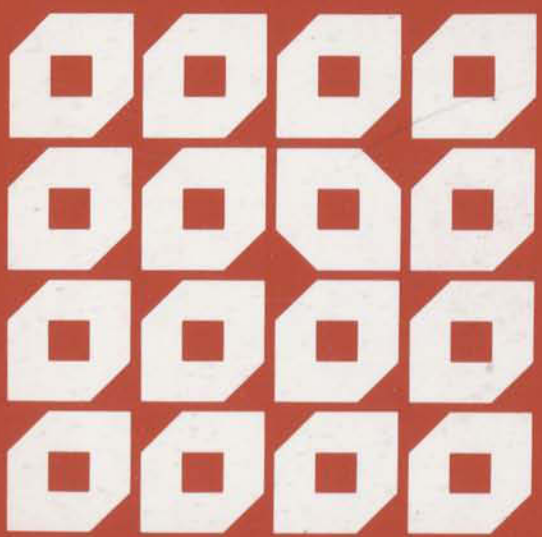
Interprovincial Product Liability Litigation:

Jurisdiction, Enforcement and Choice of Law in Quebec Private International Law

David Appel



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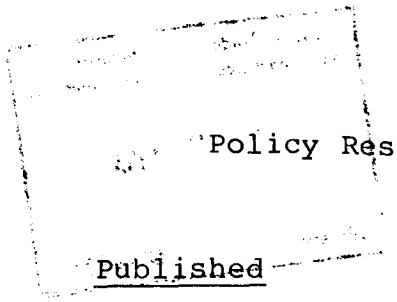
David Appel

Policy Research, Analysis and Liaison Directorate
Policy Coordination Bureau
Consumer and Corporate Affairs Canada



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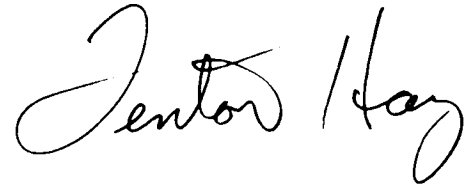
FOREWORD

A Quebec consumer who buys a defective product that was manufactured outside Quebec faces some complex problems in trying to obtain redress. Conversely, a consumer from outside Quebec who buys a defective product made in Quebec will confront certain hurdles in obtaining redress from the Quebec manufacturer.

Decisions may have to be made in such situations as to whether Quebec courts have jurisdiction, whether Quebec or other provincial or foreign laws apply, or whether judgements obtained outside Quebec can be enforced in Quebec.

In this study, David Appel, a lawyer who has practised in Quebec, discusses these problems in the context of the civil law of Quebec.

It should be noted that this study was written as a companion report to an earlier study entitled Interprovincial Product Liability Litigation: Jurisdiction, Enforcement and Choice of Law by Robert J. Sharpe which dealt with these same problems from the perspective of the common law provinces and which was published by Consumer and Corporate Affairs Canada in 1981.



Dr. Fenton Hay
Director General
Policy Research, Analysis
and Liaison Directorate

SUMMARY

This study deals with interprovincial litigation in the area of product liability. Such interprovincial litigation may arise in two ways:

A Quebec consumer buys, in Quebec or elsewhere in Canada, a defective product which is manufactured or distributed by someone with no place of business or assets in Quebec. When does the consumer have a right to institute proceedings in a Quebec court? What jurisdiction does a Quebec court have over a non-Quebec defendant?

A non-Quebec consumer has obtained judgement from another province against a manufacturer or distributor who has assets, a place of business or a residence in Quebec. When can the consumer obtain execution of this judgement in Quebec courts?

In each of the two situations above, a third problem arises, that of the rules of choice of law: what law applies to an action instituted in Quebec by a consumer?

The problems raised are far from academic. A Quebec consumer who has purchased a product made or distributed by an Ontario company will want to bring his action in Quebec. If he cannot do so because the Quebec court lacks jurisdiction, he may have to waive his right of action in view of the cost involved. Similarly, although the consumer has a right to bring his action in a Quebec court, he may waive that right if he knows in advance that an Ontario court will not recognize the judgement.

Consumers in the other provinces also face the same problems vis-à-vis Quebec. For this reason, when solutions to these problems are sought, considerations affecting all of Canada must be borne in mind.

It is clear that a Canadian consumer who must waive a right of action because he would have to exercise it in a foreign province, or because any judgement which he may obtain in his own province might not be executed in another province, will feel deprived and disillusioned by our system of justice.

The existing judicial machinery is inadequate and involves enormous expenditure compared to the benefits which the consumer hopes to receive. This is particularly unacceptable in light of the fact that the distribution and sale of consumer products takes place on a national scale, where-

as at the judicial level each Canadian province functions as a quasi-sovereign country.

This paper examines each of the factors as they exist in Quebec at the present time, and suggests certain proposals for the modernization of the law.

The first consideration involves the international jurisdiction of Quebec courts, that is, their jurisdiction over foreign defendants. Currently, Quebec courts have jurisdiction if:

- the defendant resides or owns property in Quebec;
- the entire cause of action arose there;
- the contract was concluded there; or
- the action was served on the defendant personally in Quebec.

These rules are outdated, and are very little improved by the draft Civil Code revision.

The second consideration involves the recognition by a Quebec court of a foreign judgement, so that the judgement can be executed in Quebec. The consumer is required to bring a new action in Quebec, seeking recognition and enforcement of his judgement. Such recognition would be given when the Quebec defendant contested the original action or when it was served on him personally; otherwise, the defendant is entitled to contest the application for recognition filed in Quebec.

The final problem involves the law which the Quebec court will apply in arriving at its decision. Often, the court will have to interpret a contract in accordance with the law of another province, which may be very different from that of Quebec.

The following recommendations are made with a view to ensuring that the rules in this area can more adequately meet modern requirements.

1. Each Canadian province should acquire jurisdiction over the near vendor. A consumer should have the right to bring an action in his own province against a near vendor, even if the latter has no place of business or assets in that province.

2. The near vendor would be a manufacturer or distributor who brought in his goods in the normal course of business in Canada. The tests to determine who was a near vendor would be in accordance with the observations made in Moran v. Pyle.

3. The law applicable to such litigation would be that of the province in which the consumer purchased the product.

4. Any judgement rendered would almost automatically be recognized by the court in the province of the near vendor, thus keeping formalities and costs to a minimum.

To effect the foregoing proposals, the provinces could follow the example of the United States and allow the federal government to draft a uniform code to which each province would subscribe. Alternatively, the provinces could conclude reciprocal agreements by which each would undertake to apply identical rules regarding the jurisdiction of the courts, the recognition of foreign judgements and the law applicable to litigation. The second alternative might be better suited to the present political situation in Canada. In any case, it would be desirable for the federal government to propose changes in this area and to ask the provinces to consider and effect these changes as they saw fit.

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INTRODUCTION

The purpose of this study is to complement the study prepared by Professor Robert J. Sharpe, dealing with interprovincial litigation and product liability.[1] The Sharpe study dealt with the question in the context of common law; this study will consider the same problems in the context of civil law in the province of Quebec. Because Quebec law in this field is very similar to common law, it would be useful for the reader to examine the Sharpe study before reading this one.

