf of the Crown to recover moneys owing for taxes or other debts due to the Crown,

(m) the proceeding is founded upon a contract, or is in respect of a claim for alimony, and the defendant has assets in British Columbia,

(n) the action is brought under the Carriage by Air Act (Canada),

(o) the claim arises out of goods or merchandise sold or delivered in British Columbia,

(p) the proceeding is brought upon a foreign judgment and the defendant or respondent has assets in British Columbia, or

(q) the proceeding is a divorce or a matrimonial action. (MR 64, 71, 865, 894i; ER 11/1.)

Idem

(2) Except in a divorce proceeding or a proceeding brought under subrule (3), a copy of an originating process served outside British Columbia without leave shall state specifically by endorsement in

Form 6 upon which of the grounds referred to in subrule (1) it is claimed that service is permitted under this rule. (MR 64.)

Application for Leave to Service Outside the Jurisdiction

(3) In any case not provided for in subrule (1), the Court may grant leave to serve an originating process or other document outside British Columbia. (MR 6; ER 11/4.)

Idem

(4) An application for leave to serve a person outside British Columbia shall be made before the originating process or other document is served and shall be supported by an affidavit or other evidence showing in what place or country that person is or probably may be found and the grounds upon which the application is made. The application may be made ex parte. (MR 66; ER 11/4.)

Service of Order, Etc.

(5) Copies of the application for leave to serve, of all affidavits in support of the application, and of the order granting leave to serve shall be served with the originating process or other document. (New.)

Time for Appearance

(6) Where a person is served with an originating process outside British Columbia, the time for the appearance by that person, after service, shall be 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere. The Court may shorten the time for appearance on ex parte application. (MR 68; ER 11/4.)

Where Service Without Leave Valid

(7) Nothing in this rule shall invalidate service outside British Columbia without leave of the Court where the document could have been validly served apart from this rule. (New.)

Contract Containing Terms for Service

(8) Notwithstanding these rules, the parties to a contract may agree

(a) that the Court shall have jurisdiction to entertain a proceeding in respect of the contract, and

(b) that service of a document in the proceeding may be effected at any place, within or outside British Columbia, on any party, or on any person on behalf of any party, or in a manner specified or indicated in the contract. (MR 65; ER 10/3.)

Idem

(9) Service of a document in accordance with an agreement referred to in subrule (8) is effective service, but no contractual stipulation as to service of a document shall invalidate service that would otherwise be effective under these rules. (MR 65a.)

Application to Set Aside

(10) Application may be made to set aside service of an originating process or other document served outside British Columbia without entering an appearance. Where it appears that service should not have been made outside British Columbia, the Court may set aside service of the originating process or other document and may order the person initiating the proceeding to pay the costs of the applicant on a solicitor and client basis. (ER 12/8.)

Carriage by Air Act

(11) (a) Where, for the purpose of an action under the Carriage by Air Act (Canada) and the Convention therein set out, a party proposes to serve a writ of summons upon a high contracting party to the Convention, other than Her Majesty, this rule shall apply.

(b) The writ shall specify the time for entering an appearance as provided in subrule (6).

(c) A certified copy of the writ shall be transmitted by the Registrar to the Secretary of State, together with a copy translated into the language of the country of the defendant to be supplied by the solicitor for the plaintiff, with a request for transmission to the government of that country.

(d) An official certificate transmitted by the Secretary of State to the Court certifying that the certified copy of the writ was delivered on a specified date to the government of the country of the defendant shall be sufficient proof of service and shall be filed in the Registry and be equivalent to an affidavit of service.

(e) After filing an appearance by the defendant or, if no appearance is filed, after the expiry of the time limited for filing the appearance, the action may proceed to judgment in all respects as if the defendant had for the purposes of the action waived all privileges and submitted to the jurisdiction of the Court.

(f) Where it is desired to serve or deliver any other document outside British Columbia, the provisions of this rule shall apply, mutatis mutandis. (MR 71aa; ER 11/7.)

Manitoba

26. Where the action is against partners in the name of their firm, the statement of claim shall be served either on any one or more of the partners, or at the principal place within Manitoba of the business of the partnership on any person having at the time of service the control or management of the partnership business there; and such service shall be deemed good service on the firm; provided that, in the case of a co-partnership which has been dissolved, to the knowledge of the plaintiff, before the commencement of the action, the statement of claim shall be served on every person sought to be made liable.

27. (1) A corporation may be served with a statement of claim by delivering a copy to the mayor, reeve, president or other head officer, or to the manager, cashier, treasurer, secretary, clerk, or agent of such corporation, or of any branch or agency thereof in Manitoba. Any person who within Manitoba transacts or carries on any of the business of, or any business for, any corporation whose chief place of business is without Manitoba shall, for the purpose of service as aforesaid, be deemed the agent thereof.

(2) Service may also be effected on a corporation in the manner provided by any statute.

(3) In the case of a railway, telegraph, or express corporation, service may be effected by delivering a copy to the agent of the corporation at any branch or agency thereof, or to any station master of the railway company, or to the telegraph operator or express agent having charge of any telegraph or express office belonging to the corporation.

Service Out of Manitoba

28. Service out of Manitoba of a statement of claim may be made wherever:

(a) the whole subject matter of the action is land situate within Manitoba (with or without rents or profits), or the perpetuation of testimony relating to land within Manitoba; or

(b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within Manitoba is sought to be construed, rectified, set aside, or enforced; or

(c) any will of a deceased person who at the time of his death was domiciled within Manitoba, affecting personal property, is sought to be construed, or where the executors or administrators of any such person apply by way of originating notice under the provisions of rule 534; or

(d) any relief is sought against any person domiciled or ordinarily resident within Manitoba; or

(e) the action is for the administration of the personal estate of a deceased person who at the time of his death was domiciled within Manitoba, or for the execution as to property situate within Manitoba of the trusts of a written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Manitoba; or

(f) the action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for, or in respect of, the breach of a contract

(i) made within Manitoba; or

(ii) made by or through an agent trading or residing within Manitoba on behalf of a principal trading or residing out of Manitoba; or

(iii) by its terms or by implication to be governed by the law of Manitoba; or

(g) the action is one brought against a defendant in respect of a breach committed within Manitoba of a contract wherever made, even though such breach was preceded or accompanied by a breach out of Manitoba which rendered impossible the performance of the part of the contract which ought to have been performed within Manitoba; or

(h) the action is founded on a tort committed within Manitoba; or

(i) an injunction is sought as to anything done or to be done within Manitoba, or any nuisance within Manitoba is sought to be prevented or removed, whether damages are or are not claimed in respect thereof; or

(j) a person out of Manitoba is a necessary or proper party to an action brought against another person duly served within Manitoba; or

(k) the action is on or in relation to a mortgage, charge, or lien of any description on personal property of any description within Manitoba in which foreclosure, sale, possession, or redemption is sought, but in which a personal judgment or order for payment is not claimed, unless a personal judgment or order for payment may be claimed under some other provision of this rule.

