

APPENDIX C

(See page 48)

UNIFORM LAW CONFERENCE OF CANADA COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT

Contents

PART 1 INTERPRETATION

1. Definitions

PART 2 TERRITORIAL COMPETENCE OF COURTS OF [ENACTING PROVINCE OR TERRITORY]

2. Application of this part
3. Proceedings in personam
4. Proceedings with no nominate defendant
5. Proceedings in rem
6. Residual discretion
7. Ordinary residence - corporations
8. Ordinary residence - partnerships
9. Ordinary residence - unincorporated associations
10. Real and substantial connection
11. Discretion as to the exercise of territorial competence
12. Conflicts or inconsistencies with other Acts

PART 3 TRANSFER OF A PROCEEDING

13. General provisions applicable to transfers
14. Grounds for an order transferring a proceeding
15. Provisions relating to the transfer order
16. [Superior court's] discretion to accept or refuse a transfer
17. Effect of transfers to or from [superior court]
18. Transfers to courts outside [enacting province or territory]
19. Transfers to [superior court]
20. Return of a proceeding after transfer
21. Appeals
22. Departure from a term of transfer
23. Limitations and time periods

APPENDIX C

INTRODUCTORY COMMENTS.

0.1. This proposed uniform Act has four main purposes:

(1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;

(2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897;

(3) by providing uniform jurisdictional standards, to provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform *Enforcement of Canadian Judgments Act*; and

(4) to provide, for the first time, a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.

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

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

UNIFORM LAW CONFERENCE OF CANADA

PART 1 INTERPRETATION

Definitions

1. In this Act

"person" includes a state;

"plaintiff" means a person who commences a proceeding, and includes a plaintiff by way of counterclaim or third party claim;

"proceeding" means an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion;

"procedure" means a procedural step in a proceeding;

"state" means

- (a) Canada or a province or territory of Canada, and
- (b) a foreign country or a subdivision of a foreign country;

"subject matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;

"territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

- (a) the territory or legal system of the state in which the court is established, and
- (b) a party to a proceeding in the court or the facts on which the proceeding is based.

APPENDIX C

COMMENTS TO SECTION 1

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

PART 2

TERRITORIAL COMPETENCE OF COURTS OF [ENACTING PROVINCE OR TERRITORY]

Application of this Part

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

UNIFORM LAW CONFERENCE OF CANADA

COMMENTS TO SECTION 2.

- 2.1. Part 2 is drafted so as to define the territorial competence of any court of the enacting jurisdiction. This may be subject to rules in any other statute that give a particular court a wider or narrower territorial competence than the rules in this Act (see section 12). The transfer provisions in Part 3 are drafted so as to apply only to the superior court of unlimited jurisdiction (see the note after the heading of Part 3).
- 2.2. Subsection 2(2) is intended to make it clear that a court's territorial competence is to be determined according to the rules in the Act and not according to any "common law" jurisdictional rules that the Act replaces.
- 2.3. The Act defines a court's territorial competence "in a proceeding" (section 3). It does not define the territorial aspects of any particular remedy. Thus the Act does not supersede common law rules about the territorial limits on a remedy, such as the rule that a Canadian court generally will not issue an injunction to restrain conduct outside the court's own province or territory.
- 2.4. The Act only defines territorial competence; it does not define subject matter competence. It is not intended to affect any rules limiting a Canadian court's jurisdiction by reference to the amount of a claim, the subject matter of a claim, or any other factor besides territorial connections.

Proceedings in personam

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

APPENDIX C

COMMENTS TO SECTION 3.

