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The CJPTA: A Decade of Progress

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Article 1

Judicial Jurisdiction in Canada: The CJPTA—A Decade of Progress

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Judicial Jurisdiction in Canada: The CJPTA—A Decade of Progress

Abstract

In 2016, the Court Jurisdiction and Proceedings Transfer Act (“CJPTA”) marked its tenth year in force. Promulgated by the Uniform Law Conference of Canada, and adopted in British Columbia, Saskatchewan and Nova Scotia, the CJPTA was developed to clarify and advance the law of judicial jurisdiction. In a symposium hosted by Osgoode Hall Law School, ten leading scholars were invited to present papers on specific questions in order to assess the promise of the CJPTA to meet the needs of Canadians in the years ahead and to provide leadership for the law in other parts of Canada. This article provides an overview of the issues discussed in the symposium; it places the papers that were presented in the larger context of developments in the law of judicial jurisdiction in Canada and internationally; and it summarizes in an appendix the drafting reforms that might be made to the Act.

Cover Page Footnote

The author wishes to thank Professor Joost Blom for his astute and helpful comments on the draft of this paper.

Special Issue
The *CJPTA*: A Decade of Progress

Judicial Jurisdiction in Canada: The *CJPTA*—A Decade of Progress

JANET WALKER*

In 2016, the *Court Jurisdiction and Proceedings Transfer Act* (“*CJPTA*”) marked its tenth year in force. Promulgated by the Uniform Law Conference of Canada, and adopted in British Columbia, Saskatchewan and Nova Scotia, the *CJPTA* was developed to clarify and advance the law of judicial jurisdiction. In a symposium hosted by Osgoode Hall Law School, ten leading scholars were invited to present papers on specific questions in order to assess the promise of the *CJPTA* to meet the needs of Canadians in the years ahead and to provide leadership for the law in other parts of Canada. This article provides an overview of the issues discussed in the symposium; it places the papers that were presented in the larger context of developments in the law of judicial jurisdiction in Canada and internationally; and it summarizes in an appendix the drafting reforms that might be made to the Act.

* Professor, Osgoode Hall Law School. The author wishes to thank Professor Joost Blom for his astute and helpful comments on the draft of this paper.

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I. THE COMMON LAW AND THE CJPTA

IN 2016, THE COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT (“*CJPTA*”) marked its tenth year in force. Promulgated by the Uniform Law Conference of Canada (“ULCC”),¹ and adopted in Saskatchewan, British Columbia, and Nova Scotia,² the *CJPTA* was developed to clarify and advance the law of judicial jurisdiction. In a symposium hosted by Osgoode Hall Law School,³ ten leading scholars were invited to present papers on specific questions

1. Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting*, Appendix C: *Court Jurisdiction and Proceedings Transfer Act*, online: <www.ulcc.ca/images/stories/1994_EN_pdf/1994ulcc0008_Court_Jurisdiction_Proceedings_Transfer_Act.pdf> at 140 [*CJPTA*].
2. *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 [*CJPTA* (SK)]; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [*CJPTA* (BC)]; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, c 2 (2nd Sess) [*CJPTA* (NS)]. The *CJPTA* came into force in 2004, 2006, and 2008 respectively in these provinces.
3. And supported by generous funding from the Social Sciences and Humanities Research Council of Canada and Lerner LLP.

in order to assess the promise of the *CJPTA* to meet the needs of Canadians in the years ahead and to provide leadership for the law in other parts of Canada.⁴ A number of these papers have been published as articles in this Special Issue of the *Osgoode Hall Law Journal*.

This article provides an overview of the issues discussed in the symposium, and it places the papers that were presented in the larger context of developments in the law of judicial jurisdiction in Canada and internationally. Part I of this article summarizes the developments leading up to the symposium; it comments on the consideration of the differences today between the common law and the *CJPTA* contained in the first symposium paper,⁵ and it notes the results of an empirical study of the impact of the state of the law of jurisdiction on access to justice.⁶ Parts II–IV of this article then comment on the issues that were considered in the remaining papers, and Part V offers some further thoughts on the decade ahead.

The sequence of the issues considered in the papers discussed in Parts II–VI of this article follow the structure of the *CJPTA*. The main bases of jurisdiction (consent and general jurisdiction), which are provided for in section 3 of the *CJPTA*, were addressed in the second, third and fourth papers of the symposium,⁷ with special attention being given in the third paper to questions of access to local courts for consumers and other vulnerable groups.⁸ These issues are considered in Part II of this article.

The courts' discretion to accept jurisdiction in exceptional situations, which is found in section 6 of the *CJPTA*, was addressed in the fifth paper of

4. Many of these papers are contained in this Special Issue of the *Osgoode Hall Law Journal*.

5. Stephen Pitel, "Six of One, Half a Dozen of the Other? Jurisdiction in Common Law Canada" (2018) 55:1 *Osgoode Hall LJ* 63.

6. Gerard J Kennedy, "Jurisdiction Motions and Access to Justice: An Ontario Tale" (2018) 55:1 *Osgoode Hall LJ* 79.

7. Geneviève Saumier, "Has the *CJPTA* readied Canada to adopt The *Hague Choice of Court Convention*?" (2018) 55:1 *Osgoode Hall LJ* 141; John McEvoy, "Conflict of Laws and Consumer Contracts in Canada" (Paper delivered at the *CJPTA*: A Decade of Progress, University Club of Toronto, 21 October 2016) [unpublished]; Catherine Walsh, "General Jurisdiction over Corporate Defendants under the *CJPTA*: Consistent with International Standards?" (2018) 55:1 *Osgoode Hall LJ* 163. In comparing the *CJPTA* to the common law, Pitel incidentally considers issues (including the "real and substantial connection") relating to the grounds for service outside the jurisdiction. See Pitel, *supra* note 5.

8. McEvoy, *supra* note 7.

the symposium and in an additional paper prepared for this Special Issue;⁹ and the courts' discretion to decline to exercise jurisdiction, which is provided for in section 11 of the *CJPTA*, was addressed in the sixth paper.¹⁰ These issues are considered in Part III of this article.

The mechanisms for transferring proceedings, which are provided for in Part 3 of the *CJPTA*, were considered in the seventh paper;¹¹ and questions of the scope of the *CJPTA*, which are highlighted by jurisdiction over family law matters were considered in the eighth paper.¹² The implications of the *CJPTA* for the recognition and enforcement of judgments within Canada and elsewhere were considered in the ninth paper; and the implications of the *CJPTA* for Canada's participation in international regimes for the recognition and enforcement of judgments were considered in the tenth paper.¹³ These issues are considered in Part IV of this article.

As mentioned above, this article concludes with some observations about the future of the *CJPTA*. At the end of the article, there is an appendix that contains suggestions for drafting amendments that reflect the observations made on possible reforms to the *CJPTA* throughout this article.

A. TWO HISTORIES: *MORGUARD* AND THE *CJPTA*

Although the *CJPTA* has been in force for only a decade, its history dates back to its development in 1993 by the Uniform Law Conference of Canada. The path of its development has crisscrossed that of the common law since that time. Tracing

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9. Michael Sobkin, "Residual Discretion: The Concept of Forum of Necessity Under the Uniform *Court Jurisdiction and Proceedings Transfer Act*" (2018) 55:1 Osgoode Hall LJ 203; Sagi Peari, "Three Objections to Forum of Necessity: Global Access to Justice, International Criminal Law, and Proper Party" (2018) 55:1 Osgoode Hall LJ 225.
 10. Elizabeth Edinger, "Discretion and the *CJPTA*" (Paper delivered at The *CJPTA*: A Decade of Progress, University Club of Toronto, 21 October 2016) [unpublished] at 7.
 11. Vaughan Black, "Cross-Border Transfers of Court Proceedings" (2018) 55:1 Osgoode Hall LJ 239.
 12. Martha Bailey, "Judicial Jurisdiction Rules for Family Law Matters" (Paper delivered at The *CJPTA*: A Decade of Progress, University Club of Toronto, 21 October 2016) [unpublished].
 13. Angela Swan, "The Other End of the Process: Enforcement of Judgments" (Paper delivered at The *CJPTA*: A Decade of Progress, University Club of Toronto, 21 October 2016) [unpublished]; Joost Blom, "How might the *CJPTA* function in light of the current Hague Conference multilateral judgments convention project and, ultimately, one harmonizing judicial jurisdiction?" (Paper delivered at The *CJPTA*: A Decade of Progress, University Club of Toronto, 21 October 2016), "The *Court Jurisdiction Proceedings Transfer Act* and the Hague Conference's Judgments and Jurisdiction Projects" (2018) 55:1 Osgoode Hall LJ 257.

the paths of the common law and the *CJPTA* provides an important context for the issues considered in the symposium.

A quarter of a century ago, following the introduction of new rules for the recognition and enforcement of judgments in Canada, it was suggested that the new rules could have implications for the law of jurisdiction.¹⁴ The Supreme Court of Canada had held in *Morguard Investments Ltd v De Savoye*¹⁵ that a Canadian court should recognize a judgment from another Canadian court where that court had exercised “properly restrained jurisdiction” because the standards for jurisdiction (exercised by the court issuing the judgment and the court enforcing it) should correlate with one another.¹⁶ It follows from this that the standards for appropriately exercised jurisdiction would also need to be reviewed to ensure that they would be suitable bases on which the resulting judgments could fairly be accorded “full faith and credit,” to use the term made familiar by US law and jurisprudence.

To achieve this, the ULCC initiated a project to codify the law of jurisdiction “to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction.”¹⁷ The project resulted in the development of the *CJPTA*, a uniform Act that the ULCC adopted in 1994.¹⁸ Also during this period, a new book—Book X—was added to the *Civil Code of Québec* (“CCQ”) to provide codified principles for Quebec courts in cross-border matters. Title 3 of Book X, which contains the rules on jurisdiction, also came into force in 1994.¹⁹

The new rules introduced by the Supreme Court of Canada did not present significant “correlation” concerns for the traditional grounds of jurisdiction—those over local defendants and over defendants who consented to the court’s

14. Vaughan Black, “The Other Side of *Morguard*: New Limits on Judicial Jurisdiction” (1993) 22:1 Can Bus LJ 4.

15. [1990] 3 SCR 1077, 76 DLR (4th) 256 [*Morguard*].

16. *Ibid* at para 42.

17. Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting* (Charlottetown, 1994) at 48, online: <www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/739-jurisdiction/civil-jurisdiction/1730-court-jurisdiction-proceedings-transfer-act>.

18. See Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012).

19. Book Ten CCQ [CCQ].

jurisdiction.²⁰ It was already well accepted that a judgment would be enforced where it was issued by a court against a defendant who was a local person in that forum or who had consented to the court's jurisdiction. To be fair, the designations of when a defendant was to be regarded as a local defendant and when a defendant was to be regarded as consenting raised interpretive questions, but in principle these grounds were and continue to be recognized widely in other common law countries for the purposes of enforcement.

However, the new rules did raise the question of binding defendants from outside the forum who did not consent or defend. The courts were now expected to recognize the judgments of courts that had exercised properly restrained jurisdiction in these circumstances. This was said to occur when there was a "real and substantial connection" between the matter and the forum, which it was said would meet the constitutional requirements of the principles of order and fairness. If this was to be a correlative of the jurisdiction that the courts themselves exercised, it raised the question of what would qualify as a real and substantial connection such that it would constitute the exercise of jurisdiction appropriately so as to meet the constitutional requirement.²¹

Until then, common law courts in Canada had exercised jurisdiction on the basis of lists of grounds for serving defendants outside the forum that were found in rules of civil procedure. The lists had long histories that were not well documented. The lists were similar to one another but not entirely uniform among the common law provinces or between common law provinces in Canada and other common law countries; nor were the lists based on any readily recognized underlying premise. Indeed, while many of the listed grounds seemed to relate to events giving rise to the claim that had occurred in the forum, some of them clearly did not.²² As was later explained, these lists were developed as rules for service out, not as a means of exhaustively defining the scope of

20. These rules, however, are subject to issues arising from the archaic common law view that general jurisdiction over individuals was based on physical presence. See Pitel, *supra* note 5 at 69. For a discussion regarding issues about general jurisdiction over corporations, see Walsh, *supra* note 7 at 167.