29. Service out of Manitoba of a statement of claim may be allowed in an action on a contract where the parties have agreed that the courts of Manitoba shall have jurisdiction to entertain the action, or have agreed as to the manner in which service, either within or without Manitoba, of the statement of claim in an action brought in Manitoba may be affected. In either of such cases, service may be effected in the manner agreed on, or as may be ordered.

30. Service out of Manitoba of a statement of claim may be allowed where the action is not for any matter within any of the classes for which service out of Manitoba is provided by the preceding rules, but it appears that the plaintiff has a good cause of action against the defendant on a contract or judgment, or in respect of a claim for alimony, and that the defendant has assets in Manitoba of the value of two hundred dollars at least, which may be rendered liable for the satisfaction of the judgment; but the order allowing service shall in such case provide that, if the defendant does not defend, the plaintiff shall prove his claim to the satisfaction of the court before judgment shall be entered.

New Brunswick

ORDER 9

SERVICE OF WRIT OF SUMMONS

Service how effected

2. (1) When service is required the writ shall, wherever it is practicable, be served by any person in the manner in which personal service is now made, or

On wife or adult person

(2) In case the defendant has a known place of abode within the jurisdiction, a writ of summons may be served at such place of abode by delivering a copy thereof to the wife of the defendant, or to an adult person residing in the house and being an inmate of the family of the defendant; provided that such last mentioned service shall not be deemed good without the order of the Court or a Judge to be made upon affidavit, showing the circumstances of such service, and that the place where such writ was served was at the time of such

Perfecting Service

service the usual place of abode of such defendant, and that he was at the time of the service within the jurisdiction of the Court, according to the belief of the person serving such summons, stating his reasons for such belief.

Defendant carrying on business but not residing in jurisdiction

(3) Where service of writ of summons out of the jurisdiction may be allowed under Order 11, Rule 1 (1), and the defendant, whether a British subject or not, is carrying on business within the jurisdiction, but has no place of residence therein, service of such writ may be effected by leaving a copy of the same at the place of business of the defendant, with an agent or clerk, or other adult person in the employment of the defendant or defendants in such business, and known to the person serving the same as being an agent, clerk or person in the employment of the defendant in such business; provided that no such service shall be deemed good without the order of a Judge, on satisfactory proof by affidavit of the nature and place of business carried on by the defendant within the Province, and the particular nature of the agency or employment of the person with whom the copy of process was left, and that the action is in respect of a matter or matters for which service of a writ of summons may be allowed under Order 11, Rule 1 (1).

Perfecting service

Corporation

6. (1) When a corporation is a defendant to the action, service shall, unless the Court or a Judge otherwise orders, be deemed good service if made upon the mayor, warden, president or other head officer or on the cashier, treasurer, manager, secretary, clerk or agent of such corporation or of any branch or agency thereof in this Province; and any other person who within this Province manages, transacts or carries on any of the business of, or any business for any corporation whose chief place of business is without the limits of the Province, shall, for the purpose of being served as aforesaid be deemed an agent thereof.

Order for appearance against corporation

(2) Upon it being made to appear to the satisfaction of a Judge that any corporation incorporated or established under any law of this Province has not any president, manager, head officer, treasurer or secretary thereof within this Province an order for appearance may be obtained against and service thereof effected on such corporation as follows: Any Judge on affidavit of such facts may make an

order for the appearance of such corporation at a certain day therein named which order shall be published in The Royal Gazette and shall continue to be published therein for the space of at least three months prior to the day named for such appearance and after the day named in such order for appearance the plaintiff may proceed in his action as though a writ of summons had been served on the president or other officer of such corporation.

## ORDER 11

## SERVICE OUT OF JURISDICTION

Where service of writ allowed out of jurisdiction

1. (1) Service out of the jurisdiction of a writ of summons or notice of a writ of summons or of an originating summons or notice of an originating summons may be allowed by the Court or a Judge whenever:

(a) the whole subject-matter of the action is land situate within the jurisdiction, with or without rents or profits; or the perpetuation of testimony relating to the title to land within the jurisdiction; or

(b) any act, deed, will, contract, obligation or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or

(c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(d) the action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of New Brunswick; or

(e) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction; or on a tort committed therein; or

(f) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction; or

(h) the action is upon any contract wherever made for any breach wherever committed or upon any judgment or order wherever obtained and it appears to the satisfaction of a Court or a Judge that it is in the interest of justice that the same should be tried in this jurisdiction and that there are or probably will be property or assets or rights or credits or income within the Province of New Brunswick which are or may be made or may become available to satisfy in whole or in part any judgment which may be recovered or order made against the defendant. 1934, App.

(2) Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has any good cause of action against the defendant and that it is in the interest of justice that the same should be tried in this jurisdiction; but in such case, if the defendant does not appear, the Court or a Judge shall give directions from time to time as to the manner and proceedings in the action, and shall require the plaintiff, before obtaining judgment, to prove his claim before a Judge or jury, or in such manner as may seem proper.

(3) In any order made under the provisions of this Rule for service out of the jurisdiction, the Judge may give the plaintiff leave to effect such service upon some person within the Province who shall be shown to the satisfaction of the Judge to be an agent of the defendant residing and carrying on

business for the defendant in this Province, provided that when service is so made upon such agent notice of the order giving such leave and a copy thereof and of the writ of summons shall forthwith be sent by prepaid registered post to the defendant or defendants at his or their address out of the jurisdiction. Provided also that nothing in this Rule shall invalidate or affect any other mode of service in force at the time this Rule comes into operation.

Election petition and winding-up

2. Service out of the jurisdiction of any election petition or of any order or notice in the winding-up of a company, may be made and be allowed in such manner as the Court or a Judge may order.

Agreement as to service

2A. Notwithstanding anything contained in Rule 1 of this Order, the parties to any contract may agree (a) that the Supreme Court shall have jurisdiction to entertain any action in respect of such contract, and, moreover or in the alternative, (b) that service of any writ of summons in any such action may be effected at any place within or out of the jurisdiction on any party or on any person on behalf of any party or in any manner specified or indicated in such contract. Service of any such writ of summons at the place, if any, or on the party or on the person, if any, or in the manner, if any, specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident, and if no place or mode or person be so specified or indicated, service out of the jurisdiction of such writ or notice thereof may be ordered.

Other cases

3. Service out of the jurisdiction of a petition or notice of motion is an action or matter relating to the administration of the estate of a deceased person, or to the execution of a trust, or praying for an order dealing with any funds in Court, and in interpleader proceedings or in any other action or matter may be allowed by the Court or a Judge.

Application to be supported by evidence

4. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this Order.

Order to fix time for appearance

5. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country where, or within which, the writ is to be served or the notice given.

Notice in lieu of writ

6. When the defendant is not within Canada at the time of service, notice of the writ and not the writ itself is to be served upon him.

Service of notice

7. Notice of a writ of summons shall be served in the same manner in which writs of summons are served.

When statement of claim to be served with writ

8. Where a defendant is to be served out of the jurisdiction with a writ of summons or notice in lieu thereof, the statement of claim, unless the same is specially endorsed upon the writ under Order 3, Rule 6, shall not be served therewith unless the Court or a Judge otherwise orders.

Originating summons, etc.

