

RULE 17 SERVICE OUTSIDE ONTARIO

Professor Janet Walker

SYNOPSIS

	<i>Page</i>
Text of Rule 17	17-4
A. BACKGROUND AND HISTORY OF RULE 17	
§1 Amendments to Rule	17-7
§2 Former Counterpart and Model: Holmsted and Gale Cross-Reference	17-8
§3 Highlights of the Rule	17-8
§4 The Recognition and Enforcement of Judgments	17-9
[1] Author's Commentary: The <i>Morguard</i> decision and the Recognition and Enforcement of Judgments	
(a) Presence-based jurisdiction	
(b) Consent-based jurisdiction	
(c) Assumed jurisdiction	
(d) Departures from the traditional rule in federal and regional systems	
(e) The <i>Morguard</i> decision and the recognition and enforcement of judgments	
(f) The <i>Morguard</i> principles are constitutional imperatives	
(g) The <i>Morguard</i> principles also apply to foreign judgments	
(h) What remains of the jurisdictional defence to the enforcement of foreign judgments	
(i) Other defences to the enforcement of foreign judgments	
[2] Literature	
[3] Case Law: Recognition and Enforcement of Judgments	
(a) Criteria for enforcement of foreign judgments	
(b) Persons within the jurisdiction at the time of service	
(c) Submission to the jurisdiction	
(d) Real and substantial connection — Canadian judgments	
(e) Real and substantial connection — Foreign judgments	
(f) Non-jurisdictional grounds for refusing to enforce judgments	
(g) Enforcement of order or judgment for costs	
(h) Reciprocal enforcement of judgments	
(i) Execution stayed pending appeal, <i>etc.</i>	
§5 Personal Jurisdiction	17-32
[1] Author's Commentary: The <i>Morguard</i> decision and Personal Jurisdiction	
(a) The <i>Morguard</i> decision and personal jurisdiction	
(b) The grounds for service out and personal jurisdiction	
(c) Jurisdiction <i>simpliciter</i> and <i>forum non conveniens</i>	
(d) Access to justice	
(e) Multiplicity	

- [2] Literature
- [3] Case Law: Rules 17.02-17.04 — Service outside Ontario without Leave, with Leave and the Additional Requirements
 - (a) General
 - (b) Property in Ontario — rule 17.02(a)
 - (c) Administration of estates/Interpretation of an instrument — rule 17.02(b)
 - (d) Contracts — rule 17.02(f)
 - (e) Tort committed in Ontario — rule 17.02(g)
 - (f) Damage sustained in Ontario — rule 17.02(h)
 - (g) Injunctions — rule 17.02(i)
 - (h) Custody and access — rule 17.02(k)
 - (i) Judgment of court outside Ontario — rule 17.02(m)
 - (j) Claims authorized by statute — rule 17.02(n)
 - (k) Necessary or proper party — rule 17.02(o)
 - (l) Persons resident or carrying on business in Ontario — rule 17.02(p)
 - (m) Counterclaim, cross-claim or third party claim — rule 17.02(q)
 - (n) Service outside Ontario with leave — rule 17.03
 - (o) Additional requirements for service outside Ontario — rule 17.04
- §6 Declining Jurisdiction: *Forum non conveniens* 17-55
 - [1] Author's Commentary: Declining Jurisdiction — *Forum non conveniens*
 - (a) The operation of section 106 C.J.A. and rule 17.06
 - (b) The doctrine of *forum non conveniens*
 - (c) The burden where service out is challenged on grounds of inconvenient forum
 - (d) Anti-suit injunctions
 - (e) Parallel proceedings
 - [2] Literature
 - [3] Case Law: Rule 17.06 — Setting Aside Service outside Ontario and Staying Proceedings
 - (a) Generally
 - (b) Jurisdiction to hear motion
 - (c) Timing of the motion—Attornment—rule 17.06(4)
 - (d) Agreement to litigate elsewhere
 - (e) Convenience of forum — General
 - (f) Convenience of forum—Onus on the motion
 - (g) Local Ontario forum offering legitimate juridical advantage
 - (h) Convenience of forum—Examples
 - (i) Stay of Proceedings—Examples
 - (j) Dismissal of Proceedings—Examples
 - (k) Validating unauthorized service—rule 17.06(3)
- §7 Choice of Law in Tort Cases 17-91
 - [1] Author's Commentary: Choice of Law in Tort Cases
 - [2] Literature
 - [3] Case Law

§8	Manner of Service outside Ontario	17-93
	[1] Author's Commentary: Manner of Service outside Ontario	
	(a) Service outside Ontario and the Hague Service Convention	
	(b) Default proceedings	
	(c) Setting aside default judgment	
	(d) Substituted service	
	[2] Hague Service Convention	
	(a) Text of the Hague Service Convention	
	(b) Canadian Declaration pursuant to the Convention	
	(c) Table of objecting and non-objecting states under Article 10	
	[3] Bilateral Treaties	
	[4] Literature	
	[5] Case Law: Rule 17.05—Manner of Service outside Ontario	

TEXT OF RULE**DEFINITION**

17.01 In rules 17.02 to 17.06, “originating process” includes a counterclaim against only parties to the main action, and a crossclaim.

SERVICE OUTSIDE ONTARIO WITHOUT LEAVE

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims.

Property in Ontario

(a) in respect of real or personal property in Ontario;

Administration of Estates

(b) in respect of the administration of the estate of a deceased person,
(i) in respect of real property in Ontario, or
(ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;

Interpretation of an Instrument

(c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,
(i) real or personal property in Ontario, or
(ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;

Trustee Where Assets Include Property in Ontario

(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

Mortgage on Property in Ontario

(e) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;

Contracts

(f) in respect of a contract where,
(i) the contract was made in Ontario,
(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,
(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or
(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a

breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;

Tort Committed in Ontario

(g) in respect of a tort committed in Ontario;

Damage Sustained in Ontario

(h) in respect of damages sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed;

Injunctions

(i) for an injunction ordering a party to do, or refrain from doing anything in Ontario or affecting real or personal property in Ontario;

Support

(j) for support;

Custody or Access

(k) for custody of or access to a minor;

Invalidity of Marriage

(l) to declare the invalidity of a marriage;

Judgment of Court Outside Ontario

(m) on a judgment of a court outside Ontario;

Authorized by Statute

(n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;

Necessary for Proper Party

(o) against a person outside Ontario who is a necessary or proper party to a proceeding properly brought against another person served in Ontario;

Person Resident or Carrying on Business in Ontario

(p) against a person ordinarily resident or carrying on business in Ontario;

Counterclaim, Crossclaim or Third Party Claim

(q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

Taxes

(r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality. *Amended 1998.*

SERVICE OUTSIDE ONTARIO WITH LEAVE

17.03(1) In any case to which rule 17.02 does not apply, the court may grant leave to serve an originating process or notice of a reference outside Ontario.

(2) A motion for leave to serve a party outside Ontario may be made without notice, and shall be supported by an affidavit or other evidence showing in which place or country the person is or probably may be found, and the grounds on which the motion is made.

ADDITIONAL REQUIREMENTS FOR SERVICE OUTSIDE ONTARIO

17.04(1) An originating process served outside Ontario without leave shall disclose the facts and specifically refer to the provision of rule 17.02 relied on in support of such service.

(2) Where an originating process is served outside Ontario with leave of the court, the originating process shall be served together with the order granting leave and any affidavit or other evidence used to obtain the order.

MANNER OF SERVICE OUTSIDE ONTARIO

Definitions

17.05(1) In this rule,
“contracting state” means a contracting state under the Convention;
“Convention” means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965.

General Manner of Service

(2) An originating process or other document to be served outside Ontario in a jurisdiction that is not a contracting state may be served in the manner provided by these rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service is made, if service made in that manner could reasonably be expected to come to the notice of the person to be served.

Manner of Service in Convention States

(3) An originating process or other document to be served outside Ontario in a contracting state shall be served,
(a) through the central authority in the contracting state; or
(b) in a manner that is permitted by Article 10 of the Convention and that would be permitted by these rules if the document were being served in Ontario. *Amended 1992.*

Proof of Service

(4) Service may be proved,
(a) in the manner provided by these rules for proof of service in Ontario;

- (b) in the manner provided by the law of the jurisdiction where service is made; or
- (c) in accordance with the Convention, if service is made in a contracting state (Forms 17A to 17C).

MOTION TO SET ASIDE SERVICE OUTSIDE ONTARIO

17.06(1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

- (a) for an order setting aside the service and any order that authorized the service; or
- (b) for an order staying the proceeding.

(2) The court may make an order under subrule (1) or such other order as is just where the court is satisfied that,

- (a) service outside Ontario is not authorized by these rules;
- (b) an order granting leave to serve outside Ontario should be set aside; or
- (c) Ontario is not a convenient forum for the hearing of the proceeding.

(3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service.

(4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.

A. BACKGROUND AND HISTORY OF RULE 17

§1 AMENDMENTS TO RULE

Rule 17.05 was amended by O. Reg. 711/89, s. 16. The Rule was revised with the consolidation of the Rules in R.R.O. 1990, pursuant to the *Regulations Revision Act, 1989*, S.O. 1989, c. 82. Rule 17.05(3) was amended by O. Reg. 535/92, s. 7. Rule 17.02 was amended by O. Reg. 171/98, s. 2.

§2 FORMER COUNTERPART AND MODEL: HOLMESTED AND GALE CROSS-REFERENCE

For the history of and cases and commentary on the predecessor provisions of this Rule, see H. & G., R. 25 (service outside Ontario generally), R. 26 (mode of service), R. 27 (time for service), R. 28 (time for defence), R. 29 (moving to set aside service), R. 38 (conditional appearance).

§3 HIGHLIGHTS OF THE RULE

Service outside Ontario may be made without leave in cases falling within the list enumerated in rule 17.02. In such cases, the originating process must disclose the facts and specifically refer to the provision of rule 17.02 relied upon in support of such service: rule 17.04. In addition, as stated in rule 17.03, the court has broad discretion to grant leave to serve the originating process outside Ontario in cases not coming within the list in rule 17.02. This motion can be made without notice and should be supported by evidence as to where the person may be found and the grounds supporting the motion.

A party served outside Ontario may seek an order setting aside service where service is not authorized by the rule; however, the rule provides for the validation of service in cases where it would have been appropriate to grant leave to serve outside Ontario. Accordingly, it would appear that the scope for setting aside service is limited to cases in which it is not appropriate to grant leave to serve outside Ontario. In addition, a party served outside Ontario may seek an order staying the proceeding on the grounds that Ontario is not a convenient forum for the hearing of the proceeding.

A party who seeks either an order setting aside service or a stay may do so before delivering a defence, a notice of intent to defend, or a notice of appearance. The party does not, by making such a motion, submit to the jurisdiction of the court: rule 17.06(1) and (4). The rules make no provision for the entry of a “conditional appearance” to postpone the jurisdictional determination until trial. The issue of whether the court should decline jurisdiction, when it arises, is one that should be determined at the outset, and if this involves fact-finding necessitating the reception of oral evidence, the master or judge can grant leave to adduce such evidence on the hearing of the motion, under rule 39.03(4). In an unusual case, leave to dispute jurisdiction at trial might still be granted under the closing words of rule 17.06(2) (“such other order as is just”).

Rule 17.05 provides for the manner of service outside Ontario in states that are not contracting parties to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and in states that are contracting parties. For non-contracting states, rule 17.05 provides that documents may be served outside Ontario in a jurisdiction that is not a contracting state in the manner provided by these rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service

is made, if service made in that manner could reasonably be expected to come to the notice of the person to be served. Rule 17.05 was amended, effective in 1990, to implement Canada's obligations under the Hague Convention and, in particular, to recognize limitations that apply in some contracting states by reason of the fact that the private service of documents is forbidden and all documents, foreign or domestic, have to be served by state officials.

The Supreme Court of Canada decision in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and the subsequent jurisprudence interpreting it have revolutionized the law of personal jurisdiction in Canada and the operation of Rule 17. Accordingly, §§4-7 below each begins with an author's commentary explaining the recent developments in the law brought about by the *Morguard* decision. This is followed by references to the academic literature and to the case law.

§4 THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS

Subheading [1] of this section contains an author's commentary on the effect of the *Morguard* decision on the law relating to the recognition and enforcement of judgments in Canada. Subheading [2] contains references to the academic literature and the paragraphs of subheading [3] contain the case law.

[1] *Author's Commentary: The Morguard Decision and the Recognition and Enforcement of Judgments*

At one time, the rules for service outside the jurisdiction, such as Rule 17, determined the scope of the courts' personal jurisdiction. However, over the years, the relationship between service and personal jurisdiction has become considerably more sophisticated. Nowadays, service outside Ontario functions much as service within Ontario, that is, primarily as a means of ensuring that parties receive timely notice of a proceeding so that they have the opportunity to participate. The grounds on which a person may be served outside Ontario do not form fixed and absolute limits for the jurisdiction of the Ontario courts but, instead, provide a rough guide to the kinds of cases in which persons outside Ontario will be regarded as subject to the jurisdiction of the Ontario courts.

Now that the Supreme Court of Canada has decided in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, that personal jurisdiction in Canada is a function of the *Constitution*, it is particularly important to have a clear understanding of the relationship between the rules for service outside Ontario and the jurisdiction of the Ontario courts. This requires a review of the development of the law of personal jurisdiction in Canada and an explanation of how Rule 17 operates in the context of the law of personal jurisdiction.

It may seem strange to begin this review with developments in the law relating to the recognition and enforcement of judgments. However, the evo-

lution of the law of personal jurisdiction in Canada, especially as it relates to the three bases of jurisdiction, has been driven by these developments and so they are the best place to start. Then it is possible to outline the implications of the changes in the law of the enforcement of judgments for the law of personal jurisdiction, both in respect of the bases on which Canadian courts assume jurisdiction and decline jurisdiction, and on which they decide choice of law in tort.

There are three bases on which common law courts will be prepared to exercise jurisdiction: (a) presence of the defendant, as demonstrated by service, within the territory of the forum; (b) consent of the defendant, as demonstrated by either a prior agreement to resolve disputes in the courts of the forum, or by the defendant's appearance in the matter to defend on the merits of the claim; or (c) a real and substantial connection between the matter and the forum.

(a) *Presence-based jurisdiction*

Initially, the jurisdiction of common law courts and the scope for the service of documents were coterminous. This was because personal jurisdiction was a function of the power of the state to arrest defendants in both criminal and civil matters and to detain them until they had answered the complaint: see A. von Mehren, "Adjudicatory Jurisdiction: General Theories Compared and Evaluated" (1983), 63 B.U.L. Rev. 279. Personal jurisdiction was limited to defendants present in the territory of the forum, *i.e.*, those who could be served within the jurisdiction in the manners prescribed in Rule 16. It was said that the courts had authority to decide any matter involving a defendant who could be served with the courts' originating process. Since the rules for service determined who could be served, it was commonly thought that the rules also determined who would be subject to the courts' authority.

(b) *Consent-based jurisdiction*

The scope of personal jurisdiction, however, was never entirely limited to persons who could be served with notice of the proceeding. In addition to jurisdiction based on state powers of arrest, courts also had jurisdiction over persons who were willing to come before them. That is, defendants were always free to waive the right to ignore a notice of proceeding issued by a court that did not have the authority to summon them to appear and to submit to its jurisdiction. They could waive this right simply by appearing in the proceeding and defending the claim on the merits. This practice has been called "submission" or "attornment" and it has always provided an independently sufficient foundation for the jurisdiction of the court to render a judgment binding on the defendant.

Even today, in an era of expanded bases for personal jurisdiction, if the court does not have the authority to decide the case on any other basis (*i.e.*, service on the defendant in the territory, an agreement to submit disputes to the Ontario courts, or a real and substantial connection between the matter and

Ontario (see §4[1](c) below)), but the parties are still willing to have the court decide their case, the court is not required to turn them away. The court can decide the case and issue a judgment binding on the defendant simply on the basis that the defendant has attorned to the court's jurisdiction by appearing in the matter to defend on the merits. Further, common law courts rarely, if ever, inquire of their own motion whether they have personal jurisdiction to decide a case and, generally, they will make such an inquiry only upon a motion by the defendant. (It follows, then, that the authority described in s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.34 of the court to stay a proceeding on its own motion will rarely, if ever, be exercised in the context of cases with connections to other jurisdictions and it is generally reserved for other situations.)

The doctrine relating to consent-based jurisdiction and the principles of estoppel underlying it have remained relatively stable over time: having consented to the authority of the court to resolve the dispute, the defendant is estopped from subsequently challenging that authority.

(c) *Assumed jurisdiction*

Although the law relating to consent-based jurisdiction has remained constant, the law relating to other forms of jurisdiction has changed considerably over the years. In particular, over time, two things happened to the law relating to presence-based jurisdiction: first, physical arrests in civil matters were replaced by service of process; and, second, it became clear that there were many meritorious complaints that could appropriately be determined by the court if it was not for the fact that these matters involved defendants who could not be served within the territorial jurisdiction of the forum. As a result, rules, such as Rule 17, for service outside the territorial jurisdiction of the court were developed and the courts began to assume jurisdiction over matters involving defendants from other places. This additional scope of jurisdiction has been described as "assumed jurisdiction."

When courts began to exercise this additional scope for jurisdiction, they did so on terms that were somewhat different from the terms that applied to jurisdiction exercised on the basis of the presence of the defendant in the territory of the forum. This was because assumed jurisdiction did not have the support of the coercive powers of the state in which the court sat (apart from the power to seize and dispose of the defendant's locally-held assets after judgment), and because assumed jurisdiction involved an assertion of authority over persons who, due to their presence in another country, were subject to the authority of another sovereign. Assumed jurisdiction was usually statute-based, and its operation differed in two ways from presence-based jurisdiction.

First, as a cautionary measure, the plaintiff who wished to invoke this jurisdiction was required to obtain the leave of the court by persuading the court that it was a suitable forum for the resolution of the dispute even though the defendant could not be served locally. (This is no longer required in Ontario for the matters described in rule 17.02.)

Second, a judgment issued by a court exercising assumed jurisdiction would not always be treated by another court as binding on a defendant who had not previously agreed to litigate the dispute in this court. Generally, the judgment would be treated as binding on the defendant by another court only if the defendant responded to the notice of the proceeding by appearing to defend on the merits. If the defendant did not do so, for example, simply by ignoring the notice of proceeding, the court was said to lack “jurisdiction in the international sense” and its judgment would not be given effect by courts in other provinces and countries (except, perhaps, in the United States). In this way, defendants who had not agreed to litigate the dispute in a particular forum and who could not be served in the territory of that forum enjoyed what amounted to a veto over the plaintiff’s choice of that forum. A plaintiff could attempt to have the matter litigated in a particular forum by commencing the claim and having the defendant served *ex juris*, but the court’s judgment would be binding on the defendant only if the defendant consented by attorning to the court’s jurisdiction (again, apart from the capacity of the court to order the judgment executed against local assets of a foreign defendant).

To summarize the effect of the three traditional bases for personal jurisdiction, then, common law courts would generally recognize and enforce one another’s judgments only where the court’s jurisdiction was based on the defendant’s presence in the territory of the forum or the defendant’s consent. They would assume jurisdiction over non-consenting defendants served outside the jurisdiction, they would not recognize or enforce one another’s judgments where jurisdiction was assumed over non-consenting defendants served outside the jurisdiction. This has been the traditional approach to jurisdiction in common law countries and it was the law in Canada until 1990. It is still the law in many common law countries (apart from the United States).

(d) *Departures from the traditional rule in federal and regional systems*

To put the recent Canadian developments in their international context, prior to 1990, there were two notable departures from the traditional common law approach to personal jurisdiction. These departures occurred when special regimes for the recognition and enforcement of judgments were created to facilitate federal or regional political systems. The first departure occurred with the foundation of the United States when the U.S. Constitution established a requirement in Article IV that courts in the U.S., both state and federal would give “full faith and credit” to the judgments of other courts in the U.S. This requirement was later determined to be subject to the further requirement that the court that issued the judgment had afforded due process to the defendant according to the Fifth Amendment or the Fourteenth Amendment in its assumption of jurisdiction over the defendant. The U.S. Supreme Court has determined that the due process requirements will be met when there are “minimum contacts” with the forum that “make it reasonable and just according to our traditional conception of fair play and substantial justice” for the court to assume jurisdiction over the defendant: *International Shoe Co. v.*

Washington, 326 U.S. 310 (1945). The minimum contacts which may suffice to establish jurisdiction for a court in one state to issue a judgment that will be given full faith and credit by the courts of another state are generally similar in nature to the bases for service outside Ontario described in rule 17.02.

The second departure from the traditional common law approach to personal jurisdiction occurred with the establishment (pursuant to Article 220 of the Treaty Establishing the European Economic Community, 1957) of the Brussels Convention of 1968 (now Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Official Journal L 12, 16/01/2001 p. 1), which provides for the mutual recognition and enforcement of judgments by the courts of the member states of the European Union (and of the Lugano Convention which has similar operation within the European Free Trade Association). Again, the provisions for situations in which courts may assume jurisdiction over matters involving defendants domiciled in other European countries resemble the provisions in rule 17.02 for service outside Ontario without leave. Judgments in matters in which European courts have assumed jurisdiction pursuant to the Brussels Regulation are generally enforceable in other member states regardless of whether or not the defendant consents to the assumption of jurisdiction by the court.

There are two points worth noting about to these departures from the traditional common law rule for personal jurisdiction. First, it was thought necessary to the operation of these federal and regional systems that the courts of states or countries within them give effect to the judgments of the courts of other states or countries within the system in circumstances where jurisdiction was based on the connection between the matter and the forum even when the defendant did not consent. Second, by eliminating the requirement of the defendant's consent for enforceable judgments in cases of service outside the territory of the forum, it became necessary to build new safeguards into the law to prevent situations of unfairness in which defendants were forced to litigate in distant fora having little connection to the matter. This involved reviewing the various possible connections between the matter and the forum to determine whether they would support an appropriate exercise of jurisdiction.

In the United States, the effect of this varied from state to state. Some states retained statutes authorizing service outside the state ("long-arm statutes") containing catalogues of contacts with the forum similar to those found in rule 17.02. In those states, the courts interpreted these contacts or read them down to meet the due process requirements of the U.S. Constitution. In other states, however, these catalogues of contacts were replaced with a simple provision permitting service in accordance with the Constitution. Catalogues of contacts that would meet the requirements of the Constitution were then developed in the jurisprudence through determinations of their constitutionality by U.S. Supreme Court.

In Europe, the drafters of the Brussels and Lugano Conventions reviewed the connections on which the courts of each member state assumed jurisdiction over defendants served abroad and they identified the bases that they regarded as objectionable. They listed these bases in the Conventions in a separate article and prohibited European courts from exercising jurisdiction upon them in matters involving defendants of other member states.

In both the United States and Europe, however, it became apparent that it was necessary for there to be some correlation between the bases on which courts would assume jurisdiction to decide a matter and the bases they would be prepared to endorse by enforcing the judgments of other courts that relied on them to assume jurisdiction.

(e) *The Morguard decision and the recognition and enforcement of judgments*

The decision of the Supreme Court of Canada in *Morguard Investments Ltd. v. de Savoye*, [1990] 3 S.C.R. 1077 fundamentally changed the rules for the recognition and enforcement of judgments and for personal jurisdiction in Canada. Accordingly, cases decided before 1990 should be treated with caution.

Until 1990, the provincial superior courts of the common law provinces in Canada followed the traditional common law rules for the assumption of jurisdiction and for the recognition and enforcement of the judgments of other courts. They regarded other courts as having jurisdiction to issue judgments binding on defendants only if the defendants had been served in the territory of the forum or had consented to the jurisdiction of the court either by way of an agreement or by appearing and defending the matter on the merits. Jurisdiction could not be founded solely on strong connections between the matter and the forum, even where, for example, the cause of action arose in the forum, the majority of witnesses and the bulk of the evidence were to be found there, or litigation that was integrally related to the matter in question was already underway there. In short, even if the court in question was clearly an appropriate forum, it could not issue a judgment binding on a defendant served outside the province without the defendant's consent.

The courts in the common law provinces applied these rules equally to the judgments of the courts of other provinces and the courts of other countries. However, in 1990, the Supreme Court of Canada decided that this had to change. In *Morguard*, a mortgagor of land in Alberta defaulted on the payments and moved to British Columbia. When Morguard Investments Ltd. obtained a default judgment in the courts of Alberta for the shortfall owing on the mortgage after the sale of the property and sought to enforce the judgment in the courts of British Columbia, it was clear to the British Columbia courts and to the Supreme Court of Canada that despite the old rule the judgment should be enforced. According to the Supreme Court of Canada a new rule had to be developed to accommodate the needs both of modern commerce and of the

Canadian federation. Concerning the needs of modern commerce, the Supreme Court of Canada explained that,

. . . the business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

. . . what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.

Concerning the needs of the Canadian federation, the court observed:

The considerations underlying the rules of comity apply with much greater force between the units of a federal state.

. . . the English rules seem to me to fly in the face of the obvious intention of the *Constitution* to create a single country.

. . . various constitutional and sub-constitutional arrangements and practices make unnecessary a “full faith and credit” clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation.

To meet the needs of modern commerce and the Canadian federation the Supreme Court of Canada held that Canadian courts must regard a court issuing a judgment as having jurisdiction to do so provided that there was *a real and substantial connection between the matter and the forum*.

(f) *The Morguard principles are constitutional imperatives*

In the years following the Supreme Court’s decision in *Morguard*, there was uncertainty about which of these rationales for change formed the basis for the change in the law — the needs of modern commerce or the needs of the Canadian federation. The case had not been argued in constitutional terms and the court had held that it was unnecessary to pronounce definitively on the issue.

One question arising from this uncertainty related to the application of the *Morguard* principles to Quebec: If the *Constitution* was not the underlying rationale for change in the law, did the judgment bind the courts of Quebec, which otherwise were governed by the provisions of the civil law (now Book X — Private International Law, Quebec Civil Code). In 1993, in its decision in *Hunt v. T&N plc.*, [1993] 4 S.C.R. 289 the Supreme Court clarified that “the constitutional considerations raised are just that. They are constitutional imperatives” and, in *Hunt*, the court applied these constitutional considerations

to Quebec legislation demonstrating that the *Morguard* principles applied throughout Canada. In *Hunt*, the court determined that Quebec blocking legislation that provided for the issuing of orders designed to impede foreign litigation by prohibiting the removal of documents from Quebec was constitutionally inapplicable to proceedings in other provinces. As La Forest J. had explained in *Morguard*, “the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.” Blocking legislation such as the Quebec legislation in question (and similar Ontario legislation) would arbitrarily interfere with this balance, just as the traditional common law rules had done, by impeding litigation in appropriate fora. Accordingly, it was inapplicable to proceedings in other parts of Canada.

Now that the constitutional foundation for the *Morguard* principles has been established, this foundation would also appear to cast doubt on the validity of provincial legislation such as that which existed in Saskatchewan and New Brunswick purporting to codify the law relating to the enforcement of foreign judgments which permitted a plaintiff to sue on a judgment from another province, only where the traditional common law requirements were met; and it casts doubt on cases which suggested that the legislation precluded common law development of the law of personal jurisdiction: see *Cardinal Couriers Ltd. v. Noyes* (1993), 13 C.P.C. (3d) 144 (Sask. C.A.) and *844903 Ontario Ltd. v. Vander Pluijm* (1992), 12 C.P.C. (3d) 71 (N.B. Q.B.), which should be treated with caution.

Legislative schemes that codify court jurisdiction for the purposes of the registration of judgments as a streamlined means of enforcement operate independently from the enforcement of judgments at common law. Notwithstanding *Morguard*, judgments sought to be registered under such schemes must comply with the legislation. A plaintiff is still free to bring an action on the judgment and argue that on the facts of the case a real and substantial connection existed with forum in which the judgment was issued: see discussion below in §4[3](h), and *Acme Video Inc. v. Hedges* (1993), 12 O.R. (3d) 160 (C.A.).

(g) *The Morguard principles also apply to foreign judgments*

Another question arising from the uncertainty as to which rationale had prompted the change in the law introduced by the *Morguard* decision related to the application of the *Morguard* principles to foreign judgments: if the underlying rationale for the change in the law was the constitutional imperatives of Canadian federalism and the assurances of procedural fairness provided by “the essentially unitary structure of our judicial system with the Supreme Court of Canada at its apex” then it would seem that the *Morguard* principles should be applied only to Canadian judgments and not to foreign judgments.

After all, the rules contained in the Brussels Regulation facilitate the enforcement of European judgments, not non-European judgments.

In 1994, it might have seemed that some controversy remained in the Ontario jurisprudence. In that year, two decisions of the Ontario Court (General Division) — those in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.), and in *Evans Dodd v. Gambin Associates* (1994), 17 O.R. (3d) 803 (Gen. Div.), reversed (April 3, 1997), Doc. CA C18628 (Ont. C.A.) — appeared in the same volume of the Ontario Reports with conflicting results. In retrospect, the *Evans Dodd* decision concerning a default judgment by the English courts, appears to be the only decision refusing to apply the *Morguard* principles to a foreign judgment in an action for enforcement and it was reversed on appeal. Macpherson J. in *Arrowmaster*, however, endorsed the application of the *Morguard* principles to foreign judgments as follows:

I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure.

...

[T]he historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction.

By 1995, the accretion of judgments supporting the application of the *Morguard* principles to foreign judgments seemed sufficient to the Ontario courts in *United States of America v. Ivey* (1995), 26 O.R. (3d) 533 (Gen. Div.), affirmed (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal refused 33 O.R. (3d) xv (S.C.C.) to resolve the question. The judgments cited included appellate level decisions, such as that of the British Columbia Court of Appeal in *Moses v. Shore Boat Builders Ltd.* (1993), 83 B.C.L.R. (2d) 177 (C.A.) (leave to appeal to the Supreme Court of Canada refused (1994), 23 C.P.C. (3d) 294 (note) and those of first instance courts across Canada: *Fabrelle Wallcoverings & Textiles Ltd. v. North American Decorative Products Inc.* (1992), 6 C.P.C. (3d) 170 (Ont. Gen. Div.); *McMickle v. Van Straaten* (1992), 93 D.L.R. (4th) 74 (B.C. S.C.); *Stoddard v. Accurpress Manufacturing Ltd.* (1993), 84 B.C.L.R. (2d) 194 (S.C.); *Clancy v. Beach* (1994), 92 B.C.L.R. (2d) 82 (S.C.); *Allen v. Lynch* (1993), 21 C.P.C. (3d) 99 (P.E.I. T.D.). As Sharpe J. concluded in *Ivey*, a decision that was upheld by the Court of Appeal for Ontario,

In my view, the law would be seriously deficient and at odds with the reality of modern commercial life if it were possible for a resident of this province to actively engage in a business in the United States for a period of several years, but then shelter behind the borders of Ontario from answering to a claim for civil liability for harm caused by that activity.

The application of the *Morguard* principles to foreign judgments has been endorsed across the spectrum of legal disputes: *Clarke v. Lo Bianco* (1991), 50 C.P.C. (2d) 127 (B.C. S.C.) (enforcement of the Californian medical malpractice judgment arising from treatment rendered by the defendant in California); *Minkler & Kirschbaum v. Sheppard* (1991), 3 C.P.C. (3d) 104 (B.C. S.C.) (enforcement of Arizona default judgment regarding community debts for married couple); *Federal Deposit Insurance Corp. v. Vanstone* (1992), 63 B.C.L.R. (2d) 190 (S.C.) (enforcement of Oklahoma default judgment on promissory notes); *McMickle v. Van Straaten* (1992), 93 D.L.R. (4th) 74 (B.C. S.C.) (California default judgment in a product liability action enforced on the grounds of a real and substantial connection with California as the defendant's advertisements impacted upon the plaintiff in California); *Fabrelle Wallcoverings & Textiles Ltd. v. North American Decorative Products Inc.* (1992), 6 C.P.C. (3d) 170 (Ont. Gen. Div.) (enforcement of U.K. default judgment for unpaid invoice for goods shipped from U.K. to Canada); *Allen v. Lynch* (1993), 21 C.P.C. (3d) 99 (P.E.I. T.D.) (enforcement of Massachusetts default judgment arising from a debt pursuant to a promissory note); *Webb v. Hooper* (1994), 25 C.P.C. (3d) 322 (Alta. Master) (the court declined to enforce a Kentucky default judgment based upon service *ex juris*, but did so on the ground that there was no real and substantial connection between Kentucky and the subject-matter of the Kentucky action); *Beals v. Saldanha* (1998), 42 O.R. (3d) 127 (Gen. Div.), additional reasons at (January 12, 1999), Doc. 93-CQ-40311SA, 1999 CarswellOnt 19 (Gen. Div.) (an Ontario lawyer who failed to advise his clients in 1991 of the risk of the enforceability of a Florida judgment under the *Morguard* principles was held to be negligent).

It should be noted, nevertheless, that the Supreme Court of Canada has yet to pronounce on this issue. The court had an opportunity to do so in *Moses v. Shore Boat Builders Ltd.*, but refused leave to appeal.

(h) *What remains of the jurisdictional defence to the enforcement of foreign judgments*

Historically, the most frequently invoked defence to the recognition and enforcement of judgments was that the court issuing the judgment lacked jurisdiction to do so. With the change in the law brought about by the *Morguard* decision, the scope for that defence has been narrowed considerably because the forum of the court issuing the judgment now needs only to be connected to the matter in some real and substantial way. There could be several such fora and each would have jurisdiction regardless of whether the defendant consented to their assumption of jurisdiction over the matter. Nevertheless, there remains the possibility that foreign courts that have assumed jurisdiction will be regarded by Canadian courts as lacking jurisdiction to issue a judgment binding on the defendant. For example, in *Braintech Inc. v. Kostiuik* (1999), 171 D.L.R. (4th) 46 (B.C. C.A.), leave to appeal refused 253 N.R. 395 (note) (S.C.C.) the British Columbia Court of Appeal held that passive posting of information on an electronic bulletin board did not establish a real and sub-

stantial connection with Texas, the jurisdiction in which the information is received and, therefore, the Texas court lacked jurisdiction to issue a judgment enforceable in British Columbia. These situations, however, are likely to be rare. The connections to the forum required to pass the real and substantial connection test constitute a very low threshold. As La Forest J. explained in *Morguard* “the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.” The protection contemplated is not against suit in less appropriate for, but against suit in jurisdictions having little or no connection with the matter.

(i) *Other defences to the enforcement of foreign judgments*

The jurisdictional defence to the recognition and enforcement of judgments once enjoyed such prominence in the jurisprudence and academic literature that it might have seemed to be the only defence to the enforcement of final foreign money judgments for specific sums. Accordingly, it might have seemed that the *Morguard* decision had changed all of the defences to the enforcement of foreign judgments. To be sure, the jurisdictional defence is the aspect of the law of the recognition and enforcement of judgments that most directly affects the operation of Rule 17, as can be seen in the *Author's Commentary* and case law in §5. However, there are two other aspects of the law relating to the recognition and enforcement of foreign judgments — the foreign public law exception, and impeachment — and these should be mentioned to complete the discussion.

The foreign public law exception. Generally speaking, common law courts will not recognize or enforce judgments in situations in which this would be tantamount to giving effect to the sovereign will of a foreign power. The most common examples of this arise in respect of foreign penal judgments and foreign revenue judgments. The categories of such judgments are not limited to these two, however, and a residual category of judgments based on the application of “other public laws” has been identified to address related situations in other areas of public regulation: see Castel & Walker, *Canadian Conflict of Laws*, 5th ed. (Toronto: Butterworths, 2001) forthcoming, Chapter 15, Recognition and Enforcement of Judgments.

Tax conventions and other bilateral arrangements have narrowed the application of the foreign public law exception in specific situations and there has been a general tendency for the foreign public law exception to be given a flexible interpretation so that the principle remains intact but the application does not prevent the courts from providing government-led efforts to further public interests that are of “obvious transboundary significance,” such as protection of the environment. This was the case in *United States of America v. Ivey* (1995), 26 O.R. (3d) 533 (Gen. Div.), affirmed (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal refused 33 O.R. (3d) xv (S.C.C.) in which the Ontario courts enforced a Michigan judgment for reimbursement of the cost

of remedial measures undertaken by the Environmental Protection Agency pursuant to the *Comprehensive Environmental Response, Compensation and Liability Act*.

Impeachment. While the foreign public law exception deals with judgments that cannot be enforced because they go beyond the ordinary scope of private law matters that give rise to enforceable judgments, the impeachment defences deal with judgments that would otherwise be enforceable if they were not in some way objectionable. Foreign judgments may be impeached if they have been obtained by fraud, or in a manner contrary to natural justice, or if their recognition or enforcement would be contrary to public policy. The impeachment defences to the enforcement of foreign judgments have not frequently been raised and have rarely been successful. In part, the relative rarity of the impeachment defences was a result of the fact that defendants who were concerned about the quality of justice in a foreign court often could prevent a judgment from becoming enforceable simply by refraining from participating in the proceeding. While it is likely that situations giving rise to the serious prospect of impeachment will continue to be relatively rare, now that the *Morguard* decision has largely eliminated the jurisdictional defences, it is likely that cases of this sort will be more frequent than they once were. Recent examples include *Beals v. Saldanha* (1998), 42 O.R. (3d) 127 (Gen. Div.), additional reasons at (January 12, 1999), Doc. 93-CQ-40311SA (Ont. Gen. Div.) (fraud in the default determination of damages), *Ontario v. Mar-Dive Corp.* (1996), 141 D.L.R. (4th) 577 (Ont. Gen. Div.) (enforcement contrary to public policy because judgments were obtained by means of half-truths and artificiality), and *Kidron v. Grean* (1996), 48 O.R. (3d) 775 (Gen. Div.), additional reasons at (May 13, 1996), Doc. 94-CQ-59194 (Ont. Gen. Div.), leave to appeal refused 48 O.R. (3d) 784 (Div. Ct.) (refusing summary judgment to enforce California judgment for \$15 million for plaintiff who “felt horrible” in business dealings with defendant).