Sharpe gives an example that includes all the elements of the problem. It may be summarized as follows:

Jean, a resident of Quebec, purchases a stove in Quebec. The manufacturer of the stove is an Ontario company which has no place of business, assets or agent outside Ontario but distributes its products across Canada. After purchasing the stove, Jean realizes that it is defective and wants to sue the Ontario company for the purchase price.

The first problem is to decide upon the province in which the suit is to be brought. Jean would, of course, prefer to litigate in Quebec, but this raises the question of jurisdiction of the Quebec court to hear the case. The next question to be addressed is whether the judgement will be recognized and enforceable outside of Quebec. A further matter to be decided is the appropriate law to be applied in the event a Quebec court does accept jurisdiction.

If the example is changed and Jean becomes an Ontario consumer who buys a stove produced by a Quebec manufacturer with no place of business, assets or agent in Ontario, the same problem arises in reverse. The Ontario consumer wants to bring an action in Ontario. In this case, assuming that he obtains a judgement in his favour, the question arises as to whether the Ontario judgement will be recognized and its enforcement authorized in Quebec.

An aggrieved consumer will be frustrated and bitter if he has no effective remedy against the manufacturer or distributor of a product. If all means of redress seem use-

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1. See Robert J. Sharpe, Interprovincial Product Liability Litigation: Jurisdiction, Enforcement and Choice of Law (Ottawa: Consumer and Corporate Affairs Canada, 1981).

less and illusory, the consumer will consider the system of justice inadequate and, indeed, unjust.

Unfortunately, it must be recognized that in Quebec, the rules of procedure in this area are insufficient and operate to the disadvantage of the injured consumer. The present legal mechanisms are deficient and the consumer is faced with formidable barriers in seeking redress. Moreover, because the costs are enormous compared to the potential benefits, the consumer often will not avail himself of a valid recourse.

In practice, the consumer often must undertake two separate actions to obtain the desired result. He must first obtain a judgement in his own province, then a second one in the province where the judgement is to be enforced. Therefore, it will cost him twice as much as it would to proceed against a manufacturer in his own province.

If the consumer tries to avoid this duplication by bringing the original action in the manufacturer's province, there is still a large additional financial burden. The consumer will have travelling expenses between his residence and the province in which the action is brought. There will also be the travelling expenses of witnesses during trial and discovery, as well as lawyers' fees in that province, often at rates that are quite different from those in the consumer's own province. For example, in Quebec, lawyers are entitled to accept contingency fees, while in Ontario the practice is prohibited; this means that in Ontario the Quebec consumer must assume all risks of the action, while in Quebec the risk could have been shared.

An added inconvenience is that the consumer must bring the action in a province in which the rules and methods are different from those with which he is familiar. These unfamiliar rules and methods can easily make him feel insecure. Of course, if the situation were reversed and the foreign manufacturer obliged to appear before a court in the consumer's province, then the manufacturer would face the same problem. The question arises as to which party should be required to carry this additional burden.

Clearly, the present rules of procedure do not meet the needs of a modern economy in a country where the distribution and sale of consumer goods takes place on a national scale. In legal matters, each province acts as a quasi-sovereign country while in economic matters activity is national in nature and provincial boundaries have little practical significance. The illogical and unfair result is

that consumers are encouraged to purchase, in their own provinces, products that are distributed throughout Canada while they are denied a legal recourse that is also nationally recognized.

The Automobile Protection Association (APA) raised this problem in relation to non-Quebec companies selling rustproofing treatments for new cars in Quebec. The APA specifically denounced companies such as DuraCoat, of Ontario, and Rustop, of Nova Scotia, which were selling rustproofing treatments guaranteed for five years or the life of the vehicle, through dealers in Quebec. Between 1972 and 1975, the APA received hundreds of complaints concerning these treatments and the failure of the two companies to honour their guarantees. Several Quebec consumers obtained judgements in Quebec courts against these companies; unfortunately, these judgements had no value in Quebec because the companies had no assets there. In this situation, the Quebec consumers had no effective remedy; most were unwilling to bring an action outside Quebec for an amount between $200 and $500. Indeed, considering the costs that would be incurred, why should they bring an action in Niagara Falls or Halifax? These cases clearly demonstrate that the present system gives a definite advantage to the vendor who is entirely absent from Quebec, when the amount in dispute is small. These cases also emphasize that the rules of the game must be changed in order to adjust them to the present situation.

In light of the above examples, this study shall examine the Quebec rules concerning the jurisdiction of the courts and the recognition and enforcement of foreign judgements, as well as the new rules proposed by the Civil Code Revision Office. Finally, the author shall present some proposals of his own.

Chapter I

INTERNATIONAL COMPETENCE OF QUEBEC COURTS -- JURISDICTION

In the previously mentioned example of the Quebec consumer who has purchased a defective stove that was manufactured or distributed by an Ontario company, this consumer would undoubtedly be very much surprised to learn that a Quebec court could decline to hear the case for want of jurisdiction. In the mind of the consumer, the court in his province should automatically have jurisdiction, since the product was purchased in Quebec by a Quebecer.

This is not, however, the case. Quebec courts do not inevitably have jurisdiction over defendants outside Quebec. The Code of Civil Procedure (CCP) of the province of Quebec sets out rules for determining the jurisdiction of a domestic court over foreigners. There is a considerable body of case law interpreting these rules in a manner generally consistent with common law principles. The examples below will demonstrate, however, that Quebec courts have been reluctant to accept jurisdiction.

General Principles Concerning International Competence of Quebec Courts

The CCP was revised in 1965. Despite this revision, the sections dealing with international jurisdiction of the courts follow very closely the provisions of the former Code of Procedure, which dates from 1897. Accordingly, there still exist obsolete rules dating from the nineteenth century, although the circumstances to which they apply have changed dramatically in recent years.

The primary source of the rules of private international law in questions of jurisdictional competence is CCP, Article 68.[1]

> 68. Subject to the provisions of articles 70, 71, 74 and 75, and notwithstanding any agreement to the contrary, a purely personal action may be instituted:

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1. Code of Civil Procedure, L.R.Q. 1977, c. C-25.

> (1) Before the court of the defendant's real domicile or, in the cases contemplated by article 85 of the Civil Code, before that of his elected domicile.
>
> If the defendant has no domicile in Québec but resides or possesses property therein, he may be sued before the court of his ordinary residence, before the court of the place where such property is situated, or before the court of the place where the action is personally served upon him;
>
> (2) Before the court of the place where the whole cause of action has arisen; or, in an action for libel published in a newspaper, before the court of the district where the plaintiff resides if the newspaper has circulated therein;
>
> (3) Before the court of the place where the contract which gives rise to the action was made.
>
> A contract giving rise to an obligation to deliver, negotiated through a third party who was not the representative of the creditor of such obligation, is deemed to have been made at the place where the latter gave his consent.

This Article has been interpreted as relating to "l'ordre public" (public order). Thus the words "notwithstanding any agreement to the contrary"[2] have been interpreted as absolutely precluding contracting out of the terms of the Article.