21. *Ibid.*

22. See *e.g.* *Rules of Civil Procedure*, RRO 1990, Reg 194, r 17.02(h) [*RCP*]. Rule 17.02(h) was revoked by O Reg 231/13, s 5. See also *ibid.*, r 17.02(o). Rule 17.02(o) was revoked by O Reg 43/14, s 6.

jurisdiction.²³ Still, the Supreme Court of Canada acknowledged that “they represent an expression of wisdom and experience drawn from the life of the law”²⁴ and, on this view, should be considered carefully in any reform.

The drafters of the *CJPTA* sought to articulate an underlying principle that was consistent with the Supreme Court of Canada’s pronouncement and to rationalize the list of grounds for service out. According to the *CJPTA*, a court is permitted to exercise jurisdiction in general where “there is a real and substantial connection between [the forum] ... and the facts on which the proceeding against that person is based.”²⁵ Having offered a definition of real and substantial connection, the drafters of the *CJPTA* also reviewed the grounds that typically appeared in the rules for service outside the province to determine which of them fit this definition. The grounds that did not fit, such as “damages sustained in the province”²⁶ and “necessary or proper parties,”²⁷ were omitted from the list to be included in the *CJPTA*.

B. THE *MUSCUTT* TEST: “REAL AND SUBSTANTIAL CONNECTION” DEFINED?

As the years passed, no clarity emerged in the common law on what constituted a real and substantial connection despite the jurisprudence and academic commentary. To be fair, the disparities between the rules for service out and those that would meet the constitutional requirements of order and fairness affected only a small number of cases, and so the concerns took some time to develop. However, the issue came to a head in a case in which a plaintiff asked the courts of Ontario to exercise jurisdiction over a personal injury claim in respect of a traffic accident that had occurred in Alberta. The plaintiff who had moved from Ontario to Alberta before the accident, sought to rely upon the “damages sustained in the province” (*i.e.*, Ontario) on the premise that he had

23. See *Van Breda v Village Resorts Ltd*, 2010 ONCA 84 at para 72, 98 OR (3d) 721 [*Van Breda* (CA)]. It is explained that:

In *Muscutt*, at para. 51, we adopted a statement from Janet Walker in G.D. Watson & L. Jeffrey, eds., *Holmested and Watson: Ontario Civil Procedure* (Carswell: Toronto, 2001), at p. 17-19, that the grounds outlined in rule 17.02 “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.”

24. *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 88, [2012] 1 SCR 572, LeBel J [*Van Breda* (SCC)].

25. *CJPTA*, *supra* note 1, s 3(e).

26. See discussion of former Rule 17.02(h) in *supra* note 22.

27. See discussion of former Rule 17.02(o) in *supra* note 22.

resumed his residence in Ontario following the accident and continued to suffer damages while in Ontario. The defendant argued that even if Canadian courts had historically exercised jurisdiction on this basis, this was not the kind of real and substantial connection contemplated by the constitutional requirements of the principles of order and fairness, and the court was constitutionally incapable of exercising jurisdiction.²⁸

To consider this, the Court of Appeal for Ontario convened a panel of five judges in 2002 to hear this appeal and four other appeals in companion cases raising similar issues in various circumstances.²⁹ The Court of Appeal held that the rules for service *ex juris* were merely a rough guide to the constitutionally permissible bases for jurisdiction. The court formulated an eight-factor test for determining whether there was a real and substantial connection, which came to be known as the “*Muscutt* test.”³⁰

The test included factual and evaluative factors that were all to be assessed, but in a flexible and non-hierarchical way. In particular, after assessing the connections between the claim and the forum and the defendant and the forum, courts were asked to consider the unfairness to the defendant in assuming jurisdiction and the unfairness to the plaintiff in not assuming jurisdiction. Commentators expressed concerns about the indeterminacy of the *Muscutt* test and the way in which its case-specific flexibility³¹ and consideration of fairness to each of the parties conflated the test for *forum non conveniens* with the test for

28. *Muscutt v Courcelles* (2002), 60 OR (3d) 20, 213 DLR (4th) 577 (CA) [*Muscutt* cited to OR].

29. *Ibid*; *Leufkens v Alba Tours International Inc* (2002), 60 OR (3d) 84, 213 DLR (4th) 614 (CA); *Lemmex v Sunflight Holidays Inc* (2002), 60 OR (3d) 54, 213 DLR (4th) 627 (CA); *Sinclair v Cracker Barrel Old Country Store Inc* (2002), 60 OR (3d) 76, 213 DLR (4th) 643 (CA); *Gajraj v DeBernardo* (2002), 60 OR (3d) 68, 213 DLR (4th) 651 (CA). See also Janet Walker, “Beyond Real and Substantial Connection: The *Muscutt* Quintet” in Todd Archibald & Michael Cochrane, eds, *Annual Review on Civil Litigation* (Toronto: Carswell, 2002) 61 [Walker, “*Muscutt* Quintet”].

30. The eight factors were: (1) the connection between the forum and the plaintiff’s claim; (2) the connection between the forum and the defendant; (3) unfairness to the defendant in assuming jurisdiction; (4) unfairness to the plaintiff in not assuming jurisdiction; (5) the involvement of other parties to the suit; (6) the court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (7) whether the case is interprovincial or international in nature; and (8) comity and the standards of jurisdiction, recognition, and enforcement prevailing elsewhere. See *Muscutt*, *supra* note 28 at paras 76-107.

31. See text accompanying note 37 below.

jurisdiction *simpliciter*.³² In time, in a move that might be described as “voting with their feet,” some provinces chose to eliminate the confusion associated with the common law standards by adopting the *CJPTA*.³³

Having come together briefly in the first part of the 1990s, and then again in the early 2000s, the common law and the *CJPTA* largely, but not entirely, parted ways once again. On the one hand, there continued to be debate in the jurisprudence about the extent to which the common law should be regarded as a source of interpretation for the *CJPTA* provisions.³⁴ On the other hand, the common law continued to struggle on in its own search for clarity.

C. MUSCUTT GIVES WAY TO VAN BREDA

In spring of 2009, the Law Commission of Ontario released a Consultation Paper³⁵ seeking input on possible reform to the law of judicial jurisdiction. In particular, the Consultation Paper asked stakeholders for their views on the potential benefits of codifying the law of judicial jurisdiction in view of perceived uncertainty in the law, the implications for increased expense to parties in the preliminary stages of litigation, and the barriers this might create to access to justice. It further asked stakeholders for their views on the value of consistency in the law of jurisdiction among the superior courts of the provinces and territories and on the merits of adopting a statute based on the *CJPTA* which, at that time, had been implemented by British Columbia, Saskatchewan, and Nova Scotia.

Responses were received by a number of organizations and individuals, including: The Advocates’ Society; The Toronto Opinion Group; members of the profession, such as Alejandro Manevich of Heenan Blaikie LLP; scholars such as Professors Vaughan Black and Stephen Pitel, and specialists in private

32. Walker, “*Muscutt Quintet*,” *supra* note 29; *Coutu v Gauthier (Succession de)*, 2006 NBCA 16, 296 NBR (2d) 34 [*Coutu*]; *Fewer v Sayisi Dene Education Authority*, 2011 NLCA 17, 305 Nfld & PEIR 39 [*Fewer*].

33. In Saskatchewan, the *CJPTA* entered into force in 2004. See *CJPTA* (SK), *supra* note 2. In British Columbia, the *CJPTA* entered into force in 2006. See *CJPTA* (BC), *supra* note 2. In Nova Scotia, the *CJPTA* entered into force in 2008. See *CJPTA* (NS), *supra* note 2. In Prince Edward Island, the *CJPTA* has not yet entered into force. See *Court Jurisdiction and Proceedings Transfer Act*, SPEI 1997, c 61. In the Yukon, the *CJPTA* has been enacted but has not yet entered into force. See *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7.

34. Pitel cites two cases as examples of this divergence of view: *Bouch v Penny (Litigation Guardian of)*, 2009 NSCA 80, 281 NSR (2d) 238 [*Bouch*]; *Stanway v Wyeth Pharmaceuticals Inc*, 2009 BCCA 592 at para 73, 314 DLR (4th) 618. See Pitel, *supra* note 5 at 66.

35. Janet Walker, “Consultation Paper: Reforming the Law of Crossborder Litigation - Judicial Jurisdiction” (Paper delivered to the Law Commission of Ontario, March 2009), online: <ssrn.com/abstract=1491169>.

international law from other countries including Professor Richard Garnett (Australia) and Professor Catherine Kessedjian (France). Responders directed their comments to a range of issues canvassed in the consultation, but many agreed that there was uncertainty in the law and there were potential benefits of codification.

The responses were not limited to those coming from the organizations and individuals answering the questions posed. In its own response of sorts, the Court of Appeal for Ontario took the unusual step of inviting counsel in two appeals that had been heard and were on reserve, those in *Van Breda v Village Resorts Ltd* and *Charron v Bel Air Travel Group Ltd*³⁶ to address the possibility of changes to the *Muscutt* framework of analysis. The developments in the law that the court cited as prompting the review included jurisprudence and academic commentary, the implementation of the *CJPTA*, and the Consultation on Judicial Jurisdiction conducted in association with the Law Commission of Ontario.³⁷ The courts had taken up the baton in advancing the law.

In the autumn of 2009, the Court of Appeal for Ontario convened a panel of five judges for the supplementary hearing of the *Van Breda* and *Charron* appeals. The court heard submissions from counsel and from intervenors³⁸ for the purpose of deciding whether the *Muscutt* test should “be retained, modified, simplified or abandoned in favour of a different approach.”³⁹ In the spring of 2010, the court released its judgment clarifying and simplifying somewhat the *Muscutt*

36. *Van Breda* (CA), *supra* note 23 at para 1.

37. The court cited *Coutu*, *supra* note 32; *Black v Breeden* (2009), 309 DLR (4th) 708, 73 CPC (6th) 83 (Ont Sup Ct); Vaughan Black & Mat Brechtel, “Muscutt v. Courcelles Revisited: The Court of Appeal for Ontario Takes Another Look” (2009) 36:1 Adv Q 35; Vaughan Black & Stephen GA Pitel, “Reform of Ontario’s Law on Jurisdiction” (2009) 47:3 Can Bus LJ 469; Janet Walker, “Muscutt Misplaced: The Future of Forum of Necessity Jurisdiction in Canada” (2009) 48:1 Can Bus LJ 135 [Walker, “Forum of Necessity”]; Jean-Gabriel Castel, “The Uncertainty Factor in Canadian Private International Law” (2007) 52:3 McGill LJ 555; Tanya J Monestier, “A ‘Real and Substantial’ Mess: The Law of Jurisdiction in Canada” (2007) 33:1 Queen’s LJ 179; Stephen GA Pitel & Cheryl D Dusten, “Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada’s New Approach to Jurisdiction” (2006) 85:1 Can Bar Rev 61; Joost Blom & Elizabeth Edinger, “The Chimera of the Real and Substantial Connection Test” (2005) 38:2 UBC L Rev 373; Cheryl D Dusten & Stephen GA Pitel, “The Right Answers to Ontario’s Jurisdictional Questions: Dismiss, Stay or Set Service Aside” (2005) 30:3 Adv Q 297; Elizabeth Edinger, “*Spar Aerospace*: A Reconciliation of *Morguard* with the Traditional Framework for Determining Jurisdiction” (2003) 61:4 Advocate 511; Walker, “Muscutt Quintet,” *supra* note 29.

38. The intervenors that presented submissions were the Tourism Industry Association of Ontario and the Ontario Trial Lawyers Association.