[2] Literature

Texts. Castel & Walker *Canadian Conflict of Laws*, 5th ed. (Toronto: Butterworths, 2001) forthcoming. Collins, et al., ed. *Dicey & Morris on the Conflict of Laws*, 13th ed. (2000). Law Reform Commission of British Columbia, *Enforcement of Judgments Between Canadian Provinces* (Ministry of the Attorney General, 1989).

Periodical literature. E. Mazey, “The Enforcement of Labour Orders outside the Jurisdiction of Origin” (2001), 59(1) U.T. Fac. L. Rev. 25. G.D. Watson & F. Au, “Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*” (2000), 23 *Advocates’ Q.* 167. D. Schafer, “Canada’s Approach to Jurisdiction Over Cybertorts: *Braintech v. Kostiuk*” (2000), 23 *Fordham Int. L.J.* 1186. C. Wasserstein Fassberg, “Rule and Reason in the Common Law of Foreign Judgments” (1999), 12 *Can. J.L. & Juris.* 193. F. Strebel, “The Enforcement of Foreign Judgments and Foreign Public Law”

(1999), 21 Loyola L.A. Int. & Comp. L.J. 55. H. P. Glenn, "Recognition of Foreign Judgments in Quebec" (1997), 28 Can. Bus. L.J. 404-414. J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth into the World" (1997), 28 Can. Bus. L.J. 373-403. J. Blom, "The New Common Law on the Enforcement of Foreign Judgments" (1993), 8 Banking L. Rev. 265. J. Woods, "Recognition and Enforcement of Judgments Between Provinces: The Constitutional Dimensions of *Morguard Investments Ltd.*" (1993), 22 Can. Bus. L.J. 104. J. Swan, "The Uniform Enforcement of the *Canadian Judgments Act*" (1993), 22 Can. Bus. L.J. 87. B. Finkle and C. Labrecque, "Low Cost Legal Remedies and Market Efficiency: Looking Beyond *Morguard*" (1993), 22 Can. Bus. L.J. 58. E. Edinger " *Morguard v. De Savoye*: Subsequent Developments" (1993), 22 Can. Bus. L.J. 29. V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993), 22 Can. Bus. L.J. 4. Case Comment " *Morguard Investments Ltd. v. DeSavoye*: Emerging International Implications" (1992), 15 Dalhousie L.J. 629. P. Glenn, "Foreign Judgments, the Common Law and the *Constitution. DeSavoye v. Morguard Investments Limited*" (1992), 37 McGill L.J. 537. P. Boles, "In the Wake of *Morguard* — Developments in the Enforcement of Personal Extra-Provincial Judgments" (1992), 7 Nat. Creditor D. Rev. 9. J.G. Castel, "Recognition and Enforcement of a Sister-Province Default Money Judgment: Jurisdiction Based on Real and Substantial Connection" (1991), 7 Banking L. Rev. 111. J. Blom, *Comment* (1991), 70 Can. Bar. Rev. 733. V. Black & J. Swan, "New Rules for the Enforcement of Foreign Judgments: *Morguard Investments Limited v. De Savoye*" (1991), 12 Advocates' Q. 489.

[3] *Case Law: Recognition and Enforcement of Judgments*

Author's Note: As a result of the fundamental transformation of the law brought about by the *Morguard* decision (see §4{1}(e), above), pre-1990 case law should be treated with caution. Further, under the *Morguard* principles, submission or attornment has lost much of its relevance for establishing the jurisdiction of another court to issue a judgment enforceable in Canada because the court will be regarded as having jurisdiction over a non-attorning defendant provided there was real and substantial connection between the matter and the forum of the issuing court. Attornment continues to be relevant, however, for the enforcement of judgments through registration schemes: see §4{3}(h), below.

However, as Canadian defendants and their counsel realize that the implications of the *Morguard* principles are that a hearing on the merits cannot be secured in their home jurisdiction in Canada simply by ignoring the notice of the proceeding in a foreign court, they will reconsider the possibility of attorning to the foreign court, or at least, challenging the exercise of jurisdiction by it in order to avoid facing a suit to enforce a foreign default judgment with the very limited defences available. Then, having attorned, they will have obviated the need to test the jurisdiction of the foreign court on the basis of the real and substantial connection test (see §§4{1}(h) and (i), above). The

somewhat strange result will likely be that in the future the enforcement of most foreign judgments will involve attornment rather than a test of the real and substantial connection between the matter and the foreign forum.

(a) *Criteria for enforcement of foreign judgments*

The well-established principle, that where the defendant was served outside the jurisdiction of the court another court will enforce the judgment of the original forum only where the defendant either consented to or attorned to the jurisdiction of that court, is inconsistent with the federal structure of the *Constitution* and must be rejected; now, in determining whether or not such a judgment will be enforced, consideration must be given to the contacts between the jurisdiction and the matter and provided there is a real and substantial connection between the damages suffered and the adjudicating province, the judgment should be enforced; in this case the court upheld the enforcement by a British Columbia court of an Alberta default judgment for mortgage deficiency against the mortgagor of Alberta land based upon service out of the jurisdiction: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.

(b) *Persons within the jurisdiction at the time of service*

Ontario cases. The court refused to enforce a Nevada default judgment where the defendant was not resident in Nevada at the time the action was commenced and had not submitted or agreed to submit to the jurisdiction of the Nevada court: *P.C.H. Inc. v. Fedyk* (1992), 11 C.P.C. (3d) 77 (Ont. Gen. Div.).

Non-Ontario cases. An application to register a California judgment in British Columbia was refused where there was no evidence to indicate that the defendant was a resident of that state or that he carried on business there at the time the process was issued: *Moss & Enochian v. Brown* (1997), 12 C.P.C. (4th) 361 (B.C. Master). A corporation will be treated by the English courts as present within the jurisdiction of another country only where the corporation had established and maintained at its own expense in that country a fixed place of business and carried on from there its business for more than a minimal period of time through its servants or agents or through a representative; the court refused to hold that the presence of a wholly-owned subsidiary of the defendant constituted the presence of the parent corporation: since the establishment of the subsidiary was not a mere facade concealing the true facts it was not appropriate to pierce the corporate veil: *Adams v. Cape Industries PLC.*, [1990] 2 W.L.R. 657 (Eng. C.A.). An *ex parte* order directing registration of an Ontario order in British Columbia was set aside where the defendant was neither a resident of nor carried on business in Ontario: *Royal Bank v. Industmarine Ltd.*, [1982] 3 W.W.R. 449 (B.C. S.C.).

(c) *Submission to the jurisdiction*

Ontario cases. Summary judgment was granted to enforce a judgment obtained after the defendant had attorned to the jurisdiction of the Ohio court: *Black Gold Potato Sales Inc. v. Garibaldi* (1994), 29 C.P.C. (3d) 78 (Ont. Gen. Div.). Where an Ontario corporation had submitted to the jurisdiction of an American court by defending an action on the merits it could not relitigate the matter in Ontario regardless of whether attorning to the foreign jurisdiction had been intentional: *Gourmet Resources International Inc. (Trustee of) v.*

Paramount Capital Corp. (1991), 5 C.P.C. (3d) 140 (Ont. Gen. Div.), affirmed (1993), 14 O.R. (3d) 319 (C.A.). Where the defendant had voluntarily attorned to the South African court's jurisdiction by choosing to defend the action on the merits, enforcement of a judgment of that court was granted: *Clinton v. Ford* (1982), 29 C.P.C. 30 (Ont. C.A.).

Non-Ontario cases. A motion to stay registration of an Ontario summary judgment based on an Illinois judgment pending determination of earlier Manitoba proceedings relating to the same Illinois judgment was refused where the defendant had a business presence in Ontario and had attorned to that court's jurisdiction: *Girsberger v. Kresz* (1999), 30 C.P.C. (4th) 286 (Man. Q.B.), affirmed (1999), 38 C.P.C. (4th) 308 (Man. C.A.). Where the defendants had combined an application for an order that the plaintiff's claim of fraud be struck for lack of particularity with one that challenged the jurisdiction of the foreign court, the court held that they had attorned to that court's jurisdiction in the dispute as a whole: *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.* (1995), 41 C.P.C. (3d) 259 (B.C. C.A.). The court refused to set aside registration of a Colorado judgment for \$4.5 million where an attorney in Colorado had filed a defence on behalf of the defendants but the attorney withdrew before trial; the defendants had attorned to the jurisdiction and although the amount awarded appeared immoderate in comparison with what might have been awarded in British Columbia in similar circumstances, registration of the judgment could not be attacked on that ground: *Clancy v. Beach* (1994), 92 B.C.L.R. (2d) 82 (S.C.). A Texas summary judgment on a promissory note where the defendant's lawyer had filed an answer was enforceable in British Columbia despite the defendant's argument that the Texas lawyer had not been "instructed to attorn"; the defendants could, by their own acts or by acts done on their behalf attorn even though they had no intention of so doing: *First National Bank of Houston v. Houston E & C Inc.* (1990), 47 B.C.L.R. (2d) 347 (C.A.). The defendant's submission to the jurisdiction of a Texas court in an asbestos case did not amount to submission to the jurisdiction of the same court in subsequent asbestos litigation: *Adams v. Cape Industries PLC.*, [1990] 2 W.L.R. 657 (Eng. C.A.). A motion by the defendants for a stay of proceedings pending arbitration did not amount to a voluntary submission to the jurisdiction of the court: *Finnish Marine Insurance Co. v. Protective National Insurance Co.*, [1989] 2 All E.R. 929 (Q.B.). While the mere filing of an appearance did not constitute submission to the jurisdiction, the filing of a written appearance to the British Columbia action, registering a change of solicitor with the court, and appearing on two occasions before the court, without challenging the jurisdiction of the court, clearly amounted to a submission to the jurisdiction of British Columbia courts: *Canada Trustco Mortgage Co. v. Rene Management & Holdings Ltd.*, [1988] 5 W.W.R. 303 (Man. C.A.). A wife was held to be entitled to enforce an Arizona judgment for child support arrears covering a 12-year period; although the wife's claim would not have been directly enforceable in Alberta for public policy reasons, the Arizona judgment was enforced because the defendant had consented to the judgment: *Holt v. Thomas* (1987), 51 Alta. L.R. (2d) 311 (Q.B.). Casual presence in a foreign jurisdiction, in the absence of submission to that jurisdiction, is insufficient for enforcement purposes in Saskatchewan under the *Reciprocal Enforcement of Judgments Act*; moreover, by applying in British Columbia to set aside the default judgment granted the respondent did not submit to the jurisdiction of the British Columbia court and hence the judgment was unenforceable under the Act in Saskatchewan: *Carrick Estates Ltd. v. Young* (1987), 24 C.P.C. (2d) 70 (Sask. C.A.). Where a default judgment had been obtained against a defendant in Texas, the parties had contracted that the Texas courts should have jurisdiction and the defendant had been promptly served with the originating process by registered mail and had been informed in time of the probability of default proceedings, the judgment was held to be enforceable; the defendants had been properly served and dealt with in accordance with the principles of natural justice and the Texas courts had jurisdiction because of the contract: *Jim Long Cos. v. General Broadcasting Ltd.* (1986), 18 C.P.C. (2d) 131 (Sask. Q.B.). On an application for registration of an extra-provincial judgment, a respondent who makes an unconditional voluntary appearance before the court granting the judgment may not challenge the jurisdiction of that court: *First Pacific Credit Union v. Sawatzky* (1985), 47 Sask. R. 92 (Q.B.). By writing a letter to the plaintiff's solicitor indicating that it intended to defend an action and sending that letter to the court, the defendant in an Ontario proceeding was held in British Columbia enforcement proceedings to have entered an appearance and the court enforced the Ontario default judgment: *Roglass Consultants Inc. v. Kennedy* (1984), 65 B.C.L.R. 393 (C.A.). A Saskatchewan court enforced a

Florida judgment given against the defendant where the defendant had agreed by contract to submit to the jurisdiction of the Florida court and had been served in accordance with contractual provisions relating to service: *Leon Shaffer Golnick Advertising Inc. v. Bernard Tire Ltd.* (1984), 37 Sask. R. 302 (Q.B.), affirmed 40 Sask. R. 240 (C.A.).

(d) *Real and substantial connection—Canadian judgments*

Ontario cases. Summary judgment was granted based on a Quebec default judgment where the claim had a real and substantial connection with Quebec: *Confection C.M.P. Inc. v. Gravel* (1995), 44 C.P.C. (3d) 301 (Ont. Gen. Div.). A Quebec default judgment for rent arrears in respect of premises in Montreal was enforced in Ontario on the grounds that there was a real and substantial connection established by the fact that the rental property in question was located in Quebec: *87313 Canada Inc. v. Neeshat Oriental Carpet Ltd.* (1992), 11 C.P.C. (3d) 7 (Ont. Gen. Div.). A Quebec default judgment which had been held, pre-*Morguard*, to be unenforceable in Ontario for lack of jurisdiction was subsequently held, applying *Morguard*, to be enforceable on the ground that there was a real and substantial connection between Quebec and the matter giving rise to the action: *Amopharm Inc. v. Harris Computer Corp.* (1992), 10 O.R. (3d) 27 (C.A.).

Non-Ontario cases. Enforcement of another province's default judgment was granted where the subject-matter of the plaintiff's action had a real and substantial connection to that province and it was just and fair that the foreign province's courts had taken jurisdiction: *Gorman-Rupp of Canada Ltd. v. Electrical Industries Western Ltd.* (1996), 5 C.P.C. (4th) 115 (Alta. Q.B.). A New Brunswick default judgment was registered in Saskatchewan where the subject camper van had been manufactured in Saskatchewan and sold through an authorized agent in New Brunswick; the court held that meant the manufacturer carried on business in New Brunswick and accordingly there was a real and substantial connection between the manufacturer and the plaintiff's claim in New Brunswick which entitled that province's court to assume jurisdiction: *Dollar v. Pleasure-Way Industries Ltd.* (1995), 41 C.P.C. (3d) 214 (Sask. Q.B.). Where a New Brunswick resident had agreed that a lease agreement was to be governed by the laws of Quebec, the court granted a motion seeking summary judgment to enforce the default judgment obtained in that province: *Park Avenue Chevrolet, Oldsmobile, Cadillac Inc. c. LeBlanc* (1995), 164 N.B.R. (2d) 161 (Q.B.).

(e) *Real and substantial connection — Foreign judgments*

See discussion and cases cited above in §4[1](g) and (h).

Ontario cases. Summary judgment was granted based on a default judgment obtained by the plaintiff in an undefended action in Michigan: *Manistique Papers Inc. v. Rothco Sales Ltd.* (1997), 14 C.P.C. (4th) 291 (Ont. Gen. Div.). The Court of Appeal for Ontario reversed a decision by the General Division that the existence of a real and substantial connection between the matter and a foreign court was insufficient to found jurisdiction: *Evans Dodd v. Gambin Associates* (1994) 17 O.R. (3d) 803 (Gen. Div.) reversed (April 3, 1997), Doc. CA C18628 (Ont. C.A.). Summary judgment was granted based on a default judgment obtained by the plaintiff in Minnesota where there was a substantial connection between the subject-matter of the lawsuit and Minnesota: *Mulvahill v. Couldrey* (December 31, 1996), Doc. Welland 5660/95 (Ont. Gen. Div.). The plaintiff obtained summary judgment enforcing judgments obtained in

Florida where the Florida judgments were final, and there had been a real and substantial connection between Florida and the subject-matter of the action: *First American Bank & Trust (Receiver of) v. Garay* (1996), 49 C.P.C. (3d) 326 (Ont. C.A.). Summary judgment was granted on two Michigan judgments imposing civil liability for environmental damage occurring in the United States: *United States of America v. Ivey* (1995), 26 O.R. (3d) 533 (Gen. Div.), affirmed (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal refused 33 O.R. (3d) xv (S.C.C.). The court endorsed the application of the *Morguard* real and substantial connection test to an Illinois judgment: *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.). Parties to a bankruptcy proceeding had negotiated a protocol resolving a variety of issues which had been approved by a judge of the United States Bankruptcy Court; it was held that the Ontario Court (General Division) had jurisdiction to approve a vehicle such as the protocol, which all the affected the parties agreed to; however the court's approval did not bind the court in the sense of being committed unequivocally to an ouster of its jurisdiction in future, without regard to the circumstances: *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.).

See discussion and cases cited above in §4[1](g) and (h).

Non-Ontario cases. The passive posting of information on an electronic bulletin board did not establish a real and substantial connection with Texas, the jurisdiction in which the information was received and, therefore, the Texas court lacked jurisdiction to issue a judgment enforceable in British Columbia: *Braintech Inc. v. Kostjuk* (1999), 171 D.L.R. (4th) 46 (B.C. C.A.), leave to appeal refused 253 N.R. 395 (note) (S.C.C.). Enforcement of a judgment obtained in North Carolina was ordered where the action had a real and substantial connection with that state and the clause in the parties' contract that provided they would attorn to the jurisdiction of the British Columbia courts conferred concurrent rather than exclusive jurisdiction: *Old North State Brewing Co. v. Newlands Services Inc.* (1998), 23 C.P.C. (4th) 217 (B.C. C.A.). Summary judgment was granted against an Alberta defendant where the only jurisdiction having a substantial connection to the transactions in question was Oregon and clearly Oregon law would apply; the only Alberta connection was that the defendant resided there: *Commercial Agency v. Jarvis* (1996), 46 C.P.C. (3d) 223 (Alta. Q.B.). Registration of an Ontario default judgment was set aside where the defendant was not ordinarily resident in that province and had not submitted to its court's jurisdiction; even if he had personally guaranteed his company's indebtedness to the plaintiff, that did not constitute carrying on business in Ontario: *Ellerbrok v. Hortico Inc.* (1996), 44 C.P.C. (3d) 1 (N.S. C.A.). In an action based on a default judgment obtained in Maine, the court granted the plaintiff summary judgment, holding that *in personam* judgments obtained in the United States could be enforced in Canada; there was no question whatsoever of a real and substantial connection between cause of action and the state of Maine; there was no manifest error going to the root of the judgment, which appeared to have been properly granted in Maine, and there was no ground of public policy to preclude recognition and enforcement: *Lotito v. Scantlebury* (1995), 38 C.P.C. (3d) 105 (P.E.I. T.D.). An Alaska default judgment was enforced against the assets of a defendant in British Columbia where there was a real and substantial connection between the matter and Alaska: *Moses v. Shore Boat Builders Ltd.*, [1994] 1 W.W.R. 112 (B.C. C.A.), leave to appeal refused (1994), 23 C.P.C. (3d) 294 (note) (S.C.C.). Where the facts supported only a minimal, not a real and substantial, connection with the foreign jurisdiction, the court dismissed an application for recognition in British Columbia of a default judgment obtained in Ohio: *Mid-Ohio Imported Car Co. v. Tri-K Investments Ltd.* (1993), 34 C.P.C. (3d) 369 (B.C. S.C.), reversed on other grounds (1995), 41 C.P.C. (3d) 259 (B.C. C.A.).

(f) *Non-jurisdictional grounds for refusal to enforce judgments*

See discussion and cases cited above in §4|1|(i).

Ontario cases. Enforcement of a default judgment obtained in Florida was refused on the ground that it was based on fraud; the plaintiff's evidence on the question of damages was not considered in the Florida court in the context of fraud and accordingly it was open to the Ontario court to adjudicate upon the issue: *Beals v. Saldanha* (1998), 27 C.P.C. (4th) 144 (Ont. Gen. Div.). Enforcement of judgment contrary to public policy because judgment obtained by means of half-truths and artificiality: *Ontario v. Mar-Dive Corp.* (1996), 141 D.L.R. (4th) 577 (Ont. Gen. Div.). Summary judgment to enforce California judgment for \$15 million for plaintiff who "felt horrible" from business dealings with the defendants refused: *Kidron v. Grean* (1996), 48 O.R. (3d) 775 (Gen. Div.), additional reasons at (May 13, 1996), Doc. 94-CQ-59194 (Ont. Gen. Div.), leave to appeal refused 48 O.R. (3d) 784 (Div. Ct.). The court allowed an appeal from an order refusing to enforce a Michigan judgment where there were no grounds for impeaching that judgment on the basis that the damages assessed would not have been similarly assessed in Ontario: *Janda v. Riley-Meggs Industries Inc.* (1995), 64 C.P.R. (3d) 440 (Ont. Div. Ct.), leave to appeal allowed (June 12, 1996), Doc. CA M17018/95 (Ont. C.A.). A New Jersey judgment for a gambling debt was held to be enforceable since the Ontario *Gaming Act* did not apply to foreign agreements and did not express a public policy so as to preclude the enforcement in Ontario of a judgment obtained where the debt was legally incurred: *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (C.A.), additional reasons at 6 O.R. (3d) 737 at 758 (C.A.). A foreign money judgment which is final and enforceable settles the issues between the parties just as does a domestic judgment; any challenge to the judgment must be based on (1) lack of jurisdiction on the part of the foreign court; (2) lack of identity between the defendant in the foreign judgment and the party against whom enforcement is sought; (3) fraud in obtaining the judgment; (4) absence of natural justice in the mode by which the judgment was reached; or (5) public policy; unless it is challengeable on one of the above grounds a default judgment results in the merits becoming *res judicata* and the judgment may not be attacked on the basis that the foreign court had never considered the merits: *Four Embarcadero Center Venture v. Kalen* (1988), 65 O.R. (2d) 551 (H.C.).

Non-Ontario cases. The court ordered enforcement of a judgment obtained in North Carolina and held that the triple damage award based upon the state's unfair and deceptive trade practice statute was not contrary to British Columbia public policy: *Old North State Brewing Co. v. Newlands Services Inc.* (1998), 23 C.P.C. (4th) 217 (B.C. C.A.). Enforcement of a Hong Kong judgment was refused where the conduct of the summary proceedings had offended the rules of natural justice; furthermore, the defendant's failure to appeal, attributable to the same ignorance of legal procedure which gave rise to the judgment, could not revitalize the enforceability of the judgment: *Leaton Leather & Trading Co. v. Ngai* (1997), 147 D.L.R. (4th) 377 (B.C. S.C.). The court refused to set aside summary judgment on a Quebec judgment where the defendants' allegation of fraud was unfounded and their allegation of lack of notice not credible: *Morrisette v. Performax Systems Ltd.* (1996), 109 Man. R. (2d) 298 (Q.B.), reversed against personal

defendants on other grounds (1997), 115 Man. R. (2d) 55 (C.A.). Where an English court had determined that the plaintiff's title to a bronze sculpture was superior to that of the defendant, summary judgment was granted to the plaintiffs in an action brought in Alberta for recognition and enforcement of the English judgment; there was no evidence that the judgment had been obtained by fraud; recognition and enforcement of the judgment were not contrary to Alberta public policy; the English court was one of competent jurisdiction to have decided the issue: *Union of India v. Bumper Development Corp.* (1995), 36 C.P.C. (3d) 249 (Alta. Q.B.), affirmed (December 4, 1995). (Alta. C.A.), leave to appeal refused [1996] 9 W.W.R. xlvi (note) (S.C.C.). Where fraud is raised as the defence to the enforcement of a foreign judgment there is no requirement, as there is in the case of an action to set aside a domestic judgment on the ground of fraud, that the fraud should be established by fresh evidence that had not been available to the defendant at the trial and could not, with reasonable diligence, have been discovered by him before judgment had been delivered: *Owens Bank Ltd. v. Bracco*, [1992] 2 W.L.R. 621 (U.K. H.L.). The public policy of British Columbia does not permit the grantee of a chattel mortgage to both seize the chattel and to sue, he may do either but not both; consequently, where the plaintiff had seized a mobile home in British Columbia that was subject to the chattel mortgage he could not also enforce an Alberta judgment on a promissory note or covenant to pay under a chattel mortgage: *Alberta Mortgage & Housing Corp. v. Pelkey* (1990), 46 C.P.C. (2d) 55 (B.C. S.C.). An English court refused to enforce a Texas judgment in an asbestos case on the grounds that the method by which the court had arrived at the amount of damages under a default judgment was contrary to the requirements of substantial justice under English law; no rational attempt had been made to accurately assess the plaintiff's damages and instead an arbitrary figure was arrived at: *Adams v. Cape Industries PLC.*, [1990] 2 W.L.R. 657 (C.A.).

(g) *Enforcement of order or judgment for costs*

Ontario cases. Provided that a judgment for foreign costs is a final order of a court of competent jurisdiction it should be enforced in Ontario: *Days Inns of America Franchising Inc. v. Khimani* (1992), 10 O.R. (3d) 93 (Gen. Div.).

Non-Ontario cases. Registration in the Northwest Territories of a certificate of fees obtained by a law firm against a client in the Yukon was set aside where none of the specific circumstances of the relevant section of the provincial *Reciprocal Enforcement of Judgments Act* applied to the client: *Davis & Co. v. Dunn* (1996), 2 C.P.C. (4th) 347 (N.W.T. S.C.). The court refused an application to register an order as to costs recommended in a report of the Judicial Committee of the Privy Council relating to matters adjudicated upon in Jamaica where provincial legislation required that to be registrable a judgment had to be from a Superior Court of part of Her Majesty's Dominions outside Canada and the regulations passed pursuant to the legislation did not extend to Jamaica; the Judicial Committee, which was a commonwealth, not an English court, had determined a matter that arose in Jamaica, reviewed a judgment of the Jamaican Court of Appeal and had applied Jamaican law; in essence it was a "Jamaican" judgment which had been rendered not by a court of England or Great Britain but by a commonwealth court; accordingly it was not one to which the provincial statute extended: *Eldemire v. Eldemire* (1992), 10 C.P.C. (3d) 64 (Sask. Q.B.). The court held that Manitoba authority precluded registration of a foreign judgment for costs in Manitoba, but in the opinion of the court the authority was wrongly decided and the applicant was urged to consider an appeal: *Technical Coatings Co. v. Samuel Building Systems Ltd.* (1990), 40 C.P.C. (2d) 210 (Man. Q.B.). Not all foreign awards of costs are immune from reciprocal registration; orders as to costs as distinguished from judgments as to costs cannot be sued upon, but a final judgment, one obtained in an action where the rights of the parties were finally determined, even if for costs, is enforceable: *Ruf v. Walter* (1990), 43 C.P.C. (2d) 307 (Sask. Q.B.).

(h) *Reciprocal enforcement of judgments*

Author's Note: Most provinces have legislative schemes that permit judgments from specified reciprocating jurisdictions in Canada and elsewhere to be enforced by registering the judgment instead of by commencing an action on the judgment. For judgments that meet the strict requirements of the legis-

lation (typically, the pre-*Morguard* requirements), the process is more streamlined and efficient than bringing an action. While, notwithstanding *Morguard*, registration should be limited as provided in the legislation, the plaintiff is free to bring an action on the judgment and argue that on the facts of the case a real and substantial connection existed with forum in which the court issued the judgment: *Acme Video Inc. v. Hedges* (1993), 12 O.R. (3d) 160 (C.A.)

Ontario cases. Where a compensation order had been granted by a judge of the Provincial Court in Alberta following the respondent's conviction for fraud, the court granted an application to register the order in Ontario pursuant to the *Reciprocal Enforcement of Judgments Act*; the court held that since the *Criminal Code* provides that a compensation order which is not paid forthwith may be filed and entered as a judgment in the superior court of the province in which the trial was held and the *Reciprocal Enforcement of Judgments Act* defines "judgment" as "a judgment or an order of a court in any civil proceedings whereby any sum of money is payable," the compensation order was a judgment within the meaning of the provincial legislation: *Canadian Imperial Bank of Commerce v. Coupal* (1995), 38 C.P.C. (3d) 98 (Ont. Gen. Div.). The court refused registration of a Saskatchewan default judgment under the *Reciprocal Enforcement of Judgments Act* where certain sections of the Act were a bar to registration (since the defendant did not carry on business in and was not normally resident in Saskatchewan at the relevant time and had a good defence if the action were brought on the original action in Ontario); notwithstanding *Morguard*, registration should be limited as provided in the Act but the plaintiff was free to bring an action on the judgment and argue that on the facts of this case a real and substantial connection with Saskatchewan existed: *Acme Video Inc. v. Hedges* (1993), 12 O.R. (3d) 160 (C.A.). Any amendment to the title of proceedings registered under the *Reciprocal Enforcement of Judgments Act* must be made first in the original jurisdiction; the enforcing jurisdiction has no authority to graft something onto the original judgment: *Hanil Bank Canada v. Maria's Fashion Place (Edmonton) Ltd.* (1992), 9 O.R. (3d) 799 (Master).

Non-Ontario cases. A judge on an application to register an Ontario judgment erred in not enforcing the pre-judgment interest rate and cost component of that judgment; the provincial *Reciprocal Enforcement of Judgments Act* does not confer jurisdiction to vary a foreign judgment: *Susin v. Delazzer* (1997), 16 C.P.C. (4th) 21 (N.S. C.A.). Registration of a California judgment was refused where the court held that even if the defendant had been carrying on business in that state at the time the process was issued, he had not been served in accordance with the *California Practice Code*: *Moss & Enochian v. Brown* (1997), 12 C.P.C. (4th) 361 (B.C. Master). Provincial reciprocal enforcement legislation provided that no foreign judgment could be registered where the judgment debtor, if not ordinarily resident in the foreign jurisdiction, did not submit to the foreign court's jurisdiction; registration was refused where the court held that the forwarding of a statement of defence by the defendant, a resident of the domestic jurisdiction, to the plaintiff's lawyer did not constitute submission to the foreign court's jurisdiction: *Fulford v. Reid* (1996), 6 C.P.C. (4th) 224 (Man. Q.B.). Registration of a foreign default judgment was barred where there was an appeal pending from dismissal of an application to set it aside; the court held that "appeal" in the relevant provincial legislation which prohibited registration of a judgment while an appeal is pending included an appeal from a decision to decline to set aside a default judgment: *Dunton v. Whitewater West Recreations Ltd.* (1996), 6 C.P.C. (4th) 149 (B.C. S.C.). The court

refused to set aside registration of an American judgment where although the loss of a right of appeal had been caused by a procedural error, the alleged irregularities of the foreign court were not of a nature serious enough to give rise to a denial of natural justice: *National American Insurance Co. v. Leong* (1996), 49 C.P.C. (3d) 246 (B.C. S.C.). Registration of an Ontario default judgment was set aside where the defendant was not ordinarily resident in that province and had not submitted to its court's jurisdiction; even if he had personally guaranteed his company's indebtedness to the plaintiff, that did not constitute carrying on business in Ontario: *Ellerbrok v. Hortico Inc.* (1996), 44 C.P.C. (3d) 1 (N.S. C.A.). Registration of an Idaho default judgment for an unpaid account was refused where the defendant was not carrying on business within the meaning of the relevant provincial statute: *Wilson v. Hull* (1995), 41 C.P.C. (3d) 188 (Alta. C.A.). The British Columbia court, enforcing an Ontario support order, held that a limitation period in Ontario of two years being substantive, it was incumbent upon the British Columbia court, pursuant to the relevant section of the provincial *Family Relations Act*, to take judicial notice of the law of the reciprocating state and apply it, notwithstanding that by the law of British Columbia the applicant's claim was barred by a limitation period of one year, which was also substantive; therefore, the reciprocating state, Ontario, had the jurisdiction to make an order for support and that jurisdiction was recognized under the conflict of laws rules of British Columbia: *Toope v. Syvertsen* (1995), 37 C.P.C. (3d) 301 (B.C. S.C.). The court held that an Ontario child support order clearly fell within the definition of a provisional order under the provincial *Reciprocal Enforcement of Maintenance Orders Act* and as such was not effective until confirmed by the reciprocating jurisdiction: *E. (N.) v. D. (D.R.)* (1995), 11 R.F.L. (4th) 458 (Alta. C.A.). The court dismissed a judgment debtor's application to have an *ex parte* registration of a foreign judgment set aside on the ground that he had not been personally served within the jurisdiction as required by the provincial *Reciprocal Enforcement of Judgments Act* where the mandatory time-limit prescribed by that legislation for making such an application had long since passed: *Central Guaranty Trust Co. v. Deluca* (1994), 34 C.P.C. (3d) 293 (N.W.T. S.C.). The court dismissed an application to set aside an *ex parte* registration of a foreign judgment on the ground that the provincial *Reciprocal Enforcement of Judgments Act* provided that no order for registration could be made against a person who did not carry on business in the province in which the original judgment was obtained and who had not submitted to the jurisdiction of the original court: the mandatory time-limit prescribed by that legislation for making such an application had long since passed: *Concord Mortgage Group Ltd. v. Northern Geophysics Ltd.* (1994), 34 C.P.C. (3d) 286 (N.W.T. S.C.). The court granted the plaintiff's application to register a judgment obtained in England on a guarantee which contained an express agreement to submit to the jurisdiction of the English court: *Bank of Credit & Commerce International (Overseas) Ltd. v. Gokal* (1994), 32 C.P.C. (3d) 114 (B.C. C.A.). The Manitoba court refused an application to register a judgment obtained in Alberta for breach of contract where the defendant was neither carrying on business in Alberta nor had he attorned to the jurisdiction of its courts; the defendant was at all times in Manitoba, where he had prepared the contract, and did not advertise or have an address, telephone number or agent in Alberta; the only business he did in the other province was by telephone: *T.D.I. Hospitality Management Consultants Inc. v. Browne* (1994), 28 C.P.C. (3d) 232 (Man. C.A.). Where the applicant had obtained judgment in Ontario against a Saskatchewan resident, its application to register its judgment was dismissed; the respondent had raised defences under the relevant sections of the provincial *Foreign Judgments Act*, which act displaced the common law developed in recent case law; there was no evidence that the respondent had ever resided in or carried on business in his personal capacity in Ontario or that he had ever submitted to the jurisdiction of that province's court; accordingly, Ontario never had jurisdiction and by the wording of the *Reciprocal Enforcement of Judgments Act*, the judgment could not be registered: *917294 Ontario Inc. v. 167644 Canada Inc.* (1994), 28 C.P.C. (3d) 114 (Sask. Q.B.). Where the plaintiff obtained default judgment in Ontario, the Manitoba court refused to set aside registration of the judgment on the ground that the Ontario court had had no jurisdiction to grant it; notwithstanding that the contract which was breached provided that it would be governed by the laws of Manitoba, it was entered into and was to be performed in Ontario; there was a real and substantial connection with Ontario which gave the Ontario courts jurisdiction; furthermore, the contract neither expressly nor implicitly named a province whose courts would have exclusive jurisdiction to deal with issues arising between the parties: *Pfaff v. Performax Systems Ltd.* (1994), 93 Man. R. (2d) 230 (Q.B.). Registration of a Maryland judgment was refused because the Act did not provide for any registration procedure with respect to such a foreign judgment; the judgment creditor had to bring an action in Saskatchewan on the Maryland judgment or on the original cause of action: *Diamond Comic Distributors Inc. v. Tramp's Music & Books Inc.* (1994), 118

Sask. R. 70 (Q.B.). An application to enforce an arbitration award obtained in New York under the *International Commercial Arbitration Act*, an act of specific application, was allowed notwithstanding non-compliance with the procedures under the provincial *Reciprocal Enforcement of Judgments Act*, an act of general application; where provisions of a general act could not be read consistently with and could not be made to harmonize with the provision of a later special act, the special act governed: *Dunhill Personnel Systems Inc. v. Dunhill Temps Edmonton Ltd.* (1993), 13 Alta. L.R. (3d) 241 (Q.B.). The court rejected an argument that the decision in *Morguard* altered the requirements of the *Reciprocal Enforcement of Judgments Act* to one of a "real and substantial connection"; since the proceeding before the court was launched pursuant to the provisions of the Act and the requirements under that statute were not met, registration of the judgment was to be refused: *Sims v. Bower* (1993), 108 D.L.R. (4th) 677 (N.B. C.A.); *accord*, *Acme Video Inc. v. Hedges* (1993), 12 O.R. (3d) 160 (C.A.), reversing (1992), 10 O.R. (3d) 503 (Gen. Div.). An application to register in New Brunswick a default judgment obtained in Ontario was dismissed where the defendant was neither ordinarily resident nor carrying on to the jurisdiction of that province's court: *Lennox Industries (Canada) Ltd. v. Hawse* (1993), 134 N.B.R. (2d) 86 (Q.B.). Where a party sought to set aside registration in Nova Scotia of a Prince Edward Island judgment on the ground that it had been denied natural justice at the hearing of its appeal, the court held that the purpose of the *Reciprocal Enforcement of Judgments Act* was not to provide an avenue for appeal: *Dow & Duggan Prefabrication Ltd. v. Paquet* (1993), 127 N.S.R. (2d) 71 (S.C.). It was held that a plaintiff could not proceed by way of an *ex parte* application to register an Alberta judgment in Saskatchewan where the defendant had been served *ex juris* in the Alberta proceeding, had suffered default judgment and had thereafter unsuccessfully appealed the default judgment; the appeal by the defendant to have the default judgment set aside did not constitute submission and under these circumstances the defendant had to be provided with reasonable notice of proceedings for registration of the judgment: *LaFarge Canada Inc. v. Clearwater Concrete Products (2000) Ltd.* (1993), 108 Sask. R. 205 (Q.B.). Where New Brunswick legislation provided that the only acceptable jurisdictional bases for the recognition and enforcement of judgments *in personam* were presence in or submission to the jurisdiction, the court refused an application to register a default judgment obtained in Ontario against a defendant who had never had any presence in that province nor expressly or implicitly submitted to the jurisdiction of its court: *844903 Ontario Ltd. v. Vander Pluijm* (1992), 12 C.P.C. (3d) 71 (N.B. Q.B.). Where the defendant, who neither resided in nor operated a business in Ontario, opposed an application to register an Ontario default judgment against him in New Brunswick on the basis that the Ontario court lacked jurisdiction, the court held that because the automobile leasing contract on which the defendant had defaulted stated that the law of Ontario was to apply, the defendant had, therefore, expressly agreed to submit to the jurisdiction of the Ontario courts: *Cardel Leasing Ltd. v. Jewett* (1992), 127 N.B.R. (2d) 21 (Q.B.). Where there was no evidence to support the defendant's allegations of inadequate translation services during the trial nor had it made any objection during the trial, the court permitted registration of the plaintiff's Quebec judgment in Newfoundland: *Servotech Ltée v. Hayward Burry Ltd.* (1992), 98 Nfld. & P.E.I.R. 112 (Nfld. T.D.). A Washington State default judgment for damages for wrongful death against a British Columbia resident could not be registered in British Columbia since the requirement of the Act had not been met as the defendant had never resided or carried on business in Washington nor had he voluntarily appeared or submitted to the jurisdiction of the Washington court: *Hoopman Estate v. Imrie* (1991), 57 B.C.L.R. (2d) 310 (Master). Registration of an Ontario default judgment was denied where the defendant did not appear, defend or attorn to the jurisdiction of the Ontario court: *James C. Bennett Holdings Ltd. v. EMD Management Ltd.* (1991), 47 C.P.C. (2d) 13 (Man. Q.B.). The ownership of a house in Ontario and the holding of a nominal directorship in an Ontario company did not constitute carrying on business or being ordinarily resident in Ontario so as to make an Ontario default judgment registerable against a British Columbia resident: *Royal Bank v. Lo* (1990), 46 B.C.L.R. (2d) 161 (S.C.). The carrying on of business or being ordinarily resident in the foreign state refers to the defendant's activity at the time of the commencement of the action in the foreign court: *Alberta Mortgage & Housing Corp. v. Pelkey* (1990), 46 C.P.C. (2d) 55 (B.C. S.C.). Registration was refused where the judgment debtor was a non-resident of and did not attorn to the jurisdiction of the adjudicating court: *Harvey Fulton Whse Carpet Sales Ltd. v. Pye*, [1990] N.W.T.R. 143 (S.C.). A plaintiff's failure to serve an *ex parte* order obtained pursuant to the *Reciprocal Enforcement of Judgments Act* to have an out of province judgment registered within one month after the registration (as required by the Act) would permit the defendant to have the order set aside; the notice requirements are mandatory: *Capital City Savings & Credit Union Ltd. v. L-4 Group Developments Ltd.* (1989), 35 C.P.C. (2d) 126 (Sask. Q.B.).