There are, however, certain exceptions to CCP, Article 68, set out in Articles 70 to 75. For the purposes of this study, the relevant Article is Article 75, which provides that if the action is brought against several defendants domiciled in different districts, it may be brought in a court in which any one of the defendants may be summoned.

The wording could lead to a belief that, for example, a consumer who has bought a car manufactured by a foreign manufacturer from a Quebec dealer could bring an action against both parties in a Quebec court, even if the manufacturer were completely outside the court's jurisdiction. However, this is not the case, since a judgement

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2. Assurance du Crédit v. Dell, [1959] C.S. 309.

of the Quebec Court of Appeal has decided that the word "district" as it appears in Article 75 has no international or extraprovincial aspect and refers only to a judicial district within Quebec.[3] According to Sharpe, this appears to be contrary to the position taken by the courts of common law provinces. Those courts appear to have, in effect, accepted the first interpretation: if one defendant falls within the jurisdiction of a court, the other defendant also becomes subject to that jurisdiction.

As a result of the Quebec Court of Appeal's very restrictive interpretation, CPP, Article 68 is the only jurisdictional provision on which a Quebec consumer can rely. The extent of the competence of Quebec courts is, therefore, severely limited.

In Personam Jurisdiction of Quebec Courts Pursuant to CPP, Article 68

According to Article 68, a Quebec court will have jurisdiction in the following cases:

1. if the defendant is domiciled in Quebec or has elected domicile in Quebec;

2. if the defendant is a resident of Quebec;

3. if the defendant has property in Quebec;

4. if the defendant is personally served while he is present in Quebec;

5. if the whole cause of action arose in the province of Quebec;

6. if the contract which gives rise to the claim was concluded in Quebec.

Domicile of the defendant. "Domicile" means the intention of the defendant to maintain Quebec domicile and the fact of doing so. The domicile of a corporation is at its head office.[4] The courts have sanctioned election of domicile

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3. Kondylis v. Greyhound Lines of Canada Ltd., [1973] R.P. 241.

4. Dave McLellan v. Stevenson, [1963] C.S. 16. This case contains a thorough study of the law and the cases relevant to this point.

made by foreigners in order to submit their actions to the courts of Quebec.[5]

Possession of property in Quebec. As stated above, a Quebec court has jurisdiction over a foreign defendant if the defendant possesses property in Quebec. What does this requirement mean? In a leading decision, the Court of Appeal decided that the simple possession of an office, with the minimum of goods to furnish it, is insufficient. As stated by Casey J. in First National Bank of Boston v. La Sarchi Co.:

> Thus our problem is to decide whether the proof made establishes this essential fact that defendant has at the institution of the action, property of the type that could have been seized in satisfaction of the judgement that plaintiff seeks.[6]

Thus the property of a defendant must be real, tangible and sufficient, and must exist not only at the date the writ is issued but also when it is served.[7] This constitutes a serious restriction on the jurisdiction of a Quebec court.

Moreover, the word "property" does not carry any restriction according to the case law. It can include shares in a corporation, choses in action, and money deposited in trust.[8]

Location where the whole cause of action has arisen. In a definitive judgement of the Privy Council, Trower and Sons

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5. Alimport (Empresa Cubana Importadora de Alimentos) v. Victoria Transport Ltd. (1977), 2 S.C.R. 858.

6. The First National Bank of Boston v. La Sarchi Co., [1964] B.R. 801.

7. Walter S. Johnson, Conflict of Laws, 2d ed. (Montreal: Wilson et Lafleur, 1962), p. 1033.

8. McCurry v. Reid (1900), 3 R.P. 165; Porter v. Canadian Rubber Co. of Montreal (1909), 18 B.R. 534; Deshaies v. Deshaies, [1963] R.P. 165; Ross et al. v. Tsmura, [1972] C.S. 194; Southern Pacific Co. v. M. Botner and Sons Inc., [1973] R.P. 97; West India Trading Co. Inc. et al. v. Saguenay Shipping Ltd. et al., [1975] R.P. 403.

Ltd. v. Ripstein,[9] the test for determining where the whole cause of action arose is as follows:

> A cause of action is the entire set of facts and circumstances that give rise to an enforceable claim. The phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment.[10]

According to this interpretation, all factors which give rise to an action in contract or tort and which are essential to the existence of the cause of action must take place in Quebec. This means that if a product is made outside Quebec by a manufacturer with no assets or place of business in Quebec, a consumer cannot bring action against the manufacturer, since the manufacture of the product is one of the elements of the "whole" cause of action.

Thus, the very restrictive judicial interpretation of the words "the whole cause of action" reduces the effective scope of Article 68 to almost nothing.[11] In light of this judicial interpretation, it must be concluded that Article 68 provides little assistance to the Quebec consumer against a vendor or manufacturer outside Quebec.[12]

Place where the contract was made. In order to determine the place where the contract was made, it is often necessary to know the date of signing, particularly for contracts concluded by correspondence or for contracts between extrapro-

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9. Trower and Sons Ltd. v. Ripstein (1944), 4 D.L.R. 497, [1944] A.C. 254.

10. Johnson, Conflict of Laws, p. 1025.

11. Landry v. Hurdman (1903), 5 R.P. 273; Hamel v. Stapleton (1903), 9 R.J. 365; Vipond v. Grimond (1893), 3 C.S. 536; Thomas Caya Inc. v. Medenco, [1968] C.S. 15; Péladeau v. Audit Bureau of Circulations, [1966] R.P. 164.

12. The law in this area may have been affected by the decision of the Supreme Court of Canada in Wabasso Ltd. v. The National Drying Machinery Co., no. 81-692, June 22, 1981, handed down after this study was written.

vincial parties. There is a large body of case law determining the place and time a contract is made.[13]

The last paragraph of subsection 3 of Article 68 permits Quebec courts to assume broader international jurisdiction over non-Quebec defendants. The courts have thus interpreted this subsection in a very broad manner.[14]

The Jurisdiction of Quebec Courts Under the Draft Revision of the Civil Code

In 1977, the Civil Code Revision Office prepared a draft revision of the Civil Code.[15] In chapter 3 of book nine, entitled "Private International Law" and concerning conflicts of jurisdictions, the authors dealt specifically with the international competence of Quebec courts.

Article 48 of this draft proposes to replace completely Article 68 of the present CCP by the following:

> 48. In matters involving personal rights of a patrimonial nature, the courts of Québec have general jurisdiction when:
>
> 1. the defendant is domiciled in Québec, or, if the defendant is a legal person, if it was incorporated in Quebec or has its head office, a place of business, or

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13. Magann v. Auger (1902), 31 S.C.R. 186; Charlebois v. Baril, [1928] S.C.R. 88; Timossi v. Palangio (1904), 26 C.S. 70; Paquet v. Balcer (1913), 44 C.S. 36; Théberge v. Girard (1922), 32 B.R. 104; L'Association pharmaceutique de la province de Québec v. The Timothy Eaton Co. (1931), 50 B.R. 482; Les Entreprises P.E.B. Ltée v. Laurion Equipement Ltée, [1974] C.S. 217; the Court held that when a case must receive additional approval in Montreal, the contract is necessarily concluded in Montreal, wherever the common intent occurred.

