

## APPENDIX E

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### MATRIMONIAL PROPERTY AND CHOICE OF LAW

British Columbia Commissioners

#### A. INTRODUCTION

In 1986, Quebec, Ontario and Nova Scotia were appointed to report on private international law in matrimonial property regimes. The Report was prepared by the Quebec Representatives and published in the *Proceedings of the Seventieth Annual Meeting of the Uniform Law Conference of Canada* (1988).

Further work on this topic was postponed until a decision was made in 1995 to return the topic to the Conference's agenda. The B.C. Commissioners were asked to prepare a Report to be considered by the Conference at its 1996 Proceedings.

#### The Quebec Report

- contains an excellent summary of the common law and civil law principles about jurisdiction and choice of law in proceedings relating to matrimonial property, and
- fully outlines and analyzes policy choices.

Due to the sturdiness of this platform, and one other fact, the B.C. Commissioners concluded that the next step should be to suggest the outlines of a coherent policy, and raise specific questions that must be answered in order to prepare a draft Uniform Act. The other fact is that since the Quebec Report was submitted, legal developments have enhanced the ability to enforce in one province an order made in another. The Conference has been at the forefront of developing policy in this area. The Conference has considered, and is considering, related issues and policies in the *Uniform Enforcement of Canadian Judgments Act* ("UECJA"), the *Uniform Court Jurisdiction and Proceedings Transfer Act* ("UCJ") and the initiative on

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draft uniform enforcement of non-monetary judgments legislation. An important part of developing policy on choice of law rules for matrimonial property proceedings is to have regard to policy developed in these related areas.

The following materials set out propositions for discussion, followed by comment and specific questions to be directed to the Conference. A table comparing the law in Canadian provinces and territories is set out in Appendix A to this Report

### B. PROPOSITIONS

**Comment: the common law makes distinctions about jurisdiction and choice of law based on whether property is located within the territory of the court, whether the property is a movable or immovable, and when the property was acquired.**

The policy propositions suggested below depart from the common law in a number of ways and are based on three initial tentative conclusions:

- questions relating to matrimonial property should, if possible, be determined by reference to a single law.
- while practical difficulties of enforcement may limit the kinds of orders a court can make, a court with jurisdiction to decide some parts of property issues arising on marriage breakdown should be able to deal with all property in a single proceeding to the extent possible.
- a court whose jurisdiction derives solely from the fact that a minor portion of matrimonial property is located in the territory should, however, ordinarily decline jurisdiction on principles of *forum non conveniens*.

*Question 1. Should the scope of Uniform legislation be restricted to determining choice of law rules only for property located within the territory of a court?*

*Question 2. If the choice of law rules are to apply to property located outside the territory, should they be restricted to property within Canada?*

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### Comment:

In order for a court to make an order that finalizes all aspects of a dispute over matrimonial property, it must be able to have regard to property located outside its own territory, as well as outside Canada. To the extent that the order cannot be enforced outside the court's territory, other methods, described below, can be employed.

### JURISDICTION: RESIDENCE AND SUBSTANTIAL CONNECTION AS GROUNDS FOR JURISDICTION

Proposition 1: A court has jurisdiction ("territorial competence") in a proceeding that is brought against a person concerning the division of matrimonial property on marriage breakdown when one of the usual jurisdictional rules relating to

- (a) residence,
- (b) submission,
- (c) agreement or
- (d) real and substantial connection with the territory

are satisfied.

**Comment:** the question of when a court has jurisdiction to hear a matter is addressed by the Uniform Court Jurisdiction and Proceedings Transfer Act. S. 3 of the UCJ provides that:

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

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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.

### JURISDICTION: PRESUMPTIONS

Proposition 2: Without limiting the right of a spouse to prove other circumstances that constitute a real and substantial connection between the territory and the facts on which the proceeding is based, a real and substantial connection between the territory and those facts should be presumed to exist if

- (i) the spouses ordinarily resided together while married in the territory,
- (ii) a petition has been validly issued under the *Divorce Act* in the territory, or
- (iii) matrimonial property that is the subject matter of the proceeding is located in the territory.