- 3.1. Section 3 defines the five grounds on which a court has territorial competence in a proceeding *in personam*. Paragraphs (a), (b) and (c) include the three ways in which the defendant may consent to the court's jurisdiction: by invoking the court's jurisdiction as plaintiff, by submitting to the court's jurisdiction during the proceedings, or by having agreed that the court shall have jurisdiction. These reflect long-standing law. Paragraphs (d) and (e) change current law, by replacing the criterion of *service of process* with the criterion of substantive *connection* with the enacting jurisdiction.
- 3.2. Paragraph (d) is effectively the replacement for the existing rule that a court has jurisdiction over any person that is served with process in the forum province or territory. Replacing *service* in the territory of the forum court with *ordinary residence* in that territory means that a person who is only temporarily in the jurisdiction will not automatically be subject to the court's jurisdiction. For a court to take jurisdiction over a person who is not ordinarily resident in its territory and does not consent to the court's jurisdiction, a real and substantial connection must exist within paragraph (e). The current rule, which (subject to arguments of *forum non conveniens*) permits a court to take jurisdiction on the basis of the defendant's presence alone, without any other connection between the forum and the litigation, will therefore no longer apply. This change in the existing rule is proposed not only on the ground of fairness, but also because the existing rule is of doubtful constitutional validity, since a defendant's mere presence in a province is probably not enough to support the constitutional authority of a province to assert judicial jurisdiction over the defendant.
- 3.3. Paragraph (e) replaces the existing rules, in the common law provinces, relating to service *ex juris*. Territorial competence will depend, not on whether a defendant can be served *ex juris* under rules of court, but on whether there is, substantively, a real and substantial connection between the enacting jurisdiction and the facts on which the proceeding in question is based. This provision would bring the law on jurisdiction into line with the concept of "properly restrained jurisdiction" that the Supreme Court of Canada, in *Morguard Investments Ltd. v. De Savoye* (1990), held was a precondition for the recognition and enforcement of a default judgment throughout Canada. The "real and substantial connection" criterion is therefore an essential complement to the uniform *Enforcement of Canadian Judgments Act*, which requires all Canadian judgments to be enforced without recourse to any jurisdictional test. The present Act, if adopted, will ensure that all judgments will satisfy the Supreme Court's criterion of "properly restrained" jurisdiction, which the court laid down as the indispensable requirement for a judgment to be entitled to recognition at common law throughout Canada.
- 3.4. If the present Act is adopted, rules of court will still include rules as to service of process, but these will no longer be the source and definition of the court's territorial competence. Their role will be restricted to ensuring that defendants, whether ordinarily resident in or outside the jurisdiction, receive proper notice of proceedings and a proper opportunity to be heard.

UNIFORM LAW CONFERENCE OF CANADA

Proceedings with no nominate defendant

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

COMMENTS TO SECTION 4.

- 4.1 This section deals with several miscellaneous actions where the proceedings are "technically *in personam*" but there is not, or is not yet an identified "persona" whose connection with the territory founds jurisdiction. In actions such as preliminary estate matters or correction of a corporate register, it is the proceeding rather than a nominal defendant which is the crucial factor. The section is broken out from the main section to emphasize this point.

Proceedings in rem

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

COMMENTS TO SECTION 5.

- 5.1 Section 5 codifies the existing rule that jurisdiction in an action *in rem*, which can be brought only against a vessel, depends upon the presence of the vessel within the jurisdiction. Actions *in rem* are primarily brought in the Federal Court under its admiralty jurisdiction, but concurrent jurisdiction over maritime matters exists in the courts of the provinces.

Residual discretion

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

APPENDIX C

COMMENTS TO SECTION 6.

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

See also note 10.3.

Ordinary residence - corporations

7. A corporation is ordinarily resident in *[enacting province or territory]*, for the purposes of this Part, only if
- (a) the corporation has or is required by law to have a registered office in *[enacting province or territory]*,
 - (b) pursuant to law, it
 - (i) has registered an address in *[enacting province or territory]* at which process may be served generally, or
 - (ii) has nominated an agent in *[enacting province or territory]* upon whom process may be served generally,
 - (c) it has a place of business in *[enacting province or territory]*, or
 - (d) its central management is exercised in *[enacting province or territory]*.

COMMENTS TO SECTION 7.

- 7.1. Sections 7, 8 and 9 define ordinary residence for corporations, partnerships and unincorporated associations. They reflect, with only minor modifications, the approach that is generally taken under existing law to decide whether these defendants are present in the jurisdiction for the purposes of service.
- 7.2. This Act contains no definition of ordinary residence for natural persons. This connecting factor is widely used in Canada (for example, as the jurisdictional criterion in the *Divorce Act* (Can.)), and has been judicially defined in numerous cases. It was felt that an express statutory definition would probably fail to match the existing concept and would therefore provide difficulty rather than certainty.

UNIFORM LAW CONFERENCE OF CANADA

Ordinary residence - partnerships

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

COMMENT TO SECTION 8.

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

Ordinary residence - unincorporated associations

9. An unincorporated association is ordinarily resident in *[enacting province or territory]* for the purposes of this Part, only if
- (a) an officer of the association is ordinarily resident in *[enacting province or territory]*, or
 - (b) the association has a location in *[enacting province or territory]* for the purpose of conducting its activities.

COMMENT TO SECTION 9.

- 9.1. See comment 7.1.