39. *Van Breda* (CA), *supra* note 23 at para 50.

test. In addition, the court acknowledged, without relying upon, a new provision found in the *CJPTA* for extending the courts' jurisdictional reach beyond cases in which there was a real and substantial connection to those in which the court regarded it appropriate to serve as a "forum of necessity."⁴⁰

Whether the Court of Appeal for Ontario's test would become the new common law standard continued to be an open question for the next two years while the decision was under appeal to the Supreme Court of Canada, the first year while the matter was being prepared for the hearing, and the second year while the decision remained on reserve. Then, in the spring of 2012, the Supreme Court of Canada issued its judgment⁴¹ announcing its own test. It was one that was ostensibly limited in scope to matters in tort; that relied upon four "presumptive connecting factors"; and that was analytically unrelated to any test that had come before, either in Canada or elsewhere. The jurisprudential development, which had preempted any legislative reform initiatives, such as those that might have followed the Law Commission of Ontario consultation, would now come to be assessed for its promise to clarify the law as was previously done by the *CJPTA*.

The assessment has not been favourable. One concern that has arisen relates to the scope of the application of the ruling. The Court of Appeal for Ontario had noted that the *Muscutt* test that it had developed particularly for the "damages sustained in" cases had been applied to all cases of service *ex juris*;⁴² and now, despite the Supreme Court of Canada's clear statement that the *Van Breda* test was intended for cases in tort,⁴³ it too has been applied as a general standard for service *ex juris* cases across a broad range of cases. Whether the test might have been suitable for the limited context for which it was developed is unclear. However, a more general test—or a principle on which tests for specific kinds of

40. *Ibid* at para 100. Justice Sharpe states: "In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test." See also Walker, "Forum of Necessity," *supra* note 37.

41. *Van Breda* (SCC), *supra* note 24.

42. *Van Breda* (CA), *supra* note 23 at para 51.

43. See *Chevron Corp v Yaiguaje*, 2015 SCC 42 at para 40, [2015] 3 SCR 69 [*Chevron*].

The Court explained the intended scope of the *Van Breda* test as follows:

LeBel J. further—and repeatedly—confined the principles he developed in *Van Breda* to the assumption of jurisdiction in tort actions. ... "The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law" (*ibid*, citing *Van Breda* (SCC), *supra* note 24 at para 85).

cases—was needed, if not a comprehensive framework. Another concern is that Canada now has different jurisdictional standards applied in courts in Quebec, in the common law provinces that have adopted the *CJPTA*, and in the common law provinces operating under the *Van Breda* doctrine. The patchwork of regimes that prompted the initiative to simplify the law by introducing the *CJPTA* has become even more complex.

D. THE COMMON LAW WANDERS AND THE *CJPTA* CELEBRATES TEN YEARS

In light of the continuing history of inconclusive developments in the common law it was timely, on the tenth anniversary of the operation of the *CJPTA*, to convene a symposium to review the *CJPTA* and its promise to meet the challenges experienced in the common law provinces that have not adopted it. It was also timely to consider whether international trends in the law make it desirable to update some of the features of the *CJPTA*.

The symposium was held in the autumn of 2016 at Osgoode Hall Law School.⁴⁴ Leading scholars in the field were invited to present papers on ten questions relating to various aspects of the law of judicial jurisdiction as follows:

1. **Professor Stephen Pitel:** “How different today is the law in the *CJPTA* provinces from that in the common law provinces in Canada?”
2. **Professor Geneviève Saumier:** “Has the *CJPTA* readied Canada to adopt the *Hague Choice of Court Convention*?”
3. **Professor John McEvoy:** “Is there a need for special provisions for consumers, workers and other vulnerable groups, such as exists in Québec and the European Union?”
4. **Professor Catherine Walsh:** “Are the standards for ordinary residence for businesses consistent with the current national and international standards?”
5. **Michael Sobkin:** “Is there a need for residual jurisdiction to promote access to justice for plaintiffs who cannot sue elsewhere and to enable other parties to be joined as necessary? What is the appropriate standard?”
6. **Professor Elizabeth Edinger:** “Is there a continuing need for discretion to decline jurisdiction? Do we have the right formula for exercising discretion, and are we considering the right factors?”

44. The symposium, *The CJPTA: A Decade of Progress*, was organized and moderated by Professor Janet Walker, with vital assistance in funding applications and logistics provided by Dr. Sagi Peari and Gerard Kennedy.

7. **Professor Vaughan Black:** “Is the transfer of proceedings mechanism working well?”
8. **Professor Martha Bailey:** “Should there be a consolidated set of rules for family law matters, such as exists in Québec for family law matters? What kinds of proceedings would it include?”
9. **Professor Angela Swan:** “Will the judgments of courts exercising jurisdiction pursuant to the *CJPTA* be enforceable in other provinces and countries (and are either compatible with *Morguard Investments Ltd v De Savoye*)?”
10. **Professor Joost Blom:** “How might the *CJPTA* function in light of the current Hague Conference multilateral judgments convention project and, ultimately, one harmonizing judicial jurisdiction?”

E. HOW DIFFERENT TODAY IS THE COMMON LAW FROM THE *CJPTA*?

A basic question that arises from the two histories of jurisdictional law in common law Canada is the extent to which the two regimes differ in practice. In his article, addressing the question “How different today is the law in the *CJPTA* provinces from that in the common law provinces in Canada?” Professor Pitel identified two main differences, the first of which was that the *CJPTA* is clear in its adoption of “ordinary residence” for general jurisdiction over natural persons and in setting out detailed provisions for the ordinary residence of legal persons, where the common law standard historically has been one of physical presence.

In response, it might be asked whether, in fact, the common law continues to espouse physical presence as a standard for jurisdiction over individuals. This is unlikely to be examined directly, because it would require a case in which jurisdiction had been exercised over a defendant on the basis of presence alone—in such a case, a court would be likely to decline jurisdiction in any event on the basis of *forum non conveniens*. Accordingly, guidance in the jurisprudence on this question is likely in future judgments to continue to be limited to comments in *obiter*.⁴⁵ Furthermore, it is generally possible to serve a defendant locally at the defendant’s address even when the defendant is abroad.⁴⁶ Therefore, it might be said that general jurisdiction over individuals in the common law

45. In *Chevron*, the Supreme Court of Canada endorsed the use of service in cases of the enforcement of foreign judgments, but this was explained in part as a consequence of the fact that the court was not exercising adjudicatory jurisdiction. See *Chevron*, *supra* note 43 at paras 44–48.

46. See *e.g.* *RCP*, *supra* note 22, ¶ 16.03(5).

provinces that have not adopted the *CJPTA* is, for all practical purposes, based on the residence of the defendant and not, as the traditional treatises suggest, the defendant's presence. Nevertheless, as Professor Pitel observed, the *CJPTA* is different from the common law in that it is explicit in providing standards for general jurisdiction for natural persons and for legal persons that are based on ordinary residence.

Second, Professor Pitel noted a number of differences between the *CJPTA* and the common law in the connecting factors for service *ex juris* cases. He first considered the continuing uncertainty over whether the grounds listed in the *CJPTA* are exhaustive, or whether they permit service on analogous grounds.⁴⁷ This may not reflect a difference from the common law,⁴⁸ but the way in which the scope of jurisdiction is defined could benefit from greater clarity in any event.

Then, turning to specific grounds, Professor Pitel noted that the intended performance of a contract in the forum, and consumer transactions that had been solicited in the forum were included in the *CJPTA* but did not exist in the rules for service outside the province. Again, whether these represent significant practical differences between the jurisdictional standards may be debated in that functional equivalents of the *CJPTA* grounds may be found, for example, in the breach of contract in the forum ground listed in the rules for service outside Ontario,⁴⁹ and the jurisdictional provisions in consumer protection legislation.⁵⁰

In addition, Professor Pitel noted the re-introduction in *Van Breda* of the long abandoned "contract made in the jurisdiction" by the Supreme Court of Canada that was not included in the *CJPTA*. On subsequent review by the Supreme Court of Canada, this factor has since been questioned,⁵¹ and closer inspection of the intended application of this ground suggests that it was a variant on the "related claims and parties" connection that was omitted, first from the *CJPTA* and then from the common law.⁵² Finally, Professor Pitel observed that the restriction on jurisdiction to pronounce on title to foreign immovables exists in the common law but was not adopted in the *CJPTA*.⁵³

47. Pitel, *supra* note 5 at 64.

48. As discussed further in Part II.

49. *RCP*, *supra* note 22, r 17.02(f)(iv), Schedule A, s 100.

50. *Consumer Protection Act, 2002*, SO 2002, c 30, Schedule A [*CPA, 2002*].

51. See *Lapointe Rosenstein Marchand Melançon LLP v Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para 88, [2016] 1 SCR 851. Justice Côté (in the dissent) states, "I am aware of *no* conflicts regime that accepts that a forum has subject matter jurisdiction over a claim in tort simply because a contract "connected with" that claim was formed there" [emphasis in original].

52. See notes 113-114 and accompanying text below.

53. Pitel, *supra* note 5 at 76. See also the examples noted in *supra* note 34.

A simple listing of the differences in service *ex juris* jurisdiction in this way might make the concerns that these differences raise sound marginal or incidental; but differences, however small, can reflect significant barriers to access to the courts for those whose cases are affected. Moreover, as Professor Pitel noted, even if the differences affect only a minority of cases, a statutory regime would make the law “more available and more knowable” to the general public and that would be of considerable benefit.⁵⁴ In this regard, after the symposium was held, a further study was conducted by Gerard Kennedy to examine empirically the costs of this uncertainty by assessing trends in jurisdictional motions and examining the costs awarded in them. That study is published in this Special Issue.⁵⁵

Finally, in addition to the immediate benefits of greater clarity outlined by Professor Pitel, any desired reform to the law would benefit from a clear and common starting point that enables the law to be considered as a whole and not in piecemeal fashion as occurs in the case law.

II. CONSENT-BASED JURISDICTION AND GENERAL JURISDICTION

The first substantive provision of the *CJPTA*, section 3, sets out an exhaustive list of five bases on which a court may exercise territorial competence over *in personam* proceedings. The first three of these bases relate to the consent of the parties to the court’s jurisdiction.

A. ATTORNMENT

Although not addressed directly in any of the symposium papers, for the sake of a complete analysis, it is worth noting the first two of the bases of jurisdiction relying on the parties’ consent, which may be described as forms of “appearance,” “submission,” or “attornment.”⁵⁶ They are set out in section 3 of the *CJPTA* as follows:

- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
- (b) during the course of the proceeding that person submits to the court’s jurisdiction.⁵⁷

54. *Ibid.*

55. Kennedy, *supra* note 6.

56. Janet Walker, *Canadian Conflict of Laws*, 6th ed (Markham, Lexis Nexis: 2005) at 11.2.

57. *CJPTA*, *supra* note 1, s 3(a), (b).

These two bases of jurisdiction are widely accepted and generally consistent with the common law in Canada and with the CCQ. Although there have been interpretive questions about the operation of the bases,⁵⁸ the debates have not undermined the underlying certainty of the base as codified in the *CJPTA*. Nevertheless, the addition of the phrase “by defending the merits of the proceeding” could provide guidance on the means by which these bases commonly indicated.⁵⁹

B. JURISDICTION AGREEMENTS AND NEGATIVE JURISDICTION PROVISIONS

The third basis of jurisdiction provided in section 3 of the *CJPTA* reads as follows:

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding.⁶⁰

Like the first two provisions, this provision is in principle clear and uncontroversial. However, it requires further detail to meet the current needs of cross-border litigation in commercial matters. This is considered in the article

58. In the first form of attornment or submission listed in the *CJPTA*—by commencing a proceeding in the court—the plaintiff, who is also the defendant by counterclaim, has waived any right to object to that court’s jurisdiction. See *ibid*, s 3(a). Questions that can arise include:

1. Does the subject matter of the counterclaim need to be related to the main claim so as to operate to waive the right of the counterclaim’s defendant to object to the court’s jurisdiction?; and
2. Does such a waiver apply to all plaintiffs, including those such as foreign states who would otherwise be immune from the court’s jurisdiction?