**Comment:** the UCJ provides that a court has territorial competence if it can be established that there is a real and substantial connection between the territory and the facts on which the proceeding is based (s. 3). It then identifies situations in which such a connection can be presumed (s. 8). The presumptions are rebuttable. Item (iii) in Proposition 2 is listed in s. 8 of the UCJ. Items (i) and (ii) are not listed.

*Question 3. Are the grounds for accepting jurisdiction as set out in the Uniform Court Jurisdiction and Proceedings Transfer Act suitable for matrimonial property proceedings?*

*Question 4. Are the two additional grounds (items (i) and (ii) listed in Proposition 2) suitable grounds for accepting jurisdiction in matrimonial property proceedings?*

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**Comment:** both of the additional grounds have been largely accepted by the provinces.

*Question 5. Should further situations be included in which a substantial connection with the matrimonial property proceeding and the territory will be presumed?*

**Comment:** one further ground for establishing substantial connection is currently accepted in some Canadian provinces: a court will assume jurisdiction if one of the spouses is ordinarily resident in the territory. The B.C. Commissioners have some doubts concerning whether this policy should be carried forward. Residence of one spouse in the territory is enough to bring a Divorce petition. It is also enough if the proceedings are being brought against the spouse who is ordinarily resident in the territory. Should it be enough if the resident is the spouse who is bringing the proceedings but who has not issued a Divorce petition?

*Question 6. If the additional grounds for establishing a substantial connection are accepted, should they be included in the UCJ? or does the Conference still agree that family law statutes should contain separate jurisdictional rules?*

**Comment:** the question of whether jurisdictional rules for family proceedings should be included in the UCJ, or in family legislation, has already been considered by the Conference. In an annotation to s. 8 of UCJ, it is observed:

8.4 Section 8 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 8 would lead to confusion and uncertainty because they would often be at variance with the rules in those statutes, which have priority by virtue of section 10. For this reason it was felt better to leave the matter of territorial competence for the special family law statutes. If the question of territorial competence in a particular family matter was not dealt with in a special statute, the general rules in section 3 of this Act, including ordinary residence and real and substantial connection would govern.

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Proposition 3: A court should decline jurisdiction where a court in another territory is a more appropriate forum to try the proceeding.

**Comment:** s. 9 of the UCJ adopts this policy.

*Question 7. Should family property choice of law legislation restate the forum non conveniens rule, or rely upon the UCJ?*

**Comment:** principles of forum non conveniens should play an important role in matrimonial property proceedings that concern property in more than one territory, or where the spouses lived in more than one territory during the marriage. While several courts may be able to assume jurisdiction on a variety of reasonable bases, if the suggested policy of settling matrimonial property disputes by reference to a single law in a single proceeding is to work well, usually the dispute should be heard in the territory that is the most appropriate forum.

### CHOICE OF LAW RULES: CONTRACT

Proposition 4: (1) Spouses may enter into a contract, either before or during the marriage, that specifies how their property is to be divided in the event of marriage breakdown.

(2) The contract referred to in (1) would be enforceable subject to the laws of the territory where enforcement is sought.

**Comment:** civil law and common law both recognize that parties may enter into a contract about matrimonial property.

Some provinces have legislation that allows a court to inquire into the fairness of a contract made on or during marriage that relates to the disposition of matrimonial property on marriage breakdown.

*Question 8. Does the status of a marriage contract need to be restated in family*

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*property choice of law legislation?*

### CHOICE OF LAW RULES: MARRIAGE AND COMMUNITY OF PROPERTY

Proposition 5: Subject to a contrary agreement by the spouses, if the first common habitual residence of spouses after they marry is in a territory the laws of which provide for community of property, then regardless of a change of residence, property rights on marriage breakdown are determined by the internal law of that territory.

**Comment:** this is based on a principle of both civil law and common law. It is called the "doctrine of immutability of original regime." The one difference is that the civil law and the common law tests are based upon domicile at the time of marriage, which may be different from residence. Using domicile as a test for determining choice of law for spouses has been expressly rejected in Canadian jurisdictions that have either (a) reconsidered choice of law issues, or (b) enacted legislation providing that a wife may establish an independent domicile. The only alternative is to adopt an approach based on the proper law of the marriage, determined by a test that has regard to where the spouses lived together while married.