Real and substantial connection

10. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between *[enacting province or territory]* and the facts on which a proceeding is based, a real and substantial connection between *[enacting province or territory]* and those facts is presumed to exist if the proceeding

APPENDIX C

- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in *[enacting province or territory]*,
- (b) concerns the administration of the estate of a deceased person in relation to
 - (i) immovable property of the deceased person in *[enacting province or territory]*, or
 - (ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in *[enacting province or territory]*,
- (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
 - (i) immovable or movable property in *[enacting province or territory]*, or
 - (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in *[enacting province or territory]*,
- (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
 - (i) the trust assets include immovable or movable property in *[enacting province or territory]* and the relief claimed is only as to that property;
 - (ii) that trustee is ordinarily resident in *[enacting province or territory]*;
 - (iii) the administration of the trust is principally carried on in *[enacting province or territory]*;
 - (iv) by the express terms of a trust document, the trust is governed by the law of *[enacting province or territory]*,
- (e) concerns contractual obligations, and
 - (i) the contractual obligations, to a substantial extent, were to be performed in *[enacting province or territory]*,
 - (ii) by its express terms, the contract is governed by the law of *[enacting province or territory]*, or
 - (iii) the contract

UNIFORM LAW CONFERENCE OF CANADA

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

APPENDIX C

COMMENT TO SECTION 10.

- 10.1. The purpose of section 10 is to provide guidance to the meaning of "real and substantial connection" in paragraph 3(c). Instead of having to show in each case that a real and substantial connection exists, plaintiffs will be able, in the great majority of cases, to rely on one of the presumptions in section 10. These are based on the grounds for service *ex juris* in the rules of court of many provinces. If the defined connection with the enacting jurisdiction exists, it is presumed to be sufficient to establish territorial competence under paragraph 3(c).
- 10.2. A defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial. Conversely, a plaintiff whose claim does not fall within any of the paragraphs of section 10 will have the right to argue that the facts of the particular case do have a real and substantial connection with the enacting jurisdiction so as to give its courts territorial competence under paragraph 3(c). For example, a plaintiff may argue that the "place of contracting" is such a significant factor in a contract action that the forum in which the contract was formed should exercise territorial competence. In many cases, questions of validity and performance arise at the same time and are intermingled. In an appropriate case, where only the question of formal validity of a contract is an issue, it would open to the plaintiff to argue that the court should take jurisdiction even though the plaintiff cannot invoke the presumption set out for other factors.
- 10.3. One common ground for service *ex juris* is not found among the presumed real and substantial connections in section 10, namely, that the defendant is a necessary or proper party to an action brought against a person served in the jurisdiction. The reason is that such a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction. If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present under paragraph 3(d). Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person. The proceeding against the second person will have to meet the real and substantial connection test in paragraph 3(c).

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

- 10.4. Section 10 does not include any presumptions relating to proceedings concerned with family law. Since territorial competence in these proceedings is usually governed by special statutes, it was felt that express rules in section 10 would lead to confusion and uncertainty because they would often be at variance with the rules in those statutes, which may have priority by virtue of section 10. For this reason it was felt better to leave the matter of territorial

UNIFORM LAW CONFERENCE OF CANADA

competence for the special family law statutes. If the question of territorial competence in a particular family matter was not dealt with in a special statute, the general rules in section 3 of this Act, including ordinary residence and real and substantial connection, would govern.

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

Discretion as to the exercise of territorial competence

11. (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
- (2) A court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
 - (b) the law to be applied to issues in the proceeding,
 - (c) the desirability of avoiding multiplicity of legal proceedings,
 - (d) the desirability of avoiding conflicting decisions in different courts,
 - (e) the enforcement of an eventual judgment, and
 - (f) the fair and efficient working of the Canadian legal system as a whole.

COMMENTS TO SECTION 11.

- 11.1. Section 11 is meant to codify the doctrine of *forum non conveniens*, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia* (1993). The language of subsection 11(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 11(2) as relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past.

APPENDIX C

- 11.2. The discretion in section 11 to decline the exercise of territorial competence is defined without reference to whether a defendant was served in the enacting jurisdiction or *ex juris*. This is consistent with the approach in Part 2 as a whole, which renders the place of service irrelevant to the substantive rules of jurisdiction. It is also consistent with the Supreme Court's statement in the *Amchem* case that there was no reason in principle to differentiate between declining jurisdiction where service was in the jurisdiction and where it was *ex juris*.

[Conflicts or inconsistencies with other Acts]

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

COMMENT TO SECTION 12.

- 12.1. This section is square bracketed so that the enacting jurisdiction will consider the following matters. The Uniform Act is intended to be a comprehensive statement of the substantive law of Court Jurisdiction. The statute codifies the rules and is looked to as the source of those rules. Exceptions clearly compromise that comprehensiveness. However, there may be special provisions, particularly in the family law area, which are inconsistent with the Act and are to be preserved. Those statutes can be listed specifically as exceptions to the operation of the Act. As a last resort, where an enacting jurisdiction cannot specifically list the exceptions, but is convinced that they exist, this section may be included.
- 12.2. As noted above (comment 2.1), section 12, if enacted, preserves any limitation or extension of the territorial competence of a particular court that is provided, either expressly by implication, in another statute.