In the second form of attornment, the defendant has waived any basis that it might have to object by appearing in the proceeding to defend against the merits. See *ibid*, s 3(b). Many of the questions that have arisen in particular cases about this have related to the accepted view that the defendant should be permitted to appear in the proceedings for the purpose of challenging the court’s jurisdiction without being regarded as having attorned. To enable defendants to challenge jurisdiction without being regarded as having attorned, courts in many common law countries have arranged their processes to permit jurisdictional challenges to be heard before a statement of defence is submitted. Nevertheless, debate in the jurisprudence over the demarcation between jurisdictional challenges and defenses on the merits has arisen in enforcement actions. This is particularly true where there is overlap between these two phases in the procedure in the forum of the rendering court, and where there is an obligation to take steps, for example, by mandatory case management deadlines.

59. See Appendix: Court Jurisdiction Act—Suggested Drafting Amendments, below, s3(1)

(b) [Appendix].

60. *CJPTA*, *supra* note 1, s 3(c).

prepared by Geneviève Saumier on the question: “Has the *CJPTA* readied Canada to adopt The *Hague Choice of Court Convention*?”⁶¹

The *Hague Choice of Court Convention* seeks to ensure the effectiveness of choice of court agreements between businesses in international commercial agreements. It came into force in 2015 and it includes among its signatories the United States, Mexico, and the European Union.⁶² The ULCC adopted a model implementation statute in 2010,⁶³ which has since been adopted in Ontario, subject to ratification by Canada, and may be adopted in other provinces. As Professor Saumier explains in her article, the current provision of the *CJPTA*, which codifies the common law, fails to address two critical features of the *Choice of Court Convention*.

The first of these deficiencies is that the *CJPTA* contains no *negative* jurisdiction provision. While the *CJPTA* establishes that the court may exercise jurisdiction where there is an agreement between the parties nominating the courts of the forum, it does not include the corollary provision that the court may *not* exercise jurisdiction where the parties have agreed that some other court has exclusive exercise jurisdiction. In many situations, the benefits in planning for dispute resolution of achieving certainty of access to suitable fora apply equally to achieving certainty of protection from unsuitable fora. Despite recent jurisprudence recognizing these benefits,⁶⁴ the historic resistance of common law courts to the idea that the parties might exclude their jurisdiction by agreement has prevented the common law from embracing a clear position on this.⁶⁵

In contrast, the CCQ contains a clear provision for negative jurisdiction. Article 3148, which states that “[i]n personal actions of a patrimonial nature, Québec authorities have jurisdiction [in specified situations],” finishes with the following paragraph:

However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating

61. Saumier, *supra* note 7.

62. *Hague Convention of 30 June 2005 on Choice of Court Agreements*, 30 June 2005, Hague Conference on Private International Law (entered into force 1 October 2015), online: <www.hcch.net/en/instruments/conventions/full-text/?cid=98> [*Choice of Court Convention*].

63. *Hague Convention on Choice of Court Agreements Act* (2010), Uniform Law Conference of Canada, online: <www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/645-hague-convention-choice-of-court/1404-hague-convention-on-choice-of-court-agreements-act>.

64. *Expedition Helicopters Inc v Honeywell Inc*, 2010 ONCA 351 at para 11, 100 OR (3d) 241.

65. *Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v The Eleftheria* (1969), [1970] P 94 at 99-100, [1969] 2 WLR 1073; *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 at para 21, [2003] 1 SCR 450.

to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.⁶⁶

As Professor Saumier concluded in her paper, the adoption of the *Choice of Court Convention* would require the replacement of the ad hoc judicial discretion that currently characterizes the common law with a clear obligation to decline jurisdiction where the parties, by agreement, have chosen to submit their disputes to another court.

Whether or not the eventual adoption of the *Choice of Court Convention* across the common law provinces in Canada necessitates a change in the law, the fact that Canada's major trading partners—the United States, the European Union, and Mexico—are signatories is good reason to bring the law in Canada into line with this emerging international standard. In the *CJPTA*, a negative jurisdiction provision modelled on the provision contained in the *Civil Code of Québec*, could be added following the positive jurisdiction provisions currently found in section 3 of the *CJPTA*.⁶⁷

C. VALIDITY AND EFFECT OF EXCLUSIVE AND NON-EXCLUSIVE AGREEMENTS

The obligation to respect exclusive jurisdiction agreements favouring other fora may be the most significant point in issue, but four further points affecting jurisdiction agreements are worth considering in assessing the *CJPTA*.

First, one reason why common law courts have been reluctant to recognize the ousting of their jurisdiction by the parties' agreement is the need to ensure that their jurisdiction is excluded only in cases where the jurisdiction agreement is valid. This concern is addressed in the UNCITRAL Model Law on International Commercial Arbitration for cases in which the parties have entered into an arbitration agreement by providing that the court shall refer the parties to arbitration "unless it finds that the agreement is null and void, inoperative or incapable of being performed."⁶⁸ A clarification of this point could be achieved by adding the word "valid" to the text of the *CJPTA*.⁶⁹

66. CCQ, *supra* note 19, art 3148.

67. See Appendix, below, s 3(2).

68. United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2008*, (Vienna: United Nations, 2006), art 8(1).

69. See Appendix, below, s 3(2).

Second, the *Choice of Court Convention* makes mandatory the exercise of jurisdiction by the court nominated in the jurisdiction agreement.⁷⁰ Jurisdiction-mandating provisions can interfere with the common law courts' ability to prevent abuse. In one Federal Court of Appeal decision, the court considered a mandatory jurisdiction provision of a federal statute⁷¹ that appeared to override a jurisdiction agreement. The court held that the statute could mandate the existence of jurisdiction, but it could not oust the court's inherent authority⁷² to control its own process and exercise discretion to decline to hear the case.⁷³ However, since the jurisdiction mandating provision in the *CJPTA* supports rather than overrides party autonomy it would seem rare for a situation to arise in which a Canadian court would nevertheless wish to decline jurisdiction.

Third, the *Choice of Court Convention* applies only to exclusive jurisdiction agreements,⁷⁴ and does not provide for non-exclusive or "permissive" jurisdiction agreements. It might be just as important to support the parties' choice to nominate a court while maintaining the flexibility to submit a dispute to another forum as it is to support their choice to submit their agreements exclusively to one court. Accommodating this would affect neither the jurisdiction-removing nor the jurisdiction-mandating provisions. However, a permissive jurisdiction agreement could be added to the factors currently found in the *CJPTA* for determining whether a court should decline jurisdiction if asked to do so.⁷⁵ Should the *CJPTA* provide for the exercise of discretion in cases involving non-exclusive jurisdiction agreements, it would be helpful for the statute to indicate that the exercise of discretion, either to accept jurisdiction or to decline jurisdiction, should be guided by a presumption in favour of the forum selected by the parties. A provision to this effect is included in the Suggested Drafting Amendments in the Appendix of this article.

D. PROTECTIONS FOR CONSUMERS, WORKERS, AND OTHER VULNERABLE PARTIES

A fourth issue affecting jurisdiction agreements in the *CJPTA* concerns contracts with consumers, workers, and insured persons. Just as it is important to support party autonomy in interpreting jurisdiction agreements, so too is it important

70. *Choice of Court Convention*, *supra* note 62, art 5(2).

71. *Marine Liability Act*, SC 2001, c 6, s 46.

72. See e.g. *Courts of Justice Act*, RSO 1990, c C-43, s 106.

73. *OT Africa Line Ltd v Magic Sportswear Corp*, 2006 FCA 284, [2007] 2 FCR 733.

74. Although the *Choice of Court Convention* deems jurisdiction agreements to be exclusive unless the parties have expressly provided otherwise.

75. See Appendix, below, s 8(3).

to protect weaker parties. In addition to the limits on the scope of the *Choice of Court Convention* noted above, article 2(1) of the Convention provides that:

This Convention shall not apply to exclusive choice of court agreements -

a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party;

b) relating to contracts of employment, including collective agreements.⁷⁶

The *Choice of Court Convention* does not apply to jurisdiction agreements involving consumers and workers. If the *CJPTA* came to include a negative jurisdiction clause as recommended above and the *CJPTA* was not restricted in its scope to commercial contracts, it would need to specify that the negative jurisdiction provision did not apply to contracts involving consumers, workers, and other vulnerable groups in order to ensure that they have access to courts in their home jurisdictions.

Provisions protecting consumers, workers, and insured persons from purported waiver of access to their home courts are found in CCQ articles 3149 and 3150:

3149. A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

3150. A Québec authority has jurisdiction hear an action based on a contract of insurance where the holder, the insured or the beneficiary of the contract is domiciled resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec.⁷⁷

And as mentioned above, the *CJPTA* provides for jurisdiction in matters concerning contractual obligations:

10(e)(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller.⁷⁸

76. *Choice of Court Convention*, *supra* note 62, art 2(1).

77. CCQ, *supra* note 19, arts 3149-50.

78. *CJPTA*, *supra* note 1, s 10(e)(iii).

In his symposium paper, Professor John McEvoy⁷⁹ considered whether there was a need for special provisions for consumers, workers, and other vulnerable groups, such as those which exist in Quebec and the European Union? He described the effect of a wide range of discrete provincial enactments that displaced agreements purporting to waive consumers' right to access their local courts.⁸⁰ Noting that the *CJPTA* contains special provision in section 10 for consumer transactions, he suggested that the provision could be expanded to include all consumer claims whether framed in contract or otherwise.

It might be added that such a provision could be extended to apply to claims by workers and insured parties. A new subsection could provide that a real and substantial connection to the forum would be presumed to exist if the proceeding concerns:

6(f)(i) the purchase of goods, services or both, for use other than in the course of the purchaser's trade or profession, and resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller;

(ii) the employment of a worker whose ordinary residence is in [enacting province or territory];

(iii) insurance where the holder, the insured or the beneficiary is ordinarily resident in [enacting province or territory], the contract is related to [enacting province or territory] or the loss occurred in [enacting province or territory].⁸¹

79. See McEvoy, *supra* note 7. A further issue about the application of the *CJPTA* to family law matters is addressed in the paper by Martha Bailey. See Bailey, *supra* note 12. This issue is discussed below in Part IV.

80. *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 3; *Fair Trading Act*, RSA 2000, c F-2, s 2(1); *The Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, s 15(1); *Consumer Protection Act*, CCSM c C200, ss 96, 96.1; *CPA, 2002*, *supra* note 50, s 7(1) (Ontario); *Consumer Protection Act*, RSNS 1989, c 92, s 21; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, s 3(1); *Consumer Protection Act*, RSY 2002, c 40, s 88; *Consumer Protection Act*, RSNWT 1988, c C-17, s 107; *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, s 107.

81. See Appendix, below, s 6(f). Professor McEvoy also describes the provisions of the more detailed ULCC draft statute. For more information on the draft statute, see the Uniform Law Conference of Canada, "Civil Section Minutes 2003", *Proceedings of the Eighty-Fifth Annual Meeting* (Fredericton, 10-14 August 2003) at item 10, online: <www.ulcc.ca/en/annual-meetings/284-2003-fredericton-nb/civil-section-minutes-and-resolutions-2003/102-civil-section-minutes-2003>; Uniform Law Conference of Canada, Civil Law Section "Jurisdiction and Consumer Protection in Electronic Commerce Project: Report of the Working Group" (Fredericton, 10-14 August 2003), online: <www.ulcc.ca/en/annual-meetings/288-2003-fredericton-nb/civil-section-documents/1789-jurisdiction-and-consumer-protection-in-electronic-commerce-report-2003>; Uniform Law Conference of Canada, "Civil Section Minutes 2004", *Proceedings of the Eighty-Sixth Annual Meeting*

In 2017, the Supreme Court of Canada considered the question of forum selection agreements in consumer contracts in the context of the *CJPTA*. The case involved a claim for misuse by Facebook of a subscriber's image.⁸² Since the *CJPTA* does not provide for the negative jurisdiction aspect of forum selection agreements, the Court applied the strong cause test that it had adopted many years earlier and adapted it to the consumer context. In the instant case, the Court held that the agreement was valid, clear and enforceable and that it applied to the cause of action before the court, but that a number of factors cumulatively served as strong cause to set aside the jurisdiction agreement. These factors included that the clause was found in a consumer contract of adhesion between an individual consumer and a large corporation and the claim was based on a statutory cause of action protecting quasi-constitutional privacy rights. The decision was rendered by a majority of 4 to 3 in which 6 of the 7 judges agreed nevertheless to the application of a test developed for commercial contracts to consumer contracts, and in which the dissenting judges would have upheld the waiver of the right to access local courts in a consumer contract of adhesion.