8A. (1) Service out of the jurisdiction may be allowed by the Court or a Judge of the following processes or of notice thereof, that is to say:

(a) originating summonses under Order 54a or Order 55, Rule 3 or 4 in any case where if the proceedings were commenced by writ of summons they would be within Rule 1 of this Order;

(b) any originating summons, petition, notice of motion or other originating proceedings,

(i) in relation to any infant or lunatic or person of unsound mind, or

(ii) under any Statute under which proceedings can be commenced otherwise than by writ of summons, or

(iii) under any Rule of Court or practice whereunder proceedings can be commenced otherwise than by writ of summons;

(c) without prejudice to the generality of the last foregoing sub-head any summons, order or notice in any interpleader proceedings or for the appointment of an arbitrator or umpire, or to remit, set aside or enforce an award in an arbitration held or to be held within the jurisdiction;

(d) any summons, order or notice in any proceedings duly instituted whether by writ of summons or other such originating process as aforesaid.

(2) Rules 2 to 7 inclusive of this order shall apply mutatis mutandis to such service.

(3) Nothing in this Rule contained shall in any way prejudice or affect any practice or power of the Court under which when lands, funds, choses in action, rights or property within the jurisdiction are sought to be dealt with or affected, the Court may, without affecting to exercise jurisdiction over any person out of the jurisdiction cause such person to be informed of the nature or existence of the proceedings with a view to such person having an opportunity of claiming, opposing, or otherwise intervening.

Newfoundland

ORDER III

6. In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate, may be served on the mayor or other head officer, or on the clerk, treasurer or secretary, of such corporation; and where by any statute, provision is made for service of any writ of summons, bill, petition, summons, or other process, upon any corporation, or upon any society or fellowship, or any body or number of persons, whether corporate or unincorporate, every writ of summons may be served in the manner so provided.

ORDER XI

SERVICE OUT OF THE JURISDICTION

1. Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever:

(a) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits) or the perpetuation of testimony relating to the title to land within the jurisdiction; or

(b) Any act, deed, will, contract, obligation, or liability affecting land situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or

(c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or

(d) The action is for the administration of the estate of any deceased person, who at the time of his death was domiciled within the jurisdiction or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Newfoundland; or

(e) The action is one brought against a defendant not domiciled or ordinarily resident within the jurisdiction to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract,

(i) made within the jurisdiction, or

(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

(iii) by its terms or by implication to be governed by Newfoundland law,

or is one brought against a defendant not domiciled or ordinarily resident within the jurisdiction in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.

(ee) The action is founded on a tort committed within the jurisdiction.

(f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof.

2. In probate actions service of a writ of summons, or notice of a writ of summons, may by leave of the Court or a Judge be allowed out of the jurisdiction.

3. Every application for leave to serve such writ or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or Judge that the case is a proper one for service out of the jurisdiction under this Order.

4. Any order giving leave to effect such service or give such notice shall limit a time after such service or notice within which such defendant is to enter an appearance, such time to depend on the place or country, where or within which the writ is to be served or the notice given.

5. When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him.

6. Notice in lieu of service shall be given in the manner in which writs of summons are served.

7. Where in any civil or commercial matter pending before a Court or tribunal of a foreign country a letter of request from such Court or tribunal for service on any person in this Colony of any process or citation in such matter is transmitted to the Supreme Court by His Majesty's Secretary of State for the Colonies, with an intimation that it is desirable that effect should be given to the same, the following procedure shall be adopted:

   (1) The Letter of Request for service shall be accompanied by a translation thereof in the English language, and by two copies of the process or citation to be served, and two copies thereof in the English language.

(2) Service of the process or citation shall be effected by the process server, whom the Chief Justice may appoint from time to time for the purpose, or his authorized agent.

(3) Such service shall be effected by delivering to and leaving with the person to be served one copy of the process to be served, and one copy of the translation thereof, in accordance with the rules and practice of the Supreme Court regulating service of process.

(4) After service has been effected the process server shall return to the Registrar of the Supreme Court one copy of the process, together with the evidence of service, by affidavit of the person effecting the service, verified by notarial certificate, and particulars of charges for the cost of effecting such service.

(5) The particulars of charges for the cost of effecting service shall be submitted to a Taxing Officer of the Supreme Court, who shall certify the correctness of the charges, or such other amount as shall be properly payable for the cost of effecting service. A copy of such charges and certificate shall be forwarded to the Department of Justice.

(6) The Registrar shall transmit to His Majesty's Secretary of State for the Colonies the Letter of Request for service received from the foreign country, together with the evidence of service, with a certificate appended thereto duly sealed with the seal of the Supreme Court. Such certificate shall be in the Form in the Schedule No. 43, Appendix K.

8. Upon the application of the Attorney General the Court or a Judge may make all such orders for substituted service or otherwise as may be necessary to give effect to these Rules.

9. The Court or Judge may direct that any summons, order or notice shall be served on any party or person in a foreign country.

Nova Scotia

Personal Service of a Document

10.03 (1) Personal service of a document is effected on,

(a) an individual, by leaving a true copy of the document with him;

(b) a body corporate, by leaving a true copy of the document with the president, chairman, mayor, warden or other chief officer of the body corporate, or with the manager, secretary, city or town manager or clerk, cashier or other similar officer thereof, or in the manner provided by section 33 of the Corporations Registration Act; [E. 65/3)

(c) a partnership sued in the partnership name, by leaving a true copy of the document with one or more of the partners, or with a person at the principal place of business of the partnership who appears to manage or control the partnership business there, or in the manner provided by section 17 of the Partnerships and Business Names Registration Act; provided that, if the partnership has been dissolved before the proceeding is commenced and a declaration of dissolution or a new declaration has been filed as provided in the Act, the document shall be served on every person sought to be made liable; [E. 81/3]

Originating Notice: Service on Agent of Non-Resident Principal

10.04 (1) Where a proceeding is against a principal out of the jurisdiction and the proceeding arose through dealings with or through his agent who resides or carries on business within the jurisdiction, then personal service of the originating notice may be effected on the principal by serving a true copy of it on the agent if at the time of service his authority as such agent has not been determined. [E. 10/2(1)]

(2) When the agent is served with an originating notice under paragraph (1), a true copy of the notice shall be sent within two days by ordinary mail to the principal at his address out of the jurisdiction otherwise the service on the principal shall be deemed to be voided. [E. 10/2(3)]

(3) Unless the court otherwise orders, the originating notice served upon the agent and principal shall provide thirty days for filing a defence or give thirty days notice of the application. [E. 10/2(2)]

Originating Notice: Service in Pursuance of Contract

10.05 (1) Where the court has jurisdiction in a proceeding in respect of a contract, or a contract confers jurisdiction on the court, and in the contract the parties have agreed on

(a) a place of service;

(b) a mode of service;

(c) a person upon whom service may be effected,

service of the originating notice in the proceeding may be made in accordance with the contract, and when so made the notice shall be deemed to have been personally served. [E. 10/3(1)]

(2) A contractual stipulation for service of a document that commences a proceeding shall not invalidate a service otherwise valid.