PART 3 TRANSFER OF A PROCEEDING

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

General provisions applicable to transfers

13. (1) The [superior court], in accordance with this Part, may
- (a) transfer a proceeding to a court outside [enacting province or territory], or

UNIFORM LAW CONFERENCE OF CANADA

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

COMMENTS TO SECTION 13.

- 13.1. Part 3 sets up a mechanism through which the superior court of general jurisdiction in the enacting province or territory can - acting in cooperation with a court of another province, territory or state - move a proceeding out of a court that is not an appropriate forum into a court that is a more appropriate forum. Under current law, if a court thinks the proceeding would be more appropriately heard in a different court, its only option is to decline jurisdiction and force the plaintiff to recommence the proceeding in the other court if the plaintiff wishes and is able to do so. The transfer mechanism would accomplish the same purpose more directly, by preserving whatever has already been done in the old forum and simply continuing the proceeding in the new forum. It is therefore designed to avoid waste, duplication, and delay.
- 13.2. The present draft Act, like the Uniform Transfer of Litigation Act (UTLA) promulgated by the Uniformity Commissioners in the United States, allows for transfers not only to and from courts within Canada but also to and from courts in foreign nations. There was extensive debate at the Conference on whether this was appropriate. Two principal arguments were made against it. First, Canadian courts should not, it was argued, be given the power to

APPENDIX C

relegate litigants to foreign legal systems that might be very different from our own, where the standards of justice might not be comparable, and which could not be openly evaluated by a Canadian court without the risk of embarrassment to Canada. Secondly, cooperation between a Canadian court and a foreign court should not be possible in the absence of authorization, in a treaty, by the two nations involved.

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

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

It was also argued, in support of the present scope of the draft, that a transfer mechanism would be much more valuable if it allowed a Canadian court to request transfers to, and accept transfers from, courts in the United States and elsewhere. In each case the Canadian court would have a completely free discretion to decide whether the ends of justice would be served by requesting the outbound transfer or accepting the inbound transfer.

The Conference, by a majority, decided not to restrict the present draft Act to transfers within Canada.

- 13.3. Section 13 provides the framework for all the other provisions of Part 3. Whether the transfer is from the domestic court to the extraprovincial court (paragraph 13(1)(a)) or from an extraprovincial court to the domestic court (paragraph 13(1)(b)), the Act only purports to regulate those aspects of the transfer that relate to the domestic court (or a court on appeal from the domestic court, referred to in subsection 13(4)). The provisions of Part 3 are drafted so that they do not purport to lay down any rules for the courts of the other jurisdiction that is involved in the transfer. It may be that the other jurisdiction's rules for accepting or initiating transfers differ from those in the present Act. In that event, subsection 13(5) provides that the domestic court can transfer (i.e. initiate the transfer) to, or accept a

UNIFORM LAW CONFERENCE OF CANADA

transfer from, the other jurisdiction if the differences do not impair the effectiveness of the transfer or the fairness of the proceeding.

Grounds for an order transferring a proceeding

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

COMMENTS TO SECTION 14.

- 14.1. A key feature of the transfer provisions, which is taken from UTLA, is a transfer may be made so long as *either* the transferring or the receiving court has territorial competence over the proceeding. The receiving court must always have subject matter competence; in other words it cannot, by virtue of a transfer, acquire jurisdiction to hear a type of case that it usually has no jurisdiction to entertain. But it can, by virtue of a transfer, hear a case over which it would not otherwise have territorial competence, so long as the court that initiated the transfer did have territorial competence. It should be noted in this connection that all that Part 3 does is to make a transfer to the receiving court possible. It does not guarantee that the receiving court's eventual judgment will be recognized in the transferring court - or anywhere else - as binding on a party who refuses to take part in the continued proceeding in the receiving court. As a practical matter, a transferring court would be most unlikely to grant the application for a transfer in the first place, if it appeared that the outcome might be a judgment that was unenforceable against a party opposing the transfer.
- 14.2. Subsection 14(1) deals with an outbound transfer where the domestic court has territorial as well as subject matter competence. The receiving court need only have subject matter competence, and be a more appropriate forum under the principles in section 11.

APPENDIX C

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

Provisions relating to the transfer order

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

COMMENTS TO SECTION 15.

- 15.1. Section 15 deals with the order of the superior court of the enacting jurisdiction, requesting another court to accept a transfer. Rules of court will provide the procedure for a party to apply for a transfer, as referred to by paragraph 15(2)(a). The rules of court will also deal with matters such as notice to the other parties and the opportunity to be heard.

UNIFORM LAW CONFERENCE OF CANADA

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

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

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

COMMENTS TO SECTION 16.