E. STANDARDS FOR GENERAL JURISDICTION OVER BUSINESSES

Turning from consent-based jurisdiction, to the second main basis of jurisdiction (ordinary residence), section 3 of the *CJPTA* provides that a court has jurisdiction against a person only if:

(d) that person is ordinarily resident in [enacting province or territory] at the time of the commencement of the proceeding.⁸³

In understanding this aspect of jurisdiction, it is helpful to use the distinction found in the US jurisprudence between general and specific jurisdiction.⁸⁴ Where a court has general jurisdiction, it may decide claims against local persons regardless of where the claims have arisen. In contrast, where a court has specific jurisdiction, it may decide claims that have strong connections to the forum, against all persons regardless of where they are based.

The law of general jurisdiction has evolved considerably in recent years. Some of this evolution is reflected in the *CJPTA* and some of it has occurred since the drafting of the *CJPTA*. One development in the law that is reflected

(Regina, August 2004) at 67, Appendix G at 183. This replicates in a specialized statute much of the provisions of more general application found in the *CJPTA*.

82. See *Douez v Facebook, Inc*, 2017 SCC 33, 411 DLR (4th) 434.

83. *CJPTA*, *supra* note 1, s 3(d).

84. As explained in Walsh, *supra* note 7 at 192.

in the *CJPTA* is the description of general jurisdiction as a function of ordinary residence rather than presence.⁸⁵ Historically, presence was used as the basis for determining general jurisdiction in the common law standard. It was readily demonstrated by service of the defendant with the notice of proceeding in the forum. Service of process was said to resemble a symbolic arrest by which the physical power of the local sovereign over the defendant supported the exercise of jurisdiction by the local courts.⁸⁶

The risk of unfair assertions of jurisdiction over persons who are on a brief visit to the forum for reasons unrelated to the claim has become clearer with the increased mobility of ordinary individuals and their routine engagement in online transactions and communications. Some of the potential for abuse in the exercise of jurisdiction over those temporarily present in the forum is addressed by the likelihood that Canadian courts would exercise discretion to decline jurisdiction over non-consenting defendants with no connection to the jurisdiction in respect of matters that have little connection to the jurisdiction. This makes it unlikely that there would be an opportunity for a clarification of the common law.

The civil law has never suffered from this confusion: General jurisdiction has always been based on the domicile or the residence of the defendant. Similarly, the *CJPTA* avoids this confusion by adopting “ordinary residence” as its basis for general jurisdiction over defendants. Apart from interpretive issues, the ordinary residence standard of the *CJPTA* is far clearer and more widely accepted than the common law. Indeed, it is arguable that, for all practical purposes, the common law standard of presence operates on the basis of the defendants’ ordinary residence even in the provinces that have not adopted the *CJPTA*. Accordingly, the adoption of the *CJPTA* ordinary residence standard may be sufficient to clarify this *de facto* situation and bring the law in line with prevailing international standards for claims against individuals.

However, as Catherine Walsh discusses in her article, the international standards for general jurisdiction for legal persons (corporations, partnerships, and unincorporated associations) have evolved since the promulgation of the *CJPTA*, and in both the common law provinces and the *CJPTA* provinces, the legal standard for general jurisdiction over businesses has fallen behind.⁸⁷ With regard to the law of general jurisdiction, Professor Walsh was asked to consider “Are the standards for ordinary residence for businesses consistent with the

85. See *RCP*, *supra* note 22 and accompanying text.

86. *International Shoe v Washington*, 326 US 310 (1945) at 316.

87. Walsh, *supra* note 7.

current national and international standards?”⁸⁸ In the *CJPTA*, the provisions for ordinary residence are both detailed and broad in scope for corporations, partnerships and unincorporated associations.⁸⁹ The provisions for corporations include, uncontroversially, the place of incorporation and the place of central management. However, added to these bases are: the place where a corporation has a place of business, and the place where the corporation has an address or an agent for service of process.⁹⁰

These latter two bases are out of step with prevailing norms elsewhere. In the European Union, under the *Brussels I Regulation*, general jurisdiction is based on a person’s domicile, and a legal person is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) *principal* place of business.⁹¹ Similarly, the 2017 draft Hague judgments convention, which uses “habitual residence” for general jurisdiction, provides that an entity may be resident “(a) where it has its statutory seat; (b) under whose law it was incorporated or formed; (c) where it has its central administration; or (d) where it has its principal place of business.”⁹²

In Quebec, where general jurisdiction is based on domicile, a legal person that is not incorporated in Quebec is subject to the general jurisdiction of the Quebec courts only if it has an establishment in Quebec, *and* the dispute relates to its activities in Quebec. One may question whether this restriction renders the provision one of specific jurisdiction (*i.e.*, one based on connections between the matter and the forum) rather than general jurisdiction. If so, by implication, the only basis for general jurisdiction in Quebec is that of incorporation in the province, making the scope of general jurisdiction over legal persons in Quebec the narrowest of all by far.

88. Walsh, *supra*, note 7.

89. It is unclear that there is need, in what is otherwise a generally concise and open-textured statute, for specific provisions for partnerships and unincorporated associations. Accordingly, the suggested drafting amendments combine them into a single provision for “legal persons.” See Appendix, below, s 5.

90. *CJPTA*, *supra* note 1, s 7.

91. EC, *Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement in civil and commercial matters*, [2001] OJ, L12 [*Brussels I Regulation*] replaced by EC, *Regulation No 1215/2012 of the European Parliament of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] OJ, L351/1 [*Recast Brussels I*] for proceedings instituted on or after January Vol 10, 2015.

92. *November 2017 Draft Convention*, Hague Conference on Private International Law, Special Commission on the Recognition and Enforcement of Foreign Judgments, art 2, online: <assets.hcch.net/docs/2f0e08f1-c498-4d15-9dd4-b902ec3902fc.pdf>.

Turning to the common law, in Canada, there is considerable jurisprudence on the “carrying on business” basis for general jurisdiction. Much of this jurisprudence would suggest that the courts are inclined where there is such a tenuous connection to consider whether, as is required in Quebec, the business carried on gave rise to the claim. As this is often the case, there is scant opportunity for clarification in the jurisprudence of the scope of general jurisdiction.

In contrast, in the United States, where “doing business” jurisdiction has, over the years, proved controversially broad,⁹³ in 2014 the US Supreme Court held that general jurisdiction over corporations is confined to the place where the corporation may be regarded as “at home.” This, in turn, is limited to the place of incorporation and principal place of business.⁹⁴

Thus, it may be suggested that the law of general jurisdiction over corporations is currently an unfortunate ill-fitting series of standards: too broad in the *CJPTA*; oddly narrow in Quebec; and frustratingly unclear in the common law provinces. Now that the standards in the European Union, the United States, and at The Hague Conference are converging on a clear formulation within these extremes, it could be helpful to draw on this collective wisdom to update the standards in the *CJPTA* by replacing the final two provisions for ordinary residence with “where the corporation has its principal place of business.” These suggestions are reflected in the Suggested Drafting Amendments found in the Appendix of this article.⁹⁵

Before turning to questions of discretion in the exercise of jurisdiction, it is worth noting for the sake of completeness the third main basis of jurisdiction—that of real and substantial connection. The electronic ink on this common law standard has flowed liberally and continuously since the *Morguard* decision was released more than a quarter century ago.⁹⁶ The fundamental conceptual challenges experienced with it in the common law in Canada may be contrasted with the formulation that is found in the *CJPTA*, which reads as follows:

3. A court has territorial competence in a proceeding that is brought against a person only if...

93. Hague Conference on Private International Law, “Some reflections on the present state of negotiations on the judgments protect in the context of the future work programme of the conference,” Prel Doc No 16 in *Proceedings of the Nineteenth Session* (The Hague, February 2002), online: <assets.hcch.net/upload/wop/gen_pd16e.pdf> [Negotiations on the Judgments Project].

94. *Daimler AG v Bauman*, 134 S Ct 746 at 760-63 (2014).

95. See Appendix, below, s 5(b).

96. *Morguard*, *supra* note 15.

(e) there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based. ...

10. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if the proceeding ...⁹⁷

Although no symposium paper author was tasked specifically with revisiting the debates about whether this formulation appropriately describes the scope of this basis of jurisdiction, or whether the individual grounds referred to as presumptive real and substantial connections met this standard, various issues relating to this ground of jurisdiction have been taken up in the course of addressing other topics.

III. DISCRETION IN ACCEPTING AND DECLINING JURISDICTION

A. RESIDUAL JURISDICTION: “PERSONAL OR JURIDICAL ADVANTAGE” BY ANOTHER NAME?

Moving beyond the main bases of jurisdiction, there is a secondary form of *positive* jurisdiction that is worth considering: that of residual jurisdiction. Residual jurisdiction, or “forum of necessity jurisdiction”⁹⁸ is an extended or enlarged form of jurisdiction exercised on a discretionary basis in extraordinary circumstances to promote access to justice or to prevent a denial of justice.

The concept of residual jurisdiction seems new to common law lawyers, but perhaps only because they have been used to seeing it in another form. At one time, the approach in the common law to assumed jurisdiction made residual jurisdiction unnecessary. The threshold for jurisdiction *simpliciter* in cases of service *ex juris* was very low, and excesses were controlled by a robust application of the doctrine of *forum non conveniens*. In exercising its discretion upon an application for a stay, the court considered whether granting a stay would unjustly deprive a plaintiff of a legitimate juridical or personal advantage. If so, the court would deny the stay even though it had concluded that it was a *forum non conveniens*. Accordingly, under this former approach, the opportunity to persuade a court to deny a stay served a similar function to residual jurisdiction. Its placement

97. *CJPTA*, *supra* note 1, ss 3(e), 10.

98. Janet Walker, “*Muscutt* Misplaced: The Future of Forum of Necessity Jurisdiction in Canada” (2009) 48:1 Can Bus LJ 135.

at the end of a series of several steps in the jurisdictional analysis (*i.e.*, after the court had considered and decided that it had jurisdiction *simpliciter*, and after the court considered and decided that there was a clearly more appropriate forum elsewhere) ensured that it would be exercised only in truly exceptional situations and after careful consideration.

However, following the perceived requirements of *Morguard*, as the courts began to restrict jurisdiction to cases in which there was a stronger connection between the province and the facts on which the proceeding against that party was based, the need for residual jurisdiction emerged. For example, in Ontario the rules for service outside the province contain an extensive list of grounds on which service may be effected without leave of the court. However, in addition to this, the rules contain a rarely used provision permitting service with leave of the court in any case not provided for in the list.⁹⁹ Moreover, as the Court of Appeal for Ontario reasoned in *Van Breda* (CA), there might be good reason now to recognize that although certain grounds were not presumptive of a real and substantial connection, this did not mean that the courts ought never to consider exercising jurisdiction on those grounds.¹⁰⁰

Residual jurisdiction is provided for in section 6 of the *CJPTA* as follows:

A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that

- (a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding, or
- (b) the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required.¹⁰¹

B. POTENTIAL APPLICATIONS OF RESIDUAL JURISDICTION AND STANDARDS FOR ITS USE

In the civil law, where jurisdiction is exercised on the basis of more strictly defined grounds with no *forum non conveniens* corrective, the need for a discretion to extend jurisdiction in extraordinary circumstances has been met with provisions such as that found in the Swiss Private International Law for forum of necessity.¹⁰² Whether this is intended to serve as a means of correcting anomalous deficiencies

99. *RCP*, *supra* note 22, r 17.02.