Originating Notice: Service Out of the Jurisdiction with Leave

10.07 (1) Subject to rule 10.04, where an originating notice is to be served on a person elsewhere than in Canada or one of the states of the United States of America, service of the notice on the person is only permissible with the leave of the court. [E. 11/1(1)]

(2) The court may, upon an application under paragraph (1) supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action and showing in what place or country the defendant is or probably may be found, order that the originating notice be served on the defendant in such place or country and make such other order as it thinks fit. [E. 11/4(1)]

(3) An order made under paragraph (2) shall limit a time, depending upon the place of service, within which the defendant is to file his defence or appear on the application. [E. 11/4(4)]

(4) Upon service being effected as authorized by an order made under paragraph (2), the court has jurisdiction to proceed and adjudicate in the proceeding to all intents and purposes, in the same manner, to the same extent, and with a like effect as if the defendant had been duly served within the jurisdiction of the court.

Originating Notice: Service Out of Jurisdiction -- How Effected

10.08 (1) Where service is to be effected upon a defendant in any other province of Canada, or in a state of the United States of America, or in a foreign country not within the provisions of paragraph (2), personal service of an originating notice shall be effected by a person having authority within the province, state, or foreign country to serve documents.

(2) Where service is to be effected upon a defendant in a foreign country to which this rule applies by direction of the Chief Justice of the Trial Division, the following procedure shall be followed:

(a) a copy of the originating notice certified by the prothonotary and a copy thereof translated into the language of the country in which service is to be effected, shall be sent by the prothonotary to the Under-Secretary of State for External Affairs, with instructions that it be transmitted to the government of the country in which it is to be served with a request that service, either personal or in

such manner as is consistent with the practice and usage of that country when personal service cannot be made, be effected and that a return be made showing how the service has been effected; and

(b) the plaintiff's solicitor shall, before the papers are transmitted, pay or secure to the satisfaction of the prothonotary a sum of money to answer the fees and charges in connection with the service.

Originating Notice: Service Out of Jurisdiction -- Proof of Service

10.09 (1) An originating notice, that is to be served out of the jurisdiction, shall be served personally on a defendant unless:

(a) the notice is one that by these rules or order of the court is not required to be so served; or

(b) it is served in accordance with the law of the place where the service is effected. [E. 11/5(3)]

(2) Service of an originating notice out of the jurisdiction may be proved by:

(a) an affidavit of service of the person who served it; or

(b) an official return establishing that the notice has been served on a person personally or in accordance with the law of the place, being a return:

(i) by a Canadian or British consular authority in that place, or

(ii) by the government or judicial authorities of that place.

(3) Unless the contrary is proved, a document purporting to be an affidavit or return as is referred to in paragraph (2) shall be sufficient evidence of the facts stated therein. [E. 11/5(7)]

Prince Edward Island

Personal Service of a Document

10.03 (1) Personal service of a document is effected on:

(a) an individual, by leaving a true copy of the document with him; [N.S. 10.03 (1) (a)]

(b) a body corporate, by leaving a true copy of the document with the president, chairman, mayor, warden or other chief officer of the body corporate, or with the manager, secretary, city or town manager or clerk, cashier or other similar officer thereof; [E. 65/3] [N.S. 10.03 (1) (b)]

(c) a partnership sued in the partnership name, by leaving a true copy of the document with one or more of the partners, or with a person at the principal place of business of the partnership business there; provided that, if the partnership has been dissolved before the proceeding is commenced and a declaration of dissolution or a new declaration has been filed as provided in the Act, the document shall be served on every person sought to be made liable; [E. 81/3] [N.S. 10.03 (1) (c)]

Originating Notice: Service on Agent of Non-Resident Principal

10.04 (1) Where a proceeding is against a principal out of the jurisdiction and the proceeding arose through dealings with or through his agent who resides or carries on business within the jurisdiction, then personal service of the originating notice may be effected on the principal by serving a true copy of it on the agent if at the time of service his authority as such agent has not been determined. [E. 10/2 (1)] [N.S. 10.04 (1)]

(2) When the agent is served with an originating notice under paragraph (1), a true copy of the notice shall be sent within two days by ordinary mail to the principal at his address out of the jurisdiction otherwise the service on the principal shall be deemed to be voided. [E. 10/2 (3)] [N.S. 10.04 (2)]

(3) Unless the court otherwise orders, the originating notice served upon the agent and principal shall provide thirty days for filing a defence or give thirty days notice of the application. [E. 10/2 (2)][N.S. 10.04 (3)]

(4) In case the defendant has a known place of abode within the jurisdiction an originating notice may be served at such place of abode by delivering a copy thereof to the wife or husband of the defendant, or to any adult person residing in the house and being an inmate of the family of the defendant; provided that no further proceedings shall be taken thereon without the order of a judge allowing such service, to be made upon affidavit, showing the circumstances of such service, and that the place where such notice was served was at the time of such service the usual place of abode of the defendant, and that he was at the time of service within the jurisdiction of the court according to the belief of the person serving such notice stating his reason for such belief. [P.E.I. O. 8, rr.4]

Originating Notice: Service in Pursuance of Contract

10.05 (1) Where the court has jurisdiction in a proceeding in respect of a contract, or a contract confers jurisdiction on the court, and in the contract the parties have agreed on:

(a) a place of service;

(b) a mode of service;

(c) a person upon whom service may be effected, service of the originating notice in the proceeding may be made in accordance with the contract, and when so made the notice shall be deemed to have been personally served. [E. 10/3 (1)][N.S. 10.05 (1)]

(2) A contractual stipulation for service of a document that commences a proceeding shall not invalidate a service otherwise valid. [N.S. 10.05 (2)]

Originating Notice: Service Out of the Jurisdiction with Leave

10.07 (1) Subject to Rule 10.04, where an originating notice is to be served on a person elsewhere than in Canada or one of the states of the United States of America, service of the notice on the person is only permissible with the leave of the court. [E. 11/(1)][N.S. 10.07 (1)]

(2) The court may, upon an application under paragraph (1) supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action and showing in what place or country the defendant is or probably may be found, order that the originating notice be served on the defendant in such place or country and make such other order as it thinks fit. [E. 11/4 (1)][N.S. 10.07 (2)]

(3) An order made under paragraph (2) shall limit a time, depending upon the place of service, within which the defendant is to file his defence or appear on the application. [E. 11/4 (4)][N.S. 10.07 (3)]

(4) Upon service being effected as authorized by an order made under paragraph (2), the court has jurisdiction to proceed and adjudicate in the proceeding to all intents and purposes, in the same manner, to the same extent, and with a like effect as if the defendant had been duly served within the jurisdiction of the court. [N.S. 10.07 (4)]

Originating Notice: Service Out of Jurisdiction -- How Effected

10.08 (1) Where service is to be effected upon a defendant in any other province of Canada, or in a state of the United States of America, or in a foreign country not within the provisions of paragraph (2), personal service of an originating notice shall be effected by a person having authority within the province, state, or foreign country to serve documents. [N.S. 10.08 (1)]

(2) Where service is to be effected upon a defendant in a foreign country to which this Rule applies by direction of a Judge of the Court, the following procedure shall be followed:

(a) a copy of the originating notice certified by the prothonotary and a copy thereof translated into the language of the country in which service is to be effected, shall be sent by the prothonotary to the Under-Secretary of State for External Affairs, with instructions that it be transmitted to the government of the country in which it is to be served with a request that service, either personal or in such manner as is consistent with the practice and usage of that country when personal service cannot be made, be effected and that a return be made showing how the service has been effected; and

(b) the plaintiff's solicitor shall, before the papers are transmitted, pay or secure to the satisfaction of the prothonotary a sum of money to answer the fees and charges in connection with the service. [N.S. 10.08 (2)]

Originating Notice: Service Out of Jurisdiction -- Proof of Service

10.09 (1) An originating notice, that is to be served out of the jurisdiction, shall be served personally on a defendant unless:

(a) the notice is one that by these Rules or order of the court is not required to be so served; or

(b) it is served in accordance with the law of the place where the service is effected. [E. 11/5 (3)][N.S. 10.09 (1)]

(2) Service of an originating notice out of the jurisdiction may be proved by:

(a) an affidavit of service of the person who served it; or

(b) an official return establishing that the notice has been served on a person personally or in accordance with the law of the place, being a return:

(i) by a Canadian or British consular authority in that place, or

(ii) by the government or judicial authorities of that place. [N.S. 10.09 (2)]

(3) Unless the contrary is proved, a document purporting to be an affidavit or return as is referred to in paragraph (2) shall be sufficient evidence of the facts stated therein. [E. 11/5 (7)][N.S. 10.09 (3)]

Ontario

RULE 23

23. (1) A municipal corporation may be served with a writ of summons by delivering a copy to the chairman, mayor, warden, reeve, or clerk thereof.

(2) In the case of a railway, telegraph or express corporation, service may be effected on the agent of such corporation at any branch or agency thereof, or on any station master of the railway company, or on the telegraph operator or express agent having charge of any telegraph or express office belonging to such corporation.

(3) Any other corporation may be served with a writ of summons by delivering a copy to the president or other head officer, vice-president, secretary, treasurer, director, or any agent thereof, or the manager or person in charge of any branch or agency thereof in Ontario. Any person who, within Ontario, transacts or carries on any of the business of, or any business for, a corporation whose chief place of business is out of Ontario shall, for the purpose of being served as aforesaid be deemed to be the agent thereof.

Service Out of Ontario

RULE 25

The following notice was published by the Rules Committee as an explanation of the changes made in 1975 to the rules under the heading:

1. An order permitting service out of Ontario is no longer required and the time for appearance and for defence is now prescribed by the rules. Rule 25 sets out the situations in which service out of Ontario is permitted without an order.

2. Rule 25 has been redrafted to simplify the language of the old rule and to extend the scope thereof by two notable innovations. Service out of Ontario may now be made where the action or proceeding consists of a claim or claims:

   (a) for damages sustained in Ontario arising from a tort of breach of contract committed elsewhere; and

   (b) for contribution, indemnity or other relief over in respect of any claim made against a defendant in an action commenced in Ontario.

3. A party may now be served out of Ontario without regard to whether or not he is a British subject and whether or not he is in a British Dominion.

4. Service on a party out of Ontario will now be effected by serving upon him a notice entitled "Notice for Service Out of Ontario." This notice is designed to eliminate altogether the service out of Ontario of a writ of summons, whether generally or specially endorsed, a summons to a defendant added by counterclaim, a third party notice or an originating notice of motion, as the case may be.

5. A party who has been served out of Ontario, may, within the time limited for appearance and before appearing, apply for an order setting aside the service or, in the alternative, for leave to file a conditional appearance.

25. (1) Subject to rule 795, a party to an action or proceeding may be served out of Ontario as provided by rule 26 where the action or proceeding as against that party consists of a claim or claims:

(a) for, or in respect of, real property situate within Ontario, or the administration of the estate of a deceased person in respect thereof, whether the deceased died testate or intestate as to such property;

(b) for, or in respect of, personal property situate within Ontario, or the administration of the personal property of a deceased person who, at the time of his death was domiciled within Ontario, whether the deceased died testate or intestate as to such property;

(c) for the construction of a will in respect of real or personal property situate within Ontario or in respect of the personal property of a deceased person, who at the time of his death was domiciled within Ontario;

(d) against a trustee for, or in respect of, the execution of a trust contained in a written instrument where the trust is in respect of real or personal property situate within Ontario and ought to be executed according to the law of Ontario;

(e) for foreclosure, sale, possession or redemption in respect of a mortgage, charge or lien on real or personal property situate within Ontario;

(f) in respect of a contract wherever made where:

(i) a breach is alleged to have been committed within Ontario, even though such breach was preceded by or accompanied by a breach out of Ontario which rendered impossible the performance of that part of the contract which ought to have been performed within Ontario; or

(ii) the parties thereto have agreed that the courts of Ontario shall have jurisdiction to entertain the action;

(g) in respect of a tort committed within Ontario;

(h) in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere;

(i) for an injunction in respect of anything done, being done or to be done within Ontario;

(j) for support under The Family Law Reform Act, 1978 for custody of or access to an infant;

(k) repealed;

(l) to declare a marriage void;

(m) founded upon a judgment;

(n) which, by statute, may be made by an action or proceeding commenced in Ontario;

(o) against a person out of Ontario who is a necessary or proper party to an action or proceeding properly brought against another person duly served within Ontario;

(p) against a person domiciled or ordinarily resident within Ontario;

(q) for contribution, indemnity or other relief over in respect of claim made in an action or proceeding commenced in Ontario.

(2) Any person not already a party to an action or proceeding may, by leave of the court, be served out of Ontario with any judgment or order or notice to prove claims thereunder. [Amended, O. Regs. 106/75, s. 4; 8/76, s. 1]

RULE 26

26. (1) Service out of Ontario on a defendant by writ under subrule (1) of rule 25 shall be effected by serving upon him a notice according to Form 3, and not the writ of summons itself, and, where the writ is generally endorsed, the statement of claim.

(2) Service out of Ontario on a defendant added by counterclaim shall be effected by serving upon him a notice according to Form 3 together with any other document required to be served on such a party except the summons to such a defendant added by counterclaim.

(3) Service out of Ontario on a third party shall be effected by serving upon him a notice according to Form 3 together with any other document required to be served on such a party except the third party notice.

(4) Service out of Ontario on a respondent to an originating motion shall be effected by serving upon him a notice according to Form 3 together with any other document required to be served on such a party including the notice of motion. [Amended, O. Reg. 106/75, s. 5]

RULE 27

27. Where the party to be served is a defendant by counterclaim, a third party or a respondent to an originating motion, service upon him shall be made not later than ten days after the time the service upon him would be required if he were within Ontario. [Amended, O. Regs. 36/73, s. 3; 106/75, s. 6]

RULE 28

28. (1) Where a party is served out of Ontario but elsewhere in Canada or within one of the United States of America, he shall file an appearance within forty days, excluding the day of service, and, within the same time, he shall deliver his statement of defence or his affidavit of merits, as the case may be.