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

APPENDIX C

court must have territorial competence, and the superior court must have subject matter competence.

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

Effect of transfers to or from [superior court]

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

COMMENTS TO SECTION 17.

- 17.1. The time when a transfer - whether inbound or outbound - takes effect is critical to the operation of sections 18 to 23.

Transfers to courts outside [enacting province or territory]

18. (1) On a transfer of a proceeding from the [superior court] taking effect,
 - (a) the [superior court] must send relevant portions of the record, if not sent previously, to the receiving court, and
 - (b) subject to section 17 (2) and (3), the proceeding continues in the receiving court.
- (2) After the transfer of a proceeding from the [superior court] takes effect, the [superior court] may make an order with respect to a procedure that was pending in the proceeding at the time of the transfer only if
 - (a) it is unreasonable or impracticable for a party to apply to the receiving court for the order, and
 - (b) the order is necessary for the fair and proper conduct of the proceeding in the receiving court.

UNIFORM LAW CONFERENCE OF CANADA

- (3) After the transfer of a proceeding from the [superior court] takes effect, the [superior court] may discharge or amend an order made in the proceeding before the transfer took effect only if the receiving court lacks territorial competence to discharge or amend the order.

COMMENTS TO SECTION 18.

See the comments to section 19.

Transfers to [superior court]

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

COMMENTS TO SECTION 19.

- 19.1. An instantaneous transfer, in all respects, of a legal proceeding from one court to another would be ideal but obviously cannot be fully realized in practice. Sections 18 and 19 deal with the procedures that are completed before the transfer, procedures that are pending at the time of transfer, and orders that have been made before the transfer takes effect.

APPENDIX C

- 19.2. Subsection 18(1)(b) and subsection 19(1) define the effect of a transfer for, respectively, outbound and inbound transfers: the proceeding continues in the receiving court.
- 19.3. A procedure that is completed before the transfer takes effect is simply given the same effect in the receiving court as it had in the transferring court, subject to the receiving court's right to change that effect (subsection 19(2)). (There is no need for an equivalent for outbound transfers.)
- 19.4. If a procedure is pending at the time a transfer takes effect, the transferring court retains power to make an order in respect of that procedure only in the limited circumstances defined in subsection 18(2) (for outbound transfers). The general rule is that the procedure must be completed in the receiving court. Subsection 19(3) provides (for inbound transfers) that it must be completed according to the rules of the transferring court and that relevant time limits run from 10 days after the transfer takes effect unless the court orders otherwise.
- 19.5. An order made before the transfer takes effect continues in effect until the receiving court discharges or amends it (subsections 19(4) and (5) for inbound transfers). The transferring court has no power to discharge or amend such an order unless the receiving court lacks the territorial competence to do so (subsection 18(3), for outbound transfers, and paragraph 19(5)(a) for inbound transfers). The latter situation might arise, for example, with respect to injunctions relating to things to be done or not done in the territory of the transferring court.

Return of a proceeding after transfer

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

UNIFORM LAW CONFERENCE OF CANADA

COMMENTS ON SECTION 20.

- 20.1. A return of a transfer may be necessary for two reasons. The terms of the original order requesting the transfer may require the return if certain events occur (paragraph 20(1)(a), dealing with the return of inbound transfers; compare paragraph 15(2)(c), giving power to impose such terms in outbound transfers). Or it may appear, after the receiving court has accepted the transfer, that the transfer was in fact unauthorized because a requirement of territorial or subject matter competence was not satisfied (paragraphs 20(1)(b) and (c), dealing with the return of inbound transfers).
- 20.2. A return may not be refused by the court to which the proceeding is returned (subsection 20(2), dealing with the return of outbound transfers), because the receiving court cannot retain the proceeding and the only place the proceeding can therefore be located is the transferring court. If that court lacks territorial or subject matter competence over the proceeding, the return of the proceeding may be simply for the purposes of dismissal.

Appeals

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

COMMENTS TO SECTION 21.

- 21.1. Some provinces do not require leave to appeal in respect of interlocutory orders. For those provinces, the section introduces a leave requirement in a small defined class of cases, namely, interlocutory orders granted before the transfer order takes effect. Such orders can be appealed in the receiving court only if leave of the Court of Appeal of the receiving court is obtained. An interlocutory order granted by the receiving court, after the transfer order, may

APPENDIX C

be appealed in the normal manner appropriate to the appeal of interlocutory orders in that province or territory.