A British Columbia default judgment in mortgage proceedings against Saskatchewan residents was registered in Saskatchewan on the ground that the son of the defendants who was found to have general authority on behalf of the defendants had sent a letter to the plaintiff advising where the defendants were to be reached and that this constituted in the circumstances a submission to the jurisdiction: *Carrick Estates Ltd. v. MacKinnon* (1989), 80 Sask. R. 118 (Q.B.), affirmed (1990), 86 Sask. R. 232 (C.A.). Where the defendants, who were judgment debtors on a Saskatchewan judgment, claimed they had a good defence to a part of the judgment they did not contest, the B.C. court held in enforcement proceedings that the defence, if it existed, was a matter for the Saskatchewan Court of Appeal and did not render the judgment unenforceable: *575225 Sask. Ltd. v. Boulding* (1988), 27 B.C.L.R. (2d) 352 (C.A.). Registration of an Ontario judgment was refused on the grounds that the judgment debtor would have had a good defence if an action had been brought on the original judgment, since it appeared to the court that the judgment debtor was not liable for the debt in question: *Ontario (Attorney General) v. Boivin* (1988), 92 N.B.R. (2d) 103 (Q.B.). A defendant against whom a default judgment has been rendered in a reciprocating jurisdiction is not entitled to resist registration of that judgment in Prince Edward Island on the basis that he has a good defence to the plaintiff's claim; the *Reciprocal Enforcement of Judgments Act* in providing that registration is not to be granted where the judgment debtor would have a good defence if the action was brought on the judgment, does not refer to defences to the original cause of action: *George Robberecht Seafood Inc. v. Island Fish Export Inc.* (1987), 43 D.L.R. (4th) 157 (P.E.I. S.C.). Where the defendants had agreed by contract to submit to the jurisdiction of the Alberta court it was held that this was a sufficient submission to the jurisdiction to enforce the Alberta judgment in Saskatchewan pursuant to the *Reciprocal Enforcement of Judgments Act*: *First City Trust Co. v. Roberts (H.A.) Group Ltd.* (1987), 62 Sask. R. 81 (Q.B.). Where the defendant had by contract agreed that the Alberta courts would have jurisdiction and he was subsequently served out of the jurisdiction in Alberta proceedings, the resulting judgment was enforceable in Saskatchewan pursuant to the *Reciprocal Enforcement of Judgments Act*; while the Act required an agreement to submit to the jurisdiction of a foreign court to be express, the agreement in question was an express agreement: *First City Capital Ltd. v. Winchester Computer Corp.*, [1987] 6 W.W.R. 212 (Sask. C.A.). Notwithstanding that the defendant was not resident in British Columbia, did not carry on business there and did not voluntarily appear before the B.C. courts, the B.C. judgment obtained on a contract which provided that the defendant "accepts and irrevocably submits to" the jurisdiction of the B.C. courts was held to be registerable under the *Reciprocal Enforcement of Judgments Ordinance* since it met the requirement that the defendant had "otherwise submitted" to the jurisdiction of the B.C. court: *Canadian Imperial Bank of Commerce v. Kabat*, [1985] N.W.T.R. 1 (S.C.).

(i) *Execution stayed pending appeal, etc.*

Ontario cases. Summary judgment to enforce a Missouri judgment was granted but execution was stayed pending a decision of the appeal of the foreign judgment: *Dent Wizard International Corp. v. Sears* (1999), 45 O.R. (3d) 237 (S.C.J.), additional reasons at (July 5, 1999), Doc. Windsor 99-OC-01107, 3741/98 (Ont. S.C.J.), affirmed 46 O.R. (3d) 480 (C.A.), additional reasons at (2000), 45 O.R. (3d) 736 (S.C.J.). *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) (stay of execution pending disposition of Illinois appeal). *Four Embarcadero Center Venture v. Mr. Greenjeans Corp.* (1988), 65 O.R. (2d) 160 (C.A.) (stay of execution pending disposition of California appeal).

Non-Ontario cases. A stay of execution of enforcement of a North Carolina judgment pending the appeal of the enforcement order was granted on the ground that as the parties' contract provided for British Columbia law to govern and British Columbia to be the forum, there might be injustice to the defendant; furthermore, the defendant would be crippled by the triple damages award made by the North Carolina court to the plaintiff: *Old North State Brewing Co. v. Newlands Services Inc.* (1998), 155 D.L.R. (4th) 250 (B.C. C.A.). Where the same question had been decided, the judicial decision was final and parties to the decision or their privies were the same persons as parties to the subsequent proceedings, issue estoppel applied to a judgment

made by a United States court: *Aetna Insurance Co. v. Canadian Surety Co.* (1994), 19 Alta. L.R. (3d) 317, additional reasons at 23 Alta. L.R. (3d) 182 (C.A.). In British Columbia the limitation period on the enforcement of a foreign judgment does not commence running until an absent defendant enters British Columbia: *Bank of Montreal v. Kim* (1990), 40 C.P.C. (2d) 11 (B.C. C.A.). In Alberta proceedings default judgment had been obtained against a Saskatchewan resident after the lawyer he retained to defend the Alberta proceedings failed in his duty and was later disbarred; subsequently the Alberta judgment was registered in Saskatchewan and the defendant sought to have the resulting Saskatchewan judgment set aside *ex debito justitiae*; the court declined to do so but stayed the enforcement of the Saskatchewan judgment pending the outcome of the Alberta proceedings in which the Alberta default judgments were being appealed: *Toronto Dominion Bank v. Prairie Gold Oilfield Servicing Ltd.*, [1990] 6 W.W.R. 16 (Sask. Q.B.). In enforcing an Ontario judgment which bore interest at the rate of 11 per cent from the date of judgment, the British Columbia court held that the judgment should bear interest at the rate of five per cent as prescribed by the federal *Interest Act* regardless of the provision in the Ontario judgment as to interest rate on the judgment: *Clitherow v. Krushnisky* (1987), 22 C.P.C. (2d) 314 (B.C. S.C.).

§5 PERSONAL JURISDICTION

Subheading [1] of this section contains an *Author's Commentary* on the effect of the *Morguard* decision on the law of personal jurisdiction in Canada. The academic analysis of the recent developments in the law of personal jurisdiction is found primarily in the literature on recent developments in the law of the recognition and enforcement of judgments and of the doctrine of *forum non conveniens* and, accordingly, is not collected in this section but can be found in §4[2] above and §6[2] below. The paragraphs of subheading [3] below contain the case law.

[1] *Author's Commentary: The Morguard Decision and Personal Jurisdiction*

(a) *The Morguard decision and personal jurisdiction*

The implications of the *Morguard* decision were not limited to the rules for the recognition and enforcement of judgments. The *Morguard* principles also affected the law of personal jurisdiction. The effect of special rules for the recognition and enforcement of judgments on the law of personal jurisdiction had been recognized in the United States and in Europe, as discussed above in §4[1](d), and it was recognized in Canada that a change in the law of judgments had important implications for the law of jurisdiction as well: see V. Black, "The Other Side of *Morguard*: New Limits on Judicial Jurisdiction" (1993), 22 Can. Bus. L.J. 4. These implications were described by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye* [1990], 3 S.C.R. 1077 as follows:

I noted earlier that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and I added that recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize

a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit. . . .

. . . when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of the accepted grounds traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments — in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.

The difficulty, of course, arises where, as here, the defendant was outside the jurisdiction of that court and he was served *ex juris*. To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service *ex juris* in all the provinces are broad, in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.

. . . It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties.

After the *Morguard* decision, it was clear that the constitutional principles of order and fairness required the exercise of restraint in the assumption of jurisdiction and that this requirement would be met only when there was a “real and substantial connection” between the matter and the forum. But what would suffice as a “real and substantial connection”? Would each of the situations enumerated in the rules of the provinces for service outside the province such as Rule 17 meet this test? Were these situations exhaustive of the scope of the jurisdiction of the provincial superior courts permitted under the *Constitution*?

Further guidance on the relationship between the real and substantial connection test and the grounds for service outside the province was given by the Supreme Court of Canada in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. As the court explained,

To prevent overreaching. . . courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may exercise jurisdiction only if

it has a “real and substantial connection” (a term not yet fully defined) with the subject-matter of the litigation.

...

In *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a “real and substantial connection” to the forum that assumed jurisdiction and gave judgment. *Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction . . .*

The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. More than this was left to depend on the gradual accumulation of connections defined in accordance with the broad principles of order and fairness. . .

Since the matter has been the subject of considerable commentary, I should note parenthetically that *I need not, for the purposes of this case, consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of forum non conveniens. . . Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.*

(emphasis added)

To reiterate: according to the Supreme Court of Canada, the grounds for service outside the jurisdiction (such as those described in rule 17.02) do not constitute a definitive statement of the scope of personal jurisdiction. Whether the grounds for service outside the jurisdiction are narrow or broad, they are subject to the case-specific determination by the court that they meet the requirements of order and fairness. Some courts have come to describe these two elements of the jurisdictional determination as jurisdiction *simpliciter* and *forum non conveniens*. Regardless of how they are described, it is clear from the final sentence of the quotation above from the *Tolofson* decision that there is no mechanical means of determining the scope of jurisdiction under the principles of order and fairness. Although rules for service outside the jurisdiction, such as Rule 17, provide an initial indication of jurisdiction, an exercise of discretion based on the doctrine of *forum non conveniens* is an integral feature of jurisdictional determinations mandated by the *Constitution*.

This is different from the approach to jurisdiction that operates in Europe under the Brussels Regulation (see above, §4[1](d)), which contains a list of

permitted bases for jurisdiction and a list of prohibited bases and which does not provide for the exercise of discretion in the process. The view expressed by the Supreme Court of Canada in the quotation from *Tolofson* above indicates that it would be misguided to attempt to identify which paragraphs of rule 17.02 contain constitutionally acceptable bases of jurisdiction and which paragraphs contain constitutionally unacceptable bases of jurisdiction. Discretionary determinations based on the facts of the case are an integral feature of the determination of constitutionally acceptable assumptions of jurisdiction. A paragraph-by-paragraph review of the constitutionality *per se* of rule 17.02 misses the point because the assumption of jurisdiction based on any given paragraph could be constitutional in some circumstances and not in others.

Further, as Watson & Au explained in “Constitutional Limits on Service Ex Juris: Unanswered Questions from *Morguard*” (2000), 23 Advocates’ Q. 167:

... there is considerable confusion as to *what the “real and substantial connection” is supposed to be with*. Different formulations of the “real and substantial connection” test appeared in several crucial passages of *Morguard*. The Supreme Court of Canada referred, variously, to a connection “between the *subject-matter of the action* and the territory where the action is brought,” a “connection between the *damages suffered* and the jurisdiction,” a “connection the relevant *transaction* [has] with [the] province,” a “connection with *the transaction or the parties*,” and “a substantial connection between *the defendant* and the forum province.” Professor Joost Blom suggests that the “lack of focus in the court’s terminology reflects ambiguity about the underlying rationale for the test,” and postulates two competing theoretical foundations for the “real and substantial connection” test: an “administration of justice” theory and a “personal subjection” theory. The former approach would “treat the Canadian judicial system as a group of independent but coordinated sub-systems among which jurisdiction should be allocated on the basis of where cases can *reasonably* be heard”; whereas the latter approach rests on “the idea that each province’s legal system represents an independent sovereignty, which cannot touch a defendant’s legal rights unless that person has voluntarily subjected himself in some way to the proper claims of that sovereignty.”

Battles between litigants over the propriety of service *ex juris* have been most intense, in the post-*Morguard* jurisprudence, in situations where the plaintiff sued an out-of-province defendant in respect of a tort committed outside the province, but where the damages were sustained in the province.

In cases such as *MacDonald v. Lasnier* (1994), 21 O.R. (3d) 177 (Gen. Div.) the Ontario courts have suggested that pain and suffering in Ontario (which supported service under rule 17.02(h)) in respect of an accident that occurred in Quebec) is not sufficient to constitute a real and substantial con-

nection with Ontario and, therefore, to support the exercise by the Ontario court of jurisdiction under the *Constitution* to decide the case. *Wilson v. Moyes* (1993), 13 O.R. (3d) 202, additional reasons at (October 12, 1993), Doc. 10318/92 (Ont. Gen. Div.), involving a motor vehicle accident in Florida, was to the same effect, stating in even more restrictive terms that “where a foreign defendant had no substantial connection with the forum province that forum province would have no jurisdiction over him.” Closer analysis of the reasoning and the results in such cases often reveals that the courts have, in fact, conducted an analysis of appropriate forum but have stated their decisions in terms of the constitutionality of jurisdiction. This was arguably the case in *MacDonald v. Lasnier*, above, in which Cunningham J. recited the many contacts with Quebec (the alternate forum) including that it was where the accident and alleged negligence had occurred and where the defendants, medical records and many possible witnesses were located. In other words, Cunningham J. conducted the analysis of jurisdiction *simpliciter* comparatively as would be expected for an analysis of appropriate forum, rather than in absolute terms as would be expected for an analysis of jurisdiction *simpliciter*.

The constitutional requirement of a real and substantial connection with the forum was not meant to be the basis for determining which of several fora with connections to the matter had *the most* real and substantial connection. There could be several such fora and each would be constitutionally capable of exercising jurisdiction. It would be possible for one forum to decide that another forum was clearly more appropriate and, consequently, that it should decline to exercise jurisdiction in favour of that other more appropriate forum. Indeed, the emphasized portion of the quotation from *Tolofson* above suggests that, in some sense, there might be a constitutional requirement for a court to do so. The recognition that there is a constitutional foundation for the jurisdictional analysis, however, does not eliminate the need to exercise discretion in the course of a case-specific determination. Moreover, most Canadian courts, operating in a way that appears to follow the “administration of justice” theory described by Professor Blom and referred to by Watson & Au above, seem to be deciding whether or not to exercise jurisdiction in just this way. The confusion, by and large, seems primarily to have affected the reasons the courts have provided for the results they have reached and not the outcomes in terms of whether the courts will exercise jurisdiction to decide the case: see G.D. Watson & F. Au, “Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*” 2000, 23 Adv. Q. 167.

(b) *The grounds for service out and personal jurisdiction*

To summarize the effect of this evolution of the law of personal jurisdiction in Canada, it can now be said that service outside the jurisdiction and the grounds for it provided in Rule 17 function only as a guideline for the cases in which an Ontario court is likely to assume jurisdiction and only as a starting point for the analysis of any objection to the assumption of jurisdiction. Although personal jurisdiction must now be tested against the constitutionally

mandated principles of order and fairness, these principles do not find their expression in rigid limits set by rules for service out and such rules are not, therefore, subject to scrutiny for their constitutionality.

While this appreciation of the relationship between the grounds for service out and personal jurisdiction might seem to be new, the spirit of it was captured in the 1994 Uniform Law Conference of Canada's proposed *Uniform Court Jurisdiction and Proceedings Transfer Act*, which has not been enacted in Ontario and is not yet in force in any of the other provinces or territories. Section 10 of the Act — "Real and substantial connection," contains a list of grounds similar to those found in rule 17.02 that might be considered examples of connections that might be considered real and substantial connections to the jurisdiction sufficient to found jurisdiction. However, the list is preceded by a paragraph that provides as follows:

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. . .

This paragraph clarifies that the grounds contained in the list are not to be treated as exhaustive of the grounds for personal jurisdiction. Rather, as with rule 17.03, it is open to the plaintiff to persuade the court that some other ground should suffice. Further, this paragraph clarifies that the grounds contained in the list are not to be treated as definitive of the requirements for the exercise of jurisdiction. Rather, the existence of any of the connections contained in the list merely creates the presumption that there exists a real and substantial connection to the forum. There are two grounds contained in the list of grounds in rule 17.02 for service outside the jurisdiction without leave that were not included in the list in s. 10 of the legislation proposed by the Uniform Law Conference: that in 17.02(h) for claims in respect of damage sustained in Ontario from a wrong wherever committed and that in 17.02(o) for claims against persons outside Ontario who are necessary or proper parties to claims properly brought against persons served in Ontario. While the portion of s. 10 in the quotation above makes it clear that plaintiffs retain the right to prove that these circumstances constitute a real and substantial connection between the matter and Ontario, the omission of these grounds from the list indicates that it was the view of the Uniform Law Commissioners that they are not to be treated as creating a presumption that a real and substantial connection exists.

(c) *Jurisdiction simpliciter and forum non conveniens*

Although the process by which Ontario courts exercise discretion to decline to hear a case pursuant to the doctrine of *forum non conveniens* is described in §6, it is worth pointing out now the implications of the developments in the law of jurisdiction discussed above for the relationship between

determinations of jurisdiction (sometimes called “jurisdiction *simpliciter*”) and determinations of appropriate forum.

Since the Supreme Court determined that the constitutional principles of order and fairness governed personal jurisdiction in Canada, it has been suggested in a number of cases that the determination of jurisdiction *simpliciter* and the determination of *forum non conveniens* are separate and sequential. The court first determines whether the case falls within the outer limits of the scope of jurisdiction (*i.e.*, of the cases the court *can* decide). Then the court exercises discretion pursuant to the doctrine of *forum non conveniens* to determine whether to decline to hear the case because there is another clearly more appropriate forum elsewhere (*i.e.*, to determine whether it *should* decide the case). Although this view is fairly common, *i.e.*, that the decision-making process in jurisdictional determinations is bifurcated and sequenced in this way, this view needs to be reconsidered.

In particular, the implicit suggestion that jurisdiction *simpliciter* is a fixed and rigid threshold requirement to personal jurisdiction that depends upon demonstrating a “real and substantial connection” between the cause of action or the parties and the forum is inaccurate. One indication that it is inaccurate is not new at all. It has always been true that parties are free in many cases to litigate matters having no real and substantial connection to Ontario in Ontario courts provided they are willing to do so. A common law court, generally speaking, will review its own jurisdiction as it is affected by connections between the matter and particular legal systems only when asked to do so by one of the parties. Indeed, the factual elements of a dispute that could give rise to conflict of laws issues only become legally relevant when one of the parties raises the issue and makes them relevant. Therefore, the notion that the lack of a real and substantial connection between the matter and the forum inevitably and automatically deprives a common law court of jurisdiction to decide the matter is inconsistent with the timeworn acceptance of jurisdiction based on the consent of the parties.

In addition, the implicit suggestion that jurisdiction *simpliciter* is a fixed and rigid limit to personal jurisdiction that depends upon demonstrating a “real and substantial connection” between the cause of action or the parties and the forum is inaccurate because it is fundamentally at odds with two commitments that lie at the heart of the Canadian adjudicative traditions. These are the commitments to ensuring access to justice and to preventing a multiplicity of proceedings. These commitments could be undermined by imposing fixed limits on personal jurisdiction, and the recent jurisprudence suggests that any accurate articulation of the law of jurisdiction must accommodate the primacy that these commitments have consistently been accorded by Canadian courts.

(d) *Access to justice*

With respect to access to justice, there is a small but growing jurisprudence that suggests that Canadian courts will be prepared to assume jurisdiction and to refuse to exercise discretion to decline to hear a case that has fairly tenuous

connections to the forum, where fairness between the parties requires them to do so, particularly in situations where a plaintiff is otherwise unable to pursue a claim. For example, in *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S. C.A.), leave to appeal refused (1998), 233 N.R. 397 (note) (S.C.C.) the Nova Scotia Court of Appeal expressed the following view:

The concept of fairness in determining jurisdiction should be considered from the point of view of both the respondent (the injured person), as well as the appellants (the defendant doctors). While this issue, as well as the issue of juridical advantage, are matters that are usually considered on a *forum non conveniens* issue, it is appropriate and relevant to consider them in this case involving jurisdiction *simpliciter*.

In *Oakley*, a woman was misdiagnosed as suffering from infectious hepatitis in a hospital in St. John, New Brunswick. Later, she moved to Nova Scotia where she resided, in poor health and in need of regular medical care, and dependent on an income of family benefits, but where it was discovered that she did not suffer from hepatitis. She commenced an action in Nova Scotia against the New Brunswick health care providers. The defendants brought a motion to have the service set aside on the grounds that there was no real and substantial connection between the matter and Nova Scotia and the court, therefore, had no jurisdiction. As Pugsley J.A. noted, the question of fairness to the plaintiff is usually considered in determining appropriate forum, not jurisdiction. In the test for *forum non conveniens* in most common law countries, a court that has been persuaded by a moving defendant that there is a clearly more appropriate forum elsewhere having regard to the interests of the parties and the ends of justice may still refuse to grant a stay where to do so would unjustly deprive the plaintiff of some legitimate personal or juridical enjoyed in the forum: see *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460 (U.K.H.L.), which is discussed in greater detail below in §6[1](b). While, the potential unfairness to a plaintiff in granting a stay, then, is usually considered in a second stage of the analysis of appropriate forum, Pugsley J.A. held that it could also be relevant to the threshold determination of jurisdiction *simpliciter*. To the extent that it seems wrong to pre-empt the issue of fairness, particularly where this could impair access to justice, it seems that the issue should not be left to a separate and subsequent determination of forum. After all, once the court has determined that it *cannot* hear the case, it is hardly likely to go on to determine that it *should*, nevertheless, hear the case.

Although *Oakley* is a dramatic example of the potentially overriding significance of concerns for access to justice, most Canadian courts appear to treat the issue of whether they *should* hear the case as the decisive factor in determining whether they *will* hear the case. This suggests that the analysis of appropriate forum could, in time, eclipse that of jurisdiction *simpliciter* (except in situations where another forum has exclusive jurisdiction, as for example, when the dispute relates to title to foreign land). In other words, it is arguable that the law of jurisdiction in common law Canada could evolve to the point

where what is now regarded as two distinct analyses — those of jurisdiction *simpliciter* and *forum non conveniens* — have merged into an analysis of appropriate forum. Such a trend is clearly evident in cases such as *Oakley v. Barry*, above, and *Duncan (Litigation guardian of) v. Neptunia Corp.* (April 18, 2001), Doc. 99-CV-182360 (Ont. S.C.J.), although it is not universal: see *Lemx v. Bernard* (2000), 51 O.R. (3d) 164 (Div. Ct.).

If this happened, it would not necessarily mean that the common law of jurisdiction in Canadian courts had departed in substance from the mainstream. On the contrary, this development would tend to return it to the mainstream. For it was only with the determination that the law of jurisdiction was founded on constitutional imperatives that there was a suggestion that certain rules might become peremptory norms that would override the approach in which the final outcome could turn upon the analysis of the potential loss to the plaintiff of a personal or juridical advantage. And even in the civil law, as exemplified by the Quebec Civil Code, there is provision for a court to assume jurisdiction as a “forum of necessity.” Article 3136 provides:

3136. 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.

See also Watson & Au, “Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*” (2000), 23 *Advocates’ Q.* 167.

(e) *Multiplicity*

Just as the bifurcated view of jurisdictional determinations (*i.e.*, one that divides the analysis into separate determinations of jurisdiction *simpliciter* and *forum non conveniens*) would frustrate the ability of Canadian courts to ensure access to justice, so too would it frustrate their ability to prevent a multiplicity of proceedings. As Professor Hogg noted in *Constitutional Law of Canada* (4th ed. 1996) ¶13.5(b) *n* 76:

If service out of the jurisdiction is unconstitutional with respect to those parties who lack a substantial connection with the forum province, this may prohibit the joinder of some parties as co-defendants or third parties in complex litigation, which would require additional proceedings against those parties in other jurisdictions (where the substantial connection rule would be satisfied). This is a serious drawback of the substantial connection rule, which should be avoided where possible by an expansive definition of substantial connection for the purpose of joining additional parties: see the pre-*Morguard* case of *Jannock Corp. v. Tamblin & Partners Ltd.* (1975), 8 O.R. (2d) 622, 630 (C.A.) [leave to appeal to Supreme Court of Canada refused (1975) 8 O.R. (2d) 622n], where the difficulties of multiple proceedings are elaborated.

Embracing a test for jurisdiction in which a threshold determination of jurisdiction *simpliciter* required a real and substantial connection between the forum and either the underlying events giving rise to the claim or the parties could frustrate the ability of Canadian courts to prevent a multiplicity of proceedings. Accordingly, the real and substantial connection test is to be distinguished from the American “minimum contacts doctrine” based on the due process clauses of the U.S. Constitution that accord pre-emptory significance to issues of fairness to the defendant. Fairness to the defendant, while an important consideration for Canadian courts, does not inevitably override concerns relating to access to justice and multiplicity. The real and substantial connection test for jurisdiction is a flexible test that, based on all of these considerations, seeks to establish minimum standards for jurisdiction to ensure the litigation does not proceed in an inappropriate forum. It would be inappropriate, for example, to require litigation to go forward in Province A and not in Province B, where related litigation was already underway, solely because the events giving rise to the litigation in Province A and the parties to it were not otherwise connected to Province B. See also Watson & Au, “Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*” (2000), 23 Adv. Q. 167.

The merits in consolidating multi-party proceedings in a single forum to prevent parallel proceedings and inconsistent results has caused courts in certification motions to reconsider the nature of the real and substantial connection required for jurisdiction. (For an explanation of the operation of class proceedings, see Rule 12.) For example, in *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 (S.C.), affirmed (2000), 193 D.L.R. (4th) 67 (C.A.) in a British Columbia class proceeding that proposed to include plaintiffs from other provinces who took steps to join a sub-class, an objection was raised that the court did not have jurisdiction to determine the claims that had no real and substantial connection to the province other than the fact that they came within the definition of the plaintiff class. The British Columbia Supreme Court rejected this argument, holding that: “It is that common issue which establishes the real and substantial connection necessary for jurisdiction.” In other words, once the British Columbia court had determined that a claim that contained an issue in common with other members of a plaintiff class, an issue that had a real and substantial connection to the forum, then it would be possible to assume jurisdiction to decide further claims that had no connection to the forum other than the fact that they were most conveniently tried together with the claims that were connected to the forum because they shared the common issue. This decision was upheld on appeal to the Court of Appeal. The application for leave to appeal to the Supreme Court of Canada is pending. Similar concerns have been addressed with similar results in multi-jurisdiction class proceedings commenced in Ontario in *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 at 347, affirmed (Div. Ct.) at 347; *Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (Gen. Div.); *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 425 (S.C.J.), leave to appeal refused

45 O.R. (3d) 639; and *Wilson v. Server Canada Ltd.* (2000), 50 O.R. (3d) 219, leave to appeal to Div. Ct. dismissed 52 O.R. (4th) 20, leave to appeal to S.C.C. filed January 22, 2001; see J. Walker, “Multi-Jurisdiction Class Actions in Canada” in *Class Actions: Where are we at and where are we going?* – Osgoode Professional Development Program, First Annual National Class Actions Symposium (April 2001).

[2] *Literature*

See generally literature cited under §4[2] and §6[2].

[3] *Case Law: Rules 17.02-17.04 — Service Outside Ontario Without Leave, with Leave and the Additional Requirements*

See also, below, §6[3] Case Law: Rule 17.06—Setting Aside Service outside Ontario and Staying Proceedings.

(a) *General*

Ontario cases. It is not necessary that all of the claims set forth in the statement of claim fall within rule 17.02 in order that service *ex juris* without leave be maintained: *Overland Custom Coach Inc. v. Thor Industries Inc.* (1999), 46 O.R. (3d) 788 (S.C.J.). There is no appreciable onus on either party with regard to falling within rule 17.02; it is for the court to decide whether the pleadings define a cause of action falling within the rule; in the rare case the court cannot reach a conclusion, the issue should be resolved in favour of the foreigner: *Ecolab Ltd. v. Greenspace Services Ltd.* (1998), 38 O.R. (3d) 145 (Div. Ct.), leave to appeal refused (June 16, 1998), Doc. CA M22159 (Ont. C.A.). The words “originating process” in rule 17.02 should be read to include a counterclaim against a person who is not already a party to the main action, and accordingly, service of this type of counterclaim outside Ontario is proper where the claims asserted otherwise fall within this rule: *Henry Grethel Apparel Inc. v. H.A. Imports of Canada Ltd.* (1990), 42 C.P.C. (2d) 260 (Ont. Master). Omission of the specific subsection of rule 17.02 relied upon for service *ex juris* did not affect the validity of such service; it was sufficient if the wording of the subsection relied upon were included: *Hamilton v. Hamilton* (1989), 23 R.F.L. (3d) 154 (Ont. H.C.).

Non-Ontario cases. When interpreting rules of court assuming jurisdiction over non-resident foreigners the court must be mindful of international comity and unless the transaction has a real and substantial connection with the jurisdiction it is arrogant to assume jurisdiction over the proceeding: *Northern Sales Co. v. Government Trading Corp. of Iran* (1991), 48 C.P.C. (2d) 254 (B.C. C.A.).

(b) *Property in Ontario — rule 17.02(a)*

Ontario cases. Although an investment corporation maintains \$3.6 million worth of securities in a bank in Ontario, the mere maintaining of assets in Ontario by the company does not constitute carrying on business in the jurisdiction, where all dealings in the assets are conducted from Montreal, and

service on the officer in Ontario cannot be upheld: *Santa Marina Shipping Co. S.A. v. Lunham & Moore Ltd.* (1978), 18 O.R. (2d) 315 (H.C.J.) (*Note*: This decision seems to address the connection between 17.02(a) and 17.02(p) and not 17.02(a) *per se.*). An action for a declaration that foreign defendants hold land in Ontario as trustees falls within this provision: *McMahon v. Waskochil*, [1945] O.W.N. 887 (Master), affirmed [1945] O.W.N. 887 at 889 (H.C.).

Non-Ontario cases. Where a receiver appointed under a debenture claimed security interest in fur coats sold by the defendant to a retailer in Saskatchewan, service *ex juris* was held to be valid as being in respect of an obligation affecting property in Saskatchewan; alternatively the matter was one in respect of a contract made or apparently breached in Saskatchewan: *Clarkson Gordon Inc. v. Taran Furs (MTL) Inc.* (1989), 41 C.P.C. (2d) 305 (Sask. C.A.). An action commenced in Saskatchewan on the ground that the defendant had assets in the province was valid even where the defendant, who was not a resident of the province, later disposed of his assets; the court should not set aside service out if it would prejudice the plaintiff and if it would not be of any substantial advantage to the defendant to be sued in the province where he resides (in this case the defendant was in prison in Alberta): *Lebo Co. v. Thatcher* (1989), 33 C.P.C. (2d) 35 (Sask. Q.B.), affirmed (1989), 34 C.P.C. (2d) 296 (Sask. C.A.).

(c) *Administration of estates/Interpretation of an Instrument — rule 17.02(b)*

Ontario cases. An action was held not to be within the rule where it was not in respect of real property in Ontario and the deceased, at the time of his death, was not resident in Ontario; although the executor was a necessary and proper party, rule 17.02(o) did not justify the bringing of the action in Ontario where the action against another defendant was not within rule 17.02(b): *Sugarman v. Coopersmith* (1990), 37 E.T.R. 195 (Ont. H.C.).

Non-Ontario cases. Where the plaintiff in a British Columbia action for a money judgment against the estate of a deceased person served the Alberta executrix *ex juris*, the service was set aside; such actions should be brought in the jurisdiction which appointed the personal representative so that all questions relating to the administration of the estate could be determined in the forum which authorized the personal representative to act; the executrix of the Alberta estate was a non-legal entity in British Columbia and could not sue or be sued in British Columbia: *Gavco Holdings Inc. v. Sheftel Estate* (1994), 28 C.P.C. (3d) 322 (B.C. S.C.). The court held that the relevant provincial rule permitting service out of the jurisdiction without leave where the proceeding was “for or in respect of the administration of the estate of a deceased person” was inapplicable to an action based on transactions occurring during the lifetime of a deceased and which could have been brought by him if he were still alive; the defendant was not being sued in her capacity as an executrix but in her personal capacity in respect of acts done long before the will took effect: *Kraus v. Cookson* (1992), 13 C.P.C. (3d) 126 (Sask. C.A.). An order for service out of the jurisdiction against a non-resident executor was set aside; the assumption of jurisdiction over a foreign executor was an interference in the administration of a foreign estate even where service of the jurisdiction had been made on the defendant before he died; when the party died, the jurisdiction of the court did not devolve onto the foreign executor: *Canadian Commercial Bank v. McLaughlan* (1990), 75 Alta. L.R. (2d) 40 (C.A.). This rule authorizes the issue of a writ for service *ex juris* in an action to recover a personal judgment for arrears of taxes which by statute are an obligation or liability affecting land, notwithstanding that the action itself does not affect the land: *Wilkie v. Smith*, [1944] 1 D.L.R. 224 (Sask. C.A.).

(d) *Contracts — rule 17.02(f)*

Ontario cases. Generally a contract is made at the place the offeror receives notification of the offeree’s acceptance, except where acceptance is

made by mail in which case the contract is made at the place of mailing; acceptance by facsimile transmission follows the general rule: *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 39 C.P.C. (4th) 160 (Ont. C.A.). Service *ex juris* was authorized under rule 17.02(f) where the parties' contract was made in Ontario and it specified the law of Ontario as the applicable law: *Overland Custom Coach Inc. v. Thor Industries Inc.* (1999), 46 O.R. (3d) 788 (S.C.J.). Although the contract with the defendant was formed and performed in Alberta, service was not set aside in this receiver action because neither fora was clearly more appropriate: *RDM Sports Leisure Inc. (Receiver of) v. Go-Mango Fitness Equipment* (July 22, 1998), Doc. Toronto 98-CT-91943 (Ont. Gen. Div.). Where an agreement is reached by telephone between parties in different jurisdictions, the contract is made at the place from which the offeror is telephoning as that is the place to which the acceptance is communicated by the offeree: *National Bank of Canada v. Clifford Chance* (1996), 30 O.R. (3d) 746 (Gen. Div.). Service outside Ontario was proper where the assignment agreement under which the plaintiff was assignee/purchaser was governed by the law of Ontario, although the original contract which was the subject-matter of the assignment stated that that contract was to be interpreted according to the law of a foreign jurisdiction: *Drilco Industrial Canada Inc. v. Gregory* (1988), 31 C.P.C. (2d) 112 (Ont. Master), affirmed (October 25, 1988), Doc. Toronto 24911/87 (Ont. H.C.). The court refused to uphold service under this clause where the oral contract alleged by the plaintiff was made in Nova Scotia, there was no pleading of an agreement that Ontario law would govern or that Ontario courts would have jurisdiction, and the alleged breach (non-payment) had clearly not taken place in Ontario: *Hein v. Linwell Woods Products Ltd.* (1986), 56 O.R. (2d) 106 (Dist. Ct.), reversed on other grounds (1986), 58 O.R. (2d) 799 (H.C.). A Quebec company sued an Italian manufacturing company on an exclusive sales agency contract alleging the contract was breached by a sale made by the defendant to a purchaser in Ontario; the Italian company had purported to terminate the agency agreement; it was held that the sale of goods in Ontario was incidental to the breach sued upon and no breach had occurred in Ontario within the meaning of the rule: *Dorset Precision Corp. v. Norwest Precision Ltd.* (1985), 52 O.R. (2d) 437 (H.C.). The fact that the plaintiff resided in Ontario was insufficient to permit service out of province where the claim had no physical connection whatever with Ontario and all the acts out of which the alleged damage arose occurred elsewhere: *Hayter & Scandrett Ltd. v. Deutsche Ost-Afrika-Linie GmbH* (1983), 39 C.P.C. 38 (Ont. Master), affirmed (1985), 50 C.P.C. 194 (Ont. H.C.). Service on a foreign defendant was permitted under this provision although the plaintiff denied the existence of the contract and sought a declaration to that effect: *De Havilland Aircraft of Can. Ltd. v. Metroflight Inc.* (1978), 29 C.P.C. 225 (Ont. H.C.). Where acceptance of an offer is communicated by telephone, the contract is made in the jurisdiction in which the offeror is located; the law which governs the contract is that of the jurisdiction having the closest and most real connection with the transaction: *Re Viscount*

Supply Co., [1963] 1 O.R. 640 (S.C.). The words “which ought to have been performed within Ontario” have been interpreted to mean “which must be” or “which is bound to be” performed in Ontario, and refer to a contract which, by specific term, can be validly performed only within Ontario: *Laurie v. Baird*, [1946] O.W.N. 600 (H.C.).