This rule applies if the territory's law provides for community of property. The only Canadian jurisdiction that has community of property is Quebec. Other Canadian jurisdictions adopt principles of "deferred" community of property (*i.e.*, during the marriage, principles of separate property determine ownership. It is not until marriage breakdown that legislation calls for a division of property, or an adjustment of each spouse's net worth through an equalizing payment).

A reason for adopting this rule for marriage in a community of property territory is that it may be presumed that spouses that marry in the territory and do not contract out of its rules expect community of property principles to govern the division of property in the event of marriage breakdown. The same reason might be raised for extending the rule to marriage in a deferred community of property territory.

Another reason for adopting this rule for marriage in a community of property territory is that under such a regime, rights in property vest on marriage. A reason for not adopting this rule for marriage in a deferred community of property territory is that rights to do not vest by virtue of the marriage.

A reason for not adopting this rule for marriage in a territory with separate property

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laws is that Canadian legal policy is firmly in favour of community of property rules or deferred community of property rules for dividing matrimonial property on marriage breakdown.

If the territory provides for community of property, but the spouses have made a marriage contract providing for a different regime, the suggested rule would not apply.

*Question 9. Should the doctrine of immutability of original regime be carried forward in uniform legislation?*

*Question 10. If accepted, should the doctrine of immutability of original regime apply only to marriage in a community of property territory, or extend to marriage in deferred community of property territories?*

*Question 11. Would it be necessary for uniform legislation to define "community of property" to distinguish it from "deferred community of property?"*

### CHOICE OF LAW RULES: PROPER LAW OF THE MARRIAGE

Proposition 6. Subject to Propositions 4 and 5, property rights on marriage breakdown must be determined in accordance with the internal law of the territory most closely associated with the marriage.

**Comment:** the common law rule concerning ownership of movables determines choice of law by reference to the husband's domicile at the time the property was acquired.

With respect to immovables, the common law rule is that the proper law is the law of the territory in which the immovable is located.

The civil law determines choice of law by the "doctrine of immutability of original regime."

The policy suggested is based on a conclusion that, where possible, the spouses should be allowed to pursue all related claims arising from the breakdown of their marriage in a single proceeding and subject to the laws of a single territory. Since domicile is no longer a practical test for determining the proper law of the marriage,



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the policy suggested is to base it on the law most closely associated with the marriage.

*Question 12. Should the choice of law rule for matrimonial property proceedings be based on the law of the territory most closely associated with the marriage? If not, what choice of law rule should be adopted?*

*Question 13. Should the law continue to have different choice of law rules depending upon whether the property is a movable or immovable? or is a single rule preferable?*

### CHOICE OF LAW RULES: PRESUMPTIONS

Proposition 7: (1) Without limiting the right of a spouse to prove that the law of another territory is most closely associated with the marriage, the territory most closely associated with the marriage is presumed to be the territory of the last common habitual residence of the spouses.

(2) If the spouses never formed a common habitual residence, the territory most closely associated with the marriage is presumed to be the territory of the last habitual residence of the applicant.

**Comment:** in some cases, it will be difficult to select a single law that is most closely associated with the marriage. Legislation makes that task easier by setting out presumptions to assist the courts in making the selection.

**E.g.,** the spouses marry and live for 5 years in Manitoba. They then move to Ruritania, a separate property regime, and live there for 4 years. They then move to Alberta, and live there for four years and divorce.

The presumptions suggested in Proposition 7 would select Alberta law as the proper law.

There is a consensus among Canadian provinces that have reconsidered the common law rules that the proper law of the marriage is determined by the common habitual

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residence of the spouses. If they resided in more than one location, it is the last common habitual residence. While the question of domicile depends upon a number of factors, including the intention of the husband, residence is determined purely by the physical fact of residing in a particular territory.

The phrase "common habitual residence" has been interpreted to mean "the place where the spouses most recently lived together as husband and wife and participated together in everyday family life." (*Pershad Singh v. Pershad Singh* (1987), 9 R.F.L. (3d) 359, 361 (Ont. H.C.); *Adam v. Adam* (1994), 7 R.F.L. (4th) 63, 67 (Ont. C.J.). It embraces the idea of cohabiting.