14. Vallée v. World Plywood and Veneer Co. Ltd., [1966] R.L. 245; Les Éditions Françaises v. Brousseau, [1967] P.R. 211. See also P.A. Crépeau, "La compétence internationale des tribunaux québécois en droit international privé," Revue de droit comparé, 1966:129-45.

15. Civil Code Revision Office, Report on the Quebec Civil Code (Quebec: Éditeur officiel du Québec, 1977), vol. 1, Draft Civil Code.

a branch office for disputes relating to its activities in Québec;

2. the cause of action has arisen in Québec;

3. the parties, by an express choice of forum agreement, have submitted to Québec courts any existing or future dispute between themselves relating to a specific legal relationship; or

4. the defendant has submitted himself to the jurisdiction of Québec courts, either expressly or by contesting on the merits without reservation as to jurisdiction.

It should be noted here that this Article embodies the Hague Convention on Agreements for Choice of Forum.

Article 48 will also include certain improvements to the traditional rules of jurisdiction contained in CCP, Article 68, permitting corporate persons that have only a branch office or place of business in Quebec to be summoned before Quebec courts.

In tort cases, the requirement in CCP, Article 68(2) would be considerably softened by the removal of the word "whole." From now on, a consumer suing a manufacturer as the near vendor on the basis of extracontractual civil liability will not be required to establish that all the elements of the claim arose in Quebec. For example, if a Quebec consumer suffered damages in Quebec because of a defect in his car, the fact that the car was manufactured outside Quebec would not prevent an action from being brought before the Quebec courts. This is certainly a very desirable amendment.

However, Article 48 contains a restriction that does not exist in the present law. Even if the defendant has property in Quebec, the Quebec court could not assume jurisdiction unless there were an additional element that provided it with jurisdiction. It is suggested here that such a restriction is clearly prejudicial to the interests of the Quebec consumer. If the non-Quebec defendant has assets in Quebec, why should he be protected from an action in Quebec? On the contrary, it is submitted that the presence of assets alone should give the consumer the right to bring action, since these assets are the product of business done by the defendant in Quebec.

A New Approach -- Apply the Concept of the "Near Vendor" Manufacturer

As previously discussed, the present law, like the draft law on the international jurisdiction of the courts, hardly meets the present needs of consumers. A solution to many of the problems currently faced might be obtained by applying the concept of the "near vendor" throughout the private international law context in both contract and tort actions. For this reason, the development of Quebec case law with respect to the near vendor will be briefly examined, as well as its usefulness in the area of private international law.

The best example of the near vendor is the manufacturer of consumer goods. The classic case is that of the Quebec consumer who has purchased a car from a dealer whose place of business is in Quebec. The car itself was manufactured or distributed by a non-Quebec company with neither place of business nor assets in Quebec. The problem of jurisdiction per se has never arisen because the manufacturer or distributor has always submitted to the jurisdiction of the Quebec court. The issue has always been, rather, that of the liability of the manufacturer or distributor to the consumer, there being no contractual rights which can be asserted against these parties.

The consumer entered into the contract of purchase with the dealer alone. The dealer ordered the vehicle from the manufacturer or distributor. The car's guarantee, referred to as the conventional guarantee, was given by the manufacturer or distributor, but fulfilled by the dealer.

It may be understood that, in these circumstances, the consumer who finds himself with a defective car will attempt to assert his rights against both the near vendor manufacturer and against the dealer. After all, it is the manufacturer who is mainly responsible for the product and who, therefore, should answer for its defects.

The courts have had to determine the nature of the legal relationship between the consumer and the manufacturer and have thus developed the concept of the near vendor, according to which the manufacturer is equated with the vendor. Using this legal device, it has gradually become possible to impose upon the manufacturer almost the same obligations as those imposed on the vendor himself.

Review of the case law on the near vendor manufacturer. Following the classic decision of the Supreme Court of Cana-

da in Ross v. Dunstall & Emery,[16] the Quebec cases clearly support actions brought against a nonvendor manufacturer for latent defects. Civil Code (CC), Articles 1507 and 1522 require the vendor to warrant the article it sells against all latent defects.

> Article 1522 reads as follows:
>
> The seller is obliged by law to warrant the buyer against such latent defects in the thing sold, and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them.

In the case cited, although no contract existed between Ross, the purchaser, and Emery, the manufacturer, the Supreme Court held that the latter was liable according to the ordinary principle of liability set out in CC, Article 1503. Thus, according to this decision, the purchaser could sue under the contract against the vendor and also sue in tort against the nonvendor manufacturer. Following this decision, the legal presumption of fault in matters of latent defects was extended by the courts to the near vendor manufacturer under Article 1527, which reads as follows:

> If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer.
>
> He is obliged in like manner in all cases, in which he is legally presumed to know the defects.

Recently, these principles have been confirmed in cases involving the sale of automobiles. Provided that the court has jurisdiction, the Quebec consumer can now bring an action against the manufacturer on the statutory warranty against latent defects, even in the absence of a direct contractual relationship.[17]

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16. Ross v. Dunstall & Emery (1921), 62 S.C.R. 293.

17. Rioux v. G.M. Products of Canada Ltd. & Ste-Thérèse Autos Inc., [1971] C.S. 828; Bertrand Godbout v. John Deere Ltée & B.G. Equipment Inc., [1972] C.S. 380.

In Gougeon v. Peugeot Canada Ltée & Belhumeur,[18] the Quebec Court of Appeal decided that there is joint and separate liability, binding both the near vendor manufacturer and the automobile dealer, and that the statutory warranty imposed by the Civil Code with respect to latent defects applies equally against both parties.

In his judgement, Kaufman J. stated:

> The car in question had latent defects; such defects are covered by legal warranty; this warranty binds both the manufacturer and the vendor;...Appellant was not obliged -- nor, indeed, limited -- to seek redress from Peugeot Canada Ltée in virtue of the conventional guarantee which existed.

In Fleury v. Fiat Motors,[19] the Superior Court went even further. In that case, the consumer had brought an action against Fiat Motors only, abandoning his right to sue the dealer who had sold him the car. The defendant had not manufactured the car but was merely the distributor in Canada. The court nevertheless considered that, having accepted that the court had jurisdiction, the distributor was bound by the statutory warranty to the consumer, even in the absence of any contract between them. Thus, although the warranty imposed by the Civil Code appears to apply only when there is a contract between the consumer and the vendor, the court has extended its application as though there were such a contract between the distributor and the consumer. The distributor was thereby treated as if it were the immediate vendor of the car.

This principle has been reaffirmed in the recent decision of the Supreme Court of Canada in General Motors Products of Canada Ltd. v. Kravitz.[20] In this judgement, the Court upheld a direct action against the manufacturer, under the statutory warranty covering latent defects, even in the absence of a contract between Kravitz, the consumer, and General Motors, the company.

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18. Gougeon v. Peugeot Canada Ltée & Belhumeur, [1973] C.A. 824.