- 21.2. Section 21, like sections 18 and 19, deals with a practical difficulty when a transfer takes effect. In principle, consistently with the policy of a complete continuance of the proceeding in the receiving court, appeals from any order made in the proceeding must be taken there (subsection 21(1), dealing with inbound transfers). The order requesting the transfer, however, can be appealed only in the transferring court, not the receiving court (the exception in subsection 21(1)). Likewise, the order accepting the transfer can be appealed only in the receiving court, not the transferring court (subsection 21(2), dealing with outbound transfers).
- 21.3. Pending appeals raise the same kind of difficulty as the pending procedures dealt with by subsections 18(2) and 19(3). The solution adopted in subsection 21(3) (dealing with outbound transfers) is the same as that adopted in those sections for pending procedures, namely, that the appeal court in the transferring jurisdiction should be able to complete an appeal if, and only if, that is a practical necessity.

Departure from a term of transfer

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

COMMENT TO SECTION 22.

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

Limitations and time periods

23. (1) In a proceeding transferred to the [superior court] from a court outside [enacting province or territory], and despite any enactment imposing a limitation period, the [superior court] must not hold a claim barred because of a limitation period if
- (a) the claim would not be barred under the limitation rule that would be applied by the transferring court, and
 - (b) at the time the transfer took effect, the transferring court had both territorial and subject matter competence in the proceeding.

UNIFORM LAW CONFERENCE OF CANADA

- (2) After a transfer of a proceeding to the [superior court] takes effect, the [superior court] must treat a procedure commenced on a certain date in a proceeding in the transferring court as if the procedure had been commenced in the [superior court] on the same date.

COMMENTS TO SECTION 23.

- 23.1. Subsection 23(1), dealing with inbound transfers, ensures that a limitation defence that would have been unavailable in the transferring court cannot be invoked in the receiving court after the transfer takes effect. The rule is limited to cases where the transferring court could itself have heard the case; in other words, where it had both territorial and subject matter competence.
- 23.2. Subsection 23(2), also dealing with inbound transfers, is needed so that the sequence of dates on which procedures were commenced in the transferring court is preserved intact after the transfer takes effect. If, however, a procedure is pending at the time of transfer, the special rule of subsection 19(3) applies to determine the time when the procedure must be completed.

**COURT JURISDICTION AND TRANSFER
OF LITIGATION**

Summary of Comments

by

Peter J.M. Lown, Q.C.

Alberta Law Reform Institute

COURT JURISDICTION AND TRANSFER OF LITIGATION

CONSULTATION COMMENTS

The purpose of this document is to highlight the comments which have been received in various consultations on the model legislation and annotations which the Conference approved in principle at its meeting in Edmonton last year. Each jurisdiction was asked to review the materials and this has taken different forms in different jurisdictions. Some provinces will have reviewed the materials through civil litigation sections and others through Rules Committees (It should be noted that when the legislation is ready to be implemented there will be a major task of fitting the legislation into the existing Rules of Court.)

What follows is a listing of various items which have been raised. These will be spoken to during our deliberations, and I am sure that the discussion will amplify the issues somewhat. The list consists of five general issues followed by thirteen issues specific to the model legislation. On the whole there appears to be considerable support for the initiative. Many commentators have drawn attention to the urgency of the situation, and very few are willing to wait for the courts, and particularly the Supreme Court of Canada, to eventually unravel the web that it has spun in *Morguard* and subsequent cases.

General Issue #1 - A Statutory Scheme

There appears to be universal support for moving the substantive rules of jurisdiction, and *forum conveniens*, out of the Rules of Court into a statutory form. This is quite consistent with separating the question of the existence of jurisdiction from the question of the ability to serve the defendant within the territorial boundaries of the forum. This proposal is also consistent with recent initiatives through the Hague Conference which is considering a proposal for a special commission on jurisdiction, recognition and enforcement of foreign judgments.

APPENDIX C

General Issue #2 - The Shopping List of "Real and Substantial Connection" Factors

You will recall that the original proposal considered last year included two lists of factors. The first list contained those factors which would normally constitute a real and substantial connection and which are now retained in Section 8. The second list contained a list of factors which would not of themselves normally constitute a real and substantial connection. Consultation has taken place with respect to the amended legislation which did not include the second list. Several commentators have suggested that the legislation should create as much certainty as possible and that the list of presumptive factors should be strengthened. Some questioned the implication that anything that was not on the list should therefore not be part of the presumption. Others suggested that, at least for transitional purposes, there was a clear educational role for a black list of factors which were no longer to be used to create the presumption of a real and substantial connection. It is also interesting to note the format of the proposals for the Hague Special Commission. This format includes three lists: A white list of presumptive factors, a grey list of possible influential factors and a black list of factors which are not to be used as a basis of jurisdiction. While the analogy is not a perfect one there is a strong argument, on the basis of completeness and clarity, and the educational role that the section could play, to reinsert the list of factors which do not of themselves constitute a real and substantial connection.