If the spouses never cohabited, the proper law is determined by the last habitual residence of the applicant.

The references to internal law are to ensure that principles of renvoi do not apply.

The presumptions set out under Proposition 7 are rebuttable. Here is an example where the court might select the law of the territory most closely associated with the marriage other than by reference to the last common habitual residence of the spouses.

**E.g.**, the spouses married in Ruritania and lived there together for 20 years. They then moved to Ontario, purchased a home, and lived there for one year before the marriage broke down. The wife returned to Ruritania. Most of their property is still located in Ruritania. The wife received a divorce order in Ruritania.

*Question 14. Are the presumptions set out in Proposition 7 acceptable? Should other presumptions be added?*

*Question 15. What default rule should be adopted if the spouses never had a common habitual residence?*

### PROPERTY LOCATED OUTSIDE TERRITORY

Proposition 8: In an application relating to matrimonial property, the court may dispose of all issues relating to ownership and division of the matrimonial property.

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Proposition 9: Where the matrimonial property is located outside the territory, but in a territory which is prepared to recognize and give effect to an order of the local court that provides for non-monetary relief, the local court may make an order for non-monetary relief.

**Comment:** the policy underlying Proposition 9 is that a local court can make an order pertaining to the ownership or division of property located outside the territory, if the territory in which the property is located adopts legislation similar in policy to that contemplated in the draft uniform inter-provincial enforcement of non-monetary orders legislation. This provision is less useful in those provinces that adjust property rights on marriage breakdown by requiring one spouse to make an equalizing payment to the other spouse. But even in those provinces, legislation allows the court to make a non-monetary order to facilitate separating the finances and property of spouses on marriage breakdown.

### PROPERTY LOCATED OUTSIDE TERRITORY: ALTERNATIVE ORDERS

Proposition 10: Where the matrimonial property is located outside the territory then regardless of whether the courts in that territory are prepared to recognize and give effect to an order of the local court relating to non-monetary relief, the local court may

- (a) reapportion entitlement to property within the territory to compensate for rights in property located outside the territory,
- (b) order the spouse who has legal title to property located outside the territory to pay compensation to the other spouse in lieu of division, or
- (c) make an *in personam* order compelling the spouse that owns property that is located outside the territory to convey or charge all or part of the interest in it to the other spouse.

**Comment:** Canadian courts routinely use the first two of these techniques for arriving

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at a fair division of matrimonial property, although in some cases there is doubt concerning a court's ability to do so. Any such doubt would be put to rest by specifically incorporating these powers into the relevant legislation.

The third option, the in personam order, is often overlooked. It is open to the court to make an order requiring a person to perform a specific obligation. If the person fails to obey the order, contempt proceedings can be brought to enforce it. Such an order is effective if the person is within the court's territory. It is an equitable jurisdiction that has been recognized since the 18th Century: see, e.g., Penn v. Lord Baltimore, (1750) 1 Ves. Sen. 444.

*Question 16. Should uniform legislation contain a section setting out methods by which a court asked to make an order concerning the disposition of all matrimonial property can deal with property located outside the territory?*

### SPECIAL RULES

- |                 |  |
|-----------------|--|
| Proposition 11: | A court may take into account a previous order of a court in another territory made in connection with |
|                 | (a) the marriage breakdown of the spouses, and   |
|                 | (b) the ownership or division of their matrimonial property.   |

**Comment:** under the current law, spouses with property in more than one territory are sometimes compelled to litigate the question of division in each of those territories. Questions have arisen in this connection concerning the extent to which a local court can have regard to the order of a court in another territory, and for what purposes. The policy suggested is to allow the court to make sure that its order achieves a fair result having regard to arrangements ordered in other jurisdictions. Legislation to this effect appears in the statute books of some Canadian provinces.