19. Fleury v. Fiat Motors (1975), C.S. 1102.

20. General Motors Products of Canada Ltd. v. Kravitz (1979), 1 S.C.R. 790.

The principle has become so well established over the years that Quebec has incorporated it in the new Consumer Protection Act.[21] Sections 53 and 54 of the Act provide a direct recourse for the consumer against the manufacturer, whether the consumer is the original purchaser or has acquired the item subsequently. This recourse is based on sections 37 et seq. of the Act, which prescribe sale of goods warranty obligations. It should be noted that under this Act, "manufacturer" includes the importer or distributor of goods manufactured outside Canada.

Conclusion

The concept of the near vendor could solve many of the problems involved in the jurisdiction of a Quebec court over a defendant who would not, under the present rules, be subject to its jurisdiction. This concept could also be of assistance in other provinces in Canada.

More precisely, Quebec could decide to grant jurisdiction to Quebec courts over all manufacturers and distributors who are near vendors, even if they have no assets, place of business or residence in Quebec.

The consumer would then be entitled to bring an action in Quebec against any manufacturer or distributor included in the definition of near vendor. Thus in the field of consumer law, there would be only one jurisdictional rule conferring international jurisdiction on Quebec courts when the defendant is a near vendor vis-à-vis the consumer.

Who, then, would come within the definition of near vendor? The Supreme Court of Canada decision in Moran v. Pyle is very helpful in that it sets out a test that is appropriate for determining who is a near vendor:

> [W]here 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 reason-

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21. Bill 72, proclaimed December 22, 1978.

> ably 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 the 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 marketplace 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 inter-provincial flow of commerce.[22]

In order to establish the jurisdiction of a Quebec court, the consumer would be required only to establish that the manufacturer or distributor was the near vendor. This could be done by presumption and should not be difficult to prove. For example, the following factors could be taken as proof of intent:

1. Did the manufacturer or distributor sell to other distributors in other provinces?

2. Did the manufacturer or distributor sell to local distributors who, by the very nature of their operation, would resell in other provinces?

3. Did the manufacturer or distributor advertise in other provinces?

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22. Moran v. Pyle (National) Canada Ltd. (1975), 1 S.C.R. 393 at 408-09.

4. Did the manufacturer or distributor produce advertisements aimed at consumers outside his own province?

5. Did the manufacturer or distributor sell to businesses operating on a national scale? (If so, he must have known that his products would be sold outside his own province.)

Chapter II

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS IN QUEBEC

Articles 178 to 180 of the Code of Civil Procedure (CCP) provide a system for recognition and enforcement of foreign judgements in Quebec. These rules are old and in the present context inadequate, if not obsolete.

The Present System

The situation in question is that of a non-Quebecer who has obtained a judgement in his own province against a Quebec defendant. This person wants to enforce the judgement in Quebec, where the debtor has assets. Clearly, recognition of a foreign decision is an essential step towards enforcement: if a Quebec court recognizes the decision, then the enforcement procedure will be available.

Unfortunately, recognition is neither automatic nor guaranteed. In effect, the foreign individual is deemed to have brought a new action before the Quebec court, an action which seeks to have the foreign judgement recognized. Thus, he asks the Quebec court to give judgement against the defendant as a judgement-debtor based upon the decision reached in the foreign proceedings.

A foreign judgement-creditor who has been awarded judgement by a foreign court must satisfy two requirements before the Quebec courts.

The first stage. First, the foreign plaintiff must show that the foreign court had jurisdiction to hear the case. The Quebec courts recognize the authority and jurisdiction of a foreign court if one of the following criteria is met:

1. the Quebec defendant is domiciled or resident in the territory of the foreign court;

2. the cause of action arose in the territory where the foreign court has jurisdiction, and the defendant was served in that foreign jurisdiction;

3. the Quebec defendant has property in the territory

> of the foreign courts, which property is not "illusory."[1]

The Quebec courts have concluded that unless at least one of these conditions is met, a foreign judgement-creditor cannot proceed to have his judgement enforced in Quebec and must begin again as if no action had been brought and no judgement given.[2]

The second stage. Secondly, the foreign plaintiff must establish his right to have the foreign judgement recognized and enforced. At this stage, the Quebec court must decide whether the case should be retried on the merits or whether the court should simply declare the foreign judgement valid and enforceable.

The degree of recognition given to the foreign judgement will depend on the opportunity that was available to the Quebec debtor, in the original action, to present a defence on the merits.

The CCP provides for two levels of protection, depending on whether the foreign plaintiff has a judgement from outside Canada or from another Canadian province.

1. Non-Canadian judgements. CCP, Article 178 governs non-Canadian judgements. It states:

> Any defence which was or might have been set up to the original action may be pleaded to an action brought upon a judgment rendered out of Canada.

This Article originated in old French law.[3] It is completely contrary to the existing rule of common law, which considers a foreign judgement prima facie as being res judicata. Thus CCP, Article 178 says that the defendant can

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1. Stacey v. Beaudin (1886), 9 L.N. 363; Monette v. Lariviêre (1926), 40 B.R. 350, 359.

2. May v. Ritchie (1872), 16 L.C.J. 81; Stacey v. Beaudin (1886), 9 L.N. 363; Howie v. Stanyar, [1944] C.S. 305.

3. Decree of 1629, also known as the Code Marillac, Art. 121. See also: Walter S. Johnson, Conflict of Laws, 2d ed. (Montreal: Wilson et Lafleur, 1962), pp. 766-73.

always revive a case which has been concluded outside of Canada.[4]

Pursuant to Article 178, there are three possible defences against a foreign judgement. The defence must be:

- one which could have been validly and successfully raised when the foreign action was instituted, and not one based on new facts. Ryan v. Pardo[5] and subsequent case law has affirmed this position.[6]

- based on the concept of "public order and morality."[7]

- a denial that the defendant is the defendant in the original action. In that case the foreign creditor must prove, on the weight of the evidence, the identity of the defendant.[8]

However, despite the apparent extent of the right to reopen a case based on a judgement rendered outside Canada, certain restrictions are imposed by Article 1220 of the Civil Code. This will be discussed in a later section.

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4. P.B. Mignault, Le droit civil canadien (Montreal: C. Théoret, 1901), t. 6, p. 103; André Nadeau and Léo Ducharme, Traité de droit civil du Québec, vol. 9 (De la preuve en matières civiles et commerciales) (Montreal: Wilson et Lafleur, 1965), no. 155, p. 450.

Howard Guernsey Mfg. Co. v. King (1894), 5 C.S. 182; Carsley v. Humphrey (1910), 12 R.P. 133; Knox Bros. v. Lingle (1924), 38 B.R. 325; Ryan v. Pardo, [1957] R.L. 321; Toulon Construction Inc. v. Rusco Industries Inc., [1973] R.P. 138.

5. Ryan v. Pardo, [1957] R.L. 321.

6. McDowell v. McDowell, [1954] C.S. 319: the Quebec defendant could not plead changed circumstances; Orsi v. Irving Samuel Inc., [1957] C.S. 209.