(2) Where a party is served elsewhere than in Canada or one of the United State of America, he shall file an appearance within sixty days, excluding the day of service, and, within the same time, he shall deliver his statement of defence or his affidavit of merits, as the case may be. [Amended O. Reg. 106/75, s. 7]

RULE 29

29. A party who has been served out of Ontario with a notice according to Form 3 may, within the time limited for appearance and before appearing, apply for an order setting aside the service of such a notice upon him, or in the alternative, for leave to file a conditional appearance. [Amended, O. Reg. 106/75, s. 8]

Saskatchewan

Manner of service

20. Service of a writ of summons shall be effected by serving a copy as follows:

Personal

(a) By personal service anywhere;

On representative of absent defendant

(b) In case any defendant is out of Saskatchewan but has an agent, managing clerk or other representative resident and carrying on his business within the same, service of the writ of summons may be made on such agent, managing clerk or other representative;

Corporation

(c) Every writ of summons issued against a corporation may be served on the president or other head officer or on the cashier, manager, treasurer, secretary, clerk, agent or other representative by whatsoever name or title he be known of such corporation or of any branch or agency thereof in Saskatchewan; and every person who within Saskatchewan transacts or carries on any business of or for any corporation whose chief place of business is without Saskatchewan shall for the purpose of being served with a writ of summons in an action against or at the suit of such corporation be deemed the agent thereof; or the same may be served in the manner provided by The Companies Act.

ORDER IV

SERVICE OUT OF THE JURISDICTION

Service ex juris without order

27. (1) Service of a writ of summons on a defendant out of the jurisdiction may be effected without order whenever:

(a) The whole subject matter of the action is land situate within the jurisdiction, with or without rents or profits; or S. 27(1)a.

(b) Any act, deed, will, contract, obligation or liability affecting land or hereditaments situate within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action; or S. 27(1)b. [E.O. 11, r. 1, (b).]

(c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or S. 27(1)c. [E.O. 11, r. 1 (c).]

(d) The action is for the administration of the estate of any deceased person who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument of which the person to be served is a trustee which ought to be executed according to the law of Saskatchewan; or S. 27(1)d. [E.O. 11, r. 1 (d).]

(e) The action is for the recovery of any debt contracted within the jurisdiction or is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction or is founded on a tort committed within the jurisdiction; or S. 27(1)e. [E.O. 11, r. 1 (e).] and [E.O. 11, r. 1 (ee).]

(f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed whether damages are or are not also sought in respect thereof; or S. 27(1)f. [E.O. 11, r. 1 (f).]

(g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. S. 27(1)g. [E.O. 11, r. 1 (g).]

Statement of claim to show grounds

(2) Save in respect to actions brought under the provisions of order XL, every statement of claim served out of the jurisdiction without leave, shall state specifically upon which of the above grounds it is claimed that service is permitted under this rule. S. 27(2).

Time for appearance

28. In every case in which a defendant is outside the jurisdiction of the court, the time for the appearance by such defendant, after the service of such writ, shall be, within twenty days in the case of a defendant residing anywhere within Canada; within twenty-five days in the case of a defendant residing in the United States of America; and within thirty days in the case of a defendant residing elsewhere; provided that when issuing the writ the local registrar may, if in his opinion the circumstances of the case so require, extend the time for appearance to such writ by any defendant or defendants. The court may on ex parte application order the time for appearance to be shortened. S. 28.

Service ex juris by leave

29. Service of a writ of summons on a defendant out of the jurisdiction may be allowed by the court whenever:

(a) The action is upon a foreign judgment and it is proved to the satisfaction of the court that the defendant has assets within the jurisdiction; or S. 29a.

(b) The action is for alimony or upon a contract or judgment not within paragraphs b and e of rule 27 or paragraph a hereof, and the defendant has assets in the jurisdiction of the value of $200 at least which may be rendered liable for the satisfaction of the judgment in case the plaintiff should recover judgment in the action; but in such case if the defendant does not appear the court shall require the plaintiff before obtaining judgment to prove his claim in such manner as may seem proper. S. 29b.

Application for leave

30. Every application for leave to serve a writ of summons on a defendant out of the jurisdiction under rule 29 shall be before writ issued, and be supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action and showing in what place or country such defendant is or probably may be found, and the grounds upon which the application is made, and may be made ex parte. S. 30.

Setting aside writ

31. Application may be made by a defendant to set aside a writ of summons served outside the jurisdiction without entering an appearance thereto and on such application if it appears to the court that such action should not have been commenced under this order, the court shall set aside the writ and the service thereof so far as such defendant is concerned and may order the plaintiff to pay the costs of such defendant on a solicitor and client basis. S. 31.

Saskatchewan Consumer Products Warranties Act, S.S. 1976-7 c. 15.

Service of documents

32. In disputes arising under this Act, any notice, document or legal process may be served on a manufacturer, retail seller or warrantor:

(a) where the manufacturer, retail seller or warrantor is a corporation:

(i) and has no registered office in Saskatchewan, by sending it by registered mail to the address of the corporation as shown on the receipt or other printed matter given to the consumer before or at the time of sale and, where the corporation is a manufacturer and its address is not shown on any receipt or printed matter given to the consumer, by sending it by registered mail to the retail seller whose place of business shall be deemed to be the registered office of the manufacturer;

(ii) by leaving it at, or sending it by registered mail to, the registered office of the corporation;

(iii) by personally serving any director, officer, receiver-manager or liquidator of the corporation; or

(iv) by personally serving any attorney required to be appointed by an extra-provincial corporation registered in Saskatchewan pursuant to The Companies Act;

(b) where the manufacturer, retail seller or warrantor is not a corporation:

(i) by leaving it at, or sending it by registered mail to, his or its place of business and, where he or it carries on business at more than one place of business, by leaving it at, or sending it by registered mail to, any of his or its places of business; or

(ii) by personally serving any employer or employee at his or its place of business;

and service made in accordance with this section shall be good and sufficient service.

Jurisdiction

33. (1) Subject to any regulations made by the Lieutenant Governor in Council pursuant to section 37, consumers, persons mentioned in subsection (1) of section 4 and persons mentioned in section 5 who buy or use consumer products in Saskatchewan, and manufacturers, retail sellers or warrantors who carry on business in Saskatchewan, are subject to the provisions of this Act and to the jurisdiction of the courts of Saskatchewan.

(2) For the purposes of this Act, a manufacturer, retail seller or warrantor shall be deemed to carry on business in Saskatchewan if one or more of the following conditions are met:

(a) he holds title to land in Saskatchewan or any interest in land in Saskatchewan for the purposes of carrying on business in Saskatchewan;

(b) he maintains an office, warehouse or place of business in Saskatchewan;

(c) he is licensed or registered under any statute of Saskatchewan entitling him to do business or to sell securities of his own issue;

(d) his name and telephone number are listed in a current telephone directory and the telephone is located at a place in Saskatchewan for the purposes of carrying on business in Saskatchewan;

(e) an agent, salesman, representative or other person conducts business in Saskatchewan on his behalf;

(f) he directly or indirectly markets consumer products in Saskatchewan; or

(g) he otherwise carries on business in Saskatchewan.