Non-Ontario cases. A B.C. securities dealer was permitted to sue California defendants in B.C. for losses suffered in having to purchase shares in the open market to cover its position with its client, when shares it had contracted to purchase on behalf of a client were not delivered; the breach occurred in California but the court granted leave to serve out of the province because a real and substantial connection to the province existed by virtue of the damages sustained in the province (even though British Columbia has no equivalent to rule 17.02(h)): *Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. 4th 716 (B.C. C.A.). Where allegations that the defendants had breached their implied warranties in the manufacture and marketing of breast implants might have applied to a non-manufacturing defendant that marketed the implants, the court refused to set aside service *ex juris* on that defendant: *Gray v. Dow Corning Canada Inc.* (1996), 48 C.P.C. (3d) 50 (Sask. Q.B.), affirmed 148 Sask. R. 78 (C.A.). The Russian defendant repudiated a contract in Alberta that was drafted in Alberta and to be performed in Alberta and elsewhere: *Entertainment & Sports Corp. v. Ice Hockey Federation of Russia* (1996), 201 A.R. 305 (Q.B.). Where a Manitoba plaintiff alleged that a Quebec defendant had terminated its exclusive distribution agreement without sufficient notice, the court held that service of the statement of claim *ex juris* in Quebec was justified; a cause of action existed which would give rise to damages to the plaintiff in Manitoba if proven; the existence of a more appropriate forum was to be clearly established to displace the forum selected by the plaintiff: *Imperial Agencies Ltd. v. Regal Confections Inc.* (1995), 102 Man. R. (2d) 74 (C.A.). The plaintiff corporation, which was not registered in Saskatchewan, brought an action in Alberta against the defendant corporation, which had no presence in Alberta, for breach of a contract to supply equipment to the plaintiff's Saskatchewan site; allowing the defendant's application to set aside an *ex parte* order for service *ex juris*, the court held that the contract was formed in Saskatchewan and was to be performed in Saskatchewan; what the defendant had to do was to be done in Saskatchewan and payment was to be in Saskatchewan: *Branlin Construction Ltd. v. J. Giesbrecht & Son Cranes Ltd.* (1994), 150 A.R. 308 (Master). The court dismissed the defendant's application to set aside an order for service *ex juris* in Ontario of a statement of claim in which the plaintiff Alberta corporation alleged breach of a contract executed in Ontario: the defendant had breached the contract in Alberta by failing to provide information to the plaintiff which it was entitled to receive; the plaintiff thus brought itself within the relevant provincial rule providing for service outside Alberta where the action involved a breach in Alberta of a contract made within or outside Alberta: *Aerial Sign Co. v. Steel Art Signs Ltd.* (1994), 31 C.P.C. (3d) 392 (Alta. Master). The court dismissed an application to set aside service *ex juris* where the plaintiff had commenced proceedings in England claiming damages for breach of a charter party by the defendants in failing to nominate or provide a vessel at a loading port in Florida; the principal obligation under the contract was not provision of the vessel, which was to be performed in Florida, but its nomination; nomination was necessary to identify the subject-matter of the contract and an essential prerequisite to the performance of other obligations since its effect was that the vessel's name then became written into the contract; as nomination of the vessel was to be performed in London, the English courts had jurisdiction under the relevant article of the *Civil Jurisdiction and Judgements Act 1982*: *Union Transport Group plc v. Continental Lines SA*, [1992] 1 All E.R. 161 (H.L.). Where the parties who were resident in Texas made an agreement to buy and sell shares in a British Columbia public company and the agreement provided that any dispute should be resolved under Texas law, and the plaintiff subsequently sued in British Columbia, it was held that there was no basis for service *ex juris*; none of the parties had any connection with British Columbia and the alleged breach of contract took place elsewhere: *McCulloch v. JPW Investments Inc.* (1992), 68 B.C.L.R. (2d) 382 (S.C.). The court held it had jurisdiction to permit service outside the province where the plaintiff had sued non-resident guarantors of mortgages for recovery of the deficiencies after judicial sale of the mortgaged properties; having chosen the forum where the property foreclosed upon was located, where the breach might have occurred and where the damages might have been suffered, the plaintiff had established that it came within the relevant provincial rule; although the guarantees were silent on the proper law of contract,

the reference to Saskatchewan statutes in the agreements suggested that its law should govern; the plaintiff should not be forced to conduct actions in several jurisdictions where its original choice demonstrated a real and substantial connection between the damages suffered and the jurisdiction: *Standard Trust Co. v. Ginnell* (1992), 13 C.P.C. (3d) 118 (Sask. Q.B.), leave to appeal to C.A. granted (1992), 96 D.L.R. (4th) 693n. While the defendant may have carried out negotiations with respect to the claim for loss through the local agent, which was served with the claim, such negotiation is not entering into the contract of carriage or the transaction sued upon in Canada: *Mitsui & Co. (Canada) v. United Arab Shipping Co. (S.A.G.)* (1990), 33 F.T.R. 131 (T.D.). Interpreting the English "contract rule" it was held that the plaintiff must show that there was a contract between himself and the defendant and that there was a good arguable case that the claim affected the contract; since the relief sought by the plaintiff was a declaration that no contract existed with the defendant, the claim did not fall within the scope of the rule: *Finnish Marine Insurance Co. Ltd. v. Protective National Insurance Co.*, [1989] 2 All E.R. 929 (Q.B.). Where the plaintiff claimed a security interest in fur coats and brought an application under the *Personal Property Security Act* for a declaration that it held priority over the interest of the respondent, service out of the jurisdiction was proper; the application was one in respect of a contract made in Saskatchewan or else the debenture was breached in Saskatchewan: *Clarkson Gordon Inc. v. Taran Furs (MTL) Inc.* (1989), 35 C.P.C. (2d) 156 (Sask. Q.B.), affirmed (1989), 41 C.P.C. (2d) 305 (Sask. C.A.). Where the contract giving rise to the claim was made by telephone and the acceptance of the offer occurred in Vermont the contract was not made in New Brunswick and service out of the jurisdiction was set aside: *National Bank of Can. v. Cedar Dale Industries Inc.* (1988), 92 N.B.R. (2d) 199 (Q.B.), affirmed (1989), 97 N.B.R. (2d) 352 (C.A.).

(e) *Tort committed in Ontario — rule 17.02(g)*

Ontario cases. The court held that it had jurisdiction *simpliciter* over a foreign defendant based on the real and substantial connection that existed between the alleged damage in Ontario and the defendant's conduct elsewhere: *Gariepy v. Shell Oil Co.* (2000), 51 O.R. (3d) 181 (S.C.J.), leave to appeal refused (April 24, 2001), Doc. Toronto 652/00, 653/00, 661/00 (Ont. Div. Ct.). A claim for breach of fiduciary duty is not a claim in tort and does not fall within rule 17.02(g) or (h); but leave for service outside Ontario may be available under rule 17.03: *Upper Lakes Shipping Ltd. v. Foster Yeoman Ltd.* (1992), 12 C.P.C. (3d) 31, additional reasons at (1993), 12 C.P.C. (3d) 40 (Ont. Master), affirmed 14 O.R. (3d) 548 (Gen. Div.). (*Note:* rule 17.02(h) now expressly includes breach of fiduciary duty.) Where it was alleged that the tort of inducing breach of contract occurred in Ontario, the actual geographical source of the inducement (a telephone call emanating from outside the province) was of no consequence and an Ontario court had jurisdiction to deal with the action: *Elguindy v. Core Laboratories Can. Ltd.* (1987), 60 O.R. (2d) 151 (Div. Ct.). An action for a tort committed in Ontario may be properly brought under this rule even though all the parties to the action are domiciled elsewhere: *Anderson v. Thomas*, [1935] O.W.N. 228 (H.C.).

Non-Ontario cases. The court refused to set aside service *ex juris* on a non-manufacturing defendant where allegations of negligence in the design and manufacture of breast implants applied only to the manufacturing defendants but the failure to inform the plaintiff of the risk involved was attributable to all defendants: *Gray v. Dow Corning Canada Inc.* (1996), 48 C.P.C. (3d) 50 (Sask. Q.B.), affirmed 148 Sask. R. 78 (C.A.). In a negligence action arising from a plane crash, the plaintiff, a Nova Scotia resident, sued two Wisconsin companies from which he had purchased airplane parts; the defendants applied to have service of the statement of claim set aside, arguing that the alleged negligence in the fabrication of the parts would have taken place in their place of manufacture, Wisconsin; the court dismissed the application, holding that there was a real and substantial connection to Nova Scotia; that province was where the accident had

taken place and the plaintiff and most of the witnesses resided; further, the companies knew that the parts they sold were exported to Nova Scotia and were used there: *Carroll v. WAG-Aero Inc.* (1994), 137 N.S.R. (2d) 295 (S.C.). The plaintiff company alleged that the defendant director and the defendant agent of its English parent unlawfully conspired and colluded together to injure the plaintiff and deprive it of its interest in the parent company without adequate compensation; those defendants, and the defendant Liechtenstein-based purchaser of plaintiff's shares, applied for a declaration that the court had no jurisdiction, and the application was dismissed; the facts alleged by the plaintiff showed that there had been a tort committed in British Columbia even though some of the events giving rise to the complaints occurred in England and it was likely that any harm suffered by the plaintiffs had been suffered in British Columbia; an exclusive jurisdiction clause in the share purchase agreement made between the defendant purchaser and the plaintiff stating that the parties submitted themselves to the exclusive jurisdiction of the English court did not assist the defendant because not only was British Columbia the jurisdiction with the most real and substantial connection with the subject-matter of the lawsuit, but it appeared that the vast majority of the witnesses were located in British Columbia: *Quest Vitamin Supplies Ltd. v. Hassam* (1992), 79 B.C.L.R. (2d) 85 (S.C.). A British Columbia plaintiff suing for defamation was permitted to sue in Saskatchewan and to serve the Ontario resident newspaper company out of the jurisdiction; the plaintiff had business interests in Saskatchewan, the newspaper was distributed in Saskatchewan, the alleged libel referred to a Saskatchewan company and Saskatchewan was the *forum conveniens*: *Dickhoff v. Armadale Communications Ltd.* (1992), 103 Sask. R. 307 (Q.B.), reversed on other grounds (1993), [1994] 1 W.W.R. 468 (C.A.). Where the defendants conspired to procure breaches of the plaintiff's contracts in England and the plaintiff's immediate loss was sustained in England, but the effects of loss were ultimately reflected in Switzerland, it was held that that service out of England was to be permitted on the ground of a tort committed within the jurisdiction: *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.*, [1988] 3 All E.R. 116 (Q.B.), reversed in part [1989] 3 All E.R. 14 (C.A.). Absent a claim for unliquidated or other damages, a fraudulent conveyance is not a tort: *Suncorp Realty Inc. v. PLN Investments Inc.*, [1986] 1 W.W.R. 619 (Man. Q.B.). Service *ex juris* in an action alleging inducement of breach of contract was allowed where the tort was considered to have been committed in the province where the plaintiff suffered loss and where that province's law was likely to have been in the reasonable contemplation of the parties: *Ichii Canada Ltd. v. Yamauchi Rubber Industry Co.* (1983), 43 B.C.L.R. 215 (C.A.). Leave to serve an Ontario manufacturer, the defendant in a Saskatchewan negligence action, was upheld on the ground that where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know that as a result of his carelessness a consumer may be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff in fact used it, then the forum in which the damage occurred is entitled to exercise jurisdiction over that foreign defendant: *Moran v. Pyle National (Canada) Ltd.* (1973), 43 D.L.R. (3d) 239 (S.C.C.).

(f) *Damage sustained in Ontario — rule 17.02(h).*

Authors Note: When damage sustained in Ontario is relied on for service outside Ontario, the connections to the forum are sometimes so tenuous that there are other clearly more appropriate fora elsewhere and Ontario courts will decline jurisdiction. However, as a result of the Supreme Court of Canada's determination in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 and *Hunt v. T&N plc.*, [1993] 4 S.C.R. 289, 21 C.P.C. (3d) 269 that personal jurisdiction is a function of constitutional imperatives (see §4[1](f), above), it has been suggested that the assumption of jurisdiction under rule 17.02(h) is, *per se*, constitutionally infirm. Whether the refusal to hear such a case is a matter of jurisdiction *simpliciter* (i.e., whether the court *can* hear the case) or a matter of *forum non conveniens* (i.e., whether the court *should* hear the case) has yet to be resolved definitively but there are indications in the case law that Canadian courts prefer to treat this as a matter of discretion

in order to retain their capacity to exercise jurisdiction in appropriate cases, such as those in which plaintiffs are incapable of suing elsewhere (see §5[1](d), above).

Ontario cases. The plaintiff was permitted to bring an action in Ontario regarding a motor vehicle accident in Alberta; the plaintiff had been a passenger, the action was essentially an assessment of damages, and most of the witnesses were in Ontario: *Muscutt v. Courcelles* (January 30, 2001), Doc. 33486 (Ont. S.C.J.). Where the essence of the plaintiff's pleading was that it had sustained damage in Ontario arising from breach of contract and breach of fiduciary duty, service *ex juris* was authorized pursuant to rule 17.02(h): *Overland Custom Coach Inc. v. Thor Industries Inc.* (1999), 46 O.R. (3d) 788 (S.C.J.). Where an Ontario resident was injured in a motor vehicle accident in Alberta he sustained damages in Ontario (*i.e.*, loss of income) and was permitted to serve his claim outside of Ontario; he was entitled to apply Alberta law and pursue a claim for economic loss: *George v. Gubernowicz* (1999), 44 O.R. (3d) 247 (Gen. Div.). Service *ex juris* of an action claiming damages for conspiracy, slander of goods, injurious falsehood, negligence and unlawful interference with economic interests was not set aside where the court held the plaintiffs met the requirements of rule 17.02(h): *Acronym (Cayman) Inc. v. Ontario Lottery Corp.* (1997), 12 C.P.C. (4th) 331 (Ont. Gen. Div.). The recording on the books of the plaintiff of the impact of harm or damage suffered elsewhere did not lead to the result that the damage or injury was suffered in Ontario: *National Bank of Canada v. Clifford Chance* (1996), 30 O.R. (3d) 746 (Gen. Div.). Even though an Ontario plaintiff endured pain and suffering in Ontario due to the alleged failure of a Quebec doctor to diagnose a spinal fracture, the real and substantial connection was with Quebec and not Ontario and therefore the action should be tried in Quebec: *MacDonald v. Lasnier* (1994), 21 O.R. (3d) 177 (Gen. Div.). In an action arising out of an automobile accident in Alberta, where all the parties resided within Alberta at the relevant time, the tort occurred in Alberta and the appropriate law to be applied would be the law of Alberta, the Ontario court had no jurisdiction to entertain the action: *Buchar (Litigation Guardian of) v. Weber* (1990), 46 C.P.C. (2d) 60 (Ont. H.C.). In an action against a Florida bank for wrongfully paying on a letter of credit used to secure an appearance bond in Florida, where the plaintiff was resident in Ontario and the security for the bond came from Ontario to the knowledge of the defendant, the damage was sustained in Ontario and service out of Ontario was permitted: *Jaffe v. Dearing* (1988), 65 O.R. (2d) 113 (H.C.). Where the plaintiffs were injured in an automobile accident in Alberta, service out of Ontario was permitted where the plaintiffs had sustained damages in Ontario including pain, suffering and the loss of ability to work in Ontario: *Power v. Probert* (1987), 19 C.P.C. (2d) 142 (Ont. Dist. Ct.) (annotated). Where the plaintiff's contract of employment in Ontario was induced to be breached by a telephone call by the defendants in Alberta, he had sustained damage in Ontario from a tort committed in Ontario: *Elguindy v. Core Laboratories*

Canada Ltd. (1987), 60 O.R. (2d) 151 (Div. Ct.). The mere fact that the plaintiff's financial records are kept in Ontario does not necessarily mean that damages from an alleged breach of contract are sustained in Ontario: *Hein v. Linwell Wood Products Ltd.* (1986), 56 O.R. (2d) 106 (Dist. Ct.), reversed on other grounds (1986), 58 O.R. (2d) 799 (H.C.). Service outside Ontario was set aside in a wrongful dismissal action where all the events relating to the employment and dismissal occurred in Manitoba and the plaintiff moved to Ontario only after his dismissal; inclusion of a claim for mental distress possibly sustained in Ontario did not bring the case within this subrule: *Bowers v. MWG Apparel Corp.* (1985), 6 C.P.C. (2d) 35 (Ont. Dist. Ct.). The court set aside service outside Ontario where the sole connection pleaded between the plaintiff and Ontario was that the plaintiff was incorporated and located in Ontario; it was not shown that the plaintiff sustained damages in Ontario: *Hayter & Scandrett Ltd. v. Deutsche Ost-Afrika-Linie GmbH* (1985), 50 C.P.C. 194 (Ont. H.C.) A Quebec company sued on an exclusive sales agency contract with an Italian company, alleging the contract had been breached by a sale made by the defendant to a purchaser in Ontario; the defendant had purported to terminate the agency agreement; it was held that the *locus* of the damage allegedly sustained was not in Ontario and that the link with Ontario was entirely too tenuous: *Dorset Precision Corp. v. Norwest Precision Ltd.* (1985), 52 O.R. (2d) 437 (H.C.). Where a plaintiff sued a company in Ontario for damages for wrongful dismissal in respect of a contract of employment that was signed, to be performed and breached in the Northwest Territories, service was set aside: in contract cases the damage sustained in Ontario has to be a matter of substance, not just form: *Wardell v. Tower Co.* (1961) (1984), 49 O.R. (2d) 655 (H.C.). A plaintiff whose spouse was killed accidentally in Quebec was held to have sustained damage in Ontario and hence service outside Ontario was valid: *Bouchard v. J.L. Le Saux Ltée* (1984), 45 O.R. (2d) 792 (Master), affirmed (1986), 58 O.R. (2d) 124 (note) (C.A.). Service out of Ontario was set aside in an action against Newfoundland solicitors for failing to deliver a promissory note to aid in prosecuting Newfoundland actions; the damages occurred in Newfoundland since that is where the plaintiff failed to prevail in the actions, and any breach of contract occurred in Newfoundland: *Ralph v. Halley* (1982), 30 C.P.C. 73 (Ont. Master). A claim that the foreign assignees from the defendant of certain patents held them in trust, not constituting an allegation of conversion, is not a claim for a tort committed or damages sustained in Ontario: *Canadian Bronze Co. v. Shrum* (1980), 17 C.P.C. 241 (Ont. Master). Where a resident of Ontario is injured outside Ontario and returns to Ontario with pain, suffering, disability and loss of ability to earn an income, he has sustained damage in Ontario: *Poirier v. Williston* (1980), 29 O.R. (2d) 303 (Div. Ct.), affirmed (1981), 31 O.R. (2d) 320 (C.A.). Damages in respect of loss of profits are sustained at the place where the financial records of the business are kept: *Skyrotors Ltd. v. Carrière Technical Industries Ltd.* (1979), 26 O.R. (2d) 207 (H.C.). The purchaser of a defective product from a foreign supplier sustains damage in Ontario: *Lummus Co. v. International*

Alloys Inc. (1977), 17 O.R. (2d) 322 (Master), affirmed 17 O.R. (2d) 322n (H.C.). A large company with an Ontario presence can sue in Ontario on a debt although payment is to be made elsewhere: *Canadian General Electric Co. v. C.M. Windows & Stained Glass Ltd.* (1977), 16 O.R. (2d) 188 (Master). Where a plaintiff is hospitalized, incurs medical expenses, experiences pain and suffering, etc. in Ontario, damage has been sustained in Ontario: *Mar v. Block* (1976), 13 O.R. (2d) 422 (H.C.), overruled: *Vile v. Von Wendt* (1979), 26 O.R. (2d) 513 (Div. Ct.).

Non-Ontario cases. Fairness was a relevant consideration in determining jurisdiction *simpliciter* in a claim for negligence in a diagnosis made by health care providers in another province where the plaintiff could not sue outside the province of her residence: *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S. C.A.), leave to appeal refused (1998), 233 N.R. 397 (note) (S.C.C.). Damage is merely the monetary compensation that flows from injury. It does not make the tort or breach of statutory duty something committed wholly or partly in the province of the plaintiff's residence: *Anderson v. Coy* (1998), 224 A.R. 345 (Q.B.). The court held it had jurisdiction to try a tort action by Newfoundland shareholders against United States corporation where the shares had been purchased in Newfoundland and the damages were suffered in Newfoundland: *Alteen v. Informix Corp.* (1998), 21 C.P.C. (4th) 228 (Nfld. S.C.). Damages suffered in Alberta in respect of an automobile accident in British Columbia could not support service in British Columbia for an Alberta proceeding: *Daniels v. Kwok* (1998) 67 Alta L.R. (3d) 284 (Q.B.). The court held that an action arising from an accident in the Yukon in which two residents of the Northwest Territories were killed was properly brought in the Yukon as the wrong from which the liability arose occurred entirely in the Yukon and Yukon law was therefore applicable: *Stewart v. Stewart Estate*, [1996] 8 W.W.R. 624 (N.W.T. S.C.). The defendant in an action commenced in New Brunswick for an injury sustained in the United States served a hospital in the United States with a third party notice alleging its negligence for not transferring the plaintiff to a Canadian facility but to another American one where the hospital bills were much higher; the court held that because the damages sustained were medical bills, and at the time the bills were incurred the plaintiff was a resident of New Brunswick, the damages were therefore sustained in New Brunswick and service out was proper, regardless of the fact that the alleged tort was committed in the United States: *Dubé and Dubé* (1993), 140 N.B.R. (2d) 337 (Q.B.), reversed on other grounds (1994), 147 N.B.R. (2d) 315 (C.A.). Where the act of inducing a broker to break its trading contracts with the plaintiffs was committed in New York but the damage which the plaintiff suffered had occurred in London, service out of the jurisdiction was permitted: *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.*, [1989] 3 All E.R. 14 (C.A.). Service out of the jurisdiction in Newfoundland was sustained although the contract for the sale of the hovercraft in question had been formed, negotiated and concluded in Ontario, since the defendant's damage was sustained in Newfoundland: *Berrick King Surveys Ltd. v. All Seasons Hovercraft Inc.* (1988), 72 Nfld. & P.E.I.R. 309 (Nfld. T.D.). An infant plaintiff living in Alberta was held to have suffered damages in Newfoundland where he had been receiving remuneration from his father in Newfoundland and the source of income was lost when his father was killed in a helicopter accident in Newfoundland: *Garbett Estate v. Universal Helicopters (Nfld.) Ltd.* (1986), 61 Nfld. & P.E.I.R. 302 (Nfld. T.D.), affirmed (1988), 69 Nfld. & P.E.I.R. 153 (Nfld. C.A.).

(g) *Injunctions — rule 17.02(i)*

Ontario cases. The court held that to the extent that the plaintiff's claim for injunctive relief might oblige the defendants to do or refrain from doing anything in Ontario, service *ex juris* was authorized under rule 17.02(i) *Overland Custom Coach Inc. v. Thor Industries Inc.* (1999), 46 O.R. (3d) 788 (S.C.J.).

(h) *Custody and access — rule 17.02(k)*

Ontario cases. A custody order by the foreign court where the child was ordinarily resident had become void by the time the mother brought the child to Ontario; the Ontario court assumed jurisdiction after a consideration of the best interests of the child: *Charmasson v. Charmasson* (1981), 25 C.P.C. 45 (Ont. C.A.).

(i) *Judgment of court outside Ontario — rule 17.02(m)*

Ontario cases. Service outside Ontario is permissible in respect of an action on a foreign judgment for alimony: *Lawson v. Lawson*, [1964] 2 O.R. 321 (H.C.).

(j) *Claims authorized by statute — rule 17.02(n)*

Ontario cases. Where the sole claim was for a declaration pursuant to the *Judicature Act* that there was no legally binding contract between the parties, service out of the province was not set aside: *De Havilland Aircraft of Canada Ltd. v. Metroflight Inc.* (1978), 6 C.P.C. 38 (Ont. Master).

(k) *Necessary or proper party — rule 17.02(o)*

Ontario cases. The court held that *ex juris* defendants were necessary and proper defendants and that service upon them was authorized pursuant to rule 17.02(o): *Overland Custom Coach Inc. v. Thor Industries Inc.* (1999), 46 O.R. (3d) 788 (S.C.J.). Where three of the directors of the federally incorporated respondent company with its head office in Alberta resided in Ontario, the court held that the other respondents were properly served *ex juris* under rule 17.02(o): *Fidelity Management & Research Co. v. Gulf Canada Resources Ltd.* (1995), 42 C.P.C. (3d) 93 (Ont. Gen. Div. [Commercial List]). Where an action was held not to be within the rule regarding administration of estates (rule 17.02(b)) because it was not in respect of real property in Ontario and the deceased, at the time of his death, was not resident in Ontario, it was held that although the executor was a necessary and proper party, rule 17.02(o) did not justify the bringing of the action in Ontario where the action against another defendant was not within rule 17.02(b): *Sugarman v. Coopersmith* (1990), 37 E.T.R. 195 (Ont. H.C.). Where the plaintiff alleged that one or both defendants promised to pay for work done, and each alleged that the other was liable, the non-resident defendant was a necessary and proper party to the action brought in Ontario notwithstanding that the plaintiff had separate contracts with each of the two defendants: *Hein v. Linwell Wood Products Ltd.* (1986), 56 O.R. (2d) 106 (Dist. Ct.), affirmed on this point (1986), 58 O.R. (2d) 799 (H.C.). A proceeding is not one “properly brought” against another person served in Ontario where, under the applicable conflict of laws rules, the claim made against the person served in Ontario is not one maintainable in Ontario: *Eades v. Hamilton (City)* (1985), 52 O.R. (2d) 307 (Dist. Ct.). Service out of Ontario was permitted in a libel action: *Gouzenko v. Martin* (1981), 34 O.R. (2d) 394

(Master). Where there was doubt as to which of six defendants was liable, and five had been duly served, service of the sixth out of Ontario as a necessary and proper party was permitted: *Vile v. Von Wendt* (1979), 26 O.R. (2d) 513 (Div. Ct.). A foreign manufacturer of an aircraft part alleged to be a cause of an accident is a necessary or proper party to an action against an Ontario repairer: *Skyrotors Ltd. v. Carrière Technical Industries Ltd.* (1979), 26 O.R. (2d) 207 (H.C.). Where a purchaser of equipment brings an action against the designer of the equipment and the designer alleges that the non-resident company which installed the equipment is at fault, such non-resident company is a necessary and proper party notwithstanding a clause in a contract between the plaintiff and that company stating that the British Columbia courts are to have jurisdiction: *Jannock Corp. v. R.T. Tamblin & Partners Ltd.* (1975), 8 O.R. (2d) 622 (C.A.), leave to appeal to Supreme Court of Canada refused 8 O.R. (2d) 622n. One foreign party may not be served under this provision merely because another foreign party has attorned to the jurisdiction and accepted service: *Fasig-Tipton Co. v. Willmot*, [1969] 2 O.R. 1 (Master).

Non-Ontario cases. In determining whether a foreign defendant is a necessary or proper party to the proceedings under the relevant provincial rule, the appropriate test is whether the same cause of action is pleaded against both the foreign defendant and the domestic defendant such that, were the foreign defendant within the jurisdiction, it would be possible to join both parties in a single action; the applicable test is similar to the one governing the joinder of parties: *Jan Poulsen & Co. v. Seaboard Shipping Co.* (1994), 32 C.P.C. (3d) 385 (B.C. S.C.). The requirement in rule 17.02(o) that another person was served within the jurisdiction is satisfied where a non-resident voluntarily submits to the jurisdiction before the commencement of the proceeding, but not if the submission is after the proceeding is commenced: *Amanuel v. Alexandros Shipping Co.*, [1986] 2 W.L.R. 962 (Q.B.).

(1) *Persons resident or carrying on business in Ontario — rule 17.02(p)*

See also cases under rule 16.02(1)(e), above, 16§15 — Person Outside Ontario Carrying on Business in Ontario: Rule 16.02(1)(e).

Ontario cases. Where defendant was clearly an agent for a parent corporation and it was far too early to put the plaintiff to the task of unravelling the apparently complex corporate web involving the French parent company, service was not set aside: *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), leave to appeal refused (2000), 52 O.R. (3d) 20 (Div. Ct.). Service pursuant to rule 17.02(p) was authorized where the defendant advertised in a Canadian transportation journal, operated a subsidiary in Ontario and referred to itself as a North American company: *Overland Custom Coach Inc. v. Thor Industries Inc.* (1999), 46 O.R. (3d) 788 (S.C.J.). A marketing strategy including periodic visits to Ontario and advertising in Ontario was held to constitute carrying on business in Ontario: *Applied Processes Inc. v. Crane Co.* (1993), 15 O.R. (3d) 166 (Gen. Div.). Domicile or residence is to be determined as of the date the action is commenced rather than as of the date the cause of action arose: *Finnerty v. Watson*, [1969] 1 O.R. 634 (H.C.).

Non-Ontario cases. The court dismissed an application for service *ex juris* on a parent corporation which operated a number of its subsidiaries as an integrated economic unit; the parent

corporation was not the subject of any allegations and its method of operating its subsidiaries did not mean that for legal purposes separate legal entities would be ignored absent some compelling reason for lifting the corporate veil: *Cunningham v. Hamilton* (1995), 29 Alta. L.R. (3d) 380 (C.A.).

(m) *Counterclaim, crossclaim or third party claim — rule 17.02(q)*

Non-Ontario cases. The defendant in an action commenced in New Brunswick for injuries sustained in the United States served a hospital in the United States with a third party notice alleging its negligence in not transferring the plaintiff to a Canadian facility but to another American one where the hospital bills were much higher; denying the hospital's motion to set aside service on the ground that a court order should have been obtained, the court held that the damages were sustained when the medical bills were incurred, at which time the plaintiff was resident in New Brunswick; therefore the damages were sustained in New Brunswick and service was proper under the relevant provincial rule, regardless of the fact that the alleged tort was committed in the United States: *Dubé v. Dubé* (1993), 140 N.B.R. (2d) 337 (Q.B.), reversed on other grounds (1994), 147 N.B.R. (2d) 315 (C.A.). Defendants sued on promissory notes were permitted to serve a third party notice *ex juris* in Alberta on solicitors who had advised them with respect to the investment; since the negligent advice alleged to have been given by the third parties was given to the defendants in British Columbia by telephone from Alberta the tort had been committed in British Columbia; *forum conveniens* favoured the plaintiffs since the principal object of third party proceedings is the avoidance of multiple actions and inconsistent findings and the defendants would lose a legitimate juridical advantage if they were forced to litigate the third party proceedings in Alberta; moreover, there was a real and substantial connection between British Columbia and the defendants and the events giving rise to the third party proceedings: *Canadian Commercial Bank v. Carpenter* (1989), 39 B.C.L.R. (2d) 312 (C.A.), leave to appeal to Supreme Court of Canada refused (1990), 109 N.R. 21 (note).

(n) *Service outside Ontario with leave — rule 17.03*

Ontario cases. The court is more inclined to permit service on residents of other provinces than on residents of other countries: *Jannock Corp. v. R.T. Tamblin & Partners Ltd.* (1975), 8 O.R. (2d) 622 (C.A.), leave to appeal to Supreme Court of Canada refused 8 O.R. (2d) 622n. Where an order authorizes service in one city and the defendant is served in another city, the order may be amended *nunc pro tunc*: *ESB Canada Ltd. v. Duval Corp. of Canada (No. 2)*, [1973] 3 O.R. 791 (H.C.). In disposing of the application: (1) the general balance of convenience to all parties is important; and (2) the substance of the issues involved in the suit must be examined; the court is less reluctant to allow service in other provinces than in foreign jurisdictions: *ESB Canada Ltd. v. Duval Corp. of Canada (No. 1)*, [1973] 3 O.R. 781 (H.C.). The affidavit supporting the motion for leave must depose as to the truth of the allegations contained in the statement of claim: *Cottrell v. Hanen*, [1963] 1 O.R. 164 (Master).

Non-Ontario cases. Leave granted to serve *ex juris* an *ex parte* Mareva injunction obtained in the British Columbia court on the defendant in actions alleging environmental damage commenced in both Colorado and British Columbia; the court held that while an action relating to a breach of statute or tort in Colorado should probably be tried in Colorado, interlocutory assistance might be granted to foreign court proceedings without an underlying cause of action: *United States v. Friedland* (1996), 13 C.P.C. (4th) 296 (B.C. S.C.). Obtaining leave to serve a defendant in a foreign province is a condition precedent and while failure to do so is an irregularity, in the absence of objection, performance of the condition precedent is assumed: *Pare v. Halldorson* (1996), 150 Sask. R. 96 (Q.B.). Where allegations in the statement of claim suggested that a resident defendant co-conspired with a Swiss bank to deprive it of debenture proceeds and

the alleged transactions took place in Switzerland, the plaintiff was granted leave to serve the bank *ex juris* upon the statement of claim being amended to allege the conspiracy with the resident defendant: *Pineridge Capital Group Inc. v. Anderson* (1995), 16 B.C.L.R. (3d) 296 (S.C.). In Alberta, where leave is sought to serve out of the jurisdiction, the plaintiff has the burden to show a good arguable case, a *prima facie* case from reasonable facts, and it is not sufficient to incorporate by reference into the supporting affidavit the statement of claim unless the defendant swears to the truth of it: *Sopol-Pacific Ltd. v. Schreier Malting Co.* (1991), 45 C.P.C. (2d) 235 (Alta. Master). Where the plaintiff, a Saskatchewan resident, had purchased defective pipe fittings manufactured in Japan from a Japanese resident and where, although the damage had occurred in Saskatchewan, there was uncertainty as to where the negligence arose, the court granted the plaintiff's application for leave to serve its statement of claim in Japan; the primary consideration in granting leave pursuant to the relevant provincial legislation was the issue of the most convenient forum; because of a contractual arrangement between the plaintiff and the defendant's American subsidiary which made Saskatchewan's law applicable, related contractual actions were to be litigated in that province; since many of the acts or omissions forming the basis of those actions were substantially the same as those giving rise to the alleged torts, it was reasonable to try all actions in the same jurisdiction; while there were arguments to justify the tort litigation proceeding in Japan, the balance was not so strongly in favour of the defendant as to interfere with the plaintiff's choice of forum: *Newgrade Energy Inc. v. Kubota America Corp.* (1991), 95 Sask. R. 304 (Q.B.), leave to appeal refused (1991), 97 Sask. R. 32 (C.A.). Where a plaintiff alleges several causes of action, and a good arguable case can be made for at least one, a plaintiff is entitled to leave for service *ex juris*: *Aladdin Industries Inc. v. Therma Systems Corp.* (1990), 30 C.P.R. (3d) 572 (Fed. T.D.). Leave to serve out of British Columbia where the automobile accident in question occurred in Alberta was refused; the litigation should be heard in Alberta where the defendants resided or had carried on business and where the witnesses were present: *Ratcliffe Estate v. Maj* (1989), 39 C.P.C. (2d) 261 (B.C. S.C.). Where a case does not fall within the rules permitting service *ex juris* without leave, and the plaintiff seeks leave, the onus is on the plaintiff to show the appropriateness of British Columbia as the forum and a clear balance of juridical advantage in the plaintiff's favour; the *forum conveniens* was Alberta and there was no advantage for the plaintiff, other than a saving of costs, and leave was refused: *McLean v. Retail Solutions Inc.* (1989), 39 C.P.C. (2d) 97 (B.C. S.C.). On a motion for leave to serve out of the jurisdiction the plaintiff is not required to prove its case as it would at trial; all the plaintiff need show is a reasonable cause of action or a good arguable case against the defendant: *Canadian Commercial Bank v. McLaughlan* (1989), 38 C.P.C. (2d) 23 (Alta. Q.B.).

(o) *Additional requirements for service outside Ontario — rule 17.04*

Ontario cases. Service out of Ontario ought not to be set aside if it is in fact authorized by one of the clauses of rule 17.02, even if such clause is not referred to in the originating process: *Davidson Partners Ltd. v. Kirsh* (1990), 72 O.R. (2d) 450 (Master). Where in support of service outside Ontario the plaintiff alleged that he had "sustained damages in Ontario," the court refused to order particulars of the nature and amount of damages suffered in Ontario, since these were not issues for the purpose of pleading: *Citadel Life Assurance Co. v. Sun Life Assurance Co. of Can.* (1988), 65 O.R. (2d) 790 (Master). In order to comply with rule 17.04(1) it is not necessary to relate any specific clause of rule 17.02 to any specific fact or group of facts pleaded in the statement of claim; overruling *Ontario (A.G.) v. J.H. Bachmann Can. Inc.*, below: *Schaffhauser Kantonal Bank v. Chmiel* (1988), 65 O.R. (2d) 475 (H.C.), leave to appeal refused (1988), 29 C.P.C. (2d) xlv (Ont. H.C.). The court set aside service outside Ontario where the statement of claim, while it referred to specific provisions of rule 17.02, did not disclose facts in support of such service: *Ontario (A.G.) v. J.H. Bachmann Can. Inc.* (1987), 15 C.P.C. (2d) 96 (Ont. Master).