7. Johnson, Conflict of Laws, p. 793; Ryan v. Pardo, [1957] R.L. 321.

8 Bentley v. Stock (1898), M.L.R. 4 S.C. 383; Marquette v. Smith (1894), 5 C.S. 376; Chapman v. Gordon (1864), 8 L.C.J. 196; Mignault, Droit civil canadien, t. 5, p. 638.

2. Extraprovincial judgements. Articles 179, 180 and 181 of the Code of Civil Procedure govern judgements rendered in another Canadian province. They state:

> 179. Any defence which might have been set up to the original action may be pleaded to an action brought upon a judgment rendered in any other province of Canada, provided that the defendant was not personally served with the action in such other province or did not appear in such action.
>
> 180. Any such defence cannot be pleaded if the defendant was personally served in such province, or appeared in the original action, except in any case involving the decision of a right affecting immoveables in this province, or the jurisdiction of a foreign court concerning such right.
>
> 181. In any action against a corporation, any service made in another province in conformity with the law thereof is considered as a personal service within the meaning of articles 179 and 180.

Contrary to the system for non-Canadian judgements, judgements rendered by other provincial courts have the force of res judicata, if the specified conditions set out in these Articles are met.[9]

Even a defence based on the concepts of public order and morality will be rejected: Quebec courts have, for example, ordered enforcement of a judgement based on gambling debts.[10]

Certain commentators hold the view that these Articles set out the American doctrine of "full faith and credit."[11] However, it should be noted that the principles

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9. Toulon Construction Inc. v. Rusco Industries Inc., [1973] R.P. 138; Blackwood v. Percival (1903), 23 C.S. 5; Chechik v. Rabinovitch, [1929] S.C.R. 400; Johnson, Conflict of Laws, pp. 819, 920.

10. McCurry v. Reid (1902), 4 R.P. 251, reversing 3 R.P. 165; Riordan v. McLeod (1911), 13 R.P. 156.

11. Ryan v. Pardo, [1957] R.L. 321; Johnson, Conflict of Laws, p. 819. "Full faith and credit" provides that a judgement will have the same force in other states as it has in the state where it was rendered.

described above are applicable only to a judgement rendered in a contested case. If the judgement in question was rendered by default or without personal service in the province, that judgement will not be considered as res judicata. The merits of the original action may then be fully reexamined.

Article 1220 of the Civil Code. As mentioned above, Article 1220 of the Civil Code provides valuable assistance to persons who hold a foreign judgement. It reads as follows:

> The certificate of the secretary of any foreign state or of the executive government thereof, and the original documents and copies of documents hereinafter enumerated, executed out of Lower Canada, make prima facie proof of the contents thereof without any evidence being necessary of the seal or signature affixed to such original or copy, or of the authority of the officer granting the same, namely:
>
> 1. Exemplifications of any judgment or other judicial proceeding of any court out of Lower Canada, under the seal of such court, or under the signature of the officer having the legal custody of the record of such judgment or other judicial proceeding.

The case law, on the strength of the word "contents" in this Article, has held that a foreign judgement is evidence, as a prima facie presumption, of:

- the jurisdiction of the foreign court;
- the facts set out in the judgement;
- the foreign law on which the court based its decision;
- the correct application by the court of the foreign law and the validity in fact and in law of the judgement.

Thus, in some cases Article 1220 has been used to establish as res judicata matters which Articles 178 and 179

appeared to have reopened.[12] A Quebec defendant must, therefore, bear the burden of proving the contrary to the presumption. According to Johnson, the presumption as applied in the cases has virtually the same effect as if it were considered res judicata.[13]

Criticism of the Present System

The present system requires that an action be brought. It is here suggested that this is pointless because the foreign plaintiff is then forced to bring two actions, one in the foreign jurisdiction and the other in Quebec. In view of the considerable delay involved in bringing an action, this requirement no longer serves any purpose; furthermore, it means that due recognition is not accorded the foreign judgement.

There is a conflict between the presumption created by the cases under Article 1220(1) of the Civil Code and the requirement for an action for recognition imposed by the Code of Civil Procedure. In interpreting the Article on proof, the Quebec courts have given back to a foreign plaintiff what the CCP took away. Because of this conflict, the present system is confused and contradictory, to say the least.

The criterion for recognition of judgements from other provinces based on personal service on the defendant in the foreign province is unacceptable in private international law and is universally rejected because it is uncertain and vague.[14]

Finally, there is little uniformity between the system adopted by the common law provinces and the present

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12. Bauron v. Davies (1897), 6 B.R. 547, reversing (1897) 11 C.S. 123 (leading decision); Haney v. Mahaffey (1921), 23 R.P. 225; Courtney v. Laplante (1932), 53 B.R. 540; Schatz v. McIntyre, [1935] S.C.R. 238, reversing (1934) 56 B.R. 520 (the documents filed under Article 1220(1) of the Civil Code "afford the best evidence that the law therein applied is the law in force in the country in which the judgement was rendered"); Spohn v. Bellefleur & Vanier, [1956] B.R. 608.

13. Johnson, Conflict of Laws, p. 799.

14. Kurt H. Nadelmann, "The Enforcement of Foreign Judgements in Canada," Canadian Bar Review 38 (1960): 68 at 83.

Quebec system: CCP, Article 178 is contrary to the common law rule, while Articles 179 to 181 extend, in a debatable manner, recognition of judgements from other provinces beyond the corresponding common law rules.[15]

Recognition and Enforcement of Foreign Decisions Under the Draft Civil Code

In chapter 4 of book nine, the authors of the draft code dealt with recognition and enforcement of foreign decisions. Articles 60 to 65 and 67, which may become the law in Quebec, are reproduced and discussed below.

> 60. Subject to Articles 74 and following, the courts of Québec recognize and declare enforceable judicial decisions rendered outside Québec, in civil and commercial matters, unless the defendant proves:
>
> 1. that the original authority had no jurisdiction in accordance with Article 65;
>
> 2. that the foreign decision may be subject to normal forms of review according to the law of the place where it was rendered;
>
> 3. that the foreign decision is not enforceable at the place where it was rendered;
>
> 4. that the foreign decision orders provisional or conservatory measures;
>
> 5. that the foreign decision was obtained by fraud in the procedure;
>
> 6. that proceedings between the same parties, based on the same facts and having the same purpose, either resulted in a decision rendered in Québec, whether having the force of res judicata or not, are pending before a Québec court, first to be seized of the matter.

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15. Gilbert D. Kennedy, "Recognition of Judgements in Personam: The Meaning of Reciprocity," Canadian Bar Review 35 (1957): 123.

This Article summarizes, in part, the existing law. It is based on the Hague Convention on the recognition and enforcement of foreign judgements in civil and commercial matters.[16] The following relevant points should be noted:

a) the burden of proof is now explicitly recognized as being on the defendant;

b) paragraphs 1 to 3 codify the principle that the foreign judgement would have no greater effect here than in the country where it originated; for example, if the case had not yet been finally decided in the foreign country;

c) the word "fraud" in paragraph 5 refers specifically to procedural fraud;

d) paragraph 6 embodies the result reached in the cases Toulon Construction Inc. v. Rusco Industries Inc.[17] and Olympia & York Development Ltd. v. Peerless Rug Ltd.[18] However, it is considerably extended by the words "whether having the force of res judicata or not." The foreign proceedings must therefore be terminated before such an action can be brought in Quebec.