General Issue #3 - Party Control

Some commentators suggested that the legislation should make clear that primary control of litigation should be in the hands of the parties, while at the same time acknowledging the need for some court initiative to control the process once commenced. Sections 9, 10 and 11 could be reviewed to determine whether the balance between party control and court initiative has been achieved.

General Issue #4 - An Enforcing Mechanism

The proposals advocate raising the issue of challenges to jurisdiction as early as possible, providing the court with the tools to deal with these issues and hoping for an early resolution. Coupled with the existing incentives within the litigation system, it is hoped that jurisdictional matters can be resolved as quickly as possible. On the

UNIFORM LAW CONFERENCE OF CANADA

other hand, perhaps it is naive to think that this will occur, and the cynic might say that all that has happened is that another layer of potential disagreements between the parties has been added to the equation. We may even envisage the situation of courts disagreeing on the effect of the model legislation and the matter not being resolved until the issue gets to the Supreme Court of Canada, along parallel lines from the two original courts. One suggestion has been to put in place a final sanction of some kind which would break that impasse if it was found to exist. One analogy is to refer the matter to a particular court to resolve the jurisdictional issue. You may recall that in the 1968 divorce legislation the question of what to do with divorce petitions filed in different provinces on the same day was resolved by putting the matter exclusively in the federal court, if one or other of the petitions was not discontinued within a 30 day period. Perhaps a similar provision could be created which would have the question of jurisdiction, *forum conveniens* and possible transfer dealt with in the federal court if the impasse is not resolved within a certain length of time.

General Issue #5 - The Transfer System

This is quite a new proposal in terms of Canadian jurisprudence and some consultants had difficulty grasping the overall schemes. It is vital to view the overall provisions of the transfer system and view the proposal as a whole. Some commentators suggested that the same results could be achieved by imposing conditions on court declining jurisdiction. In other words, a stay would be granted subject to certain conditions and it was suggested that that would have the effect of a transfer. While this might achieve a similar result to a transfer it is questionable whether it is as clean and as active as the transfer proposals that are contained in the legislation.

THE SPECIFIC ISSUES

(Note: References are to section numbers in the 1993 version of the legislation.)

1. Section 1 - Definition of Plaintiff

There is a question as to whether the definition properly provides for third party proceedings. The intention was to catch, by a combination of the definition of

APPENDIX C

plaintiff and the definition of proceeding, all types of action or proceeding which could be commenced.

2. Section 1 - Definition of Procedure

We have received two views here. The first would propose a more restricted definition of proceeding to a step in a proceeding that has already been commenced. The second view would broaden proceeding to include pre-action motions as well.

3. Section 2 - Abolition of Jurisdiction by Serve

Several commentators raised the question of the need for some residual discretion in this area. The closest analogy is Article 3136 of the Quebec Civil Code which states:

"Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required."

The question therefore is should there be some residual discretion, and if so, what should be the test of when that discretion should be exercised.

4. Section 3 - *In personam* and *in rem*

We have previously concluded that *in rem* jurisdiction was limited to matters involving ships. Some commentators have raised the question of whether there is a gap in that the Act applies only to proceedings where there is a personal defendant or a ship. Are there other proceedings where there would be no defendant which ought to be brought within the application of the Act?

5. Section 1, 2, 3 and 8 - Territorial Competence

Territorial competence is defined in the definition section as a connection between the territory or legal system and a party or the facts. Some commentators raise the

UNIFORM LAW CONFERENCE OF CANADA

question of whether there is a conflict between the provisions of Section 3(e) and the provisions of Section 8(e)(3). In other words the connection could consist by way of a connection with the legal system rather than the territory itself. If that connection is sufficient, should it be recognized in Section 8(e)(3), which is restricted to contracts, or should it be elevated somehow in Section 3 to mean that jurisdiction exists whenever the law of a particular territory is the applicable law. The original proposition was not to elevate applicable law to that status and to leave it in Section 8 as a factor only in the case of contracts.

6. Section 6 - Partnerships

Partnerships represent a very difficult area. Should they be viewed as a collection of individuals to which the Rules relating to individual persons apply or should they be regarded as business entities and analogies to corporations used? The tendency has been to analogize the corporations and there is a suggestion that a similar provision to Section 5(a) be introduced in Section 6, that is, where the business entity is required by law to have a registered office within the territory.

7. Section 8 - Movable Property

Several provisions of Section 8 refer to the existence of movable property as a basis for jurisdiction. The section currently does not state when the movable property should be within the territory. Should this section be amended to state that movable property should be in the territory at the time the action is commenced.