Non-Ontario cases. Where the plaintiffs alleged that their action was founded on a tort committed within the jurisdiction, the court held that establishing a winning case was not a condition precedent to securing an order for service *ex juris*; *prima facie* evidence was sufficient and the standard of proof was lax at that stage; the evidence adduced raised a good arguable case which, if proved, would serve as a sufficient basis for the alleged causes of action: *Cunningham v. Hamilton* (1995), 29 Alta. L.R. (3d) 380 (C.A.). Where the plaintiff's daughter, a resident of the Northwest Territories, had been killed in a car accident in Yukon and the plaintiff had commenced an action in the Northwest Territories, the court denied an application to set aside service *ex juris*; the plaintiff's action came within the provincial rules relating to service *ex juris* without order and although the plaintiff had failed to state correctly on which grounds such service was based, that was a mere irregularity which could be cured: *Stewart Estate v. Stewart Estate*, [1994] 8 W.W.R. 196 (N.W.T. S.C.). The defendant in an action commenced in New Brunswick for injuries sustained in the United States served a hospital in the United States with a third party notice alleging its negligence in not transferring the plaintiff to a Canadian facility but to another American one where the hospital bills were much higher; the court held that although the notice did not contain a statement of the facts relied upon, service was nevertheless authorized under the rules; the lack of compliance with the rules was not a fatal defect and could be amended: *Dubé v. Dubé* (1993), 140 N.B.R. (2d) 337 (Q.B.), reversed on other grounds (1994), 147 N.B.R. (2d) 315 (C.A.). The failure to endorse the grounds for service *ex juris* on the originating process is a curable irregularity; if the claim clearly fell within the Rules and the defendant did not enter an appearance or apply to set aside the service then the failure to endorse could be treated as an irregularity; but where, as in this case, some claims fell outside the categories in the Rules which justified service out without leave, then leave was required before service could be made and failure to obtain such leave would result in the service being set aside: *McLean v. Retail Solutions Inc.* (1989), 39 C.P.C. (2d) 97 (B.C. S.C.).

§6 DECLINING JURISDICTION: *FORUM NON CONVENIENS*

[1] *Author's Commentary: Declining Jurisdiction: Forum Non Conveniens*

Subheading [1] of this section contains an *Author's Commentary* on the effect of the *Morguard* decision (see §4[1](e)) on the law relating to declining jurisdiction and the operation of the doctrine of *forum non conveniens* in Canada. Subheading [2] contains references to the academic literature and the paragraphs of subheading [3] contain the case law.

(a) *The operation of s. 106 C.J.A. and rule 17.06*

Ontario courts, like most common law courts, have inherent authority to control their own procedure, which, as indicated by s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.34 permits the court, "on its own initiative, or on motion by any person, whether or not a party, . . . [to] stay any proceeding in the court on such terms as are considered just." This authority often finds its expression in cases involving foreign elements in the exercise of discretion to stay a proceeding in favour of a more convenient forum elsewhere. While the inherent authority of Ontario courts to control their own procedure by staying a proceeding before them is frequently invoked in cases involving connections to more than one province or country, this is not the only situation in which it is invoked. For example, a court may stay a proceeding where an arbitration of the dispute is pending or where criminal proceedings relating to issues in dispute in the matter before it are pending. These reasons for invoking

the inherent jurisdiction of the court as described in s. 106 are considered elsewhere in this work: see, above, 106§3 Stay of Proceedings.

Rule 17.06 contains the procedure applicable to most situations in which defendants apply to an Ontario court to exercise its discretion to stay a proceeding in favour of another more convenient forum. However, as the Court of Appeal in *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 noted, rule 17.06 provides for stays based on *forum non conveniens* only in situations in which the defendant has been served outside Ontario. Stays based on *forum non conveniens* may also be granted in situations in which a defendant has been served in Ontario. The authority for this is described in s. 106 of the *Courts of Justice Act*. Accordingly, rule 17.06 does not provide the procedure for all stays granted on the basis of the doctrine of *forum non conveniens* (nor does it provide for all relief granted on the basis of the doctrine of *forum non conveniens*, in that the procedure for anti-suit injunctions is contained in Rule 40. However, the reasons for granting stays provided in rule 17.06 seems generally to apply also to stays granted in matters where defendants are served under Rule 16.

Pursuant to rule 17.06(1), a party served outside Ontario may seek two kinds of orders: an order setting aside service where service is not authorized by the rule; and an order staying the proceeding on the grounds that Ontario is not a convenient forum for the hearing of the proceeding. With respect to an order setting aside service where service is not authorized by the rule, it should be noted that rule 17.06(3) provides for the validation of service in cases where it would have been appropriate to grant leave to serve outside Ontario. Accordingly, it would appear that the scope for setting aside service is limited to cases in which it would not be appropriate to grant leave to serve outside Ontario. In the vast majority of cases, this would seem to arise in situations in which Ontario is not a convenient forum. Accordingly, there is rarely much if any practical difference in the nature of the determinations that will result in the granting of these two kinds of orders.

A party who seeks either an order setting aside service or granting a stay may do so before delivering a defence, a notice of intent to defend or a notice of appearance and by doing so without addressing the merits of the claim, the party does not submit to the jurisdiction of the court. This could be significant to the enforceability outside Ontario of the judgment that might ultimately be issued by the Ontario court. At one time, it was the view of some common law courts that all those who entered an appearance solely to contest jurisdiction or to ask the court to exercise its discretion to stay the proceeding would be regarded as having attorned even if, when unsuccessful, they withdrew from the proceedings and did not go on to address the merits of the claim: see *Henry v. Geopresco International* (1975), [1976] Q.B. 726 (Eng. C.A.). However, this much criticized approach has changed, for example, in the United Kingdom through the provisions of s. 33 of the *Civil Jurisdiction and Judgments Act, 1982*: see Collins, ed. *Dicey & Morris on the Conflict of Laws*, 13th ed. (2000) at 494-495. Accordingly, now if the defendant is unsuccessful in a motion

brought under rule 17.06 and subsequently withdraws from the proceeding without taking any steps to defend against the claim, and has not entered into an agreement to resolve the dispute in Ontario, the default judgment will generally not be enforceable against him or her in countries where the test for enforceability against defendants served outside the jurisdiction is attornment and not real and substantial connection: see § 4[1](a)-(d). This is because the defendant will not be regarded as having submitted, or “attorned,” to the jurisdiction of the Ontario court simply by bringing a motion under rule 17.06.

The broad discretion regarding the making of orders based on *forum non conveniens* suggests that the requirement to bring a motion for a stay *prior* to delivering a defence, a notice of intent to defend or a notice of appearance is not absolute: see *ABB Power Generation Inc. v. CSX Transportation* (1996), 47 C.P.C. (3d) 381 (Ont. Gen. Div.). However, the delivery of a defence appears to be inconsistent with a challenge to jurisdiction *simpliciter* (such as one in a motion to set aside service) and, therefore, it would seem that any motion that a court was prepared to entertain under rule 17.06 after delivery of a defence would have to be limited to the discretionary determination that the court is not a convenient forum: see *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.) (where the defendant asked the court to decline jurisdiction after delivering a notice of intent to defend), and *National-Nederlanden Financing Co. B.V. v. Jones* (1984), 49 C.P.C. 288 (Sask. Q.B.) (where the defendant did not move until three years after filing of the statement of defence).

Further, the broad discretion in rule 17.06(2) to “make such other order as is just” reflects the increasing practice of granting stays based on *forum non conveniens* on terms, such as in *National-Nederlanden Financing Co. B.V. v. Jones* (1984), 49 C.P.C. 288 (Sask. Q.B.), above, where the Netherlands rather than Saskatchewan was the convenient forum and the plaintiff was granted a stay, on a series of terms designed to ensure that the Dutch forum would be available to the plaintiff and the stay would not have the effect of preventing the plaintiff from litigating the claim. Thus, for example, where the limitation period in a clearly more appropriate forum has expired after the commencement of the claim in Ontario, it might be suitable in the order granting a stay to require the defendant to undertake not to rely on a limitation defence in that alternative forum. This would overcome the concern that the plaintiff would lose a juridical advantage enjoyed in the local forum by the granting of the stay. Other perceived advantages of the alternate forum on which the defendant does not intend to rely might also be handled in this way to assist in ensuring that the matter is heard in the appropriate forum.

(b) *The doctrine of forum non conveniens*

When will an Ontario court grant a stay based on *forum non conveniens*? The leading Canadian decision on the law governing the exercise of discretion to decline jurisdiction based on grounds of inconvenient forum is that of the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia* (Work-

ers' Compensation Board), [1993] 1 S.C.R. 897. The British Columbia Workers' Compensation Board commenced claims in Texas against American asbestos manufacturers and others based on its subrogated interest in claims for asbestos-related injuries. The claims alleged tortious conduct in the United States in connection with decisions made in the manufacture of asbestos products, the failure to warn of the dangers of asbestos exposure, and conspiracy to suppress knowledge of those dangers. There was no concentration of manufacturers or manufacturing in any one state but most of the companies carried on business in Texas, thereby securing the jurisdiction of that state's courts under American law. Many of the defendant asbestos companies moved to stay the proceedings on the basis that Texas was an inconvenient forum but the doctrine was viewed as having been abolished by statute there. The Texas court dismissed the motion without reasons. Various forms of review were sought until the opportunities in Texas to obtain a stay were exhausted. The defendants turned to the courts of British Columbia for an anti-suit injunction to prevent the plaintiffs from continuing the Texas action. The British Columbia courts granted the injunction on the basis that British Columbia was a more natural forum for the action. The inability of the Texas court to grant a stay on the basis of *forum non conveniens* was considered a factor weighing in favour of a finding of oppression and it provided a reason not to defer to the Texas court's decision to exercise jurisdiction.

On behalf of the Supreme Court of Canada, Mr. Justice Sopinka allowed the appeal and terminated the injunction. In doing so, he conducted a survey of the law of *forum non conveniens* in stays and injunctions and he clarified the terms of these forms of relief for Canadian courts. Sopinka J. reiterated the court's earlier determination in *Antares Shipping Corp. v. "Capricorn"* (The) (1976), [1977] 2 S.C.R. 422 that the overriding consideration in cases in which a stay was sought was whether there was "some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice." Based on his review of the approaches taken to determinations of appropriate forum in other common law countries, Sopinka J. generally endorsed the approach taken by the English courts in *Spiliada Maritime Corp. v. Cansulex Ltd.* (1986), [1987] A.C. 460 (U.K. H.L.) which provided that a court should grant a stay where "there is another available forum which is clearly or distinctly more appropriate" for the trial of the action. However, Sopinka J. expressed concern about the practice in the English courts of determining in two stages whether a stay should be granted. He referred to the following description of this two-stage test found in the *Spiliada* decision:

If . . . the court concludes . . . that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this enquiry, the court will consider all the circumstances of the case,

including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.

Sopinka J. rejected this two-step analysis in *Amchem* for the following reasons:

In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum. The existence of two conditions is based on the historical development of the rule in England which started with two branches at a time when oppression to the defendant and injustice to the plaintiff were the dual bases for granting or refusing a stay. . . . The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping." On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

As Sopinka J. observed, the legitimacy of a juridical advantage is affected by the appropriateness of the forum (determined on other grounds); and, in dealing with a large claim between two parties who are both readily able to travel to litigate their dispute, such as *Amchem* and the British Columbia Worker's Compensation Board, it seems unlikely that the loss of a juridical or personal advantage in granting a stay will, of itself, readily amount to a denial of justice where a stay would otherwise be warranted due to the appropriateness of the other forum. However, in cases such as that in *Oakley v. Barry* (discussed above at §5[1](d) Access to Justice) the loss of a juridical or personal advantage looms large where the granting of a stay could render it impossible for the plaintiff to pursue the claim at all by reason of the loss of personal or juridical advantages available in the forum that make it possible to sue. Whether juridical advantage needs to be treated routinely as a compulsory second step in the analysis of every motion for a stay, or whether it is sufficient merely to note that in some cases, it should prevent the granting of a stay in favour of a clearly more appropriate forum, is not clear. However, in situations like that in *Oakley v. Barry*, and more recently in *Duncan (Litigation guardian of) v. Neptunia Corp.* (April 18, 2001), Doc. 99-CV-182360 (Ont. S.C.J.) raising issues of access to justice (*i.e.*, where, as a practical matter, the plaintiff does not have access to the alternative forum), the prominence granted to the juridical advantage enjoyed by the plaintiff in the local forum suggests that juridical advantage it is being accorded much the same significance as it would enjoy if considered in a separate step of the analysis; see §5[1](d).

- (c) *The burden where service out is challenged on grounds of inconvenient forum*

In *Amchem*, above, Sopinka J. sought to distinguish the Canadian approach to determining motions for stays based on *forum non conveniens*, also on the basis of the placement of the burden of proof. The House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, had held that in England, where service has been made on a defendant within the jurisdiction, the burden is on the defendant to show that some other forum is the appropriate one in which to try the action. However, where service has been made on a defendant outside England, the burden of proving that England is the appropriate forum in which to try the action is on the plaintiff. This reflects the requirement to obtain leave before service can be effected.

Sopinka J. stressed that the burden of proof would be significant only in cases where the court has difficulty reaching a decision on the basis of the materials presented by the parties. This point was also emphasized by the Court of Appeal in *Frymer v. Brettschneider*, (discussed below in this subheading) and it has been emphasized by other Canadian courts deciding motions for stays based on *forum non conveniens*. It seems to suggest that in such matters, Canadian courts are particularly concerned to be even-handed and to demonstrate that they are not beginning the analysis of appropriate forum with any fixed presumptions or expectations. In addressing the question of how this burden should be allocated in Canada, however, Sopinka J. concluded as follows:

The special treatment which the English courts have accorded to *ex juris* cases appears to be based on the dictates of Ord. 11 of the English rules which imposes a heavy burden on the plaintiff to justify the assertion of jurisdiction over a foreigner. In most provinces in Canada, leave to serve *ex juris* is no longer required except in special circumstances and this trend is one that is likely to spread to other provinces. This phenomenon was considered by the High Court of Australia in *Voth* [(1990), 65 A.L.J.R. 83], in reaching its conclusion that the tests should be same for service *ex juris* cases and others. Whether the burden of proof should be on the plaintiff in *ex juris* cases will depend on the rule that permits service out of the jurisdiction. If it requires that service out of the jurisdiction be justified by the plaintiff, whether on an application for an order or in defending service *ex juris* where no order is required, then the rule must govern. The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate decision on the basis of the material presented by the parties.

Thus, in terms of the Ontario rules, in situations involving service in the jurisdiction (*i.e.*, Rule 16 situations), the burden is understood to be on the defendant to show that there is a clearly more appropriate forum elsewhere,

and in situations involving service outside Ontario with leave (*i.e.*, rule 17.03 situations), the burden is understood to be on the plaintiff to show that Ontario is the appropriate forum. It is only in situations involving service outside Ontario without leave (*i.e.*, rule 17.02 situations) that there is an issue raised as to the placement of the burden of proof.

The placement of the burden of proof was considered at length by the Court of Appeal for Ontario in *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60. The case involved an action by the plaintiff, one of two daughters of the settlor of a trust, who entered into an agreement relating to the trust and sought to have that agreement set aside on the basis of undue influence and lack of independent legal advice. Her action was brought in Ontario, based on service outside of the jurisdiction, against the trustee who resided in Calgary and the settlor's wife who resided in Quebec. The Court of Appeal was unanimous in upholding Adams J.'s decision that in the circumstances the action should be stayed on the ground that some other forum, perhaps Florida, where the trust had been executed, and not Ontario was the convenient forum.

The members of the *Frymer* court were not unanimous, however, on the issue of who bears the burden of establishing which is the convenient forum when the defendant has been served out of the jurisdiction. In response to a view expressed by Sopinka J. in *Amchem* that the burden should be placed on the moving defendant in cases in which the defendant had been served outside the jurisdiction without leave, Arbour J.A., said on behalf of the majority,

. . . rule 17.06 is only of marginal significance in the appreciation of the scope of *forum non conveniens* in Ontario and cannot be usefully resorted to as a means of altering the fundamental principles upon which the doctrine in its broader scope should properly rest. . . . the reference to the availability of a motion for a stay of proceedings on the basis of that doctrine in the present rule 17.06 sheds no light on the workings of a doctrine which is essentially based on principles of international comity. Therefore, in my respectful opinion, the Ontario law relating to *forum non conveniens* is not found in rule 17.06, but in the jurisprudence which has, over the years, elaborated on the rationale for the doctrine and the principles which should govern its application. . . .

Essentially, I would conclude that when the plaintiff chooses a forum in which jurisdiction exists "as of right," in the sense that the defendant is a resident of that jurisdiction, the defendant has the burden of showing that another forum is the convenient one. If the plaintiff chooses to bring a foreigner into the jurisdiction, typically in a case of service *ex juris*, the burden will be on the plaintiff to establish that Ontario is the appropriate forum if the choice of forum is challenged by the defendant. This, in my view, accords with the principles of comity upon which the doctrine of *forum non conveniens* rests.

As Arbour J.A. observed, the law of *forum non conveniens* is not subsumed under rule 17.06. A stay based on the doctrine of *forum non conveniens*

is also available to a defendant served in the province but there is no provision for it under rule 17.06, nor is an anti-suit injunction: see below §6|1|(d). Section 106 describes the authority for a stay in cases of service in Ontario and Rule provides the procedure for anti-suit injunctions. Accordingly, although the *Amchem* decision left room to consider this point more carefully in that it was clearly not before the court in *Amchem*, which was a case involving an anti-suit injunction, the view of Arbour J.A. in *Frymer* seems difficult to reconcile with that expressed by Sopinka J. in *Amchem*. However, on reflection, often the defendant's location coincides with a range of other factors likely to be of significance to determining appropriate forum, such as where the wrongful conduct occurred, where the evidence and witnesses are likely to be found (and where the defendant's assets are likely to be located for collection purposes). To the extent that this is borne out in any given case, the burden of proof will be relevant and it will appropriately be placed on the plaintiff to show why the alternative forum is not clearly more appropriate. To the extent that the balance of convenience to the parties and the logistical efficiencies of the litigation favour a different result, then the burden of proof will be of much less significance. Bearing these considerations in mind, the views underlying the approaches suggested by the majority in *Frymer* and the Supreme Court of Canada in *Amchem* do not seem to be inconsistent.

(d) *Anti-suit injunctions*

Another means of resisting a plaintiff's choice of jurisdiction exists in the form of an application for an anti-suit injunction restraining the plaintiff in a foreign proceeding from taking further steps in that proceeding. Although the procedures relating to anti-suit injunctions are provided for in Rule 40, and not in rule 17.06, brief mention of them here is warranted because the principles underlying the granting of both forms of relief are those of the doctrine of *forum non conveniens*.

An anti-suit injunction is considered a more "aggressive" remedy than a stay because although it operates *in personam* on the plaintiff in the foreign proceeding, through the remedies available for contempt of court, it can have the effect of pre-empting a foreign court's determination of whether it should entertain and decide a case before it. As a result, anti-suit injunctions are said to raise sensitive issues of comity. *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 was an appeal from an order for an anti-suit injunction. On behalf of the Supreme Court, Sopinka J. established certain prerequisites for the availability of anti-suit injunctions. The prerequisites included that there must be a foreign proceeding pending, that the applicant must have been unable to obtain relief from the assumption of jurisdiction in the foreign jurisdiction, and that the domestic forum must be alleged to be the most appropriate forum and it must be potentially an appropriate forum. Another prerequisite that the court did not consider in *Amchem* because it was not at issue on the facts of that case was that the court issuing the injunction must have jurisdiction over the plaintiff who is to be restrained.

Subsequent cases have caused these prerequisites to be reconsidered and it now appears that they will not necessarily all be required in every situation. For example, the dual requirements that the forum have jurisdiction over the plaintiff to be enjoined and that the forum must be alleged to be the most appropriate forum and it must be potentially an appropriate forum led to the situation in *Airbus Industrie GIE v. Patel*, [1998] 2 All E.R. 257 (H.L.) in which neither the natural forum (Bangalore, India), nor the forum in which the plaintiffs were resident (England) was in a position to restrain proceedings brought in Texas despite the fact that it seemed that both courts agreed that proceedings should be restrained. This was because, according to the House of Lords, the forum to which the plaintiffs in a foreign proceeding were subject should exercise its jurisdiction to enjoin the plaintiffs (and to interfere indirectly in the foreign proceedings) only when it had a sufficient interest in, or connection with, the matter in question to justify doing so. Generally, this would be the case only when the court asked to grant the injunction was the natural forum. The result of this is that in any situation in which the plaintiff is not subject to the jurisdiction of the court of the natural forum, there will be no forum outside of the forum in which the action has been commenced in which a defendant subjected to an abusive choice of forum can seek relief in the form of an anti-suit injunction. It is possible that this *lacuna* in the availability of relief could cause these two requirements to be reconsidered.

There has also been reconsideration of the requirement that the applicant for an injunction first seek a stay in the foreign court before seeking an anti-suit injunction. In *Hudon v. Geos Language Corp.* (1997), 34 O.R. (3d) 14 (Div. Ct.), the Ontario court had determined on a motion for a stay based on *forum non conveniens* that Ontario was the appropriate forum and that the plaintiff was in no position to pursue her claim in a foreign forum. When a parallel proceeding for a declaration that the defendant was not liable to the plaintiff was commenced in Japan in an effort to pre-empt the decision of the Ontario court, the Ontario court did not require the Ontario plaintiff first to travel to Japan to seek a stay before seeking an anti-suit injunction in Ontario.

(e) *Parallel proceedings*

Another of the “more aggressive” means of resisting or pre-empting another party’s choice of jurisdiction is that of the defendant commencing a parallel proceeding in another jurisdiction. With the liberalization of the recognition and enforcement of judgments, the edict found in s. 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.34, that “as far as possible, a multiplicity of legal proceedings should be avoided” has come to have crossborder application. In particular, in recent years, the instances of parallel proceedings have increased on the interprovincial front and the views expressed by appellate courts in *Guarantee Co. of North America v. Gordon Capital Corp.* (1994), 18 O.R. (3d) 9 (Gen. Div.), leave to appeal refused (April 25, 1994), Doc. 93-CQ-40684 (Ont. Gen. Div.), leave to appeal refused (October 6, 1994), Doc. 24199 (Ont. S.C.C.); *Sydney Steel Corp. v. Canadian National Railway* (1998),

164 D.L.R. (4th) 747 (N.S. C.A.) have come to be questioned. In those cases, the courts declined to grant stays based on *forum non conveniens* because the existing standards for doing so had not been met and they did not go on to find that the resulting multiplicity of proceedings required them to take steps to resolve it. A different result was reached in two decisions of the British Columbia Court of Appeal, one dealing with a parallel proceeding in Ontario and the other with a parallel proceeding in Kansas: *472900 B.C. Ltd. v. Thrifty Canada Ltd.* (1998), 168 D.L.R. (4th) 602 (B.C. C.A.), and *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 173 D.L.R. (4th) 498 (C.A.), leave to appeal allowed (2000), 143 B.C.A.C. 319 (note) (S.C.C.), affirmed 2001 SCC 26. In both of those cases, the other court was first seized and the British Columbia court agreed that the other court was not an inappropriate forum. In both cases the British Columbia courts granted stays, tailoring the test for *forum non conveniens* to take account of the special considerations that apply in situations of parallel proceedings. The court in *Thrifty* developed the following test that was endorsed by the court in *Westec*:

- (1) Are there parallel proceedings underway in another jurisdiction?
- (2) If so, is the other jurisdiction an appropriate forum for the resolution of the dispute?
- (3) Assuming there are parallel proceedings in another appropriate forum, has the plaintiff established objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it?

An appeal to the Supreme Court of Canada in *Westec* was dismissed without reasons after an adjournment prompted by the revelation that the issue might be moot in view of the fact that the Kansas court had granted summary judgment in the parallel proceeding: *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 173 D.L.R. (4th) 498 (B.C. C.A.), leave to appeal allowed (2000), 143 B.C.A.C. 319 (note) (S.C.C.), affirmed 2001 SCC 26.

[2] Literature

Texts. J.-G. Castel & J. Walker *Canadian Conflict of Laws*, 5th ed. (2001) forthcoming. Collins, et al., ed. *Dicey & Morris on the Conflict of Laws*, 13th ed. (2000), J.J. Fawcett, *Declining Jurisdiction in Private International Law* (1995).

Periodical literature. Hynes, "Challenging the Jurisdiction of the British Columbia Courts" (1999), 57 *The Advocate* 23. Gosnell, "Jurisdiction on the Net: Defining Place in Cyberspace" (1998), 29 *Can. Bus. L.J.* 344. Koehnen, "Reasonable Expectations and a Principled Approach to Forum Shopping" (1997), 19 *Adv. Q* 310. V. Black, "Territorial Jurisdiction Based on the Plaintiff's Residence" — Case comment, *Dennis v. Salvation Army Grace General*

Hospital (1997), 14 C.P.C. (4th) 222. Skene, "Commercial Litigation Beyond the Pale: A Comparison of Extraterritorial Antisuit and Mareva Jurisdiction Exercised by the Courts of England and British Columbia in Commercial Disputes" (1996), 30 U.B.C.L.Rev. 1. G. Saumier, "Judicial Jurisdiction in International Cases: The Supreme Court's Unfinished Business" (1996), 19 Dal. L.J. 447. J. Swan, "Choice of Forum and Choice of Law: The Implications of the New Criteria for Judicial Control" (1996), 18 Adv. Q. 1. Guthrie, "A Good Place to Shop: Choice of Forum and the Conflict of Laws" (1995), 27 Ottawa L. Rev. 201. J. Walker, "A Tale of Two Fora: Fresh Challenges in Defending Multijurisdictional Claims" (1995) 33 Osgoode Hall L.J. 549. P. Perell, "A Litigator's New Primer on Conflict of Laws" (1995), 17 Adv. Q. 300. A Bell, "The Negative Declaration in Transnational Litigation" (1995), 111 Law Quarterly Review 674. J. McEvoy, "International Litigation: Canada, *Forum Non Conveniens* and the Anti-Suit Injunction" (1995), 17 Adv. Q. 1. Blom, "Rules for Declining Jurisdiction in Civil and Commercial Matters in Common Law Canada: *Forum Non Conveniens, Lis Alibi Pendens*" in *Contemporary Law* (1994), at 287. Brian M. Samuels, "Civil Litigation in the U.S. and Canada: Cross-border Shopping" (July 1994) 52 Advocate (Van.) 521—524. E. Hayes, "*Forum Non Conveniens* in England, Australia and Japan: The Allocation of Jurisdiction in Transnational Litigation" (1992), 26 U.B.C.L. Rev. 41. E. Edinger, Case Comment (1992), 71 Can. Bar Rev. 117. V. Black, "The Standard for Issuing Antisuit Injunctions" (1990), 44 C.P.C. (2d) 30. Juenger, "Forum Shopping, Domestic and International" (1989), 63 Tul. L. Rev. 553. Note, "Forum Shopping Reconsidered" (1989-90), 103 Harv. L. Rev. 1677. K. Feldman and S. Vella, "The Evolution of '*forum conveniens*': Its application to Stays of Proceedings and Service *ex Juris*" (1989), 10 Adv. Q. 161. Horn, *Court Jurisdiction* (1989), at 108. V. Black "The Antisuit Injunction Comes to Canada" (1988), 13 Queen's L.J. 103. M. Peacock, "The Doctrine of *Forum Non-Conveniens* in Ontario and Quebec: The Two Solitudes" (1987), 47 R. du B. 111. S. Harrington, "*Forum Non-Conveniens* in the Quebec and Federal Courts: Rigidity or Flexibility", [1987] Meredith Mem. Lect. 257.). Oland, "*Forum non conveniens* in Canada: the Common Law Position, the Federal Court of Canada, Suggested Reform," [1986] Meredith Memorial Lectures 33. E. Edinger, "The MacShannon Test for Discretion: Defence and Delimitation" (1986), 64 Can. Bar Rev. 283. E. Edinger, "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 U.B.C.L. Rev. 1.

[3] *Case Law: Rule 17.06 — Setting Aside Service Outside Ontario and Staying Proceedings*

(a) *Generally*

Ontario cases. A defendant who delivers a notice of intent to defend cannot move to set aside service outside Ontario; a statute providing for exclusive jurisdiction of a foreign court, such as Article 15 of the French *Code*

Civil does not prevent an Ontario court from taking jurisdiction: *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), leave to appeal refused (2000), 52 O.R. (3d) 20 (Div. Ct.). Service *ex juris* was set aside where the plaintiff failed to establish a good arguable case against a non-resident U.S. corporation: *Gilmour v. Barry-Wehmiller Co.* (1996), 34 O.R. (3d) 304 (Gen. Div.), additional reasons at (October 2, 1996), Doc. 95-CU-82928 (Ont. Gen. Div.). The plaintiff has a *prima facie* right to have its case tried in Ontario, if it demonstrates that its action falls within rule 17.02: *Applied Processes Inc. v. Crane Co.* (1993), 15 O.R. (3d) 166 (Gen. Div.). Where an Ontario resident, injured in a Florida automobile accident, had served *ex juris* Florida defendants and a Scottish defendant/driver, the service was set aside on the ground that none of the defendants had any connection with Ontario and that Florida was the proper jurisdiction; an Ontario judgment would not be enforceable against either of the Scottish or Florida defendants: *Wilson v. Moyes* (1993), 13 O.R. (3d) 202 (Gen. Div.), additional reasons at (October 12, 1993), Doc. 10318/92 (Ont. Gen. Div.). In an action arising out of an automobile accident in Alberta, where all the parties resided within Alberta at the relevant time, the tort occurred in Alberta and the appropriate law to be applied would be the law of Alberta, the Ontario court had no jurisdiction to entertain the action: *Buchar (Litigation Guardian of) v. Weber* (1990), 46 C.P.C. (2d) 60 (Ont. H.C.). By reason of rule 17.06(4), the bringing of a motion to stay on the grounds that Ontario is not a convenient forum is not a waiver of the right of state immunity conferred by the *State Immunity Act*, R.S.C. 1985, c. S-18: *Jaffe v. Miller* (1990), 75 O.R. (2d) 133 (H.C.), affirmed (1993), 13 O.R. (3d) 745 (C.A.), leave to appeal refused (1994), 107 D.L.R. (4th) vii (S.C.C.). While the failure to move to set aside service may constitute a submission to the court's jurisdiction over the person, it does not amount to submission to the court's jurisdiction over the claims asserted: The court declined to set aside service on the ground of sovereign immunity where the defendant foreign highway authority was found not to be the alter ego or organ of a foreign state: *Ferranti-Packard Ltd. v. Cushman Rentals Ltd.* (1980), 30 O.R. (2d) 194 (Div. Ct.), affirmed (1981), 31 O.R. (2d) 799 (C.A.). The court refused to stay the action and thereby interfere with the choice of Ontario as the forum notwithstanding that the parties were non-residents: *Anderson v. Thomas*, [1935] O.W.N. 228 (H.C.).

Non-Ontario cases. Service *ex juris* effected some eight years after the plaintiff sustained injuries in a motor vehicle accident was not set aside where the court held that the forum in which the plaintiff suffered damages was entitled to exercise jurisdiction over a foreign manufacturer and the loss of the limitation period in the foreign jurisdiction was not a reason to decline jurisdiction: *Moellenbeck v. Ford Motor Co. of Canada* (1999), 34 C.P.C. (4th) 102 (B.C. S.C.), affirmed (2000), 145 B.C.A.C. 269 (C.A.). The court held the plaintiff failed to place before the court a body of evidence which established that it had a good arguable case against the defendant sufficient to establish jurisdiction *simpliciter*: *AG Armeno Mines & Minerals Inc. v. PT Pukuafu Indah* (1999), 32 C.P.C. (4th) 167 (B.C. S.C.), affirmed (2000), 77 B.C.L.R. (3d) 1 (C.A.). Where the plaintiff had met the test for service *ex juris* by having made out a good arguable case and by establishing on the basis of the pleadings and the evidence that there was a real and substantial connection between the court and either the defendants or the subject-matter

of the litigation, service on two residents of Colorado was not set aside: *Corsaire Snowboard Inc. v. Nazerali-Walji* (1998), 24 C.P.C. (4th) 301 (B.C. S.C.). An order for service *ex juris* was set aside where the plaintiffs' application had failed to disclose material facts: *Duke Energy Corp. v. Duke/Louis Dreyfus Canada Corp.* (1998), 22 C.P.C. (4th) 154 (Alta. C.A.), affirmed (1998), 66 Alta. L.R. (3d) 273 (C.A.). Service *ex juris* was set aside where the court held that the requirement the plaintiff put forward a good arguable case was not met where he had asserted a sequence of events and sought to have the court infer fraud and acts of conspiracy because of the defendants' silence: *J. Michael Jensen Boat Sales Ltd. v. McAfee* (1997), 12 C.P.C. (4th) 210 (B.C. S.C.). The court refused to set aside service *ex juris* where there was clearly a real and substantial connection between the factors relevant to the action and the province of Manitoba: *Craig Broadcast Systems Inc. v. Frank N. Magid Associates Inc.* (1997), 7 C.P.C. (4th) 319 (Man. Q.B.), affirmed (1998), 15 C.P.C. (4th) 95 (Man. C.A.). Service out of the jurisdiction was set aside, and the action stayed, where an Ontario corporation brought a contract action against an American supplier in Manitoba in respect of (a) telephones delivered by the American supplier to Ontario, and (b) work done on behalf of the American supplier in Ontario on telephones which had been delivered by the American supplier to Manitoba and returned to Manitoba after their repair; service out of the jurisdiction was unavailable because the American supplier could not be said to be carrying on business in Manitoba; moreover, the existence of an unrelated debt owing to the American supplier, which could be the subject of pre-judgment garnishment, was not sufficient to ground jurisdiction: *Tortel Communication Inc. v. Suntel Inc.* (1994), 23 C.P.C. (3d) 1 (Man. Q.B.), affirmed (1994), 30 C.P.C. (3d) 154 (Man. C.A.). Service *ex juris* was not set aside against one set of defendants where the court had jurisdiction on the basis of the substantial connection test and the plaintiffs had a good, arguable case; however, service was set aside against another set of defendants where the requirement of a good, arguable case was not met: *Stern v. Dove Audio Inc.* (April 15, 1994), Doc. Vancouver C930935 (B.C. S.C.), leave to appeal refused (August 31, 1994), Doc. CA018818 (B.C. C.A.), affirmed (October 21, 1994), Doc. CA018818 (B.C. C.A.). Where there was a disputed question of fact essential to determining whether service out of the jurisdiction was proper, the standard of proof required was that the plaintiff establish a good arguable case; in other words, the judge had to reach a tentative conclusion that the plaintiff was probably right: *Attock Cement Co. v. Romanian Bank for Foreign Trade*, [1989] 1 All E.R. 1189 (C.A.).

(b) *Jurisdiction to hear motion*

Ontario cases. A master has jurisdiction under rule 17.06 to set aside service, to stay the proceedings or to grant leave for service outside Ontario, since the rule uses the word "court" rather than "judge": *Cooke v. Cooke* (1985), 53 O.R. (2d) 43 (H.C.).

Non-Ontario cases. Service *ex juris* against certain defendants was set aside where, as no evidence of a good arguable case was advanced against them, the plaintiff bank had failed to establish the court's jurisdiction *simpliciter* over them: *Bangkok Bank of Commerce Public Co. v. City Trading Corp.* (1997), 13 C.P.C. (4th) 324 (B.C. S.C.). The court held that it had an unlimited jurisdiction to decide the existence and limits of its own jurisdiction and thus to decide whether it had jurisdiction to try the issues in an action; by acceding to a plaintiff's application for the production of documents, it would not be assuming jurisdiction to hear an action but it would be determining its own jurisdiction by hearing and deciding a defendant's application to set aside service *ex juris*: *Canada Trust Co. v. Stolzenberg*, [1997] 1 W.L.R. 1582 (Eng. C.A.).

(c) *Timing of the motion — Attornment — rule 17.06(4)*

Ontario cases. A defendant who had filed a notice of intent to defend was precluded from seeking to have service set aside but could still seek a stay based on *forum non conveniens*: *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), leave to appeal refused (2000), 52 O.R. (3d) 20 (Div. Ct.). Motion for summary judgment on the ground that Ontario was not the proper jurisdiction was dismissed where the defendant had not contested the

court's jurisdiction but had, by filing a statement of defence and counterclaim, attorned to it: *Coldmatic Refrigeration of Canada Ltd. v. P.U.M.A. s.r.l.* (1998), 21 C.P.C. (4th) 267 (Ont. Gen. Div.). The court held that while third parties had attorned to the jurisdiction by delivering a statement of defence, rule 17.06 is not an exhaustive code as to when a motion to stay on the basis of *forum non conveniens* may be brought and that they were not precluded from seeking a stay pursuant to s. 106 of the *Courts of Justice Act: Occidental Chemical Corp. v. Sovereign General Insurance Co.* (1997), 32 O.R. (3d) 277 (Gen. Div.). Jurisdiction to stay a proceeding based on *forum non conveniens* is wider under s. 106 than rule 17.06; the court may stay a proceeding under s. 106 notwithstanding the defendant's delivery of a notice of intent to defend: *ABB Power Generation Inc. v. CSX Transportation* (1996), 47 C.P.C. (3d) 381 (Ont. Gen. Div.). A defendant's appearance to dispute jurisdiction will not be treated as an attornment to the jurisdiction of a court; however, also contesting the merits of the case does constitute voluntary submission to the jurisdiction of the court: *Gourmet Resources International Inc. (Trustee of) v. Paramount Capital Corp.* (1991), 5 C.P.C. (3d) 140 (Ont. Gen. Div.), affirmed (1993), 14 O.R. (3d) 319 (C.A.).