> 61. A decision rendered by default will not be recognized and declared enforceable unless the plaintiff proves that the defaulting party received notice of the institution of proceedings in accordance with the law of the place where the decision was rendered.
>
> However, the judge may refuse recognition or enforcement if the defaulting party proves that, in view of the circumstances, he was not able to learn of the institution of the proceedings or did not have sufficient time to present his defence.

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16. Recueil des Conventions de La Haye (Netherlands: Bureau Permanent de la Conférence de La Haye, 1973), p. 106 ff.

17. Toulon Construction Inc. v. Rusco Industries Inc., [1973] R.P. 138.

18. Olympia and York Development Ltd. v. Peerless Rug Ltd., [1975] C.A. 445.

The draft provides a special procedure for default judgements. It places the burden of proving personal service on the foreign plaintiff; on the other hand, the defendant has the burden of proving that it was impossible to defend, even if the conditions of the first paragraph of Article 61 are met by the plaintiff.

> 62. Recognition or enforcement may not be refused merely because the court of origin has applied a law other than that which would have been applicable according to Québec private international law rules.

This Article is based on Article 7(1) of the Hague Convention. The authors intended that this Article should amend the current law and, in particular, the decision in Karim v. Ali,[19] which they believe demonstrated "excessive chauvinism."[20]

> 63. Subject to the requirements of Articles 60 to 62 the courts of Québec do not review the merits of decisions rendered outside Québec.
>
> 64. In determining the jurisdiction of the court of origin, the courts of Québec are bound by the findings of fact on which the court of origin based its jurisdiction, unless the decision was rendered by default.

Article 64 must be read in conjunction with Article 63. It establishes a rule for the international jurisdiction of the court of origin: the Quebec judge will be bound by the findings of fact of the foreign court; he has jurisdiction to decide only 1) the legal effect (or limitations) given the facts found by the foreign court; and 2) the interpretation given of the rules of law by the court of origin in finding that it had international jurisdiction.

> 65. The court of origin is considered to have jurisdiction when:

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19. Karim v. Ali, [1971] C.S. 439.

20. On this point, see the comments of the codifiers, Report on the Quebec Civil Code (Quebec: Éditeur officiel du Québec, 1977), vol. 2, Commentaries, t. 2, p. 993.

1. the defendant was domiciled in the jurisdiction of the court of origin at the time the proceedings were instituted or, if the defendant is not a physical person, had there its place of incorporation or its head office;

2. the defendant possessed a commercial, industrial or other business establishment, or a branch office in the jurisdiction of the court of origin at the time the proceedings were instituted, and was cited there in proceedings relating to their activity;

3. the action had as its object a dispute relating to immoveable property situated in the place of the court of origin;

4. the act which caused the damage upon which the action is based occurred in the jurisdiction of the court of origin, and the author of the damage was present at that time;

5. by a written agreement, the parties have agreed to submit to the jurisdiction of the court of origin disputes which have arisen or which may arise in respect of a specific legal relationship, unless the law of Québec would, in this case, give exclusive jurisdiction to its courts;

6. the defendant has contested on the merits without challenging the jurisdiction of the court or making reservation to it; however, the jurisdiction will not be recognized if the defendant has contested on the merits in order to resist the seizure of property or to obtain mainlevée, or if the law of Québec would, in this case, give exclusive jurisdiction to its courts; or

7. the person against whom recognition or enforcement is sought was the plaintiff in the proceedings in the court of origin and was unsuccessful in those proceedings, unless the law of Québec

would give, in this case, exclusive jurisdiction to its courts.

In every case where recognition of a judgement is disputed on the basis of Article 60, the Quebec court will look to Article 65 in determining whether the court of origin had jurisdiction. It should be noted here that the rules contained in paragraphs 1 to 7 of this Article are similar to the rules of internal jurisdiction (see Articles 48 et seq. of the draft).

However, there are two significant changes to the existing rules. Paragraph 2 extends considerably the jurisdiction of the court of origin over corporations -- it appears that the maintenance of any place of business can support jurisdictional competence. Paragraph 4, in matters of tort, limits the jurisdiction of the court to the place where the damage occurred. The authors propose that there be a requirement that the tortfeasor be personally present in the territory of the court of origin at the time when the act occurred.

> 67. On application by the defendant, the jurisdiction of the court of origin is not recognized by the courts of Québec when:
>
> 1. the law of Québec, either because of the subject matter or by virtue of an agreement between the parties, gives exclusive jurisdiction to its courts to hear the claim which gave rise to the foreign decision;
>
> 2. the law of Québec, either because of the subject matter or by virtue of an agreement between the parties, recognizes the exclusive jurisdiction of another court; or
>
> 3. the law of Québec recognizes an agreement by which exclusive jurisdiction is conferred upon arbitrators.

Article 67(1) is based on Article 12 of the Hague Convention and would apply to an action brought pursuant to the Consumer Protection Act.

Criticism of the proposed system. It is submitted that the proposed system is more in accordance with international law

than, and is thus superior to, the current system; the concept of "near vendor," however, merits more attention than it received in the draft. It is further suggested that the rule proposed in Article 65(4) is too rigid, and that it would be preferable to amend it to include a rule for recognition and enforcement similar to the rule recognized in Article 32 of the draft and in Moran v. Pyle. That is, if a manufacturer who is the near vendor puts his products on the interprovincial or international market, and his products are available in the consumer's area, a judgement obtained by the consumer should be recognized by Quebec courts without applying the restrictive principles proposed in Article 65 of the draft.

Conclusion

As concerns recognition and enforcement of foreign judgements, neither the present rules in the CCP nor those proposed in the draft adequately meet the needs of consumers. The costs involved in an action for recognition of a foreign judgement are very high, and the possibility that all the points at issue could be reopened is contrary to sound policy. The consumer simply is discouraged from enforcing a judgement that has been obtained. It is proposed that the concept of the "near vendor" could provide a solution for many of the problems in this area.

More specifically, any consumer who has a judgement against a near vendor (either the manufacturer or the distributor of the item purchased) should have the right to obtain recognition of this judgement by the court of the province where the near vendor has his place of business without that court reopening the merits of the case. Thus there should be automatic recognition by the court where the near vendor is domiciled or has his place of business.

Should a defendant identified as a near vendor default in contesting his status when an action is brought in the consumer's province, he would forfeit all rights to do so later on, when the request for recognition of the foreign judgement is submitted to the court in his own province.

If the procedure for recognition and enforcement of a foreign judgement is simplified in this way, the foreign judgement will have real value and consumers will be more truly protected.

Chapter III

CHOICE OF LAW RULES IN THE PRIVATE INTERNATIONAL LAW OF QUEBEC

When a consumer brings an action before a Quebec court and the problem of jurisdiction or recognition of a foreign judgement arises, the question of what law applies is presented. The Quebec court must then determine which province's law will be used in deciding jurisdiction or the merits of the claim.