8. Necessary and Proper Party

This is no provision in the proposed legislation for assuming jurisdiction over a necessary and proper party, even though that exists in almost every current version of the Rules of Court. The thinking was that this is an aberration from the normal basis for exercise of jurisdiction. On the other hand, many commentators suggested that there was a need to be able to reach individuals as necessary and proper parties in circumstances where they may not be reachable according to the Rules that we have proposed. It is possible that the extension of jurisdiction under the rubric of real and substantial connection would catch some of these individuals. If that is not the case, how should one deal with the attempt to establish jurisdiction over a defendant who does not satisfy the basic connection requirements?

APPENDIX C

One possible solution, rather than adding necessary and proper party as a specified ground for jurisdiction, is to use the residual discretion which was mentioned under issue number 3 above. You will recall that Article 3136 of the Code sets up an extraordinary basis for hearing a dispute, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Québec cannot reasonably be required. This provision probably captures the situation in which the concept of necessary and proper party ought to be used. A proposal along these lines would leave our basic premise intact, preserve the possibility of using the necessary and proper party approach, but add a further hoop or hurdle of proving that it is impossible or impractical to institute the proceedings outside the forum in which the necessary and proper party is sought to be involved.

If necessary and proper party is to be preserved, then it has to be preserved as an exception to our basic rule that jurisdiction can be asserted only over a defendant who has agreed, submitted, or where there is an objective real and substantial connection with the forum.

9. Section 8(g)

The wording of this subsection preserves much of the jurisprudence which has been established around the Rules of Court. Several commentators suggest that it should be made clear that this provision does not cover the case where the circumstances show only that damage was suffered within the territory. Should the phrasing be amended so as to exclude consequential damage suffered in the territory as a result of a tort committed elsewhere?

10. Section 8 - Constitutional Cases

Several commentators raised the issue that constitutional cases are not properly accommodated within Section 8. Is there a separate set of factors or a method of accommodating constitutional cases within Section 8? Most commentators agreed that constitutional cases should be within the application of the Act.

11. Section 19 - Leave to Appeal

Section 19 appears to give an absolute right to appeal a decision on transfer, and several commentators suggested that such a right might be used for delaying tactics.

UNIFORM LAW CONFERENCE OF CANADA

It was suggested that the right should be tempered by at least requiring leave to appeal.

12. Binding the Crown

The intention is that the Crowns be bound by this Act. Although it appears that there is no longer a "crown as litigant" exception to those Interpretation Acts which specify that the Crown is not bound unless specifically mentioned, the developing jurisprudence would probably hold that the Crown is subject to this legislation. Should the legislation make it clear that this is intended to be the case? If it purports to do so, then there is a constitutional question as to whether or not a province can bind the federal Crown by a provincial enactment. So far, the only situation in which this has occurred has gone unchallenged. Should the legislation test the waters by specifying that both provincial and federal Crowns are bound by the legislation?

13. Section 8(e)(2)

While this was the subject of some debate at last year's Annual meeting, it seemed to be fairly generally agreed by the commentators that the mere place of contracting should not be in the Section 8 list of factors. It should be noted that Article 3148 of the Québec Code refers in subsection 3 to a situation where one of the obligations arising from the contract was to be performed in Québec. Even the subsequent articles of Section 3149 and 3150 relating to consumer contracts or insurance contracts do not raise the question of place of contracting. There appears to be general agreement that place of contracting should now be removed from Section 8 as a presumptive factor.

CONCLUSION

One other factor which arose in consultation was the question of whether transfer should be restricted to other Canadian Courts. This suggestion was made on the basis that the concept of compulsory transfer, being a novel concept, should be tried out in Canada first before it being extended to other countries or territories. The second basis was that the concept of compulsory transfer may be politically more

APPENDIX C

acceptable if there was a restriction to each of the eleven jurisdictions in which the Model Act might be adopted.

You will recall that the proposed legislation dealing with recognition of judgments is restricted to judgments from other Canadian provinces. The starting premise was that, having rationalized the basis of jurisdiction, judgments from other Canadian sources should be automatically acceptable. Once jurisdiction is rationalized, there is no possibility or there should be no possibility of exorbitant jurisdiction being exercised. This approach is similar to the approach taken by the Supreme Court of Canada in *Morguard* but not exactly so. In fact, several commentators refer to what they consider to be the many uncertainties of *Morguard* and excesses to which the *Morguard* principle has been put. They pointed to recognition of judgments from outside Canada in circumstances where the fact of recognition precluded the hearing of issues which ought to have been dealt with, and which were not - to the considerable prejudice of the judgment debtor.

Perhaps the answer is that transfer should be restricted to other Canadian provinces. An effective transfer to a non-Canadian jurisdiction could be achieved by conditional stay where the Order sets out the conditions under which it is thought that another non-Canadian territory is a more appropriate jurisdiction.

In summary there appears to have been considerable support for the proposed legislation, and for the benefits which are claimed for it.