Non-Ontario cases. By filing a defence and a providing a list of documents without objecting to the jurisdiction of the Federal Court on the ground that the bill of lading provided for any litigation involving it to be heard elsewhere, the defendants waived any right to challenge jurisdiction some nine months later: *Trans-Continental Textile Recycling Ltd. v. "Erato" (The)* (1995), 106 F.T.R. 278 (T.D.). Where a bill of lading provided that it was subject to English law but the plaintiff had commenced its action in the Federal Court of Canada and the defendant had not objected but had defended and counterclaimed, the court held that by so doing the parties had amended the jurisdiction clause to transfer jurisdiction to the Federal Court; the plaintiff's application to stay the counterclaim on the ground that England was the proper forum was dismissed and the Federal Court assumed jurisdiction for it; the dispute had no relation to England and there would otherwise have to be two actions instead of one: *Maersk Inc. v. Coldmatic Refrigeration of Canada Ltd.* (1994), 74 F.T.R. 70 (T.D.). A motor vehicle accident took place in Alberta and the plaintiff moved to British Columbia and retained counsel who wrote to the defendant's insurer indicating that an action would be commenced in British Columbia; a statement of claim was issued and forwarded to the insurer and counsel advised the plaintiff that he acted for the defendant, that an appearance had been filed and that they planned to settle the matter; a few days later defendant's counsel wrote again indicating that he intended to contest the jurisdiction of the British Columbia court and applied to set aside service *ex juris*; the limitation period both in British Columbia and in Alberta had by then expired and the court held that the application should be dismissed as the defendant attorned through his acts and had submitted to the British Columbia court: *Edgar v. Ronald* (1994), 26 C.P.C. (3d) 58 (B.C. C.A.). Where an article of the relevant English legislation provided that entering an appearance solely to contest the jurisdiction of the court did not confer jurisdiction on the court, the court held that a German defendant's applications for discovery and an extension of time for service of defence were not inconsistent with a challenge to the court's jurisdiction and, accordingly, the court had no jurisdiction under that article: *Kurz v. Stella Musical Veranstaltungen G.m.b.H.*, [1991] 3 W.L.R. 1046 (Eng. Ch. Div.). In subsequent proceedings to enforce the judgment of a foreign court, a motion to set aside a default judgment in the foreign jurisdiction was held not to amount in itself to a submission to the jurisdiction of that court: *Carrick Estates Ltd. v. Young*, (1987), 24 C.P.C. (2d) 70 (Sask. C.A.). Where the Netherlands rather than Saskatchewan was the convenient forum, the plaintiff was granted a stay, on terms, notwithstanding that the defendant did not move until three years after filing of the statement of defence: *National-Nederlanden Financing Co. B.V. v. Jones* (1984), 49 C.P.C. 288 (Sask. Q.B.).

(d) *Agreement to litigate elsewhere*

Ontario cases. The court refused to stay an Ontario action based on a clause in a bill of lading selecting Florida as the exclusive forum: *Texserv Inc. v. Incon Container USA Ltd.* (2000), 48 O.R. (3d) 427 (S.C.J.). Service *ex juris* was set aside and the action stayed where evidence in the contract between the parties confirmed that they contemplated the law of Trinidad as the governing law and Trinidad was the more convenient forum than the plaintiffs' choice of Ontario: *Persaud v. Trinidad & Tobago National Petroleum Marketing Co.* (1997), 25 O.T.C. 91 (Gen. Div.). A stay was granted where the plaintiff advanced claims relating to copyright infringement but a contract between the parties regarding assignment of copyright entered into in England intended that it be governed by English law and a judgment in England already existed as to the interpretation of the agreement pertaining to ownership of copyright; there was no real or substantial connection of the claims to Ontario: *Folkes v. Greensleeves Publishing Ltd.* (1997), 76 C.P.R. (3d) 359 (Gen. Div.), additional reasons at (1997), 32 O.T.C. 75 (Gen. Div.), affirmed (1998), 112 O.A.C. 326 (C.A.), leave to appeal refused (1999), 239 N.R. 393 (note) (S.C.C.). Where the choice of forum clause in a contract was unambiguous, the court set aside service outside of Ontario: *DiPaolo Machine Works Ltd. v. Prestige Equipment Corp.* (1996), 5 C.P.C. (4th) 175 (Ont. Gen. Div.). A motion by one of the defendants for a stay was dismissed where the court held that although the contract in issue provided it was to be governed by the laws of Illinois, it was the pleadings which were at issue; Ontario was the appropriate forum as the defendants did business in Ontario and many of the plaintiff's witnesses were employees of one of the defendants in Ontario: *Lana International Ltd. v. Menasco Aerospace Ltd.* (1996), 28 O.R. (3d) 343 (Gen. Div.). The court held that Ontario was the appropriate forum in an action for negligence against the Florida based operator of a cruise ship on which the plaintiff had been a passenger, notwithstanding that the ticket issued to the plaintiff had contained conditions which, *inter alia*, designated Florida as the forum for any litigation and purported to create a short limitation period; the plaintiffs were legally aided and without resources to retain Florida counsel; on the liability issue, it would be more convenient for the witnesses to come to Ontario; as most of the plaintiff's medical treatment was in Ontario, the convenient and efficient adducing of evidence on the damages issue overwhelmingly favoured Ontario; little weight should be attached to the jurisdiction clause in the ticket, the terms of which were onerous and complicated and not brought to the attention of the plaintiff; there was a juridical advantage to the plaintiff in avoiding the defendant's limitation defence: *Trepanier v. Kloster Cruise Ltd.* (1995), 23 O.R. (3d) 398 (Gen. Div.). A mere allegation of fraud does not make a contract void *ab initio* so as to vitiate the choice of jurisdiction clause contained in the contract; in this action, where the plaintiffs sought a declaration that their agreements with Lloyd's were void *ab initio* as having been induced by fraud on the part of Lloyd's, the court granted a stay of the action as against

Lloyd's in light of the contractual clause giving exclusive jurisdiction to the English courts and because the contracts were to be performed in England, the alleged wrongful conduct took place in England and the overall picture was one of an overwhelming affinity to England; the court also stayed the actions against banks and financial institutions against whom injunctions were sought to restrain them from paying on letters of credit associated with the transaction: *Ash v. Corp. of Lloyd's* (1992), 9 O.R. (3d) 755 (C.A.), additional reasons at (1992), 9 O.R. (3d) 755 at 761 (C.A.), leave to appeal refused (1992), 10 O.R. (3d) xv (note) (S.C.C.). Where parties have agreed upon jurisdiction in a contract which is the subject-matter of a dispute, and where it is not unconscionable or against public policy, the court will give effect to the agreement unless it is shown that the interests of the parties and the interest of justice favour another jurisdiction: *Fairfield v. Low* (1990), 71 O.R. (2d) 599 (H.C.). The court set aside service on a West German defendant where the proper law of the contract sued upon was West German and the contract gave exclusive jurisdiction to a West German court: *Anthes Equipment Ltd. v. Wilhelm Layher GmbH* (1986), 53 O.R. (2d) 435 (H.C.). An Ontario action was stayed where the parties had contracted to have their disputes resolved in Alberta and an Alberta action had been commenced: *Gulf Canada Ltd. v. Turbo Resources Ltd.* (1980), 18 C.P.C. 146 (Ont. H.C.). Where an action for breach of contract had been commenced in another province and where it appeared the contract would be construed according to the laws of that province, a subsequent Ontario action was stayed: *Pasen v. Dominion Herb Distributors Inc.*, [1968] 1 O.R. 688 (H.C.), affirmed [1968] 2 O.R. 516 (C.A.). Where a contract specifies that disputes be resolved by foreign courts, an Ontario court should not interfere unless it is shown that the foreign court cannot give the relief sought: *Poly-Seal Corp. v. John Dale Ltd.*, [1958] O.W.N. 432 (H.C.). It is not a sufficient ground to stay an action that the agreement on which the action is based has a term which provides the agreement is to be construed according to the laws of another jurisdiction to which each party has submitted: *Empire-Universal Films Ltd. v. Rank*, [1947] O.R. 775 (H.C.).

Non-Ontario cases. A stay was granted where a jurisdiction clause in the bill of lading stated that any dispute was to be decided in the country where the carrier had its principal place of business and the carrier's head office was located in Malta; the plaintiff did not show strong reasons justifying departure from the *prima facie* rule that contractual undertakings must be honoured: *Abies Canada Inc. v. Angel Maritime Inc.* (January 31, 1997), Doc. T-1090-95 (Fed. T.D.). The defendant's application to the Supreme Court to decline jurisdiction was dismissed where the court held that clauses in the contract between the parties vesting jurisdiction in Ontario were ambiguous and did not operate as an automatic bar to an action outside Ontario: *Schleith v. Holoday* (1997), 31 B.C.L.R. (3d) 81 (C.A.). The balance of convenience and expense is only one of the circumstances to be considered in deciding whether parties should be held to their agreement regarding jurisdiction; where the choice is between two common law jurisdictions, a party who agrees to litigate disputes in the courts of another province should be taken to have accepted at the time the agreement was made that there could be significant inconvenience and expense associated with geographical distance: *Reuna Ventures Ltd. v. Refco Futures (Canada) Ltd.* (November 5, 1996), Doc. Vancouver C964104 (B.C. S.C.). A stay of proceedings was appropriate where the action involved the fulfilment of obligations under an agreement and such agreement stated that it was governed by the laws of another province, the courts of which had

exclusive jurisdiction over any disputes arising from the agreement: *Encal Energy Ltd. v. Numac Energy* (September 6, 1996), Doc. Vancouver C962977 (B.C. S.C.). The defendants established a *prima facie* case for a stay where reading two clauses in a bill of lading together resulted in a reasonable and intelligible provision: *Can-Am Produce & Trading Ltd. v. "Senator" (The)* (1996), 112 F.T.R. 255 (T.D.). An employee's action for negligence was stayed where the court held that the language of the jurisdiction clause in his employment contract clearly included claims in tort arising outside the jurisdiction specified in the clause: *Sarabia v. "Oceanic Min-doro" (The)* (1996), 4 C.P.C. (4th) 11 (B.C. C.A.), leave to appeal refused (May 22, 1997), Doc. 25790 (S.C.C.). Where the parties' agreement provided that it was to be interpreted in accordance with Alberta law and that the parties would attorn to the jurisdiction of that province's court with respect to any claim or dispute, the court held it should not be interfered with without good reason; however, the plaintiff Nova Scotia corporation had discharged the onus upon it that the attornment clause should not be enforced by showing that the action had a more substantial connection with Nova Scotia than with Alberta; accordingly, the defendant Alberta corporation's motion to set aside or strike the statement of claim in the action commenced in Nova Scotia was dismissed: *Maritime Telegraph & Telephone Co. v. Pre Print Inc.* (1996), 44 C.P.C. (3d) 40 (N.S. C.A.). The court held that the plaintiff was not contractually committed to another jurisdiction by a clause in its contract with the defendant where the standard terms of the contract contained certain exceptions and, even if there were a binding clause, the court had discretion to decline to follow it: *Valmet Paper Machinery Inc. v. Hapag-Lloyd AG* (December 23, 1996) Doc. Vancouver C960793 (B.C. S.C.). Where a provision in a lease agreement stated that Ontario law would apply, an appeal from an order that the proper law governing its validity as against creditors of the bankrupt lessee was the law of Nova Scotia was dismissed; third party creditors were not privy to the contractual choice of parties and, in the absence of notice, third party creditors were not bound by the contractual choice: *Re. Grace* (1995), 36 C.B.R. (3d) 45 (N.S. S.C.), affirmed (1996), 131 D.L.R. (4th) 449 (N.S. C.A.). A stay of a British Columbia action was refused where the parties' written agreements specified that they would be construed according to Alberta law but the defendant failed to define the issues to be determined and, without such evidence, could not demonstrate that the action was not to be heard where it was commenced: *Agrifoods International Cooperative Ltd. v. Beatrice Foods Inc.* (1995), 16 B.C.L.R. (3d) 378 (S.C.). Where an attornment clause did not govern all the dealings between the parties and the *forum conveniens* was determined to be Ontario, an Alberta action was stayed: *Novatel Communications Ltd. v. Ericsson G.E. Mobile Communications Canada Inc.* (1993), 18 C.P.C. (3d) 204 (Alta. Q.B.). Where the plaintiff sued his former partners resulting from his expulsion from a musical partnership and sought an accounting of profits and royalties, the court refused the defendant's motion to stay the action by reason of an exclusive jurisdiction clause in a recording contract; the exclusive jurisdiction clause applied to disputes between the musical group and the record company and did not apply to disputes between members of the musical group; as all the partners were, or had been, resident in Manitoba the plaintiff had properly selected Manitoba as the convenient forum: *Lambert v. Darvill* (1992), 10 C.P.C. (3d) 273 (Man. Q.B.). Although the parties had by a sale agreement irrevocably attorned to another jurisdiction and the plaintiff had sued in that jurisdiction for breach of contract, because the circumstances were exceptional, the plaintiff was permitted to bring a further action in Manitoba against the defendant for the tort of inducing the plaintiff's employees to breach their employment contract in the other jurisdiction by taking employment with the defendant: *Northern Sales Co. v. Saskatchewan Wheat Pool* (1992), 78 Man. R. (2d) 200 (C.A.). Where the contract between the parties provided that any disputes were to be resolved in the Iranian courts but the plaintiff, pleading that the defendant Iranian corporation had assets in British Columbia, commenced its action there, the court granted the defendant's application to set aside the proceedings; the court held it was arrogant to assume jurisdiction over a transaction involving non-resident foreigners unless it had a real and substantial connection with British Columbia and that was especially so where the contract in question contained a term vesting jurisdiction in a foreign court: *Northern Sales Co. v. Government Trading Corp. of Iran* (1991), 48 C.P.C. (2d) 254 (B.C. C.A.). The court held it had jurisdiction over an English plaintiff's claim for moneys owing to him by a defendant German company pursuant to an agreement which contained a clause providing for non-exclusive submission to the jurisdiction of the English courts; under the relevant English legislation, jurisdiction was a question of the parties' intention and did not limit their choice to a single jurisdiction but meant that their choice was to have effect to the exclusion of jurisdictions that would otherwise be imposed by the legislation: *Kurz v. Stella Musical Veranstaltungen G.m.b.H.*, [1991] 3 W.L.R. 1046 (Eng. Ch. Div.). The plaintiffs, who had been dismissed in British Columbia, brought a wrongful dismissal

action against their employer, a Quebec corporation; the court refused to set aside service *ex juris* notwithstanding that the contract between the parties contained a jurisdictional clause providing that any disputes were to be resolved in Quebec; although a substantial connection between the parties to British Columbia was not sufficient to override the clause, the plaintiffs had shown strong cause for the court not declining jurisdiction in that their limited financial resources would, in all probability, mean that they would be unable to pursue their action if they were required to proceed in Quebec: *Fleming v. Samuelsohn Ltd.* (1990), 43 C.P.C. (2d) 292 (B.C. S.C.). In an action arising out of damages to a ship the court refused to give effect to a contractual agreement to litigate in England where the plaintiff would have suffered prejudice in not being able to compel non-party witnesses to go to England to give testimony: *Corostel Trading Ltd. v. Secunda Marine Services Ltd.* (1990), 38 F.T.R. 232 (T.D.). A properly framed contractual choice of forum will be enforced unless the balance of convenience massively favours an opposite conclusion; the onus of showing that the contract provision should not be followed rests with the plaintiff; the onus when dealing with the doctrine of *forum conveniens*, where no contractual choice is involved, rests with the defendant to satisfy the court that the plaintiff's choice should not be respected: *Oulton Agencies Inc. v. Knolloffice Inc.* (1988), 30 C.P.C. (2d) 12 (P.E.I. C.A.). Where a contract of carriage provided that disputes were to be within the exclusive jurisdiction of the Hong Kong courts it was held that the Federal Court did not lose its jurisdiction in a maritime claim of this nature simply because the parties agree to another forum; the court refused to stay the Canadian action where the proof of damages rested in the hands of Canadian witnesses: *Mountainbell Co. v. W.T.C. Air Freight (H.K.) Ltd.* (1988), 20 F.T.R. 57 (T.D.), affirmed (1990), 49 F.T.R. 239 (note) (C.A.). A stay was granted where the parties had agreed by contract that their disputes were to be settled by Japanese courts; the plaintiff had failed to show strong reasons why the contract should not be enforced; the balance of convenience did not favour either jurisdiction (discussion of the factors to be considered in determining whether the choice of foreign jurisdiction should be upheld): *Nissho Iwai Corp. v. Paragon Grand Carriers Corp.* (1987), 11 F.T.R. 134 (T.D.). Where a contract provided that the courts of Ontario should have exclusive jurisdiction, the Alberta court held that it should give effect to the agreement unless the balance of convenience massively favoured an opposite conclusion; since witnesses would have to travel to one or the other province, there was no particular balance of convenience so the court ruled that the parties should honour their agreement and stayed the Alberta action: *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd.* (1985), [1986] 1 W.W.R. 380 (Alta. C.A.). An agreement to submit disputes under a contract to Ontario courts did not oust Newfoundland's jurisdiction and the court denied an application to stay: *McKinlay Motors Ltd. v. Honda Canada Inc.* (1985), 55 Nfld. & P.E.I.R. 170 (Nfld. T.D.). Where parties had agreed to sue on a contract only in Alberta, a stay was granted subject to the condition that the defendant agreed not to plead any limitation period in the other forum: *Hi-Dro Electric Co. v. Commonwealth Construction Co.* (1984), 36 Sask. R. 182 (Q.B.). Whether a court will give effect to agreements to litigate in another jurisdiction is a discretionary matter to be decided in the circumstances of each particular case; in "*Eleftheria*" (*The*) (*Cargo Owners*) v. "*Eleftheria*" (*The*), [1969] 2 All E.R. 641 (P.D.A.) at 645, Brandon J. stated the principles to be applied in deciding whether to exercise such a discretion were as follows: The principles established by the authorities can, I think, be summarized as follows: (I) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in a foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

(e) *Convenience of forum — General*

Ontario cases. The court held Alberta was clearly the more appropriate forum and stayed the Ontario action where there was no real and substantial connection to Ontario other than the location of the corporate defendant's head office and that the plaintiffs had resided in Ontario at the time of the accident; all other considerations favoured Alberta as the more convenient forum: *Rozi v. Hertz Canada Ltd.* (1997), 45 C.C.L.I. (2d) 147 (Ont. Gen. Div.). A stay of an Ontario action commenced by a former Ontario resident, which would have allowed the defendant to commence an action in the province where the plaintiff now resided, Alberta, was refused; the defendant failed to establish Alberta was clearly the more appropriate forum and there were no guarantees that it would not raise the Alberta limitation period as a defence or that the Alberta court might decline jurisdiction: *Neville v. State Farm Mutual Automobile Insurance Co.* (1997), 24 O.T.C. 325 (Gen. Div.). Relevant issues on a motion to stay an action based on the argument of *forum non conveniens* include: the parties' residence, the residence of needed witnesses, the locations of relevant documents and the locations of relevant public records: *Elfe Juvenile Products Inc. v. Bern* (1994), 35 C.P.C. (3d) 117 (Ont. Div. Ct.).

Non-Ontario cases. Where three jurisdictions had a real and substantial connection to the matter and none stood out as the most convenient, the domestic forum, Manitoba, won by default: *Craig Broadcast Systems Inc. v. Frank N. Magid Associates Inc.* (1997), 7 C.P.C. (4th) 319 (Man. Q.B.), affirmed (1998), 15 C.P.C. (4th) 95 (Man. C.A.).

(f) *Convenience of forum — Onus on the motion*

Ontario cases. When the plaintiff chooses a forum in the jurisdiction which exists "as of right," in the sense that the defendant is a resident of that jurisdiction, the defendant has the burden of showing that another forum is the convenient one; however, if the plaintiff chooses to bring a foreigner into the jurisdiction, through service *ex juris*, the burden will be on the plaintiff to establish that Ontario is the appropriate forum if the choice of forum is challenged by the defendant: *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 (C.A.). Discussion of plaintiff's burden of proof; the burden of proof will rarely play a significant role in *forum non conveniens* motions: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897. The court refused to stay proceedings in Ontario where the defendants failed to establish that the state of Missouri was clearly the more appropriate forum: *Gilmour v. Barry-Wehmiller Co.* (1996), 34 O.R. (3d) 304 (Gen. Div.), additional reasons at (October 2, 1996), Doc. 95-CU-82928 (Ont. Gen. Div.). Where three of the directors of the federally incorporated respondent company with its head office in Alberta resided in Ontario, the court held that there was a sufficient connection to Ontario, and that the foreign respondents, who had been served *ex juris*, had failed to satisfy the court that Alberta was the more appropriate forum: *Fidelity Management & Research Co. v. Gulf Canada Resources Ltd.* (1995), 42 C.P.C. (3d) 93 (Ont. Gen. Div. [Commercial List]).

Non-Ontario cases. Service *ex juris* was not set aside and the court held it had jurisdiction where the plaintiff satisfied the onus of providing evidence it had a good and arguable case and where several factors weighed in favour of British Columbia being the *forum conveniens*: *Leisure Time Distributors Ltd. v. Calzaturificio S.C.A.R.P.A. – S.P.A.* (1996), 5 C.P.C. (4th) 320 (B.C. S.C.). The plaintiff, a resident of Nova Scotia, sued the defendant hockey player pursuant to a contract entered into while the defendant was resident in Russia and which he executed either in Russia or Germany; the defendant had subsequently taken up residence in California; the plaintiff also brought an action against other defendants, residents of New York, in tort, alleging they had induced breach of contract and had interfered in economic and contractual relations; on an application for a stay of proceedings on the grounds of *forum non conveniens*, the court rejected the argument that the burden of proof shifted to the plaintiff in cases where the defendant resided outside the jurisdiction, holding that the burden of proof remained with the defendants to show a more appropriate forum for the trial of the action; in relation to the defendant hockey player, it was a reasonable assumption that with regard to the applicable law, the contract had a closer connection to Nova Scotia and, while the defendant would be required to travel from California, there was no evidence that other California witnesses would be called; accordingly, considering the applicable law and probable expense to each of the parties, there was no forum more appropriate than Nova Scotia; in relation to the other defendants, although the action against them was in tort, both actions were based on the same subject-matter; there was no evidence about where the tort was allegedly committed nor was there evidence that they would lose a juridical advantage if the trial took place in Nova Scotia; there was a real and substantial connection with Nova Scotia because the plaintiff and all of its witnesses resided there; accordingly, there was no more appropriate forum than Nova Scotia and all matters should be tried there at the same time to avoid inconvenience and expense: *Landmark Sport Group Atlantic Ltd. v. Karpov* (1995), 39 C.P.C. (3d) 162 (N.S. S.C.). Where service out of the jurisdiction was justified under the Manitoba rule, the court held that the existence of a more appropriate forum was to be clearly established to displace the forum selected by the plaintiff: *Imperial Agencies Ltd. v. Regal Confections Inc.* (1995), 102 Man. R. (2d) 74 (C.A.). Where an action had a substantial connection to New Brunswick and three of the four parties involved were from there, the court held that the defendant had failed to establish that it was not the convenient forum: *G.N. Johnson Equipment Co. v. Remstar International Inc.* (1994), 151 N.B.R. (2d) 193 (Q.B.). Where the estates of the plaintiff's deceased daughter and one of the defendants were both located in the Northwest Territories, the court held it had jurisdiction as of right over the defendant estate in an action commenced in that province arising from a fatal car accident in the Yukon and that the defendant estate bore the onus of showing that the Yukon was a more appropriate forum; however, with regard to the defendants resident in the Yukon who had been served *ex juris* and had not attorned to the jurisdiction, the plaintiff bore the onus of showing that the Territories was the more appropriate forum: *Stewart v. Stewart Estate*, [1994] 8 W.W.R. 196 (N.W.T. S.C.).

(g) *Local forum offering legitimate juridical advantage*

Ontario cases. The court refused to stay this action arising out of a motor vehicle action in Pennsylvania where the fact that the plaintiff's claim was statute-barred in Pennsylvania outweighed other considerations: *Gotch v. Ramirez* (2000), 48 O.R. (3d) 515 (S.C.J.). The availability of class actions in Ontario was held to be a legitimate juridical advantage: *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), leave to appeal refused (2000), 52 O.R. (3d) 20 (Div. Ct.). Where the ends of justice would be better served by having the proceedings to enforce a final foreign judgment dealt with in Ontario and the plaintiff had a legitimate juridical advantage in prosecuting the action in Ontario, the court dismissed a motion to stay the action on the grounds of *forum non conveniens*: *Girsberger v. Kresz* (1998), 19 C.P.C. (4th) 57 (Ont. Gen. Div.). The court held Ontario rather than Japan was the appropriate forum where the defendant failed to show that it would be deprived of any legitimate juridical advantage by not proceeding in Japan but there was a

strong personal advantage to the plaintiff, a permanently disabled person, in being able to pursue her action in Ontario rather than travelling to Japan: *Hudon v. Geos Language Corp.* (1997), 10 C.P.C. (4th) 92 (Ont. Div. Ct.). Availability of oral discovery in Ontario was not considered to be a significant juridical advantage where few facts were in dispute and damages was the principal area where evidence would be required: *National Bank of Canada v. Clifford Chance* (1996), 30 O.R. (3d) 746 (Gen. Div.). The availability of legal aid in Ontario was considered to be a juridical advantage: *Shewan v. Canada (Attorney General)* (1994), 27 C.P.C. (3d) 244 (Ont. Master). The court held that Ontario was a convenient forum for the plaintiff to assert a claim against family members for sexually abusing her as a child in the Netherlands since, *inter alia*, the plaintiff had a legitimate juridical advantage in suing in Ontario where the defendants could be compelled to answer incriminating questions on discovery: *B. (J.) v. d. (E.)* (1993), 16 C.P.C. (3d) 242 (Ont. Gen. Div.). Notwithstanding that the defendant had satisfied the onus of establishing Manitoba as a more convenient forum than Ontario, the court refused to stay proceedings where a stay would have resulted in the loss of the substantive and legitimate juridical advantage of the plaintiff to require that the issues of fact be determined by a jury: *Thwaites v. Simcoe Erie Group* (1993), 17 C.P.C. (3d) 93 (Ont. Gen. Div.). A plaintiff who suffered permanent brain damage as a result of a motor vehicle accident in Alberta, where he had resided for three years prior to the accident, returned to Ontario where he received treatment and subsequently sued the Alberta defendants in Ontario; the Ontario action was dismissed, since to apply Ontario law would defeat the intent of the Alberta legislation and the reasonable expectations of the parties, and the plaintiff's juridical advantage in maintaining an action in Ontario (the necessity of establishing ordinary negligence rather than gross negligence as required in Alberta) was not sufficient reason to found an Ontario action; moreover, on the evidence the *forum conveniens* was also Alberta: *Buchar (Litigation Guardian of) v. Weber* (1990), 46 C.P.C. (2d) 60 (Ont. H.C.). The plaintiff's burden of proving that granting a stay would deprive it of a juridical advantage can be discharged by demonstrating a danger that it might be so deprived; moreover, the juridical disadvantage created by the limitation period having expired in Nova Scotia, but not in Ontario, was not removed by the fact that the defendants undertook not to raise the limitation defence in Nova Scotia, since a bare promise not to rely on the passage of time was unenforceable: *Westminer Canada Holdings Ltd. v. Coughlan* (1990), 75 O.R. (2d) 405 (Div. Ct.). Where the plaintiff had been abducted by the defendants in Ontario and taken to Florida to face criminal proceedings and the plaintiff commenced a law suit in Ontario and served the defendants out of the jurisdiction, the court declined to set aside the service out; while Florida would have been a more convenient forum, staying the Ontario proceedings would deprive the plaintiff of a legitimate personal or juridical advantage because if he returned to Florida he would be incarcerated and would be unable to proceed with the civil action: *Jaffe v. Miller* (1989), 39 C.P.C. (2d) 157 (Ont. Master). The plaintiff was permitted to prosecute his

action in Ontario rather than Florida, the natural forum, where charges were pending against the plaintiff in Florida and would deter him from bringing an action there: *Jaffe v. Dearing* (1988), 65 O.R. (2d) 113 (H.C.). Where the party applying for a stay established that Quebec had the closer connection with a lawsuit, and the responding party failed to introduce evidence showing the loss of a personal or juridical advantage enjoyed in the domestic jurisdiction, the Ontario proceeding was stayed: *Tremblay Estate v. Demers* (1988), 66 O.R. (2d) 323 (H.C.). The court refused a stay of proceedings where it would have deprived the plaintiff of a legitimate juridical advantage, namely, the obligation of the defendant in Ontario proceedings to answer questions on discovery even though the answers may incriminate him; if the plaintiff had to sue in New York he would have been deprived of this advantage since the defendant could plead the Fifth Amendment and not answer incriminating questions: *General Dynamics Corp. v. Veliotis* (1985), 53 O.R. (2d) 371 (H.C.). It is permissible to choose to bring an action in Ontario to gain a legitimate juridical advantage; in this case the U.S. defendant failed to appear in a defamation action brought in the Bahamas, the natural forum; U.S. law, unlike Ontario law, would require the plaintiff to prove "actual malice"; in the circumstances it was permissible to bring the action in Ontario: *Pindling v. National Broadcasting Corp.* (1984), 49 O.R. (2d) 58 (H.C.). Where both forums do not afford the applicant similar rights, the principle of *forum conveniens* is not applicable; therefore, service of process claiming support will not be set aside where this would compel the wife to countersue in the husband's pending divorce action in New York State, where similar relief is unavailable: *Johnson v. Johnson* (1979), 27 O.R. (2d) 698 (Master).

Non-Ontario cases. Where the plaintiff brought a contract action in British Columbia based on *ex juris* service the court held that the State of Washington, and not British Columbia, was the convenient forum; the witnesses for the defendant and the main witness for the plaintiff resided in the United States and the proper law of one of the contractual documents was likely to be Washington law which would have to be proven at trial with attendant expense if the trial were in British Columbia; the issue of juridical advantage was to be weighed along with the other factors that were considered in identifying the appropriate forum and the advantage to the plaintiff in proceeding in British Columbia, namely the possible availability of a motion for summary judgment to resolve the action and the potential disadvantage in proceeding in the State of Washington, namely, exposure to a jury trial, did not outweigh the factors that supported a conclusion that British Columbia was not the appropriate forum: *Mercer International Inc. v. Larsen* (1994), 25 C.P.C. (3d) 110 (B.C. S.C.). The court refused to set aside service of a third party notice out of the jurisdiction in Alberta because the principal object of third party proceedings is the avoidance of multiple actions and inconsistent findings and hence the defendants would lose a legitimate juridical advantage if they were forced to litigate the third party proceedings in Alberta: *Canadian Commercial Bank v. Carpenter* (1989), 39 B.C.L.R. (2d) 312 (C.A.), leave to appeal refused (1990), 109 N.R. 21 (note) (S.C.C.). Service out of England in New Jersey was upheld where the plaintiff showed that if it won the action in England it would have its costs paid by the defendant, whereas if it sued in New Jersey its success in monetary terms would be substantially less because it would not recover its costs; the cost advantage from litigation in England was, in the circumstances, a sufficient factor against requiring the plaintiff to proceed in New Jersey: *Roneleigh Ltd. v. MII Exports Inc.*, [1989] 1 W.L.R. 619 (Eng. C.A.). Where Quebec notaries were served out of the jurisdiction in British Columbia proceedings, service was set aside since there was no real and substantial connection of the transactions involving the notaries with British Columbia and the juridical advantage lay with the notaries: *Patseas v.*

Castelo (1988), 54 D.L.R. (4th) 573 (B.C. C.A.). Where the plaintiff entered into a contract in Nova Scotia for employment in Indonesia and subsequently received substandard medical treatment in Indonesia and sued in Nova Scotia, the defendant successfully applied for a stay of proceedings; when the interests of both parties were considered there was really no *forum conveniens* but if the action was tried in Nova Scotia, the burden on the defendant would be heavier than that on the plaintiff if the forum was Indonesia; most of the defendant's witnesses, and some of the plaintiff's witnesses, were in Indonesia: *S.G. Ryle & Associates Ltd. v. Resources Management International Inc.* (1988), 86 N.S.R. (2d) 171 (T.D.).

(h) *Convenience of forum — Examples*

Ontario cases. The court found that Bermuda was the proper forum for the determination of the claim arising from unsafe drinking water at the defendant's Bermuda hotel: *Smith & Nephew Inc. v. Marriott's Castle Harbour* (2000), 42 C.P.C. (4th) 336 (Ont. Master). The court refused to stay an action against a U.S. physician who was the only one of several defendants outside Ontario: *McNichol Estate v. Woldnik* (2000), 52 O.R. (3d) 49 (S.C.J.). The Ontario court entertained a claim for carbon monoxide poisoning arising from the use of a dilapidated bus on a package holiday in Grenada: *Lemmex v. Bernard* (2000), 49 O.R. (3d) 598 (S.C.J.), leave to appeal granted (2000), 51 O.R. (3d) 164 (Div. Ct.). Where (1) the subject contract was formed in Italy, (2) the majority of witnesses resided in Italy, (3) the factual matters arose in Italy, and (4) the plaintiff would lose no juridical advantage in Italy, the court stayed the action based on *forum non conveniens*: *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 39 C.P.C. (4th) 160 (Ont. C.A.), leave to appeal refused (2000), 259 N.R. 198 (note) (S.C.C.). The court permitted a third party claim by a non-resident defendant against a non-resident third party, where Ontario was the appropriate forum for the main action: *Ferguson Bros. of St. Thomas v. Manyan Inc.* (1999), 38 C.P.C. (4th) 91 (Ont. S.C.J.). The court held that Ontario was the *forum conveniens* on the grounds that there was a real and substantial connection between Ontario and the subject-matter of the action and equally between Ontario and the *ex juris* defendants and that it was reasonable to conclude that the defendants submitted to the risk of litigation with the plaintiff in Ontario when they entered into their business relationship with the plaintiff in Ontario: *Overland Custom Coach Inc. v. Thor Industries Inc.* (1999), 46 O.R. (3d) 788 (S.C.J.). The court held that Ontario was the convenient forum where the plaintiff had concerns about her personal security if she litigated in Malaysia and one co-defendant wanted to litigate in Ontario: *Pei v. Bank Bumiputra Malaysia Berhad* (1998), 21 C.P.C. (4th) 289 (Ont. Gen. Div.). The court permitted a class action to proceed in Ontario against a foreign manufacturer of materials used in an allegedly defective product; the court did set aside service of part of the claim alleging breach of fiduciary duty which did not fall within rule 17.02: *Ontario New Home Warranty Program v. General Electric Co.* (1998), 17 C.P.C. (4th) 183 (Ont. Gen. Div.). The court held Ontario was the convenient forum for this action where the plaintiffs had sustained damage in Ontario arising from a breach of contract elsewhere and where the majority of their business was in Ontario and most of the damage evidence would come from Ontario witnesses:

Acronym (Cayman) Inc. v. Ontario Lottery Corp. (1997), 12 C.P.C. (4th) 331 (Ont. Gen. Div.). One of the factors that may be considered on the issue of *forum non conveniens* is the potential apprehension of bias; that factor, *inter alia*, was taken into account when choosing Ontario as the appropriate forum where one of the foreign third parties was a judge of the Queen's Bench in Alberta: *Occidental Chemical Corp. v. Sovereign General Insurance Co.* (1997), 32 O.R. (3d) 277 (Gen. Div.). The court held that California was the appropriate forum for this claim by a Canadian buyer of allegedly defective goods from a California manufacturer: *Holo-Deck Adventures Ltd. v. Orbotron Inc.* (1996), 8 C.P.C. (4th) 376 (Ont. Gen. Div.). The court held that the real and substantial connection to matters pertaining to the United States restructuring of a corporation lay with the United States Bankruptcy Court; the court has jurisdiction to apply the doctrine of *forum conveniens* to a motion in a *Companies' Creditors Arrangement Act* proceeding: *Re, Olympia & York Developments Ltd.* (1996), 7 C.P.C. (4th) 157 (Ont. Gen. Div. [Commercial List]). Where the plaintiff's only connection to Ontario was a summer home, the court held that Ontario was not the convenient forum: *Olde v. Capital Publishing Ltd. Partnership* (1996), 5 C.P.C. (4th) 95 (Ont. Gen. Div.), affirmed (1998), 18 C.P.C. (4th) 1 (Ont. C.A.). The court stayed a proceeding where, although the Ontario Court of Justice and the Federal Court of Canada had concurrent jurisdiction, the Federal Court of Canada was the more convenient forum: *Dudnik v. Canada (Canadian Radio-Television & Telecommunications Commission)* (1995), 41 C.P.C. (3d) 336 (Ont. Gen. Div.). Dismissing an application to set aside service of a statement of claim, the court held that the defendant, a British Columbia resident, had failed to establish that there was another more appropriate forum for trial than Ontario; the parties had entered into the contract in Ontario and Ontario law applied, the cost to the defendant of having to travel to Ontario was not a relevant factor: *Provident Life & Accident Insurance Co. v. Walton* (1994), 35 C.P.C. (3d) 147 (Ont. Gen. Div.). Ontario was held not to be the convenient forum where the activities complained of were conducted in or between Saskatchewan and British Columbia, the parties, key witnesses and evidence were all clearly located outside Ontario and there were generally no relevant factors connecting the action to Ontario: *Metis National Council Secretariat Inc. v. Evans* (1994), 33 C.P.C. (3d) 395 (Ont. Gen. Div.). The court refused to set aside service of the statement of claim in Florida where the plaintiff was an Ontario resident who had been injured in a slip and fall in Florida; the costs of transporting evidence to Florida would be harsh and unjust to the plaintiff, and the plaintiff's daughter had a claim under the *Family Law Act*, while no similar right of action existed in the State of Florida: *Dino v. Albertson's Inc.* (1994), 28 C.P.C. (3d) 15 (Ont. Master). The court permitted a plaintiff to sue in Ontario regarding a motor vehicle accident in Alberta where the balance of convenience favoured Ontario and the plaintiff had personal and juridical advantages in suing in Ontario: *de Vlas v. Bruce* (1994), 18 O.R. (3d) 493 (Gen. Div.). The court set aside service outside Ontario because California had the most natural, real and substantial

connection with the subject dispute: *Bailey & Co. v. Laser Medical Technology Inc.* (1993), 15 O.R. (3d) 212 (Gen. Div.). Where the parties agree by contract that all claims would be tried in one jurisdiction under that jurisdiction's laws, that jurisdiction will be determined to be the convenient forum: *Mithras Management Ltd. v. New Visions Entertainment Corp.* (1992), 90 D.L.R. (4th) 726 (Ont. Gen. Div.). The court set aside service outside Ontario where the subject of the action related to events in Florida. *Frymer v. Brettschneider* (1992), 10 O.R. (3d) 157 (Gen. Div.), additional reasons at (1992), 10 O.R. (3d) 157 at 183 (Gen. Div.), further additional reasons at (1992), 9 C.P.C. (3d) 294 at 299 (Ont. Gen. Div.), affirmed (1994), 19 O.R. (3d) 60 (C.A.). Where there is any doubt about the balance of convenience, the plaintiff should be allowed to choose the place for trial: *Giles v. Arnold Palmer Motors Inc.* (1991), 5 O.R. (3d) 536 (Gen. Div.). In an action for breach of an agreement as to the distribution rights of the defendant's product, where the plaintiff had sought out the defendant in Quebec, all discussions took place in Quebec and all relevant documents were located in Quebec, service out of the jurisdiction was set aside on the ground that Quebec was the convenient forum: *Seymour Concrete Equipment Sales Ltd. v. Geroquip Inc.* (November 7, 1991), Doc. CA 381/91 (Ont. C.A.). The court refused to set aside service on the basis that France was the most convenient forum where Ontario was more convenient for two of the three parties and there was no evidence on the relative number of witnesses; the fact that French law applied was not conclusive: *First Lady Coiffures Ltd. v. Laboratoire (Laboratoire) Rene Guinot* (February 11, 1988), Doc. 19514/87 (Ont. Master). Where an action was brought in Ontario in respect of an Alberta automobile accident, Ontario was held to be the appropriate forum; the plaintiffs could not afford the economic burden of being compelled to sue in Alberta and most of the treating physicians were in Ontario; the defendants' complaint of prejudice in respect of their third party proceedings was rejected as the plaintiffs should not be prejudiced or delayed by a third party claim: *Power v. Probert* (1987), 19 C.P.C. (2d) 142 (Ont. Dist. Ct.) (annotated). In a contract action where one of two defendant contractors was served outside Ontario under rule 17.02(o), and there was a related action in Nova Scotia, the court refused to set aside service; the fact that Nova Scotia law could govern was not determinative of the issue of *forum conveniens*, the avoidance of a multiplicity of actions was more important; as the defendants were blaming each other, setting aside service would lead to two trials with possibly inconsistent determinations, whereas allowing the plaintiff to proceed in Ontario would result in one trial in one province: *Hein v. Linwell Wood Products Ltd.* (1986), 58 O.R. (2d) 799 (H.C.). The court held that Ontario courts had jurisdiction to entertain an action arising out of an automobile accident in Quebec, that Ontario law applied, and that the *Family Law Reform Act* claims could be advanced: *Ang v. Trach* (1986), 57 O.R. (2d) 300 (H.C.). The court refused to set aside service outside Ontario where the main issue was almost entirely a question of fact, although it could conceivably be affected by foreign law: *National Utility Service (Can.) Ltd. v. Abbott Laboratories Ltd.* (1986), 56

O.R. (2d) 407 (H.C.). After having obtained an interim support order in Belgium, the plaintiff wife moved to Ontario and commenced an action for a division of property and support; the master held that Belgium was the convenient forum; the husband, all property, and the history of the spouses together were in Belgium, Belgian law was the proper law, and the wife's right to continue her action in Belgium was still existent: *Mainguy v. Mainguy* (1984), 42 C.P.C. 84 (Ont. Master). Where the contracts involved called for interpretation by the laws of other countries, few witnesses were from Ontario, and Ontario had the least connection with the facts, Ontario was not the convenient forum even if there were difficulties in proceeding elsewhere: *Hayter & Scandrett Ltd. v. Deutsche Ost-Afrika-Linie GmbH* (1983), 39 C.P.C. 38 (Ont. Master), affirmed (1985), 50 C.P.C. 194 (Ont. H.C.). In an action against Newfoundland solicitors for failing to deliver a promissory note to aid in prosecuting Newfoundland actions, the substance of the matter was based largely in Newfoundland and that was the convenient forum: *Ralph v. Halley* (1982), 30 C.P.C. 73 (Ont. Master). Service on a corporation resident in Quebec was ruled proper in this action where the section of the *Canada Business Corporations Act* upon which the plaintiff's claim was based had been declared unconstitutional in Quebec: *Wismer v. Javelin International Ltd.* (1981), 34 O.R. (2d) 785 (H.C.), leave to appeal refused (1982), 34 O.R. (2d) 785 at 793 (C.A.). Where a defendant resident in Ontario instituted third party proceedings against a United States corporation, the court held that Ontario was the most convenient forum to dispose of the proceeding; it would be very difficult for the defendant to conduct an action for indemnity in the United States: *Greg Lund Products Ltd. v. Husband Transport Ltd.* (1981), 34 O.R. (2d) 777 (Co. Ct.). Where Quebec law was the proper law of contract and the balance of convenience was otherwise equal, Quebec was the most convenient forum for a wrongful dismissal action: *Jones v. Ontario White Star Products Ltd.* (1979), 15 C.P.C. 144 (Ont. H.C.). Ontario was a convenient forum where it was reasonably foreseeable that the foreign manufacturer's aircraft part would be used and if carelessly made cause damage in Ontario, and much of the evidence involving other parties concerned events in Ontario: *Skyrotors Ltd. v. Carrière Technical Industrial Ltd.* (1979), 26 O.R. (2d) 207 (H.C.). Where there were other pending lawsuits in another province, all arising out of the same occurrence and involving common questions of fact and law, the balance of convenience was in favour of that province: *Roger Grandmaitre Ltd. v. Canadian International Paper Co.* (1977), 15 O.R. (2d) 137 (H.C.), affirmed (1977), 4 C.P.C. 299 (Ont. C.A.).