*Question 17. Should uniform legislation contain a section stating that a court may have regard to orders made by a court of another territory?*

**APPENDIX A: TABLE OF CANADIAN LEGISLATION**

	<b>British Columbia</b>	<b>Saskatchewan</b>	<b>Alberta</b>	<b>Manitoba</b>
<b>Family Property Statute</b>	<i>Family Relations Act</i> , R.S.B.C. 1979, c. 121	<i>Matrimonial Property Act</i> , S.S. 1979, c. M-6.1	<i>Matrimonial Property Act</i> , R.S.A. 1980, c. M-9	<i>Marital Property Act</i> , R.S.M. 1987, c. M45
<b>Relevant provisions</b>	none (c/l rules apply)	ss. 21(2)(i); 21(2)(p) (c/l rules apply generally)	ss. 3, 8(j); 9(1)	ss. 2(1); 12
<b>Jurisdiction</b>	c/l	c/l	s. 3	s. 2(1)
• <i>over persons</i>	if defendant is within province or is duly served <i>ex juris</i> ; or if defendant has interest in land in dispute	if defendant is within province or is duly served <i>ex juris</i> ; or if defendant has interest in land in dispute	(1) if joint or habitual residence of both spouses in province (2) if <i>Divorce Act</i> petition issued in province	if habitual residence of both spouses or last common habitual residence in province
• <i>over land</i>	only if situate in province	only if situate in province	only if situate in province and parties meet jurisdiction requirements of s. 3	only if situate in province and parties meet jurisdiction requirements of s. 2(1)
• <i>court order re: property outside the province</i>	<i>Laurence</i> : can grant award of assets in province to compensate for immovables elsewhere	s. 21(2)(p) value of matrimonial property [of any type?] outside province <b>may</b> be taken into account when making a division of matrimonial property that is fair and equitable	s. 9(1) court <b>may</b> distribute property in province to give effect to distribution of all property [of any type?], wherever situate	s. 12 value of assets [of any type?] outside province <b>shall</b> be taken into account when calculating equalization payment [i.e. no c/l jurisdiction over foreign movables?]
<b>Choice of law</b>	apply law of domicile to local or foreign movables apply <i>lex situs</i> only to local immovables	apply law of domicile to local or foreign movables apply <i>lex situs</i> only to local immovables	may only apply for operation of Alberta act if parties meet jurisdiction requirements of s. 3	may only apply for operation of Manitoba act if parties meet jurisdiction requirements of s. 2(1)
• <i>movable/immovable distinction</i>	yes	yes	yes	s. 12 may operate to treat foreign movables and immovables the same
• <i>renvoi</i>	yes	yes	not applicable	not applicable
<b>Effect of extra-provincial order</b>	could be held to be <i>res judicata</i> if final; or may be influential by comity	21(2)(i) previous distribution of matrimonial property made by a court of competent jurisdiction may be taken into account	8(j) a prior court order to be taken into consideration when making a distribution of property	could be held to be <i>res judicata</i> if final; or may be influential by comity

	Newfoundland	Nova Scotia	Prince Edward Island	Yukon
<b>Family Property Statute</b>	<i>Family Law Act</i> , R.S.N. 1990, c. F-2	<i>Matrimonial Property Act</i> , R.S.N.S. 1989, c. 275	<i>Family Law Reform Act</i> , R.S.P.E.I. 1988, c. F-3	<i>Family Property &amp; Support Act</i> , R.S.Y. 1986, c. 63
<b>Relevant provisions</b>	s. 32	s. 22	s. 13	s. 17
<b>Jurisdiction</b>	c/l	c/l -- can be declined ( <i>Vladi</i> )	c/l -- can be declined ( <i>Cackette</i> )	c/l
• <i>over persons</i>	if defendant is within province or is duly served <i>ex juris</i> ; or if defendant has interest in land in dispute	if defendant is within province or is duly served <i>ex juris</i> ; or if defendant has interest in land in dispute	if defendant is within province or is duly served <i>ex juris</i> ; or if defendant has interest in land in dispute	if defendant is within territory or is duly served <i>ex juris</i> ; or if defendant has interest in land in dispute
• <i>over land</i>	only if situate in province	only if situate in province	only if situate in province	only if situate in territory
• <i>court order re: property outside the province</i>	s. 32(3) value of immovables, wherever situate, may be taken into consideration	s. 22(3) value of immovables, wherever situate, may be taken into consideration	s. 13(2) value of immovables, wherever situate, may be taken into consideration	s. 17(2) value of immovables, wherever situate, may be taken into consideration
<b>Choice of law</b>	s. 32(1) ownership and division of movables: internal law of place of last common habitual residence if no [such?] residence, law of province s. 32(2) ownership of immovables: internal law of place where property located	s. 22(1) ownership and division of movables: law of place of last common habitual residence if no such residence, law of province s. 22(2) ownership of immovables: law of place where property located	s. 13(1) ownership and division of movables: internal law of place of last common habitual residence if no such place, law of province s. 13(2) ownership of immovables: internal law of place where property located	s. 17(1) ownership and division of movables: internal law of place of last common habitual residence if no such place, law of Yukon s. 17(2) ownership of immovables: internal law of place where property located
• <i>movable/ immovable distinction</i>	yes	yes	yes	yes
• <i>renvoi</i>	no	yes	no	no
<b>Effect of extra-provincial order</b>	could be held to be <i>res judicata</i> if final; or may be influential by comity	could be held to be <i>res judicata</i> if final; or may be influential by comity	could be held to be <i>res judicata</i> if final; or may be influential by comity	could be held to be <i>res judicata</i> if final; or may be influential by comity