## II. Reciprocal Enforcement Legislation

### Uniform Law Conference of Canada Model Act

AN ACT TO FACILITATE THE RECIPROCAL ENFORCEMENT OF JUDGMENTS

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of....., enacts as follows:

Short title

1. This Act may be cited as "The Reciprocal Enforcement of Judgments Act."

Interpretation

2. (1) In this Act,

"judgment"

(a) "judgment" means a judgment or order of a court in a civil proceeding, whether given or made before or after the commencement of this Act, whereby a sum of money is made payable, and includes an award in an arbitration proceeding if the award, under the law in force in the state where it was made, has become enforceable in the same manner as a judgment given by a court in that state, but does not include an order for the periodical payment of money as alimony or as maintenance for a wife or former wife or reputed wife or a child or any other dependant of the person against whom the order was made;

"judgment creditor"

(b) "judgment creditor" means the person by whom the judgment was obtained, and includes his executors, administrators, successors, and assigns;

"judgment debtor"

(c) "judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the state in which it was given;

"original court"

(d) "original court" in relation to a judgment means the court by which the judgment was given;

"registering court"

(e) "registering court" in relation to a judgment means the court in which the judgment is registered under this Act.

(2) All references in this Act to personal service mean actual delivery of the process, notice, or other document, to be served, to the person to be served therewith personally; and service shall not be held not to be personal service merely because the service is effected outside the state of the original court.

Application for registration of judgment

3. (1) Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to the.....Court (name of appropriate court in province) within six years after the date of the judgment to have the judgment registered in that court, and on any such application the court may order the judgment to be registered.

Application ex parte

(2) An order for registration under this Act may be made ex parte in any case in which the judgment debtor:

(a) was personally served with process in the original action; or

(b) though not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court,

and in which, under the law in force in the state where the judgment was made, the time within which an appeal may be made against the judgment has expired and no appeal is pending or an appeal has been made and has been disposed of.

Certificate from original court required

(3) In a case to which subsection (2) applies, the application shall be accompanied by a certificate issued from the original court and under its seal and signed by a judge thereof or the clerk thereof.

Form of certificate

(4) The certificate shall be in the form set out in the Schedule, or to the like effect, and shall set forth the particulars as to the matters therein mentioned.

Notice of application in other cases

(5) In a case to which subsection (2) does not apply, such notice of the application for the order as is required by the rules or as the judge deems sufficient shall be given to the judgment debtor.

Conditions of registration

(6) No order for registration shall be made if the court to which application for registration is made is satisfied that: (Amendment, 1967)

(a) the original court acted either

(i) without jurisdiction under the conflict-of-laws rules of the court to which application is made, or

(ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor; or

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the state of that court or had agreed to submit to the jurisdiction of that court; or

(d) the judgment was obtained by fraud; or

(e) an appeal is pending or the time within which an appeal may be taken has not expired; or

(f) the judgment was in respect of a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court; or

(g) the judgment debtor would have a good defence if an action were brought on the judgment.

Method of registration

(7) Registration may be effected by filing the order and an exemplification or a certified copy of the judgment with the (proper officer) of the court in which the order was made, whereupon the judgment shall be entered as a judgment of that court.

Jurisdiction to issue certificate

4. Where the original court is a court in the Province (or Territory) of.....(insert name of enacting province or territory) that court has jurisdiction to issue a certificate for the purposes of registration of a judgment in a reciprocating state.

Conversion to Canadian currency

5. Where a judgment sought to be registered under this Act makes payable a sum of money expressed in a currency other than the currency of Canada, the registering court, or, where that court is the (Supreme) Court, the (registrar) of that court, shall determine the equivalent of that sum in the currency of Canada on the basis of the rate of exchange prevailing at the date of the judgment in the original court, as ascertained from any branch of any chartered bank; and the registering court or the (registrar), as the case may be, shall certify on the order for registration the sum so determined expressed in the currency of Canada; and, upon its registration, the judgment shall be deemed to be a judgment for the sum so certified.

Where judgment is in a language other than (English)

6. Where a judgment sought to be registered under this Act is in a language other than the (English) language, the judgment or the exemplification or certified copy thereof, as the case may be, shall have attached thereto for all purposes of this Act a translation in the (English) language approved by the court, and upon such approval being given the judgment shall be deemed to be in the (English) language.

Effect of registration

7. Where a judgment is registered under this Act,

(a) the judgment, from the date of the registration, is of the same force and effect as if it had been a judgment given (or entered) originally in the registering court on the date of the registration and proceedings may be taken thereon accordingly, except that where the registration is made pursuant to an ex parte order, no sale or other disposition of any property of the judgment debtor shall be made under the judgment before the expiration of the period fixed by clause (b) of subsection (1) of section 8 or such further period as the registering court may order;

(b) the registering court has the same control and jurisdiction over the judgment as it has over judgments given by itself; and

(c) the reasonable costs of and incidental to the registration of the judgment, including the costs of obtaining an exemplification or certified copy thereof from the original court and of the application for registration, are recoverable in like manner as if they were sums payable under the judgment if such costs are taxed by the proper officer of the registering court and his certificate thereof is endorsed on the order for registration.

Ex parte orders

8. (1) Where a judgment is registered pursuant to an ex parte order,

(a) within one month after the registration or within such further period as the registering court may at any time order, notice of the registration shall be served upon the judgment debtor in the same manner as a (writ of summons or statement of claim) is required to be served; and

(b) the judgment debtor, within one month after he has had notice of the registration, may apply to the registering court to have the registration set aside.

(2) On such an application the court may set aside the registration upon any of the grounds mentioned in subsection (6) of section 3 and upon such terms as the court thinks fit.

Application for garnishment order

9. (1) At the time of, or after, making an application under section 3, the applicant may further apply, ex parte, to the registering court for an order that all debts, obligations, and liabilities owing, payable, or accruing due to the judgment debtor from such person as may be named in the application be attached.

Making of garnishing order

(2) A judge of the registering court, upon considering the application for registration of the judgment and the certificate of the original court accompanying it, and upon production of such further evidence as he may require, may, if he deems it proper, make the order mentioned in subsection (1); and the order when made shall be deemed to be a garnishment order before judgment, and the rules of the registering court with respect to such garnishment orders shall apply thereto.

Note: -- The inclusion of section 9 to be optional in each adopting province; and, if adopted, the wording to be varied to suit the procedure in the courts of the province.

Rules of practice

10. Rules of court may be made respecting the practice and procedure, including costs, in proceedings under this Act; and, until rules are made under this section, the rules of the registering court, including rules as to costs, mutatis mutandis, apply. (This section to be changed to suit the rule-making procedures in the province.)

Exercise of powers

11. Subject to the rules of court, any of the powers conferred by this Act on a court may be exercised by a judge of that court.

Reciprocating jurisdictions establishment

12. (1) Where the Lieutenant-Governor in Council is satisfied that reciprocal provisions will be made by a state in or outside Canada for the enforcement therein of judgments given in (name of province), he may by order declare it to be a reciprocating state for the purposes of this Act.

Dis-establishment

(2) The Lieutenant-Governor in Council may revoke any order made under subsection (1) and thereupon the state with respect to which the order was made ceases to be a reciprocating state for the purposes of this Act.