Non-Ontario cases. Service of originating process without leave on the Ontario defendant was set aside and an order granting leave to serve *ex juris* made on the grounds that a real and substantial connection existed between British Columbia and the action and that it was the *forum conveniens*: *Morguard Investments Ltd. v. M.E. Pritchard Associates Ltd.* (1999), 30 C.P.C. (4th) 117 (B.C. S.C.). The court held that Nova Scotia was the most convenient or appropriate forum where it was clearly supported by the facts and the defendants had not established that Ontario was clearly more appropriate: *679927 Ontario Ltd. v. Wall* (1997) 156 N.S.R. (2d) 360 (C.A.). The court held that all women implanted with breast implants who were

resident or implanted in Canada, other than Ontario and Quebec, were to be included in an action certified as a class proceeding; the common issue, whether silicone gel breast implants are reasonably fit for their intended purpose, established the real and substantial connection necessary for jurisdiction: *Harrington v. Dow Corning Corp.* (1997), 8 C.P.C. (4th) 262 (B.C. S.C.). Discussion of the factors the court considered in determining that British Columbia was the *forum conveniens*: *Valmet Paper Machinery Inc. v. Hapag-Lloyd Ag.* (December 23, 1996). Doc. Vancouver C960793 (B.C. S.C.). The court granted the plaintiffs' application for an order that Saskatchewan was the proper forum for the trial of an action relating to a helicopter crash in Kyrgyzstan; although there was some merit to the defendant's argument regarding accessibility of evidence, a representative of the Canadian Bureau of Transportation Security who was a member of the investigating team was available in Canada as a witness and there was no evidence that Canadian employees of the defendant who resided in Kyrgyzstan would not participate fully in the proceedings: *Garrett Estate v. Cameco Corp.* (1996), [1997] 10 W.W.R. 393 (Sask. Q.B.). The defendant insured, a defendant in a California action, successfully obtained a stay of the plaintiff insurer's British Columbia action where the plaintiff sought only a determination of the extent of its coverage as one of two insurers whose policies were in issue in the California action; California was clearly the more appropriate forum given that the action there had progressed substantially, the fact that the same issues were involved and there was no significance attached to the applicability of British Columbia law because the foreign court would simply be applying general laws of contract in an insurance context: *Royal Insurance Co. of Canada v. Detroit Diesel-Allison British Columbia Ltd.* (1997), 43 C.C.L.I. (2d) 11 (B.C. S.C.). The plaintiff had resided in New Brunswick at the time of the alleged medical misdiagnosis but later moved to Nova Scotia; a stay of her action in Nova Scotia was refused on the ground that the defendants failed to satisfy the burden of proof that Nova Scotia would be a *forum non conveniens*: *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679 (N.S. C.A.), leave to appeal refused (1998), 233 N.R. 397 (note) (S.C.C.). A stay of a Nova Scotia negligence action for damages arising out of the birth of the infant plaintiff in Newfoundland was refused where the factors favouring a trial in Nova Scotia outweighed those in favour of Newfoundland: *Dennis v. Salvation Army Grace General Hospital Board* (1997), 14 C.P.C. (4th) 207 (N.S. C.A.), leave to appeal refused (1997), 163 N.S.R. (2d) 79 (note) (S.C.C.). Defendant's application to stay the plaintiff's claim on the grounds that Louisiana, the location of the loss, and not Alberta was the *forum conveniens* was dismissed; the insurance policy issued by the plaintiff was intended to cover property of companies controlled by the defendant outside of Alberta; also, the action had a real and substantial connection to Alberta as it concerned an insurance policy issued in Alberta to a Canadian company: *Gerling Global General Insurance Co. v. Canadian Occidental Petroleum Ltd.* (1997), 11 C.P.C. (4th) 349 (Alta. Q.B.), affirmed (1997), 11 C.P.C. (4th) 356 (Alta. C.A.). The court held that the defendant had failed to meet the burden of proof that the Republic of Vanuatu and not the plaintiff's choice of Saskatchewan was the *forum conveniens*; the plaintiff's evidence rebutted the defendant's position that foreign witnesses could not be compelled to attend the domestic court or that foreign confidentiality laws would prevent the release of relevant documents: *Hill v. Klynveld Peat Marwick Goerdeler* (1997), 9 C.P.C. (4th) 301 (Sask. Q.B.). In general, where a plainly more appropriate forum has been identified, the plaintiff must take it, even though in certain respects it is less advantageous than the English forum; however, where the nature and complexity of the case was such that it could not be tried without financial assistance and substantial justice could not be done in the appropriate forum but could be done in England where the appropriate resources, in the form of either legal aid or a conditional fee agreement, were available, the plaintiff was permitted to pursue his action in England: *Connelly v. R.T.Z. Corpn. Plc.*, [1997] 3 W.L.R. 373 (U.K. H.L.). The plaintiff's action was stayed on the ground that Iran had the closest connection with the action; the decision on *forum conveniens* is one of pure discretion and the choice of the appropriate forum is the jurisdiction having the closest connection with the action and the parties, and not the one which would secure a juridical advantage to one of the parties. *Sarafi v. "Iran Afzal" (The)* (1996), 111 F.T.R. 256 (T.D.). A stay of proceedings in an action claiming mortgage arrears in relation to Florida property was not appropriate where the evidence would be mostly self-explanatory documentary and accounting records, mortgages were treated similarly in both jurisdictions and the jurisdiction clause in the mortgage was not an exclusive one but merely allowed concurrent jurisdiction with Florida: *Mundaca Investment Corp. v. Keats* (1996), 144 Nfld. & P.E.I.R. 77 (Nfld. T.D.). The defendant failed to establish that the plaintiff's choice of Nova Scotia was not *forum non conveniens*; the court considered several factors, including the province each party was connected with, in what province the evidence was situated and whether the law of the foreign court applied: *Godin v. Richard* (1996),

155 N.S.R. (2d) 33 (S.C.). The defendant discharged the burden of establishing that Newfoundland was the most appropriate jurisdiction in that it was the forum in which justice could be done at substantially less inconvenience and expense: *Hunt v. Durdle* (1996), 153 N.S.R. (2d) 223 (S.C.). The court allowed the plaintiffs who had commenced actions alleging breach of contract and tortious activity by Saskatchewan residents within the province to bring an action respecting related torts committed outside the province by a non-resident; Saskatchewan was the most convenient forum and to deny leave would encourage multiple proceedings: *Aquino v. Machula* (1996), 6 C.P.C. (4th) 361 (Sask. Q.B.). The court refused to set aside service *ex juris* on the defendant foreign manufacturer where the plaintiff's evidence established jurisdiction *simpliciter*, several factors weighed in favour of British Columbia as the *forum conveniens* and the requirements of order and fairness were satisfied: *Leisure Time Distributors Ltd. v. Calzaturificio S.C.A.R.P.A. - S.P.A.* (1996), 5 C.P.C. (4th) 320 (B.C. S.C.). Service *ex juris* in an action alleging fraud arising from an investment scheme was permitted on the ground that British Columbia was the *forum conveniens* where at all relevant times the corporate defendants were conducting their business in and all individual defendants resided in the province: *Traff v. Evancic* (1995), 15 B.C.L.R. (3d) 85 (C.A.). After the plaintiff had been involved in a single-car accident in a province where she did not reside but in which the corporate defendant was incorporated and the individual defendant was resident, she was involved in another accident in her home province; the individual defendant had already been served in the plaintiff's home province with the statement of claim relating to the first accident; the court dismissed an application by the defendants for an order declaring that the court should have declined jurisdiction, or alternatively, that the court was not the most convenient forum; service of the defendant in the plaintiff's home province gave the court *prima facie* jurisdiction, as little evidence of the accident was required and the majority of evidence respecting medical care, wage loss and future care was in its jurisdiction, it was the most convenient forum; the court also considered the potential for combining the first and second accidents in a single trial in order to apportion damages: *Stewart v. Stewart* (1995), 5 B.C.L.R. (3d) 350 (S.C.). The plaintiff, an Alberta resident, commenced actions in both Alberta and British Columbia for injuries sustained in an accident in British Columbia against individual defendants who were Alberta residents and corporate defendants which were registered in British Columbia; an application to stay the Alberta action was refused on the ground that the balance of convenience and the expenses of the parties favoured Alberta as the most convenient forum; evidence of the factual events of the accident would be given by Alberta residents and the medical evidence relied upon would be provided primarily by Alberta residents; the nature of the action did not restrict it to the place of the accident and no interpretation of foreign law would be involved: *Quaia v. Sweet* (1995), 30 Alta. L.R. (3d) 365 (Q.B.). An application to stay actions commenced in Alberta against a Colorado college was refused where the court held Alberta was the convenient forum; in one action, the alleged defamation occurred at least partly in Alberta where the plaintiff's reputation was more important than in Colorado and, if a wrong were committed in Alberta, it was a more significant wrong; in the other, a consideration of all of the circumstances surrounding the contract alleged to have been breached led to the conclusion that Alberta law had the closest and most substantial connection: *University of Calgary v. Colorado School of Mines* (1995), 43 C.P.C. (3d) 189 (Alta. Q.B.). A motion to stay a third party action was dismissed where the court held that the *forum conveniens* had to be considered separately from that of the main action and that once Canada had been chosen as the forum, it was not to be displaced unless the third party clearly established that the convenient forum was not Canada: *Donohue Inc. v. "Ocean Link" (The)* (1995), 94 F.T.R. 69 (T.D.). A defendant was denied leave to appeal a refusal to grant a stay of an action arising out of a car accident in British Columbia, commenced in that province by Alberta residents; the no-fault insurance benefits were considerably higher in British Columbia than in Alberta and the defendant alleged that the plaintiffs were forum shopping; the court held that although the judge did not mention all of the items going to the choice of forum identified by counsel, he gave consideration to a sufficient number to show that he had an appreciation of the relevant considerations in determining which forum had the "natural" or "real and substantial connection" to the case; it was extremely unlikely that a panel of the appeal court would interfere with the exercise of the judge's discretion: *Marchand (Guardian ad litem of) v. Alberta Motor Assn. Insurance Co.* (1994), 89 B.C.L.R. (2d) 293 (C.A.). The plaintiff, a company incorporated in Saskatchewan and having its head office there, sued in that province to confirm its rights under a joint venture agreement; the defendant, a federal corporation having its head office in British Columbia and registered as an extra-provincial corporation in Saskatchewan, applied to strike out the statement of claim on the ground that the location of the joint venture, Alberta, was a more convenient

forum; the court held that the defendant failed to meet the onus of proving that Alberta was a more appropriate forum in which to litigate; there was no information why it would be easier for the plaintiff's witnesses to travel to Alberta than for the defendant's witnesses to travel to Saskatchewan; the plaintiff had no corporate presence in Alberta nor any assets or employees there; any distribution of profits would be in Saskatchewan as would any damages the plaintiff might incur; the defendant, however, had a real connection with Saskatchewan where it had conducted business for some years through regional offices; the plaintiff's right to choose where to litigate was not to be interfered with lightly: *Dairy Producers Co-operative Ltd. v. Agrifoods International Cooperative Ltd.*, [1994] 7 W.W.R. 596 (Sask. Q.B.). The plaintiff, a Norwegian company, sued the defendants in British Columbia alleging that it had provided brokerage services for the defendants in connection with the building of a motor vessel in Norway and the defendants had failed to make the required monthly payments; one of the defendants was a British Columbia company, the other was a U.K. company, 99 per cent owned by the B.C. company, and three of its directors resided in British Columbia; British Columbia was held to be the convenient forum since the significant juridical advantage of oral pre-trial examination was unavailable if the plaintiff was forced to litigate in England; because of its corporate connections, the U.K. company could reasonably expect that it might be called upon to defend actions against it in the home jurisdiction of its parent, and a former director of the U.K. company who was a potentially significant witness resided in British Columbia: *Jan Poulsen & Co. v. Seaboard Shipping Co.* (1994), 32 C.P.C. (3d) 385 (B.C. S.C.). The plaintiff, who was employed in Manitoba by an American corporation working with that corporation's Ontario subsidiary, served his statement of claim in a wrongful dismissal action on the American parent company in Michigan; the court granted an application to set aside service on the ground that the claim had insufficient connection with Manitoba; the defendant was not registered in Manitoba, did not carry on business there, had no assets there nor did it have an attorney for service there; there was no connection justifying service; the state of Michigan, not Manitoba, was the appropriate forum: *Janke v. Budd Canada Inc.* (1994), 31 C.P.C. (3d) 1 (Man. C.A.). The plaintiff commenced an action in his home province of New Brunswick, seeking damages for aggravation to a pre-existing medical condition arising from injuries sustained in a car accident in Maine; denying an application to dismiss the action on the ground that Maine was the most convenient forum, the court held that the questions of fault and contributory negligence, which did not appear to be as serious as the question of personal injury, could be equally argued in New Brunswick as in Maine; however, much would depend on the medical testimony; having doctors attend a trial in Maine would cause difficulty and great expense to the plaintiff whereas the defendant's insurers would bear the expense of his witnesses testifying in New Brunswick: *Touchbourne v. Philbrook* (1994), 151 N.B.R. (2d) 377 (Q.B.). Where the estates of the plaintiff's deceased daughter and one of the defendants were both located in the Northwest Territories, the court held that an action commenced in that province arising from a fatal car accident in the Yukon against the defendant's estate and defendants resident in the Yukon should proceed in the Territories; although there would probably be witnesses in the Yukon because the accident had occurred there, it was probable that evidence as to damages would exist in the Territories; it was practical for the plaintiff to bring one action against all tortfeasors at the same time and the Territories was the more suitable forum for the ends of justice: *Stewart Estate v. Stewart Estate*, [1994] 8 W.W.R. 196 (N.W.T. S.C.). Where the plaintiff could not commence his action in Quebec because of its no-fault insurance scheme, the court held that it could not be said that it was the more appropriate forum: *Tomlinson v. Turner* (1993), 108 Nfld. & P.E.I.R. 346 (P.E.I. C.A.), leave to appeal to Supreme Court of Canada refused (1993), 114 Nfld. & P.E.I.R. 90 (note) (S.C.C.). The defendant in a Federal Court patent infringement action sought a stay of the action on the ground that, if it were held liable, it would claim over against the province of Ontario and that claim could not be heard in Federal Court; the application was denied on the ground that the dispute was within the Federal Court jurisdiction and the plaintiff was not required to bring the action elsewhere to convenience the defendant in an action against third parties: *Miwel Construction Ltd. v. Bot Construction Ltd.* (1993), 48 C.P.R. (3d) 319 (Fed. T.D.), affirmed (1993), 48 C.P.R. (3d) 319n (Fed. T.D.). Where the plaintiff, a resident of Germany and a director of the defendant Manitoba corporation, brought an action on certain promissory notes, the defendant counterclaimed and the plaintiff sought a stay of the counterclaim on the grounds that Germany was the *forum conveniens* for the counterclaim; a stay was refused on the ground that the plaintiff failed to show that Germany was clearly a more appropriate forum than Manitoba; forcing the defendant to litigate a second action in Germany would have only added significantly to costs and delay, as well as inconvenience to some, if not all, of the witnesses: *Pietzsch v. R-Tek Corp.* (1993), 87 Man. R. (2d) 298 (Q.B.).

Where the plaintiff sued on a disability contract in Nova Scotia, the action was stayed on the ground that Prince Edward Island was the convenient forum; while the plaintiff had been injured in an accident in Nova Scotia he was a resident of P.E.I., all witnesses resided there and the contract of insurance was entered into through the defendant's office in P.E.I.; a trial in P.E.I. would not deprive the plaintiff of a legitimate personal or juridical advantage and justice could be done between parties at substantially less inconvenience and expense in P.E.I.: *Owen v. Non-Marine Underwriters, Lloyds London* (1992), 116 N.S.R. (2d) 245 (T.D.). The court refused to stay the plaintiff's action on the ground that the defendant's own province was a more appropriate jurisdiction for both it and a possible counterclaim where, although there was significant evidence that the balance of convenience was not solely in favour of the plaintiff's choice of Nova Scotia as the forum, it was not so strongly in favour of Alberta, where the defendant was based; the counterclaim was distinct enough to be proceeded with as a separate action in Alberta: *Witham v. Liftair International (1985) Ltd.* (1992), 114 N.S.R. (2d) 43 (T.D.). In an action for negligence by residents of Nova Scotia arising from a hydroplane accident in Quebec, the court held there was a very real and substantial connection to Nova Scotia and that the balance of convenience strongly favoured the plaintiff in having her case heard in that province; expert and lay evidence regarding certain heads of damage originated in Nova Scotia; if the plaintiffs were compelled to proceed in Quebec, their action would likely be statute-barred; the defendant corporation was federally regulated and did not have a connection with any particular province; there was a lack of evidence about the witnesses to be called and whether there were compelling reasons why their evidence could not be heard in Nova Scotia; if the Nova Scotia action were stayed, the plaintiff had deposed that she would not have the financial resources to continue: *Monahan (Guardian ad litem of) v. Trahan* (1992), 13 C.P.C. (3d) 52 (N.S. T.D.). In Alberta proceedings to dissolve a partnership where one of the defendants had been served *ex juris* in Ontario, the defendant satisfied the burden on it to show that there was another available forum that was clearly and distinctly more suitable; the focus of this action was on the financial status of a defendant Ontario corporation; all of the documents and witnesses were in Ontario which was clearly the convenient forum: *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1992), 11 C.P.C. (3d) 43 (Alta. Q.B.). Where British Columbia was the province in which the plaintiffs carried on business and the contract, which had been made and allegedly breached there, incorporated its law, and where the subject-matter was largely British Columbia real estate and most of the documents and witnesses were located there, the court dismissed an application for a declaration that the British Columbia courts should decline jurisdiction: *Northland Properties Ltd. v. Equitable Trust Co.* (1991), 5 B.C.A.C. 293 (C.A.). In British Columbia asbestos litigation three Quebec-based producers who had been served *ex juris* were unsuccessful in setting aside service; they failed to establish that justice could be done in Quebec at less inconvenience or expense; granting the application would deprive the plaintiffs of a legitimate advantage as the actions had been long started and could not now be restarted in Quebec after the expiry of the limitation; British Columbia was the forum with the most substantial connection to the parties and the subject-matter of litigation: *Bushell v. T & N plc* (1991), 60 B.C.L.R. (2d) 294 (S.C.), affirmed (1992), 9 C.P.C. (3d) 59 (C.A.), leave to appeal to Supreme Court of Canada refused (1992), 70 B.C.L.R. (2d) xxxii (note) (S.C.C.). A minority shareholder of a company, incorporated in England and whose business was carried on solely in Argentina, sought an order that the majority shareholders purchase his shares or that the company be wound up; it was held that Argentina was the convenient forum; the fact that relief was sought under English legislation in respect of an English company had not satisfied the onus of showing that England was the more appropriate forum, and the dispute had the most real and substantial connection with an Argentine court and substantial justice could be obtained there: *Re Harrods (Buenos Aires) Ltd.*, [1991] 3 W.L.R. 397 (Eng. C.A.). Where a landlord sued a tenant in Nova Scotia in respect of the rental of commercial premises in New Brunswick, a stay was granted; the balance of convenience favoured a trial in New Brunswick as that was where the majority of witnesses and evidence were situated: *Garson Holdings Ltd. v. Norman Wade Co.* (1991), 111 N.S.R. (2d) 32 (T.D.). The plaintiff, a New Brunswick corporation, purchased in Nova Scotia a propeller and tail shaft designed, manufactured and assembled in Norway by the defendant and had it installed in its fishing vessel at a Nova Scotia shipyard; the propeller and tail shaft subsequently fell off during a fishing trip off the coast of Labrador, resulting in the vessel being towed to St. John's, Newfoundland; the court held that since the parties would want to discover or call as witnesses persons involved in the installation, the master and crew of the boat, government officials and dockyard personnel and damages, including towing, and general damages for down time would require evidence from people directly involved in the Atlantic provinces, Nova Scotia was the

convenient forum for the litigation: *Pandalus Nordique Ltée v. Ulstein Propeller A/S* (1991), 105 N.S.R. (2d) 52 (T.D.). The plaintiff Manitoba resident sued in Manitoba for being wrongfully dismissed from his job in a store in Saskatchewan; the defendant's request for a stay of proceedings was refused as Manitoba was not an inconvenient forum; the applicable laws were the same in both jurisdictions, important witnesses resided in each of the jurisdictions and if the action proceeded in Saskatchewan the plaintiff would likely face an application for security for costs: *Corrigal v. Hudson's Bay Co.* (1990), 63 Man. R. (2d) 274 (Q.B.). Where the plaintiff sued in Nova Scotia in respect of a contract of sale entered into by the defendant receiver/manager, which had been appointed by the P.E.I. Supreme Court, the court stayed the action on the ground that P.E.I. was the convenient forum; the majority of witnesses resided there, the defendant had been appointed by the P.E.I. courts and the assets which would have been affected by the judgment were located in P.E.I.: *693663 Ontario Inc. v. Deloitte & Touche Inc.* (1990), 102 N.S.R. (2d) 376 (T.D.), affirmed (1991), 109 N.S.R. (2d) 295 (C.A.). A contract provided that the law of the place of work should govern its interpretation but did not specify the law governing dispute resolution; when an action was commenced in Saskatchewan, arising out of work done in Manitoba, one of the defendants, the only party not resident in Saskatchewan but registered as an extra-provincial corporation carrying on business in that province, unsuccessfully applied to strike out the statement of claim on the ground that it had not been brought in the proper forum; the court held that every person was to have access to the courts without having to travel miles to do so and the fact that expert witnesses would have to be called to testify to Manitoba law did not outweigh the inconvenience to other parties and their witnesses: *Thorpe Brothers Ltd. v. Saan Stores Ltd.* (1990), 89 Sask. R. 106 (Q.B.). Where the plaintiff commenced an action for damages against several defendants for loss suffered in a fire and a number of the defendants were non-residents served *ex juris*, it was held on the evidence that Alberta was the convenient forum: *Suncor Inc. v. Canada Wire & Cable Ltd.* (1990), 114 A.R. 341 (Q.B.). Where an Alberta plaintiff brought an action against a British Columbia law firm for failing to sue the plaintiff's doctors in time, it was held that Alberta was a convenient forum since the defendant failed to establish that there was a clear balance in favour of British Columbia as a more suitable forum: *Holland v. Pihl* (1990), 104 A.R. 59 (Master). Canada was held to be the *forum conveniens* in an action in which a consignee's goods had been damaged by faulty ship equipment as they were being unloaded in Canada; the accident had occurred in Canada and the witnesses were in Canada: *Saint John Shipbuilding Ltd. v. "Eldir" (The)* (1990), 43 F.T.R. 158 (T.D.). Leave to serve outside British Columbia and Alberta in an action for wrongful dismissal and breach of fiduciary duty was refused where the balance of convenience favoured Alberta; the only benefit to the plaintiff was a savings in costs and the defendants faced a host of disadvantages — they were based in Alberta, they had no assets in British Columbia, their witnesses were in Alberta and the alleged contract had been made in Alberta: *McLean v. Retail Solutions Inc.* (1989), 39 C.P.C. (2d) 97 (B.C. S.C.). Where a New Brunswick resident commenced an action in New Brunswick in respect of a motor vehicle accident which occurred in Alberta, service *ex juris* was set aside on the ground that New Brunswick was not the convenient forum; all of the liability witnesses were in Alberta and Alberta was the more convenient appropriate forum: *Gauthier v. Swain* (1989), 100 N.B.R. (2d) 173 (Q.B.). Service out of Prince Edward Island on a Quebec defendant was not set aside where the plaintiff's witnesses and records necessary in order to prove the case were all located within the court's jurisdiction; requiring the plaintiffs to sue in Quebec would have involved considerable extra time and expense and the defendants had carried on business in P.E.I. and would not be so inconvenienced: *Fathers of Confederation Buildings Trust v. Gesser Enterprises Inc.* (1989), 75 Nfld. & P.E.I.R. 337 (P.E.I. T.D.). In staying proceedings brought in Alberta by an Alberta company against an Ontario company the court held that the test to apply in determining the appropriate forum is the *forum conveniens* test which satisfied two concerns: there must not be encouragement of litigation about where to litigate, and it would be a greater wrong to require the defendant to litigate in an inappropriate forum in the name of practical expediency; where the forum possesses jurisdiction over a defendant as of right, the defendant must show that there is another available forum which is "clearly or distinctly more suitable"; where jurisdiction does not exist as of right (*e.g.*, where there is service out of the jurisdiction) the same burden rests on the party seeking to establish jurisdiction; the party alleging an advantage or disadvantage must establish it: *United Oilseed Products Ltd. v. Royal Bank* (1988), 29 C.P.C. (2d) 28 (Alta. C.A.). A British Columbia court refused to set aside service on an Oregon defendant where B.C. was an appropriate forum in which to try the action; looking at the substance of the transaction it was clear that with regard to juridical advantage that the fact that the witnesses and one of the defendants resided in British Columbia outweighed the possible involvement of Oregon law with

some of the issues to be determined in the action: *First City Investments Inc. v. Shrum, Liddle & Heberton* (1988), 26 B.C.L.R. (2d) 46 (C.A.). In an action brought in Newfoundland for breach of a contract of purchase of a hovercraft where the contract was made in Ontario, Newfoundland was held to be the convenient forum; although the defendants did not carry on business in Newfoundland there was no substantial reason to disturb the plaintiff's choice of forum where the hovercraft had broken down in Newfoundland and the expert witnesses were available in Newfoundland: *Berrick King Surveys Ltd. v. All Seasons Hovercraft Inc.* (1988), 72 Nfld. & P.E.I.R. 309 (Nfld. T.D.). The court refused to set aside service *ex juris* on a New Brunswick corporate defendant on the grounds of *forum conveniens*; both New Brunswick and P.E.I. had a connection with the facts of the case and the defendants would not incur substantial travel costs and inconvenience if they were to defend the case in P.E.I., nor would severe injustice be caused to them: *Gillis v. Lounsbury Industrial Ltd.* (1988), 71 Nfld. & P.E.I.R. 18 (P.E.I. T.D.). In an action brought in England by a Liberian shipowner against Canadian shippers for damage caused to the ship by wet cargo, the court held that England was a convenient forum; the court took into account the availability of witnesses, potential multiplicity of proceedings and the fact that the court was already hearing a similar action for damages involving the same shippers in respect of another ship and that the accumulated experience of counsel derived from their participation in the other action would lead to savings of time and money; since the shipowners had not acted unreasonably in failing to commence proceedings in British Columbia before the expiry of the limitation period there, the court would only have set aside service out on condition that the shippers waived their right to rely on the time bar in British Columbia: *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1986] 3 W.L.R. 972 (U.K. H.L.). Service out of the jurisdiction was set aside in a shipping case where the claim did not relate to events in England and Ethiopia would, in all the circumstances, be a more convenient forum for the numerous witnesses: *Amanuel v. Alexandros Shipping Co.*, [1986] 2 W.L.R. 962 (Eng. Q.B.). Where the plaintiff in a wrongful dismissal action was hired in Ontario by an Ontario company, it was held that Alberta was a convenient forum where the defendant was in fact carrying on business in Alberta (although not registered in Alberta to do so) and the plaintiff performed his services for the company in Alberta: *Kroetsch v. H.W. Domnik Industries Ltd.* (1985), 60 A.R. 69 (Q.B.). Leave to bring an action for defamation in Saskatchewan was refused where the publication occurred outside the province and neither convenience nor logic made Saskatchewan the appropriate jurisdiction for the action: *Thatcher v. Southam Inc.* (1985), 42 Sask. R. 272 (Q.B.). Unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed, and in an action against newspapers which are distributed in many provinces it would be unfair to hold that a person alleging defamation must bring the action where the owner or publisher is resident: *Borowski v. Hurst* (1984), 32 Man. R. (2d) 207 (Q.B.). When an action brought in Prince Edward Island involved the question of construction of a building in New Brunswick, service out of the jurisdiction was set aside because the potential cost of bringing expert witnesses from another province and the ease of obtaining relevant evidence about the construction defects made New Brunswick the convenient forum: *Catena Holdings Ltd. v. Simpsons-Sears Ltd.* (1984), 51 Nfld. & P.E.I.R. 71 (P.E.I. S.C.).

(i) *Stay of Proceedings—Examples*

Ontario cases. The court stayed an Ontario action which had no real and substantial connection to Ontario, and with respect to which the United Arab Emirates was clearly the more convenient forum: *ECS Educational Consulting Services Canada Ltd. v. United Arab Emirates (Armed Forces)* (2000), 44 C.P.C. (4th) 111 (S.C.J.), additional reasons at (2000), 44 C.P.C. (4th) 127 (Ont. S.C.J.), affirmed (November 16, 2000), Doc. CA C33764 (Ont. C.A.). Where, subsequent to the commencement of the Ontario action, the plaintiffs had commenced an action in Alberta under the *Builders Lien Act*, the Ontario action was stayed on the basis of *forum non-conveniens*: *North American Steel Equipment Co. v. G.N. Johnston Equipment Co./Equipment G.N. Johnston Ltée.* (1999), 34 C.P.C. (4th) 324 (Ont. Gen. Div.). The court stayed an Ontario action where British Columbia was clearly a more appropriate forum: *Four*

Seasons Hotel Ltd. v. Pacific Centre Ltd. (1999), 48 C.P.C. (4th) 338 (Ont. S.C.J.). Danish defendant's application for a stay on the ground that Ontario was not the convenient forum was refused where the plaintiff fulfilled the burden of establishing that the interests of the parties and justice favoured trial in Ontario and that the action had a real and substantial connection to Ontario: *Fresh Mix Ltd. v. Bilwinc A/S* (1999), 30 C.P.C. (4th) 282 (Ont. Gen. Div.), leave to appeal refused (May 21, 1999), Doc. Barrie G22898-98 (Ont. S.C.J.). Where a passenger was injured on flight from Guyana to Toronto, the court held that the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* applied and Ontario was not the convenient forum: *Roberts v. Guyana Airways Corp.* (1998), 41 O.R. (3d) 653 (Gen. Div.). Service *ex juris* was set aside and the action stayed where evidence in the contract between the parties confirmed that they contemplated the law of Trinidad as the governing law and Trinidad was the more convenient forum than the plaintiffs' choice of Ontario: *Persaud v. Trinidad & Tobago National Petroleum Marketing Co.* (1997), 25 O.T.C. 91 (Gen. Div.). Where Ontario had the closest connection with the case, the court refused to stay the Ontario action even though an early trial date was available in an Ohio action: *DY 4 Systems Inc. v. Diamond Point International Inc.* (1997), 14 C.P.C. (4th) 99 (Ont. Gen. Div.). Where proceedings dealing with the same subject-matter and issues had already been commenced in the United Kingdom and were proposed in South Africa, the court stayed the Ontario action for a period of 30 days pending discontinuance in the United Kingdom and commencement in South Africa; the United Kingdom was not an appropriate forum and, although the action had a real and substantial connection to Ontario, South Africa was the more appropriate forum: *Thermasteel V (Canada) Inc. v. Macsteel Commercial Holdings (Pty) Ltd.* (1996), 2 C.P.C. (4th) 1 (Ont. Gen. Div.). These actions by Canadian financial institutions advancing contract and tort claims against English solicitors arising out of an opinion concerning a property development in England were stayed where England was clearly the appropriate forum: *National Bank of Canada v. Clifford Chance* (1996), 30 O.R. (3d) 746 (Gen. Div.). The court granted the defendant's motion for an order staying an action on the ground that Ontario was a *forum non conveniens* where it was clear from the relevant factors involved in the litigation, including the location in which the core of the action was located, the substance of legal issues in the matter, the location of the majority of the witnesses and the location from which the bulk of the evidence would come, that Germany was the more appropriate jurisdiction: *Mannai Properties (Jersey) Ltd. v. Horsham Corp.* (1994), 36 C.P.C. (3d) 235 (Ont. Gen. Div.). Where (1) the location of witnesses was evenly divided between Ontario and British Columbia, (2) the contract was entered into in Ontario, and (3) Ontario law governed the contract, the court dismissed the motion to stay the plaintiff's action in Ontario on the ground that Ontario was not a convenient forum: *Provident Life & Accident Insurance Co. v. Walton* (1994), 35 C.P.C. (3d) 147 (Ont. Gen. Div.). The court refused to stay an Ontario action pending disposition of a related Alberta

action where it was not established that Alberta was a more convenient forum: *Lehndorff Management Ltd. v. Gentra Canada Investments Inc.* (1994), 34 C.P.C. (3d) 354 (Ont. Gen. Div.). The court stayed an action which had virtually no connection with Ontario and awarded solicitor-and-client costs against the plaintiff: *SDI Simulation Group Inc. v. Chameleon Technologies Inc.* (1994), 34 C.P.C. (3d) 346 (Ont. Gen. Div.). The defendant's motion for a stay of proceedings was granted where Belgium was the forum that had the most real and substantial connection with the lawsuit and the plaintiff would not be deprived of any personal or juridical advantage by litigating there: *Bank Van Parijs en de Nederlanden Belgie N.V. v. Cabri* (1993), 19 C.P.C. (3d) 362 (Ont. Gen. Div.). The court stayed an Ontario action pending determination of a related Texas action; the subject contract had been negotiated in Texas and was governed by Texas law and the Texas action had been commenced first; Texas was the most convenient forum; the defendants had given undertakings obviating the need for interlocutory relief in Ontario: *Sterling Software International (Canada) Inc. v. Software Recording Corp. of America* (1993), 17 C.P.C. (3d) 116 (Ont. Gen. Div.). Where a piece of equipment which had been manufactured and delivered in Illinois was being used by the purchaser in Ontario, B, who was operating the equipment at the time was injured, brought an action for damages for personal injuries in Ontario; the owner of the equipment also brought an action for loss of the equipment; the initial motion by the defendant for a stay on the ground of *forum conveniens* was unsuccessful largely on the ground that the personal injury action was pending and the two actions should be tried together to avoid a multiplicity of proceedings; subsequently it was discovered that at the time of the first ruling the personal injury claim had in fact been settled and the defendant brought a second motion to stay which was identical to the first motion; it was held that Illinois was clearly the convenient forum since Illinois law applied and all the defence witnesses would be American and since the personal injury action had been settled there was no longer any reason, based on judicial economy, to force the case to be dealt with in Ontario; the doctrine of *res judicata* did not apply to the defendant's motion since that doctrine applies to final judgment orders and not to interlocutory motions of this kind: *Blewater Agromart Ltd. v. Paul's Machine & Welding Corp.* (1993), 16 O.R. (3d) 404 (Gen. Div.). The court stayed an action brought in Ontario by a plaintiff who sought recovery under an insurance policy for a loss by theft which occurred in British Columbia; British Columbia had the most real and substantial connection with the lawsuit in that it was where the loss by theft arose and where the majority of the witnesses resided; the fact that both parties carried on business in Ontario was not determinative: *Osmosis Waste Systems Ltd. v. Guardian Insurance Co. of Canada* (1993), 12 O.R. (3d) 786 (Gen. Div.). A motion for a stay was dismissed in this action arising out of the international sale of goods; the certificate of insurance which was the subject of the action was silent with respect to jurisdiction, and the defendant was not able to establish that there was another forum more convenient than Ontario: *Ronald A. Chisholm Ltd. v. Agro & Diverses Souscrip-*

tions Internationales — ADSI — S.A. (1991), 4 O.R. (3d) 539 (Gen. Div.). Where a plaintiff had instituted several actions in different jurisdictions, it was not permitted to stay the Ontario action while it tested the waters in other jurisdictions that might be more favourable to its cause: *Manufacturers Life Insurance Co. v. Guarantee Co. of North America* (1987), 62 O.R. (2d) 147 (H.C.). The court stayed an Ontario action where justice could be done in Quebec with substantially less inconvenience and expense; the prospect of a trial in the French language in Quebec was not grounds to permit the action to proceed in Ontario: *Bonaventure Systems Inc. v. Royal Bank* (1986), 57 O.R. (2d) 270 (Div. Ct.). Where most or all of the witnesses were in Alberta and the plaintiff in this Ontario action could assert its claim in a subsequent action commenced in Alberta by the defendant, the Ontario action was stayed: *Pli-brico (Can.) Ltd. v. Suncor Inc.* (1982), 35 O.R. (2d) 781 (H.C.).