100. *Van Breda* (CA), *supra* note 23 at para 80.

101. *CJPTA*, *supra* note 1, s 6.

102. Switzerland's Federal Code on Private International Law (CPIL) 1 of December 18, 1987, art 3.

in the regular grounds for exercising jurisdiction or whether it is intended to address truly extraordinary circumstances is unclear. Perhaps it is both.

A provision for forum of necessity was also included in the CCQ. In Quebec, article 3136 provides:

Even though a Quebec authority has no jurisdiction to hear a dispute, it may nevertheless hear it provided the dispute has a sufficient connection with Quebec, if proceedings abroad prove impossible or the institution of proceedings abroad cannot reasonably be required.¹⁰³

As mentioned earlier, in its review of the real and substantial connection standard in *Van Breda*, the Court of Appeal for Ontario recognized in principle the need to include this form of jurisdiction among the common law bases of jurisdiction. This followed, in part, from the elimination of grounds such as “damage sustained in the province” and “necessary or proper parties” that were once used in exceptional situations to permit access to the courts.¹⁰⁴

Michael Sobkin’s symposium paper addressed the questions: “Is there a need for residual jurisdiction to promote access to justice for plaintiffs who cannot sue elsewhere and to enable other parties to be joined as necessary? What is the proper standard?”¹⁰⁵ In it, Mr. Sobkin considered in detail the existing jurisprudence and commentary. He discussed an emerging line of cases relating to matters such as those involving allegations of torture by foreign state officials that the courts have recognized as ideally suited for this kind of jurisdiction.¹⁰⁶

In many such cases, it would seem unlikely for the court exercising such jurisdiction to be in a position to produce an internationally enforceable judgment. This would once have been the case with all judgments based on service *ex juris* and, in this way, might have been more easily accepted. However, under the approach recommended in *Morguard* (*i.e.*, that courts exercise jurisdiction only in situations in which the resulting judgment should be enforceable internationally), the concern about enforceability might now be reason to question the purpose of exercising such extraordinary jurisdiction. One case discussed by Mr. Sobkin is instructive. In *Bouzari v Bahremani*,¹⁰⁷ the plaintiff was the victim of torture in Iran and one of the defendants was a relative of a former president. For obvious reasons of personal safety, the plaintiff could not reasonably have been required to sue in Iran. And for equally obvious reasons, it would not be expected that the

103. CCQ, *supra* note 19, art 3136.

104. *Van Breda* (CA), *supra* note 23 at para 72.

105. See Sobkin, *supra* note 9.

106. *Bouzari v Bahremani*, 2013 ONSC 6337, 235 ACWS (3d) 936.

107. *Ibid.*

judgment would be enforceable there. However, the acceptance of jurisdiction and the issuance of a judgment in default ultimately persuaded the defendant to participate in the proceedings, thereby suggesting that exercising jurisdiction served a useful purpose.¹⁰⁸ In this way, the likelihood of the judgment being enforced in the defendant's home jurisdiction was not a relevant factor to consider.

Cases such as this are truly extraordinary, and it is to be expected that the jurisdictional analysis would entail careful consideration of the range of concerns affecting the parties to ensure that jurisdiction is exercised in a properly restrained manner. However, as Mr. Sobkin pointed out, residual jurisdiction might also be used on a discretionary basis in other appropriate circumstances in cases in which the grounds that would once have supported jurisdiction have been eliminated because the events giving rise to the claim occurred outside the forum. In particular, Mr. Sobkin reasoned that extraordinary cases such as the *Bouzari* case may be understood as contemplated by the first phrase in the provision for residual jurisdiction, *i.e.*, "there is no court outside [the province] in which the plaintiff can commence the proceeding." Other cases might be understood as contemplated by the second phrase, *i.e.*, "the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required."¹⁰⁹ Cases of this second sort could include "damages sustained in the province" and "necessary or proper parties." As the Supreme Court of Canada has observed, even if some bases for service outside the province accord with the real and substantial connection standard, "they [may] represent an expression of wisdom and experience drawn from the life of the law."¹¹⁰

As was discussed in connection with the *Muscutt* decision, the cases in which jurisdiction would at one time have been based on "damages sustained in the province" tended to be personal injury cases in which plaintiffs had returned home from the place of injury or settled in a place to convalesce and were not physically or financially able to litigate elsewhere. These cases involved injuries

108. The defendant appealed the noting in default to the Court of Appeal for Ontario and brought a motion based on *forum non conveniens*, which was successful. See *Bouzari v Babremani*, 2015 ONCA 275, 126 OR (3d) 223.

109. *CJPTA*, *supra* note 1, s 6(b). See also *CCQ*, *supra* note 19, art 3136.

110. *Van Breda* (SCC), *supra* note 24 at para 83.

suffered in traffic accidents in other provinces,¹¹¹ or in negligent medical treatment in other provinces,¹¹² or injuries sustained while on vacation abroad.¹¹³ Considerable attention was given to these kinds of cases in the *Muscutt* and *Van Breda* decisions.

The second kind of case considered in some detail by Mr. Sobkin involved “necessary or proper parties.” The need to extend jurisdiction to parties related to claims properly before the courts arises in situations where the effective adjudication of the case would otherwise require more than one forum to exercise jurisdiction. Where jurisdiction lies severally in separate fora, there may be no one court capable of properly adjudicating the claim. For example, where a defendant wishes to claim over against a third party who is not otherwise subject to the jurisdiction of the court, the procedural fairness justifications for third-party proceedings within the forum serve equally to justify the exercise of jurisdiction

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111. *Bunyan v Enns*, 2010 ONSC 216, 99 OR (3d) 304 (liability witnesses in Alberta where highway accident occurred, damages evidence in forum, held that plaintiff’s recovery might be jeopardized if forced to travel to sue, stay denied); *Kablou v Cheecham*, 2010 ONSC 1957, 187 ACWS (3d) 700 (accident in British Columbia, plaintiff could not show residency in the forum at the time of the accident); *Dennis v Farrell*, 2010 ONSC 2401, 84 CCLI (4th) 64 (liability admitted for car accident in British Columbia and damages evidence located in the forum; inconvenient for injured plaintiff to travel to sue); *Lintner (Litigation Guardian Of) v Saunders*, 2010 ONSC 4862, 192 ACWS (3d) 1155 (accident in British Columbia, plaintiff could not show residency in the forum at the time of the accident); *Cardinali v Strait*, 2010 ONSC 2503, 188 ACWS (3d) 1017 (parties insured in Ontario and Michigan, respectively, but by same insurer).
112. *Dennis v Salvation Army Grace General Hospital Board*, 1997 NSCA 177, 156 NSR (2d) 372; *Oakley v Barry*, 1998 NSCA 68, 166 NSR (2d) 282; *O’Brien v Canada (Attorney General)*, 2002 NSCA 21, 201 NSR (2d) 338; *Bouch*, *supra* note 34; *Fewer*, *supra* note 32; *Dembroski v Rhainds*, 2011 BCCA 185, 333 DLR (4th) 437; *Ayles v Arsenault*, 2011 ABQB 493, 523 AR 233.
113. *Sinclair v Cracker Barrel Old Country Store, Inc* (2002), 60 OR (3d) 76, 213 DLR (4th) 643 (CA) (members of restaurant chain located in Buffalo not required to defend slip and fall action in Toronto). But see *Mynerich v Hampton Inns Inc*, 166 ACWS (3d) 61, 2008 CarswellOnt 1855 (WL Can) (Sup Ct) (Quebec hotel required to defend slip and fall action in Ontario as a result of evidence of insurance coverage); *Dilkas v Red Seal Tours Inc*, 2010 ONCA 634, 104 OR (3d) 221 (where defendants’ post-accident indemnity agreement contemplated litigation in the forum and primary issue was quantification of damages, evidence of which was in the forum); *Moore v Vancouver Fraser Port Authority*, 2011 ONSC 3692, 204 ACWS (3d) 278 (the port could not be expected to defend every tourist’s claim in the tourist’s home jurisdiction).

over third parties elsewhere.¹¹⁴ In situations where a claimant may not have access to the defendant who bears ultimate responsibility or may not have an obligation to seek recovery from anyone other than an intermediate defendant, it could be unfair for a plaintiff to lack access to the ultimate defendant or for the intermediate defendant to bear the responsibility for an enforceable judgment pending an action to claim over the loss from the ultimate defendant.¹¹⁵ This may seem particularly unfair in cases where the ultimate defendant is an insurer.¹¹⁶

Similarly, where a person suffers separate injuries in two or more fora causing indivisible harm, separate adjudications risk producing irreconcilable judgments. It may be difficult or impossible for either court to assess the respective proportions of harm caused by the defendants when the court has only one of the defendants before it. The finger pointing between the defendant who is present in each forum

114. *RCP*, *supra* note 22, r 17.02(q). It is stated that:

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

For an excellent analysis of this basis of jurisdiction, see Koji Takahashi, *Claims for Contribution and Reimbursement in an International Context: Conflict-of-laws Dimensions of Third Party Procedure* (Oxford: Oxford University Press, 2000).

115. *Red Sea Insurance Co Ltd v Bouygues SA* (1994), [1995] 1 AC 190, [1994] 3 WLR 926 (PC) (interpreting governing law to permit claim over in the same proceeding); *Josephson (Litigation Guardian of) v Balfour Recreation Commission*, 2010 BCSC 603, 10 BCLR (5th) 369. This is to be distinguished from cases in which the defendant and the third party have entered into an exclusive jurisdiction agreement nominating another court (e.g., *GreCon Dimter Inc v JR Normand Inc*, 2005 SCC 46, [2005] 2 SCR 401) or there is strong reason for the claim against the third party to be decided elsewhere (e.g., *Teck Cominco Metals Ltd v Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 SCR 321 [*Teck Cominco*]).
116. *Misyura v Walton*, 2012 ONSC 5397, 112 OR (3d) 462; *Paraie v Cangemi*, 2012 ONSC 6341, 113 OR (3d) 231; *Mitchell v Jeckovich*, 2013 ONSC 7494, 235 ACWS (3d) 671; *Tamminga v Tamminga*, 2014 ONCA 478, 120 OR (3d) 671; *Forsythe v Westfall*, 2015 ONCA 810, 128 OR (3d) 124 (plaintiff passenger who was injured in a single car collision was required to sue own insurer in Ontario and was not permitted to join the defendant who was resident elsewhere).

and the defendant in the other forum is bound to generate inconsistencies in respective adjudications and to result in an incomplete recovery for the plaintiff.¹¹⁷

Jurisdiction over related cases is available in the European Union¹¹⁸ and continues to be available in many common law jurisdictions, such as the English courts.¹¹⁹ It used to be available in Canadian courts,¹²⁰ where the grounds for service outside the jurisdiction were once fashioned with a view to producing judgments that had only local effect. In Canada, in reviewing the rules for service

117. *McNichol Estate v Woldnik* (2001), 150 OAC 68, 13 CPC (5th) 61 (CA) (jurisdiction over one out-of-province co-defendant among several local defendants in medical malpractice claim); *Sekela v Cordos*, 2015 BCSC 732, 77 BCLR (5th) 184 (jurisdiction over foreign defendant declined where plaintiff injured in car accident in foreign forum and a second accident in the forum the next day giving rise to indivisible injuries); *Mannarino v Brown Estate*, 2015 ONSC 3167, 50 CCLI (5th) 122 (plaintiff injured in accident in the forum and, six weeks later, in accident in another forum; court declined jurisdiction over defendant in second accident finding it extremely troubling that the limitation period had now passed in foreign jurisdiction); *Cesario v Gondek*, 2012 ONSC 4563, 113 OR (3d) 466. But see *Best v Palacios*, 2016 NBCA 59, 410 DLR (4th) 367 [*Best*] (jurisdiction based on second accident in the forum exacerbating original injury declined).