	New Brunswick	Ontario	Northwest Territories	Quebec
<b>Family Property Statute</b>	<i>Marital Property Act</i> , S.N.B. 1980, c. M-1.1	<i>Family Law Act</i> , R.S.O. 1990, c. F.3	<i>Matrimonial Property Act</i> , R.S.N.W. 1988, c. M-6	<i>Civil Code of Quebec</i> , 1991, c. 64
<b>Relevant provisions</b>	ss. 44, 45	s. 15	none (c/l rules apply)	Arts. 3123, 3135, 3136, 3152, 3154, 3155
<b>Jurisdiction</b>	s. 44; c/l	c/l	c/l	3135: court may decline jurisdiction  3136: if dispute is sufficiently connected with Quebec and proceedings cannot reasonably be brought outside Quebec, court may hear it though no jurisdiction
• <i>over persons</i>	(1) if joint or single spouse habitually resident in province (2) if person who doesn't qualify under (1) applies for determination of rights to any property, can have Act apply by 44(3)	if defendant is within province or is duly served <i>ex juris</i> ; or if defendant has interest in land in dispute	if defendant is within province or is duly served <i>ex juris</i> ; or if defendant has interest in land in dispute	3154: if one of the spouses has domicile or residence in Quebec at the initiation of proceedings; or if a person has an interest in land in Quebec in dispute
• <i>over land</i>	only if situate in province	only if situate in province	only if situate in territory	all land in dispute
• <i>court order re: property outside the province</i>	s. 45 court shall take into account property wherever situate when making division; c/l limitations on authority of court to make order affecting land outside of province persist	Act does not distinguish property by location when determining equalization entitlement (see ss. 7, 9)	?	yes? no provision restricting jurisdiction to foreign land
<b>Choice of law</b>	s. 44: Act applies (1)(a) if spouses had last common habitual residence in the province; or (b) if one spouse is habitually resident in province (3) if court chooses to apply act to non-resident's property s. 44(2): law of place of last common residence of spouses applies if ss.(1) application requirements not met	s. 15 internal law of place of last common habitual residence if no such place, law of Ontario	apply law of domicile to local or foreign movables apply <i>lex situs</i> only to local immovables	3123: law of spouses' domicile at time of solemnization of marriage if no common domicile, then law of first common residence; or law of common nationality; or law of place of solemnization of marriage
• <i>movable/immovable distinction</i>	yes	no	yes	no
• <i>renvoi</i>	probably not; s. 44(2) says "dispose"	no	yes	?
<b>Effect of extra-provincial order</b>	could be held to be <i>res judicata</i> if final; or may be influential by comity	could be held to be <i>res judicata</i> if final; or may be influential by comity	could be held to be <i>res judicata</i> if final; or may be influential if comity	3155: final decision of court of competent jurisdiction recognized and declared enforceable