Non-Ontario cases. The court stayed a British Columbia action where there were parallel proceedings in Kansas and the court found that Kansas was the appropriate forum; further, there was no evidence of any personal or juridical advantage that would be available to the plaintiff only in British Columbia: *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 34 C.P.C. (4th) 1 (B.C. C.A.), leave to appeal allowed (2000), 255 N.R. 200 (note) (S.C.C.), affirmed 2001 SCC 26. An application for a stay of an action commenced by the estate of a deceased in his home province was refused where the defendant town failed to establish that the province in which it was located was clearly the more convenient forum: *Sto. Domingo Estate v. Kenora (Town)* (1996), 109 Man. R. (2d) 32 (Master), affirmed (1996), 111 Man. R. (2d) 124 (Q.B.). An action brought in Alberta against North Dakota lawyers who had acted for the plaintiff in a products liability action dismissed earlier in that state was stayed where the plaintiff failed to establish that Alberta was the *forum conveniens*: *Ferdais v. Ohlsen* (1995), 41 C.P.C. (3d) 125 (Alta. Q.B.). A pilot, who was paid in his home province of Nova Scotia as an independent contractor brought an action to recover payment under a contract negotiated by telephone with an Alberta based company; the company, which had no connection with Nova Scotia other than through the plaintiff, was considering bringing a counterclaim and applied for a stay of the Nova Scotia action on the basis that Alberta was the appropriate forum; the court held that although there was significant evidence that the balance of convenience was not solely in favour of Nova Scotia, it was not so strong as to disturb the pilot's choice; the company's counterclaim was distinct enough that it could be proceeded with as a separate section in Alberta: *Witham v. Liftair International (1985) Ltd.* (1992), 114 N.S.R. (2d) 43 (T.D.). Alberta and Arizona plaintiffs sued the defendant Alberta corporation alleging a fraudulent conspiracy to depress share prices and obtained leave to serve other defendants in the eastern United States, Texas and Europe on the grounds that they had committed a tort in Alberta; the defendants were denied a stay since they failed to establish that Colorado was clearly a more suitable forum as witnesses and documents were located equally distant from Calgary and Denver: *Paterson v. Hamilton* (1991), 79 Alta. L.R. (2d) 111 (C.A.).

(j) *Dismissal of Proceedings—Examples*

Ontario cases. Summary judgment dismissing the action was granted where the court held that the law of Quebec governed the determination of damages: *Buchan v. Non-Marine Underwriters, Lloyds London* (1999), 44 O.R. (3d) 685 (S.C.J.). Motion to dismiss the plaintiff's action granted where the applicable law was New York law, pursuant to which the defendants conduct was not actionable: *Davidson Tisdale Ltd. v. Pendrick* (1998), 31 C.P.C. (4th) 164 (Ont. Div. Ct.). Where the defendant counterclaimed for damages resulting from an improperly obtained Mareva injunction, a motion for dismissal on the ground that Ontario lacked jurisdiction *simpliciter* and

was not a convenient forum was refused: *United States v. Friedland* (1998), 21 C.P.C. (4th) 89 (Ont. Gen. Div.), reversed on other grounds (1999), 46 O.R. (3d) 321 (C.A.), leave to appeal allowed (2000), 261 N.R. 400 (note) (S.C.C.). In an action for damages sustained in a slip and fall on the defendant's premises in Connecticut, the defendant's motion to dismiss the action on the ground that Connecticut was the convenient forum, was dismissed; the location of key witnesses overwhelmingly favoured Ontario, given that the doctors all resided in Ontario, medical treatments were done there, much of the damages were sustained in Ontario and it would likely be less expensive to call experts on Connecticut law than it would be to cause many people to go to Connecticut to testify: *Dunlop v. Connecticut College* (1996), 50 C.P.C. (3d) 109 (Ont. Gen. Div.). An Ontario resident injured in a skiing accident in Quebec brought an action in Ontario after the expiry of the applicable limitation period in Quebec; the action was dismissed as Quebec was the forum with the most real and substantial connection with the law suit: *Furlong v. Station Mont Tremblant Lodge Inc.* (1991), 4 O.R. (3d) 693 (Gen. Div.).

Non-Ontario cases. The defendant in an action commenced in New Brunswick for injuries sustained in the United States served a hospital in the United States with a third party notice alleging its negligence in not transferring the plaintiff to a Canadian facility but to another American one where the hospital bills were much higher. On an application to dismiss the third party claim on the ground that New Brunswick was not a convenient forum, the court discussed the objects of third party claims and concluded that the United States would not be more convenient; the third party was located within ten miles of the residences of both the plaintiff and the defendant; the cost of assembling witnesses, obtaining the third party's records and the inconvenience of proving foreign law were not significant factors in determining the most convenient forum: *Dubé v. Dubé* (1993), 140 N.B.R. (2d) 337 (Q.B.), reversed on other grounds (1994), 147 N.B.R. (2d) 315 (C.A.). Ontario and Nova Scotia residents sued in British Columbia a Nova Scotia law firm, a British Columbia law firm, an accounting firm and an investment firm for negligent advice regarding the purchase of shares in a British Columbia company; the Nova Scotia law firm unsuccessfully applied for the action to be dismissed on the ground that Nova Scotia was the most appropriate forum; British Columbia had the most real and substantial connection with the action and the balance between personal and juridical advantages to the competing litigants favoured British Columbia: *Arkelian v. Seifert* (July 25, 1990), Doc. CA012568 (B.C. C.A.).

(k) *Validating unauthorized service — rule 17.06(3)*

Ontario cases. Since rule 17.04 and Form 14A are specific, mandatory and clear that the facts relied upon to support service out must be pleaded, it was not proper to validate service under this rule where the statement of claim did not comply with these provisions: *Ontario (A.G.) v. J.H. Bachmann Can. Inc.* (1987), 15 C.P.C. (2d) 96 (Ont. Master). (On the issue of whether the facts pleaded must be specifically related to the clauses referred to in rule 17.02 this case was overruled in *Schaffhauser Kantonalbank v. Chmiel* (1988), 65 O.R. (2d) 475 (H.C.) (annotated), leave to appeal refused (1988), 29 C.P.C. (2d) xlv (Ont. H.C.).)

Non-Ontario cases. Where it was a condition of a grant of leave to serve a defendant outside the jurisdiction under the relevant United Kingdom Order that another defendant be already served and that condition had not been met, service *ex juris* was therefore invalid; however, pursuant to another Order, retrospective validation could be given where there was a

good cause to do so; in this case the court held there existed exceptional circumstances justifying such retrospective validation: *Kuwait Oil Tanker Co. S.A.K. v. Al Bader*, [1997] 1 W.L.R. 1410 (Eng. C.A.). The plaintiffs, members of two Manitoba Indian Bands, alleged that a power plant and dam owned by the defendant and located in Saskatchewan caused water levels in Manitoba to rise with resultant flooding; they applied for declaratory relief against the defendants and the statement of claim was served *ex juris* without leave of the court; on the defendant's application to set aside service, service was upheld: there was a real and substantial connection between the claim and the province of Manitoba and it was therefore appropriate to validate service given that the plaintiffs would have been granted leave: *Mathias Colomb Band of Indians v. Saskatchewan Power Corp.*, [1993] 6 W.W.R. 153 (Man. Q.B.), affirmed [1994] 2 W.W.R. 457 (Man. C.A.), leave to appeal refused [1994] 5 W.W.R. 1vi (S.C.C.). Where the plaintiff had served the defendant with a statement of claim in another jurisdiction without first obtaining leave, the court validated the service because it was satisfied that, if requested, leave would have been granted: *Khitab v. Boyce* (1987), 83 N.B.R. (2d) 191 (Q.B.). Where a judge at first instance had set aside service out of the jurisdiction, his order was reversed, *inter alia*, because the judge had failed to consider the rule whereby service out of the jurisdiction may be subsequently validated if leave could have been granted in the first instance: *ABP Consultants Ltd./ABP Consultants Ltée v. LeMaistre* (1986), 76 N.B.R. (2d) 404 (C.A.). The court validated service *ex juris*, notwithstanding that it had been made without obtaining leave of the court, where leave would have been granted had such a motion been made before service, since in the circumstances service out was necessary for just determination of the plaintiff's action: *S.M. White (Woodworking) Ltd. v. Biso Roofing & Enterprises Ltd.* (1985), 63 N.B.R. (2d) 349 (Q.B.).

§7 CHOICE OF LAW IN TORT CASES

[1] *Author's Commentary: Choice of Law in Tort Cases*

The fundamental change in the law of jurisdiction and judgments triggered by the *Morguard* decision, and the marked increase it brought about in the opportunities for plaintiffs to choose favourable fora for the resolution of their disputes, proportionately increased the potential for opportunistic choices of forum that would seek to manipulate the outcome of the dispute by obtaining the application of a favourable law. This practice, commonly known as "forum shopping," has been a perennial problem in crossborder litigation, but the ease with which it could be pursued in Canada after the *Morguard* decision created what the Supreme Court of Canada described in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 as a "structural problem." In that case and a companion case, *Lucas v. Gagnon*, the court considered traffic accidents in which the plaintiffs commenced actions in the provinces of their residence rather than in the provinces where the accidents had occurred in an effort to evade restrictions on their actions under the law of the place where the accident had occurred. The court held that the law that should apply in respect of interprovincial torts was the law of the place where the tort occurred (the *lex loci*) without exception. As was explained by La Forest J. on behalf of the majority,

The nature of our constitutional arrangements — a single country with different provinces exercising territorial legislative jurisdiction — would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect

throughout the country. This militates strongly in favour of the *lex loci delicti* rule.

In brief concurring judgments, Justices Sopinka and Major questioned whether such rigidity was necessary. As Major J. pointed out, “La Forest J. has recognized the ability of the parties by agreement to choose to be governed by the *lex fori* and a discretion to depart from the absolute rule in international litigation in circumstances in which the *lex loci delicti* rule would work an injustice.” Sopinka and Major JJ. also suggested that flexibility might occasionally be warranted in the interprovincial setting, but this suggestion did not seem to have the support of the majority. Since the decision in *Tolofson*, Canadian courts, including the Ontario courts in *Hanlan v. Sernesky* (1997), 35 O.R. (3d) 603 (Gen. Div.), affirmed (1998), 38 O.R. (3d) 479 (C.A.) have struggled with the apparent rigidity of the requirement to apply the *lex loci* and, in cases such as *Hanlan*, which have involved international torts, they have occasionally applied the personal law of the parties instead of the *lex loci*: *Wong v. Wei* (1999), 45 C.C.L.T. (2d) 105 (B.C. S.C.); *Buchan v. Non-Marine Underwriters, Lloyd’s London* (1999), 44 O.R. (3d) 685 (S.C.J.); *Gill (Guardian ad litem of) v. Gill*, [2000] B.C.J. No. 1106 (B.C. S.C.); *Wong v. Lee* (2000) 50 O.R. (3d) 419 (S.C.J.); *Gracey v. Skinner Estate*, [2001] O.J. No. 1038 (S.C.J.). In *Lau v. Li* (2001), 26 C.C.L.I. (3d) 94 (Ont. S.C.J.), Mr. Justice Day of the Ontario Superior Court of Justice took the analysis one step further by suggesting that the flexibility that other courts have applied to the determination in international cases should also apply in interprovincial cases. As he pointed out,

Injustice is not simply a platitude: judges are called upon to exercise their discretion whenever patent injustice is staring them in the face. While I recognize that the *lex loci delicti* rule applies in cases involving domestic litigation, its application to this particular case would work a dire injustice. The circumstances of the case at bar summons application of the *lex fori*.

In addition to establishing the application as a general rule of the *lex loci* in crossborder tort cases, the Supreme Court eliminated an anomaly in the common law choice of law rules by holding that limitation periods should be characterized as matters of substantive law. This would ensure that the limitation period of the governing law (*i.e.*, the *lex loci*) would apply, and not the limitation period of the forum, an approach that had once given rise to a large proportion of the opportunistic forum choices because it enabled plaintiffs to re-activate stale claims simply by suing in a forum with a longer limitation period than the one whose law would govern the claim.

[2] Literature

Texts. Castel & Walker *Canadian Conflict of Laws*, 5th ed. (2001) forthcoming. Collins, et al., ed. *Dicey & Morris on the Conflict of Laws*, 13th ed.

(2000). McLachlan & Nygh, eds., *Transnational Tort Litigation: Jurisdictional Principles* (1996). Sharpe, *Interprovincial Product Liability Litigation: Jurisdiction, Enforcement and Choice of Law* (1980).

Periodical literature. J. Walker, "Are We There Yet?: Towards a New Rule for Choice of Law in Tort" (2000), 38 Osgoode Hall L.J. 331. V. Black, "Crash: The Ontario Court of Appeal Bumps into *Tolofson*" (1998), 41 C.C.L.T. (2d) 170. C. Walsh, "Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims" (1997), 76 Can. Bar Rev. 91. J. Swan, "Choice of Forum and Choice of Law: The Implications of the New Criteria for Judicial Control" (1996), 18 Adv. Q. 1. R.M. Junger, "Case Comment: *Tolofson v. Jensen*" (1996), 23 Man. L.J. 689. J.-G. Castel, "Back to the Future! Is the 'New' Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995), 33 Osgoode Hall L.J. 35. P. Kincaid, "*Jensen v. Tolofson* and the Revolution in Tort Choice of Law (1995), 74 Can. Bar Rev. 537. J. McEvoy, "Choice of Law in Torts: The New Rule" (1995), 44 U. New Brunswick L.J. 211.

[3] *Case Law*

For case law on this topic see below 21§6[11] — Choice of law rule re limitation periods: The impact of the decision in *Tolofson v. Jensen*.

§8 MANNER OF SERVICE OUTSIDE ONTARIO

[1] *Author's Commentary: Manner of service outside Ontario*

(a) *Service outside Ontario and the Hague Service Convention*

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters was established to facilitate service abroad by accommodating the concerns of some states ("objecting states") about the use of private process servers to serve court documents. With the amendments to rule 17.05 to implement Canada's accession to the Convention, two distinct regimes now exist: one for non-contracting and the other for contracting states.

If service is to be made in a jurisdiction that is a *non-contracting state* the former practice continues, *i.e.*, the person may be served in a manner provided by the rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service is made, provided that service made in that manner would reasonably be expected to come to the notice of the person to be served: rule 17.05(2). If service is to be made in a *contracting state* the document shall be served (a) through the central authority in the contracting state (for objecting states), or (b) in a manner permitted by Article 10 of the Convention and that would be permitted by the Rules if the document were being served in Ontario: rule 17.05(3) (for non-objecting states).

Based on Article 10, two distinct regimes now exist among contracting states, as well — one for “non-objecting states” and another for “objecting states.” Article 10 provides for the documents to be served in *non-objecting states* directly through “judicial officers, officials or other competent persons of the State of destination,” or by mail. Thus, if a contracting state is a non-objecting state, such as the United States and the United Kingdom, private means of service may still be used as they were before the Convention. (As to which signatory states object or do not object to the methods permitted by Article 10, see below, “Table of Objecting or Non-objecting States.”) Rule 17.05(3) was amended in 1992 to clarify that the Article 10 methods of service may be used only if such methods are permitted by the Ontario Rules if the document were being served in Ontario. Thus, for example, where the document to be served is an originating process it may not be served under the Convention by mail, except in the very limited circumstances provided in rule 16.03(4) and (6).

If the country in which the document is to be served is an *objecting state*, *i.e.*, a state that objects to private service, then service must be made through the Central Authority in the state (and under the Convention each country is required to appoint a Central Authority). With regard to such countries, private service is not permitted by the Convention, even though formerly it would have been recognized and been acceptable in Ontario.

The Convention makes it mandatory where service is being effected through a Central Authority to use certain forms. These forms (which have been added to the Rules) are the request and certificate of service (Form 17A), and the summary of the document to be served (Form 17B). In addition, the Hague Convention has recommended that a document containing a warning and summary of proceedings also be included with any request, and that form has been added to the Rules (Form 17C). Rule 17.05(4) has been amended to provide that service may be proved “in accordance with the Convention, if service is made in a contracting state.” (Part of Form 17A is a certificate to be filled out by the person effecting service that the certificate has been served). Where service is being made under the Convention through the Central Authority in the state where the document is to be served, the request for service and the document to be served are to be furnished in duplicate (Article 3). Pursuant to Article 7, the documentation may be written either in French or English, but the Central Authority may require the document to be translated into the official language or one of the official languages of the state where the document is to be served.

When service is being made in a “non-objecting” state by mail or through a private agent, it is not necessary to use either Form 17A or 17B. Form 17C (summary of documents to be served) is not in fact a document mandated by the Convention. Rather it is one that is merely recommended by the Hague Convention, however, it is one that is recommended for use “whether or not the service is effected through the channels of the Central Authorities created

under the . . . Convention.” Consequently, it would seem that in all cases the use of Form 17C is optional.

(b) *Default proceedings*

Article 15 of the Convention deals with proceedings in default of appearance where an originating process has been transmitted abroad for the purpose of service, under the provisions of the Convention. If the defendant has not appeared, judgment shall not be given until it is established that (a) the document was served by a method prescribed by the internal law of the state addressed for the service of documents in domestic actions upon persons who are within its territory, or (b) the document was actually delivered to the defendant or to his or her residence by another method provided for by the Convention and that in either case, the service or the delivery was effected in sufficient time to enable the defendant to defend. However, it is further provided that every contracting state shall be free to declare that a judge, notwithstanding the above, may give judgment even if no certificate of service of delivery has been received if all of the following conditions are fulfilled: (a) the document was transmitted by one of the methods provided for in the Convention, (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, (c) no certificate of any kind has been received even though every reasonable effort has been made to obtain it through the competent authorities of the state addressed. (It is also provided that, notwithstanding these provisions, a judge may order, “in case of urgency, any provisional or protective measures.”) The Government of Canada has declared that judges may give judgment, as provided in Article 15, even if no certificate of service or delivery has been received, subject to the conditions spelled out in Article 15. (See below, “Canadian Declaration Pursuant to the Convention.”)

(c) *Setting aside default judgment*

Article 16 deals with setting aside default judgments. It provides that where a judgment has been entered against a defendant who has not appeared (other than a judgment concerning status or capacity of persons) the judge has power to “relieve the defendant from the effects of the expiration of the time for appeal from the judgment” if the following conditions are fulfilled: (a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and (b) the defendant had disclosed a *prima facie* defence to the action on the merits. The Government of Canada has declared that “an application filed under Article 16 of the Convention will not be entertained if it is filed after the expiration of one year following the date of the judgment, except in exceptional cases determined by the rules of the court seized of the matter.” (See below, “Canadian Declaration Pursuant to the Convention.”)

(d) *Substituted service*

While the rule on substituted service (rule 16.04) has not been specifically amended, it would seem that rule 17.05 would affect a request for an order for substituted service where the person to be served resides in a contracting state in the following way. The court's power to order substituted service or to dispense with service is dependent, under the rule, on a showing that "it is impractical for any reason to effect prompt service." It seems that a court will (and should) require a showing that service has been attempted pursuant to the Convention and has proved unsuccessful. Even where it has proved unsuccessful an order for substituted service might be refused in light of the fact that the Convention itself provides for a method of obtaining default judgment where no certificate of service or delivery has been received (Article 15 and see discussion above).

[2] *Hague Service Convention*(a) *Text of the Hague Service Convention*

The text of the Convention is in both English and French. Only the English text is reproduced here. Following the text of the Convention are two sections containing lists of the declarations of states parties under Article 10 and of the bilateral treaties that Canada has entered into in respect of service of documents.

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND
EXTRAJUDICIAL DOCUMENTS IN CIVIL OR
COMMERCIAL MATTERS

(Concluded November 15, 1965)

The States signatory to the present Convention,

DESIRING to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

DESIRING to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

HAVE RESOLVED to conclude a Convention to this effect and have agreed upon the following provisions:

ARTICLE I

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER 1 — JUDICIAL DOCUMENTS

ARTICLE 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

ARTICLE 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legislation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

ARTICLE 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

ARTICLE 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either —

- (a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or
- (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

ARTICLE 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

ARTICLE 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

ARTICLE 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

ARTICLE 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

ARTICLE 10

Provided the State of destination does not object, the present Convention shall not interfere with —

- (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

ARTICLE 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

ARTICLE 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by —

- (a) the employment of a judicial officer or of a person competent under the law of the State of destination,
- (b) the use of a particular method of service.

ARTICLE 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

ARTICLE 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

ARTICLE 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Conven-

tion, and the defendant has not appeared, judgment shall not be given until it is established that —

- (a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
- (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled —

- (a) the document was transmitted by one of the methods provided for in this Convention,
- (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

ARTICLE 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled —

- (a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and
- (b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II — EXTRAJUDICIAL DOCUMENTS

ARTICLE 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III — GENERAL CLAUSES

ARTICLE 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

ARTICLE 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

ARTICLE 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with —

- (a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3,
- (b) the language requirements of the third paragraph of article 5 and article 7,
- (c) the provisions of the fourth paragraph of article 5,
- (d) the provisions of the second paragraph of article 12.

ARTICLE 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following —

- (a) the designation of authorities, pursuant to articles 2 and 18,
- (b) the designation of the authority competent to complete the certificate pursuant to article 6,
- (c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of —

- (a) opposition to the use of methods of transmission pursuant to articles 8 and 10,
- (b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,
- (c) all modifications of the above designations, oppositions and declarations.

ARTICLE 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

ARTICLE 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

ARTICLE 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the parties have otherwise agreed.

ARTICLE 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the

matters governed by this Convention to which the contracting States are, or shall become, Parties.

ARTICLE 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

ARTICLE 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

ARTICLE 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

ARTICLE 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

ARTICLE 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

ARTICLE 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following —

- (a) the signatures and ratifications referred to in article 26;
- (b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;
- (c) the accessions referred to in article 28 and the dates on which they take effect;
- (d) the extensions referred to in article 29 and the dates on which they take effect;
- (e) the designations, oppositions and declarations referred to in article 21;
- (f) the denunciations referred to in the third paragraph of article 30.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to

each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

(b) *Canadian Declaration pursuant to the Convention*

For the complete text of the Canadian accession document (and the text of the Convention in both English and French) see the Canada Treaty Series 1989, No. 2 (Law: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In force for Canada May 1, 1989.) In large part, the accession document is concerned with matters that are of interest to foreign practitioners and Canadian civil servants, *i.e.*, how to serve foreign documents in Canada pursuant to the treaty, *e.g.*, who is the Central Authority, *etc.* However, that part of the accession document which is concerned with declarations made by the Government of Canada pursuant to Article 15, para. 1 or Article 16, para. 3 is important for Canadian practitioners. That part of the accession document is as follows:

(Accessions September 26 1988 — entry into force May 1st 1989)

GUARANTEES UNDER THE CONVENTION

Declarations made pursuant to Articles 15, paragraph 1, or 16, paragraph 3.

1. Stays of entry (Article 15, paragraph 2)

Canada declares that the judges may give judgment under the conditions stated in Article 15 of the Convention.

2. Relief from expiration of the period of time for appeal (article 16, paragraph 3)

Canada declares that an application filed under Article 16 of the Convention will not be entertained if it is filed after the expiration of one year following the date of the judgment, except in exceptional cases determined by the rules of the court seized of the matter.

(c) *Table of objecting and non-objecting states under Article 10*

Under Article 10 of the Convention, *provided the state of destination does not object*, the Convention does not interfere with (a) the freedom to send judicial documents by postal channels directly to persons abroad; (b) the freedom of judicial officers, officials, or other competent persons of the state of origin to effect service of judicial documents directly through the judicial officers, officials, or other competent persons of the state of destination; or (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials, or other competent persons of the state of destination.

The following is information as to the position taken by Canada and those other countries that had acceded to or ratified the Convention as of May 8,

2001 as to whether or not they object to the modes of service referred to in Article 10. The source of this is the Hague Conference website at www.hcch.net.

Antigua and Barbuda — With reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

Bahamas — no declaration in respect of Article 10.

Barbados — no declaration that it objects to any of the methods of transmission referred to in Article 10.

Belarus — no declaration in respect of Article 10.

Belgium — no declaration that it objects to any of the methods of transmission referred to in Article 10.

Belize — with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

Botswana — objects to the methods of service referred to in Article 10, paras. (b) and (c). It does not object to service by postal channels, however, service by mail is not permissible in respect of matters concerning proceedings in the High Court, but only, in certain circumstances, regarding proceedings in the Magistrates' Courts (by registered mail).

Bulgaria — objects to the use of the channels of transmission for service mentioned in Article 10 of the Convention.

Canada — does not object to service by postal channels.

China — opposes the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention.

China (Hong Kong Special Administrative Region only) — with reference to the provisions of sub-paragraphs b and c of Article 10 of the Convention, documents for service through official channels will be accepted in the Hong Kong Special Administrative Region only by the Central Authority or other authority designated, and only from judicial, consular or diplomatic officers of other Contracting States.

China (Macau Special Administrative Region only) — no information given with regard to whether or not there is an objection with regard to Article 10.

Cyprus — no opposition to the methods of transmission of documents provided by these articles.

Czech Republic — judicial documents may not be served by another Contracting State through postal channels nor through the judicial officers, officials or other competent persons.

Denmark — unable to recognize the method of effecting service set out in Article 10, para. c.

Egypt — opposes the use of the methods of transmitting abroad the Judicial and Extra-Judicial Documents according to Articles 8 and 10 of the Convention.

Estonia — is against the way of forwarding referred to in point c of Article 10.

Finland — no declaration that it objects to service by postal channels. With regard to paras. (b) and (c) it has stated that Finnish authorities are not obliged to assist in serving documents transmitted by using any of the methods referred to in those paragraphs.

France — no declaration that it objects to the utilization of postal channels. With regard to the other methods referred to in Article 10, the accession document appears to be unclear, but does not contain a statement that France objects to the methods of service provided for in paras. (b) and (c).

Federal Republic of Germany — objects to the methods of service provided for in Article 10.

Fiji — with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

Greece — opposed to the method of service provided in Article 10.

Ireland — objects to

(i) the freedom under Article 10(b) of judicial officers, officials or other competent persons of the State of origin to effect service in Ireland of judicial documents directly through judicial officers, officials or other competent persons and

(ii) the freedom under Article 10(c) of any person interested in a judicial proceeding to effect service in Ireland of judicial documents directly through judicial officers, officials or other competent persons, but this is not intended to preclude any person in another Contracting State who is interested in a judicial proceeding (including his lawyer) from effecting service in Ireland directly through a solicitor in Ireland.

Israel — will, in what concerns Article 10, paragraphs (b) and (c), of the Convention, effect the service of judicial documents only through the Directorate of Courts, and only where an application for such service emanates from

a judicial authority or from the diplomatic or consular representation of a Contracting State.

Italy — no declaration that it objects to the use of any of the methods provided in Article 10.

Japan — no declaration that it objects to service through postal channels, but has declared that it objects to the use of the methods of service referred to in paras. (b) and (c).

Luxembourg — has declared that it does not object to service through postal channels. It has further declared that “judicial acts sent from abroad and served pursuant to Article 10, subparas. (b) and (c), through a Luxembourg huissier, should be written in French or German or accompanied by a translation into one of these languages.

Kiribati — with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

Republic of Korea — objects to the following:

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officials or other competent persons of the State of destination.
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Latvia — no information.

Luxembourg — was opposed to judicial documents being sent through postal channels to persons residing within its territory, but communicated the withdrawal of this declaration by a Note dated 2 June 1978.

Malawi — no information.

Mexico — opposed to the direct service of documents through diplomatic or consular agents to persons in Mexican territory according to the procedures described in sub-paragraphs (a), (b), and (c), unless the judicial authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of the formalities whose application is required to effect service of the document.

Netherlands — no declaration of any objection to service by the methods provided in Article 10.

Norway — objects to each of the methods of services provided for in Article 10.

Pakistan — no objection to such service by postal channels directly to the persons concerned (Article 10(a)) or directly through the judicial officers of Pakistan in terms of Article 10(b) of the Convention if such service is recognised by the law of the requesting State.

Poland — opposed to the modes of service specified in Article 10 within its territory.

Portugal — no declaration that it objects to service through postal channels. With regard to the other methods referred to in Article 10, no information is available.

Russian Federation — no information.

Saint Lucia — with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

Saint Vincent and the Grenadines — with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

St. Kitts and Nevis — with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

Seychelles — no objection to service through postal channels, but objects to service under paras. (b) and (c) insofar as they permit service of judicial documents through officials or persons other than judicial officers.

Slovakia — is bound by declarations made by Czechoslovakia as well as objections by Czechoslovakia in respect of reservations made by other treaty parties.

Solomon Islands — with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

Spain — no declaration in respect of Article 10.

Sweden — no objection to service through postal channels. As to the methods provided in paras. (b) and (c), Sweden has declared that its authorities are not obliged to assist in serving documents transmitted by using any of the methods referred to in those paragraphs.

Switzerland — opposed to the use in its territory of the methods of transmission provided for in Article 10.

Turkey — objects to service by any of the methods referred to in Article 10.

Tuvalu — with reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States.

United Kingdom — does not object to service through postal channels. Initially, the United Kingdom declared that with regard to the methods provided in paras. (b) and (c), documents for service through official channels would be accepted in the United Kingdom only by the central or additional authorities and only from judicial, consular or diplomatic officers of other contracting states. Subsequently, it has indicated that this declaration does not preclude any person in another contracting state who is interested in a judicial proceeding (including his or her lawyer) from effecting service in the United Kingdom directly through a solicitor in the United Kingdom.

United States — does not object to any of the methods referred to in Article 10. However, with reference to the provisions in paragraphs (b) and (c), the accession document indicates that these methods are “virtually unknown in the United States (although isolated instances of such service between Canadian and United States jurisdictions adjoining the American/Canadian border are known to have taken place).”

Venezuela — does not agree to the transmission of documents through postal channels.

[3] *Bilateral Treaties*

The Convention does not override bilateral agreements between contracting states for the service of documents abroad, and either procedure may be used where a state is a signatory to both the Convention and a bilateral agreement (Article 11). Canada is a party to 19 such treaties, which typically involve the use of diplomatic channels for service and appear to be rarely used in practice: Austria, C.T.S. 1935/16, C.T.S. 1952/3; Belgium, C.T.S. 1928/16, C.T.S. 1937/4; Czechoslovakia, C.T.S. 1928/17; Denmark, C.T.S. 1936/4; Finland, C.T.S. 1936/5; France, C.T.S. 1928/15; Germany, C.T.S. 1935/11, C.T.S. 1953/17; Greece, C.T.S. 1938/11; Hungary, C.T.S. 1939/6; Iraq, C.T.S. 1938/12; Italy, C.T.S. 1935/14; The Netherlands, C.T.S. 1936/2; Norway, C.T.S. 1935/15; Poland, C.T.S. 1935/18; Portugal, C.T.S. 1935/17; Spain,

C.T.S. 1935/12; Sweden, C.T.S. 1935/13; Turkey, C.T.S. 1935/19; Yugoslavia, C.T.S. 1939/4.

[4] *Literature*

Texts. Castel & Walker *Canadian Conflict of Laws*, 5th ed. (2001) forthcoming. Collins, et al., ed. *Dicey & Morris on the Conflict of Laws*, 13th ed. (2000). D. McClean, *International Judicial Assistance* (1992). *Practical Handbook on the Operation of the Hague Convention of 15 November, 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (1983). The Commonwealth Secretariat, *The Hague Conventions on the Service of Process, the Taking of Evidence and Legislation, Explanatory Documentation Prepared for Commonwealth Jurisdictions* (London: 1979).

Periodical literature. *Note:* in addition to the following, the Hague Conference website at www.hcch.net contains a bibliography on this convention. J. Gregory, "The Hague Service Abroad Convention" (1990), 11 *Advocates' Q.* 327. Horlick, "A Practical Guide to Service of United States Process Abroad" (1980), 14 *The Int'l Lawyer* 648. Boyd, "Contemporary Practice of the United States Relating to International Law — The Hague Service Convention" (1978), 72 *American Journal of International Law* 130. Downs, "The Effect of the Hague Convention on Service Abroad of Judicial or Extrajudicial Documents in Civil or Commercial Matters" (1968), 1 *Cornell International Law Journal* 125. Graveson, "The Tenth Session of the Hague Conference on Private and International Law" (1965), *International and Comparative Law Quarterly* 528. Horlick, "Service of Process and Other Documents Abroad" in *American Bar Association, Problems in Transnational Litigation*, 1980, 23.

[5] *Case Law: Rule 17.05 — Manner of Service outside Ontario*

Ontario cases. A defendant who delivered a notice of intent to defend waived the right to challenge whether service of the statement of claim in France by courier was invalid under the *Hague Convention: Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), leave to appeal refused (2000), 52 O.R. (3d) 20 (Div. Ct.). Where there was no evidence that the service of an originating process under the Hague Convention was impractical, the court refused to grant an order for substituted service: *Dofasco Inc. v. Ucar Carbon Canada Inc.* (1998), 27 C.P.C. (4th) 342 (Ont. Gen. Div.). Substituted service by mailing to an address out of Ontario is permissible: *Rabichaud v. Rabichaud*, [1948] O.W.N. 727 (C.A.) (*Note:* pre-Convention case).

Non-Ontario cases. Although service by mail out of the jurisdiction was invalid for not complying with the rules of either Newfoundland or the jurisdiction where service was to be made, the court refused to set aside service; although the mode of service was irregular, the defendant was fully aware of the action having been taken against him: *Garbett Estate v. Universal Helicopters (Nfld.) Ltd.* (1988), 69 Nfld. & P.E.I.R. 153 (Nfld. C.A.). Where in serving out of the jurisdiction the plaintiff served the defendants in accordance with the domestic law, but not in accordance with the foreign law at the place of service, it was held that the service was valid in the absence of any ratified treaty requiring the domestic plaintiff to meet the procedural

17§8

SERVICE OUTSIDE ONTARIO

requirements of the foreign jurisdiction: *Abitibi-Price Sales Corp. v. "Wilhelm Wesch" (The)*,
[1987] 2 F.C. 579 (T.D.).