118. *Recast Brussels I*, *supra* note 91, art 8. Article 8 states:

A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case.

119. *The Civil Procedure Rules 1998*, SI 1998/3132. Practice Direction 6(b), s 3.1(3) states the following:

A claim is made against a person (“the defendant”) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and – (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

120. *RCP*, *supra* note 22, r 17.02(o). Rule 17.02(o) was revoked in 2014 by O Reg 43/14, s 6. It stated:

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

out to ensure that they complied with the requirement that they represent a “real and substantial connection,” these grounds were eliminated in places such as Ontario.¹²¹ In provinces where they were not eliminated, they were read down to conform to meet that standard.¹²²

These situations raise challenging issues of procedural fairness in that they involve an exercise of jurisdiction over defendants who would otherwise not expect to have to defend themselves in that forum. It is important, therefore, that jurisdiction be exercised on a discretionary case-by-case basis to ensure, for example, that the forum selected is a suitable one. Courts faced with challenges involving parallel proceedings in these situations might also consider ways of coordinating the proceedings, for example, by staying the final determination of the matter before them until the proceeding in the other forum has been heard and, perhaps, the findings in the local proceeding have been taken into account.¹²³ In an era in which courts feel constrained to exercise jurisdiction only where it will produce a judgment enforceable elsewhere, this kind of jurisdiction may seem problematic, but the law may need to move beyond that perceived restriction.¹²⁴

The important point is that in situations where it would otherwise be warranted, the absence of jurisdiction over related claims and necessary parties is bound to be productive of injustice. As Mr. Sobkin concluded, there appears to be provision for this kind of jurisdiction in the *CJPTA*, and it remains only for the courts to re-establish the timeworn practice in the common law of exercising positive jurisdiction on a discretionary basis. Possible amendments to the *CJPTA* that would indicate the availability of residual jurisdiction in these situations together with the requirement that it be exercised in a properly restrained manner are indicated in the Appendix of this article.

C. DISCRETION TO DECLINE JURISDICTION: THE COMMON LAW LANGUISHES

One of the great common law contributions to the law of jurisdiction of the last century was the doctrine of *forum non conveniens*, under which a court having jurisdiction to decide a case could exercise discretion to decline jurisdiction

121. *Ibid*; *CJPTA* (BC), *supra* note 2 (this Act, along with its counterparts in Saskatchewan and Nova Scotia, contain no provision comparable to the previous Rule 17.02(o) of the *RCP*).

122. *Best*, *supra* note 117.

123. *Safeway Holdings (Alberta) Ltd v Cactus Ridge Estates Inc*, 2016 ABQB 411, 268 ACWS (3d) 764; *Safeway Holdings (Alberta) Ltd v Cactus Ridge Estates Inc*, 2014 BCSC 2237, 247 ACWS (3d) 690 (claim against guarantors brought in two provinces).

124. As is discussed in Part V, below.

where there was a clearly more appropriate forum elsewhere. Unlike courts in the civil law, where judges have principal carriage of the matters assigned to them and a responsibility to see them through to their final disposition, common law courts have a less proactive role, which can make their process more vulnerable to abuse. The parties plan much of the litigation in advance of presenting it to the court, and, as part of this planning, plaintiffs may select a forum strategically on the basis that it will provide an advantage that they would not reasonably expect in the natural forum. This opportunism has been described as “forum shopping” and it has made common law courts wary of being co-opted in an unfair process.

Although this is an inevitable by-product of party prosecution, the issue came to the fore only within the last fifty years as the mobility of litigants increased. England was one of the fora most likely to be affected because the Commercial Court in London had long been a leading forum for international litigation.¹²⁵ When the need to exercise discretion to decline jurisdiction became clear, and the test crystallized in the jurisprudence of the House of Lords, the relevant factors for consideration were left open-ended. This was not necessarily a flaw in the test, as it was meant to reflect a court’s inherent powers to prevent abuse and to have a cautionary effect on clever lawyering.

As with other areas of the law, it might have been hoped that the doctrine would mature and the basis for exercising discretion might have become clearer and more structured. Some progress was made in this direction. The House of Lords came to recognize that the discretion needed to be applied differently in cases involving exclusive jurisdiction agreements from those in which more than one forum was suitable.¹²⁶ In cases involving exclusive jurisdiction agreements, the court’s role in reviewing them should be limited to determining whether the agreement is invalid or contrary to public policy. This takes the question of jurisdiction out of the realm of discretion. A further question that arose in the early Canadian jurisprudence was whether the burden of proof should vary

125. As a plaintiff-friendly jurisdiction, the United States was also affected. However, in the United States, where the right to jury trials occupies considerable public resources, the concerns are different from elsewhere in the common law and they have given rise to a review of different factors, making the jurisprudence there less relevant. See *Piper Aircraft Co v Reyno*, 454 US 235 (1981).

126. The House of Lords also identified a third kind of case: That in which a claim had been brought inappropriately in a forum that provided a unique remedy, which the claimant would not reasonably expect to receive in an appropriate forum. However, the issue arises in that kind of case only where it is the jurisdiction of a foreign court that is being challenged in an application for an anti-suit injunction and so is beyond the scope of this symposium. See *Airbus Industrie GIE v Patel* (1998), [1998] UKHL 12, [1999] 1 AC 119.

between local defendants and those based elsewhere. At the time, the debate was influenced by the now superseded view that rules of service determined the scope of jurisdiction.¹²⁷ Since then, the debate has continued in the jurisprudence.¹²⁸

As Professor Elizabeth Edinger noted in her symposium paper, beyond these two points (the distinction between cases involving jurisdiction agreements and those involving another potentially more suitable forum, and the distinction between cases involving local and foreign defendants) there has been little progress made in refining the bases on which discretion is exercised and the manner in which it is exercised. This is the case with both the *CJPTA* and the common law. The English courts have become preoccupied with the European rules that they were now required to apply—rules that are heavily influenced by the civil law and that all but eliminate the use of discretion. And, as discussed at the outset of this paper, Canadian courts themselves became preoccupied with issues of jurisdiction *simpliciter* with the *Muscutt* and *Van Breda* tests which prevailed from 2002–2012 and which incorporated discretionary features that left little room for *forum non conveniens* analysis. As a result, over the last two decades, the common law of *forum non conveniens* has languished.

D. STRUCTURING THE DISCRETION TO DECLINE JURISDICTION

The structure of discretion to decline jurisdiction in cases involving jurisdiction agreements could be improved. In cases involving agreements exclusively nominating the forum in which the matter has been commenced, the court should have discretion to decline jurisdiction only where the agreement has been determined to be invalid or contrary to public policy. And in cases involving non-exclusive jurisdiction agreements, the court should base its exercise of discretion to accept or to decline jurisdiction on a presumption in favour of the forum selected by the parties. Provisions to this effect are contained in the suggested drafting amendments in the Appendix of this article.

Similar considerations regarding the burden of proof could be introduced for jurisdiction based on the ordinary residence of the defendant and on a real and substantial connection between the matter and the forum. Despite the continuing uncertainty in the jurisprudence on this point, the better view seems to be that it is reasonable for a plaintiff to expect to be able to commence an action against a defendant in the defendant's court, and it is for the defendant to persuade

127. *Anchem Products Incorporated v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, 77 BCLR (2d) 62; *Frymer v Brettschneider* (1994), 19 OR (3d) 60, 115 DLR (4th) 744 (CA).

128. *Van Breda* (SCC), *supra* note 24 at para 103.

the court that there is a clearly more appropriate forum elsewhere. In contrast, in cases involving defendants based outside the forum who have not consented to the forum selected by the plaintiff, it is not reasonable for a court to presume that it is an appropriate forum, and where the defendant objects, it is for the plaintiff to persuade the court that it is clearly more appropriate than the defendant's own forum. On one view, jurisdiction based only on connections between the matter and the forum is a kind of *forum conveniens* (i.e., the corollary to *forum non conveniens*), and not to be presumed in the event of an objection. Possible amendments to the *CJPTA* that would provide for these various presumptions are indicated in the Appendix of this article.

A number of further points have emerged in the jurisprudence that could be codified. First, some of the disadvantages that could await a plaintiff required to seek relief in another forum might be mitigated by imposing terms on the applicant for the stay. For example, where a defendant seeks a stay in favour of a forum in which the defendant might raise a time bar, the defendant could be required as a term of granting the stay to undertake to refrain from making such a defence. Should a defendant who has been granted a stay fail to comply with the terms, the stay may be lifted and the action resumed.¹²⁹ The fact that stays may be granted on terms is well understood in some common law systems and less well understood in others. A revised *CJPTA* might include specific mention of the possibility of imposing terms on the granting of a stay. Second, the settled view has been that the standard on which a stay is granted is that the proposed forum is *clearly* more appropriate. A revised *CJPTA* might include this qualification as well.

Third, turning to the factors themselves, five points might be mentioned. First, while the defendant's participation in the proceedings is less definitive in precluding a request for a stay based on *forum non conveniens* than it is in precluding an objection to jurisdiction *simpliciter*, the nature and extent of such participation may be a relevant factor in determining whether the applicant should be regarded as having waived the right to seek a stay. Second, perhaps the most significant consideration will be the comparative convenience and expense for the parties. This will include factors such as their respective abilities to present witnesses and relevant documents, their relative abilities to litigate outside their home fora, and a myriad of other logistical considerations that are difficult to catalogue. Third, there may be a separate question that arises in relation to the accessibility of

129. This is what happened in the Nova Scotia Court of Appeal with the case *Quadrangle Holdings*. In that case, the limitation period in the proposed forum was mandatory. See *Quadrangle Holdings Ltd v Coady*, 2015 NSCA 13, 355 NSR (2d) 324.

relevant evidence. Fourth, in a common law system where foreign law must be pleaded and proved, the attendant expense for the parties and complexity for the court may militate against the exercise of jurisdiction and encourage a court to defer to a forum that would apply its own law to the case. Finally, the desirability of avoiding a multiplicity of legal proceedings and the possibility of inconsistent results is presented in the disjunctive in the current version of the *CJPTA* and could be expressed in the more familiar conjunctive form.

Additional points that might be observed about the current version of the *CJPTA* are that it includes “the enforcement of an eventual judgment,”¹³⁰ a point that could be speculative at the commencement of the matter, and the relevance of which has been questioned.¹³¹ Further, the generic “fair and efficient working of the Canadian legal system as a whole”¹³² could be subsumed in wording in the introductory paragraph that made the exercise of jurisdiction and the consideration of the relevant factors permissive. Suggested drafting amendments based on these various considerations have been included in the Appendix of this article.

IV. FURTHER POINTS: TRANSFERRING PROCEEDINGS, FAMILY LAW MATTERS, ENFORCEMENT

A. TRANSFERRING PROCEEDINGS TO OTHER FORA

One of the more concerning legal fictions that has persisted in the common law is that in exercising discretion to decline jurisdiction in favour of a clearly more appropriate forum elsewhere, there is some assurance that the proceeding will, in fact, continue in the more appropriate forum. To be sure, a court may decline to grant a stay where it is persuaded that this would unjustly deprive the plaintiff of logistical or procedural benefits necessary to pursue the claim. And courts may impose terms on the granting of the order so as to prevent applicants from taking advantage of a stay to frustrate the proceedings in the proposed forum. Further, some actions involving forum shopping may be based on claims that are not viable in the natural forum. Despite this, there are a range of personal, practical, and juridical reasons why the granting of a stay may have the effect of bringing a meritorious proceeding to an end.

130. *CJPTA*, *supra* note 1, s 11(e).

131. *Chevron*, *supra* note 43 at paras 94-95.

132. *CJPTA*, *supra* note 1, s 11(f).

This does not happen in changes of venue within the forum, nor does it happen within the Federal Court system in the United States¹³³ or between states in Australia.¹³⁴ In those places, the file itself is transferred and there is no need to commence the proceeding a second time in the new forum. Accordingly, while, as Vaughan Black notes in his article,¹³⁵ a regime for transferring proceedings is different in kind from that for determining jurisdiction, it could well be understood as a useful adjunct within Canada to facilitate the process of ensuring that proceedings are decided in appropriate fora.