The present rules on conflicts of law in matters of contract are contained in Article 8 of the Civil Code.

> 8. Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases, effect is given to such law, or such intention expressed or presumed.

This Article recognizes the freedom of contractual intention of the parties. For example, if the contracting parties are domiciled in Quebec and wish to contract that they be subject to the law of England, the courts will give effect to this expression of their wishes.[1]

However, section 19 of the new Consumer Protection Act provides that a clause in a contract that subjects the contract in whole or in part to a law other than an Act of the Parliament of Canada or of the Legislature of Quebec is prohibited. Clearly, this considerably restricts the scope of Article 8 of the Civil Code. It must be remembered that section 19 will apply only to consumer contracts entered into in the province of Quebec.

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1. Vipond v. Furness Withy Co. Ltd. (1917), 54 S.C.R. 521, 527.

In matters of tort, the choice of law rules are those set out by the Supreme Court in O'Connor v. Wray.[2] There is a double test: a Quebec plaintiff must first prove that the act that caused the damage gave rise to an action for damages under Quebec law, and that the act was an "unlawful" or "unjustifiable" act according to the law of the place where the tort occurred. These two conditions must both be satisfied or the action will be dismissed. The courts will then decide the other fundamental questions under the law of the forum.

However, these rules are obsolete and frequently inconsistent. They require additional expenses to be paid by the consumer, since the consumer must give evidence of the foreign law through an expert witness. Simpler rules should be established to respond more closely to the present economic context and to the needs of the consumer. These are proposed in chapter 4.

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2. O'Connor v. Wray, [1930] S.C.R. 231.

Chapter IV

RECOMMENDATIONS

As in the common law provinces of Canada, the private international law of Quebec concerning the jurisdiction of courts, enforcement of foreign judgements and choice of law rules is governed by obsolete concepts that no longer meet consumers' needs. Considering the difficulties encountered by consumers, it is proposed that the present rules be replaced by a uniform Canada-wide system. The recommended changes are:

1. That each Canadian province, including Quebec, assume jurisdiction over the near vendor. That is, a consumer would have the absolute right to bring an action against a near vendor. The consumer's domestic court would have jurisdiction over all near vendors, even if they had no assets or place of business in the consumer's province.

2. That the near vendor include the manufacturer and distributor of the product. This is in accordance with the Quebec Consumer Protection Act.

3. That any manufacturer or distributor who causes his goods to enter into the normal channels of trade in Canada be considered a near vendor as specified in Moran v. Pyle.[1] This would include any manufacturer or distributor who intends to sell or cause his products to be sold in a province other than his own. This presumption would be made when one of the cases mentioned in the conclusion of chapter 1 is established.

4. That in deciding whether it has jurisdiction to hear the case on the merits, the court must first determine whether the foreign defendant is a near vendor. Only at this point could the foreign defendant plead exception to the jurisdiction of the local court on the ground that he is not a near vendor. Default in pleading the point at this stage would be grounds for the court to refuse to allow him to contest that issue in subsequent proceedings. Thus the

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1. Moran v. Pyle (National) Canada Ltd. (1975), 1 S.C.R. 393.

defendant would no longer be entitled to raise this defence when the court of his own province decides whether to recognize the foreign judgement.

5. That the applicable law be that of the province where the consumer purchased the product. It would not be open to either the consumer or the vendor to specify the law of another jurisdiction. Of course it would normally be the law of the forum that would apply, insofar as consumers generally purchase in their own provinces, and bring actions there. It is submitted that such a rule is desirable and just, because the consumer should not have more rights than those granted by the province where he chose to purchase the product. Similarly, the near vendor who has decided to permit sales of his products in the consumer's province presumably will have done so with knowledge of the laws of that province, taking these laws into account in deciding to distribute the product in that province and in setting the sale price of his product there.

6. That the final step, recognition and enforcement of a foreign decision in the near vendor's province, be automatic for all consumers. All judgements of a court in the consumer's province would be recognized by the court in the near vendor's province with a minimum of formalities and without an opportunity for the defendant to dispute. Enforcement of the judgement would follow the rules of the defendant's province. This system already exists for judgements in divorces.

How could the provinces of Canada implement the above proposals? Two possible approaches are:

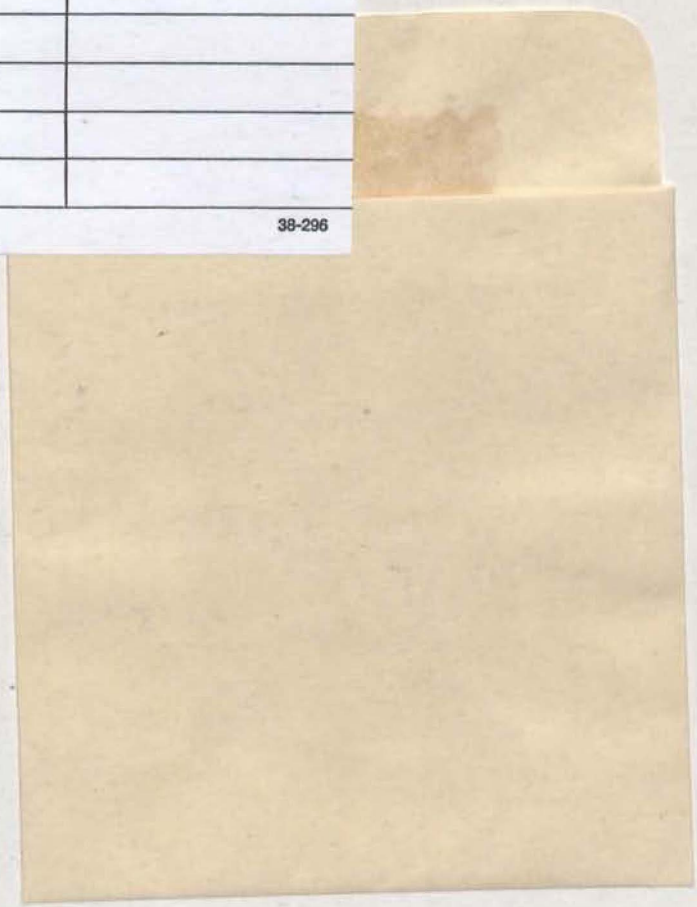
a) As is done in the United States, the federal government could draw up a uniform code which each province would be invited to adopt. Each province that accepted would be required to apply the proposed rules.

b) The provinces themselves could enter into reciprocal agreements under which each province would undertake to apply the same rules concerning the jurisdiction of courts, recognition of foreign judgements and choice of law.

Clearly, it would be very difficult to take the first approach because, in the present political context, it is likely that the provinces would be very hesitant to allow the federal government any jurisdiction whatever in the field of consumer affairs.

Reciprocal agreements among the provinces could be effective. The principle has been established, in that such reciprocal agreements already exist between provinces. Quebec, for example, has proposed such an agreement in the matter of language of instruction.

However, considering the difficulties in coming to such agreements, it would be desirable, in the short term, to have the federal government propose rules in this area and to invite the provinces to examine them and give such effect to them as they may choose.



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