Saving

13. Nothing in this Act deprives a judgment creditor of the right to bring action on his judgment, or on the original cause of action,

(a) after proceedings have been taken under this Act; or

(b) instead of proceeding under this Act,

and the taking of proceedings under this Act, whether or not the judgment is registered, does not deprive a judgment creditor of the right to bring action on the judgment or on the original cause of action.

General purpose

14. This Act shall be so interpreted as to effect its general purpose of making uniform the law of the provinces that enact it.

Variations in Provincial Legislation

The model Reciprocal Enforcement of Judgments statute (hereinafter referred to as "Model") as drafted by the Uniform Law Conference of Canada has been implemented in the nine common law provinces of Canada with the following minor variations:

Alberta:

1. The 1967 amendment of s. 3(6) of the Model Act was not incorporated into the Alberta statute. Instead, s. 3(6) of the Alberta Reciprocal Enforcements of Judgments Act reads as follows:

   > No order for registration shall be made if it is shown by the judgment debtor to the court to which application for registration is made that....

2. There is no provision in the Alberta statute equivalent to s. 4 in the Model Act setting out the jurisdiction of the court to issue a certificate.

3. The Alberta statute contains no section regarding the application and making of a garnishment order as in s. 9 of the Model Act.

4. There is no general purpose provision (s. 14 of the Model Act) in the Alberta statute.

British Columbia:

1. The British Columbia enactment contains a provision which is not present in the statute drafted by the Uniform Law Conference:

s. 3(8) Where a judgment contains provisions for the payment of a sum of money and also contains provisions with respect to other matters, the judgment may be registered under this Act only in respect of those provisions for the payment of money. (1975 c. 4 s. 14).

Manitoba:

1. The Manitoba statute contains two provisions which are not included in the Model Act:

Judgment containing registerable and unregistrable provisions:

3(8) Where, on an application for registration of a judgment it appears to the court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that, if they had been contained in a separate judgment, that judgment could properly be registered under this Act, the judgment in respect of which the application is made may be registered in respect of those provisions but not in respect of any other provisions contained therein; and the court may determine which of the provisions of the judgment are registerable and which are not.

Court to which application to be made.

3(9) Where the sum payable under the judgment would have been within the jurisdiction of a County Court if action had been brought therefor in the province, the application shall be made to a County Court; in other cases the application shall be made to Her Majesty's Court of Queen's Bench for Manitoba.

S.M., 1961 (1st Sess.), c. 30, s. 3; am.

New Brunswick:

1. Aside from the definition section, the opening paragraphs of the New Brunswick statute differ from those of the Model Act. The New Brunswick statute does not include a definition of personal service as in s. 2(2) of the Model and section s. 2(2) regarding ex parte applications is different than the ex parte provision (s. 3(2)) in the Model:

   2(2) Where the judgment debtor was not personally served with process in the original action or did not appear or defend or otherwise submit to the jurisdiction of the original court, reasonable notice of the application shall be given to him but in all other cases the order may be made ex parte.

2. The "conditions of registration" section in the New Brunswick Act is also different than the Model equivalent providing simply:

   3 No judgment shall be ordered to be registered under this Act if it is shown to the registering court that:

   (a) the judgment debtor has a defence under section 5 of the Foreign Judgments Act, or

   (b) the judgment debtor would have a good defence if an action were brought on the original judgment. R.S., c. 192, s. 3.

3. The New Brunswick statute does not include a provision regarding conversion to Canadian currency (s. 5 of the Model) or a provision regarding judgments rendered in a language other than English (s. 6 of the Model). As well, the New Brunswick statute does not include a provision covering the making of garnishment orders (as in s. 9 of the Model).

4. Finally, there is no general purpose provision in the New Brunswick statute.

Newfoundland:

1. s. 3(6) of the Newfoundland Act is not consistent with the amendment to the Model Act in 1967 and thus reads like the Alberta section 3(6):

> No order for registration shall be made if it is shown by the judgment debtor to the court to which application for registration is made that....

Nova Scotia:

1. The Nova Scotia Act contains a section regarding registerable and unregisterable provisions (as does the Manitoba Act) which is not included in the Model:

> (6) Where, on an application for registration of a judgment it appears to the court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that, if they had been contained in a separate judgment, that judgment could properly be registered under this Act, the judgment in respect of which the application is made may be registered in respect of those provisions but not in respect of any other provisions contained therein; and the court may determine which of the provisions of the judgment are registerable and which are not.

Ontario:

1. The Ontario Act includes no provision setting out the meaning of personal service as in s. 2(2) of the Model.

2. The Ontario Act requires that reasonable notice be given in all cases where personal service was not effected as follows:

Notice of application to register

> S. 2(2) Reasonable notice of the application to register shall be given to the judgment debtor in all cases in which he was not personally served with process in the original action and did not appear or defend or otherwise submit to the jurisdiction of the original court, but in all cases the order may be made ex parte.

3. The Ontario Act does not contain a section regarding conversion to Canadian currency (s. 5 of the Model); judgment in a language other than English (s. 6 of the Model); or the making of a garnishment order (s. 9 of the Model).

Prince Edward Island:

1. The P.E.I. Reciprocal Enforcement of Judgments Act is identical to the Model drafted by the Uniform Law Conference.

Saskatchewan:

1. The Saskatchewan statute is identical to the Model except that it includes a reasonable notice for ex parte applications provision (s. 3(4)) like the Ontario section noted above and fails to include a provision regarding garnishment.

Concordance of Reciprocal Enforcement Legislation in the Nine Common Law Provinces

| Model Section No. | Alberta | B.C. | Manitoba | New Brunswick | New-foundland | Nova Scotia | Ontario | P.E.I. | Saskatchewan |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 1 | 1 | 1 | none | 1 | 1 | none | none | 1 |
| 2 | 2 | 2 | 2 | 1 / no s. 2(2) | 2 | 2,3 | 1 / no s. 2(2) | 1 | 2 / no s. 2(2) |
| 3 | 3 | 3 | 3 | 2,3 (not identical) | 3 | 4 | 2,3 (not identical) | 2 | 3,4 (not identical) |
| 4 | none | 4 | 4 | none | 4 | none | none | 3 | none |
| 5 | 4 | 5 | 5 | none | 5 | 5 | none | 4 | none |
| 6 | 5 | 6 | 6 | none | 6 | 6 | none | 5 | none |
| 7 | 6 | 7 | 7 | 4 | 7 | 7 | 4 | 6 | 5 |
| 8 | 7 | 8 | 8 | 5,6 | 8 | 8 | 5,6 (not identical) | 7 | 6,7 (not identical) |
| 9 | none | none | 9 | none | 9 | 9 | none | 8 | none |
| 10 | 8 | 9 | 10 | 7 | 10 | 10 | 7 | 9 | 8 |
| 11 | 9 | 10 | 11 | 1(2) | 11 | none | 1(2) | 10 | 1(2) |
| 12 | 10 | 11 | 12 | 8 | 12 | 11 | 8 | 11 | 9 |
| 13 | 11 | 12 | 13 | 9 | 13 | 12 | 9 | 12 | 10 |
| 14 | none | 13 | 14 | none | none | none | none | none | 11 |

15 : effect of repeal of former act

13 : rules made pursuant to s. 10(1) are regulations

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