As a new feature of jurisdictional law in Canada, introduced only with the coming into force of the *CJPTA*, it seemed suitable in the symposium to assess the progress that had been made. In his symposium paper, Professor Black observed that the dearth of jurisprudence on the subject suggests that it remains a largely uncharted area of the law. In the case law, as it exists, there does not appear to be any clear indication that the transfer mechanism has been assessed unfavourably and is being avoided: It is simply new and largely untested. And, as Professor Black observed, while there is no prohibition on sending proceedings to fora that have not adopted the *CJPTA*, the process of sending and receiving matters would seem likely to benefit from procedural rules that would clarify the procedure involved. These rules, of course, have not been introduced in provinces that have not adopted the *CJPTA*. As Professor Black noted, they also have not been introduced in any detail in provinces that have adopted the *CJPTA*. He points out that detailed rules to facilitate transfers of proceedings in child custody matters have been adopted in England's *Family Procedure Rules* and have been the subject of considerable judicial interpretation.¹³⁶

Accordingly, the transfer mechanism, though useful in principle, might become more useful in practice if suitable rules of procedure were adopted to facilitate it, as has occurred in other areas of the law. Whether reform of the *CJPTA* should also seek to include either the existing or a revised version of the provisions for transferring proceedings is a question best left to the discretion of legislators in provinces interested in codifying the law of jurisdiction.

B. FAMILY MATTERS AND THE SCOPE OF THE *CJPTA*

Another unfortunate legal fiction of the common law is that jurisdictional rules are trans-substantive, *i.e.*, the same rules apply to all matters *in personam*

133. *Judiciary and Judicial Procedure*, 28 USC §§ 1404, 1406 (1948).

134. *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW), No 125.

135. Black, *supra* note 11.

136. *The Family Procedure Rules 2010* (UK), SI 2010/2955.

regardless of the subject matter in question. It is true that one feature of the common law different from the civil law is the tradition of maintaining courts of general jurisdiction, as opposed to dividing the court system into separate departments for different types of cases, such as private law and public law.

However, the suggestion that the standards for jurisdiction in civil and commercial matters apply equally to family law matters is simply untrue. This is illustrated by the structure of many conflict of laws treatises. While it is typical to have a chapter covering the topic of judicial jurisdiction in matters *in personam* without qualification as regards the areas of law to which the rules apply, it is also typical to have subsequent chapters covering areas such as marriage, divorce, custody, and support in which the first few sections of the chapter outline specialized rules for jurisdiction. Confusion on the difference between the standards has been illustrated by the appropriation of jurisdictional standards developed in divorce matters for civil and commercial matters,¹³⁷ and the application of the *CJPTA* to family law matters.¹³⁸

The *CJPTA* provides no indication of its scope of application other than to provide that it defers to other jurisdictional statutes. While this has the effect of supporting the jurisdictional regimes that are established by statutes in the area of family law, it has not prevented courts in *CJPTA* provinces from using it for guidance where those statutes appear to be unclear or to have gaps.¹³⁹ This situation is to be contrasted with the CCQ, which contains a section of the

137. *Morguard*, *supra* note 15. The “real and substantial connection test” in *Morguard* was taken from an earlier House of Lords Decision. See *Indyka v Indyka* (1967), [1969] 1 AC 33, [1967] 3 WLR 510 (HL).

138. *Anaka v Yeo*, 2006 SKQB 201, 282 Sask R 279 [*Anaka*] (neither child’s presence in province, nor nominal or procedural step taken by respondent could confer jurisdiction under the *Court Jurisdiction and Proceedings Transfer Act* where the *Children’s Law Act, 1997*, SS 1997 c C-8.2 [*CLA*] did not. See *CJPTA* (SK), *supra* note 2); *Giles v Beisel*, 2005 SKQB 390, 20 RFL (6th) 161 (no inconsistency existed with the *CLA* in the provisions for determining the appropriate forum as the *CJPTA* alone contained factors for making the determination); *Hunter v Hunter*, 2005 SKCA 76, [2006] 5 WWR 141 (no inconsistency with *Family Property Act*, SS 1997, c F-6.3, s 54).

139. *Anaka*, *supra* note 138 (no jurisdiction to determine matrimonial property dispute under *CJPTA* (SK), *supra* note 2, where all relevant connections were to another province); *Hubrich v Keil*, 2011 BCSC 1745, 210 ACWS (3d) 476; *Yonis v Garado*, 2011 NSSC 110, 301 NSR (2d) 148; *Inglis v Inglis*, 2012 NSSC 124, 316 NSR (2d) 75 (ordinary residence in province of applicant for variation sufficient despite not being included specifically in *Court Jurisdiction and Proceedings Transfer Act*).

Title on Jurisdiction that is specifically devoted to “extrapatrimonial and family law matters.”¹⁴⁰

For the symposium, Professor Martha Bailey was asked to consider, “Should there be a consolidated set of rules for family law matters, such as exists in Quebec for family law matters? What kinds of proceedings would it include?” Professor Bailey noted in her paper that there are fundamental constitutional challenges to consolidating such rules, including the fact that legislative authority in the field is divided between the Federal and provincial legislatures. These divisions complicate judicial jurisdiction, dividing it between superior courts and provincial courts. Moreover, in the specialized field of family law, practitioners are sufficiently familiar with and resigned to the byzantine structure of the law and the court system that they regard the possibility of a consolidated set of jurisdictional rules as a matter of curiosity. Nevertheless, given the complexity of the matter, Professor Bailey acknowledged that a consolidated listing of the various jurisdictional rules and where they may be found in legislation would be helpful.

Other jurisdictional regimes, such as the *Brussels I Regulation* and the *Choice of Court Convention*, address this issue as one of the scope of their application. These regimes provide that they apply to “civil and commercial matters” (and thus not, for example, to family law matters) and also include provisions specifying a

140. CCQ, *supra* note 19, art 3141-47. The provisions read as follows:

3141. A Québec authority has jurisdiction to hear personal actions of an extra patrimonial and family nature when one of the persons concerned is domiciled in Québec.

3142. A Québec authority has jurisdiction to rule on the custody of a child provided he is domiciled in Québec.

3143. A Québec authority has jurisdiction to decide cases of support or applications for review of a foreign judgment which may be recognized in Québec respecting support when one of the parties has his domicile or residence in Québec.

3144. A Québec authority has jurisdiction in matters relating to nullity of marriage when one of the spouses has his domicile or residence in Québec or when the marriage was solemnized in Québec.

3145. As regards the effects of marriage, particularly those which are binding on all spouses, regardless of their matrimonial regime, a Québec authority has jurisdiction when one of the spouses has his domicile or residence in Québec.

3146. A Québec authority has jurisdiction to rule on separation from bed and board when one of the spouses has his domicile or residence in Québec at the time of the institution of the proceedings.

3147. A Québec authority has jurisdiction matters of filiation if the child or one of his parents is domiciled in Québec.

It has jurisdiction in matters of adoption if the child or plaintiff is domiciled in Québec.

range of areas to which they do not apply.¹⁴¹ Although it may not seem necessary to delimit the scope of the *CJPTA* in such detail, the *CJPTA* currently contains no indication of its scope apart from providing that it gives way to other statutes that codify jurisdiction:

If there is a conflict or inconsistency between this Part and another Act of [enacting province or territory] or of Canada that expressly

- (a) confers jurisdiction or territorial competence on a court, or
 - (b) denies jurisdiction or territorial competence to a court,
- that other Act prevails.¹⁴²

141. *Choice of Court Convention*, *supra* note 62, art 2(2). The provision reads as follows:

This Convention shall not apply to the following matters –

- a) the status and legal capacity of natural persons;
- b) maintenance obligations;
- c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
- d) wills and succession;
- e) insolvency, composition and analogous matters;
- f) the carriage of passengers and goods;
- g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
- h) anti-trust (competition) matters;
- i) liability for nuclear damage;
- j) claims for personal injury brought by or on behalf of natural persons;
- k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship;
- l) rights *in rem* in immovable property, and tenancies of immovable property;
- m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs;
- n) the validity of intellectual property rights other than copyright and related rights;
- o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract;
- p) the validity of entries in public registers.

142. *CJPTA*, *supra* note 1, s 12.

A moderate approach to the challenge of clarifying the scope of the *CJPTA* could be to specify simply that the Act applies to civil and commercial matters, and to retain the subordination provision excerpted above.

C. THE OTHER SIDE OF THE *CJPTA*: ENFORCEABILITY OF *CJPTA* JUDGMENTS ELSEWHERE

The *Morguard* approach to the law of jurisdiction has been understood to imply an approach to the recognition and enforcement of judgments in which the enforcing court has a reduced mandate to review the jurisdiction of the issuing court. In the United States, under the Full Faith and Credit obligation of Article IV.1 of the Constitution, enforcing courts must grant full faith and credit (*i.e.*, accept) the judgments of other courts in the United States not only as to the merits of the dispute, but also to the courts' determinations of their own jurisdiction.¹⁴³ This is a departure from the general approach under the common law. In the European Union, under the *Brussels I Regulation*, the approach is also different from the common law in that the obligation to enforce judgments issued in Europe is independent of whether the issuing court complied with the jurisdictional rules of the Regulation.

In her symposium paper, Professor Angela Swan responded to the question, "Will the judgments of courts exercising jurisdiction pursuant to the *CJPTA* be enforceable in other provinces and countries (and are either compatible with *Morguard Investments Ltd v De Savoye*)?" Noting that the companion statute to the *CJPTA*, the *Enforcement of Canadian Judgments Act*,¹⁴⁴ eliminates review of the issuing court's jurisdiction in an enforcement action, Professor Swan argued that the *Morguard* decision spoke of a constitutional requirement for courts to exercise properly restrained jurisdiction, but did not eliminate the possibility of jurisdictional review by the enforcing court.

As will be considered next in Part IV(D), for the common law in Canada, this is but one of the concerns raised by the approach to the law of jurisdiction and judgments that has emerged in the generation of jurisprudence since the *Morguard* decision.¹⁴⁵

143. *Restatement (Second) of Judgments* §§ 10, 12 (1982); *Restatement (Second) of Conflict of Laws* §§ 96-97 (1971).

144. Uniform Law Conference of Canada, *Enforcement of Canadian Judgments and Decrees Act*, online: <www.ulcc.ca/en/home/333-josetta-1-en-gb/uniform-actsa/enforcement-of-canadian-judgments-decrees-act/4-enforcement-of-canadian-judgments-and-decrees-act>.

145. See Part V, below.

D. INTERNATIONAL HARMONIZATION AND THE TROUBLE WITH DOUBLE CONVENTIONS

One of the main incentives for pursuing jurisdictional reform is the desire to align or to coordinate local jurisdictional regimes with international standards. This facilitates the international recognition and enforcement of judgments.¹⁴⁶ Accordingly, any assessment of the progress to date of the *CJPTA* and its promise for the future, if adopted more widely in the common law provinces of Canada, should consider how it would operate in the larger international context.

The jurisdictional reforms brought about by the *Morguard* decision (*i.e.*, to recognize and enforce judgments against defendants served abroad who did not consent to jurisdiction and did not defend) were initially advanced as standards for defendants served *ex juris* in other parts of Canada. However, Canadian courts found no reason to refrain from applying this more generous approach to the judgments of foreign courts as well, despite the fact that courts in other countries would not enforce judgments from Canadian courts where jurisdiction *ex juris* had been exercised on this basis (*i.e.*, over non-consenting defendants who did not participate in the proceedings). In the case of courts in civil law countries, their jurisdictional statutes did not provide for recognition on this basis, and in the case of common law courts, leading courts in England and Ireland rejected it.¹⁴⁷

Nevertheless, the view that the way forward in cross-border litigation was to develop regimes for both jurisdiction and judgments so as to correlate them was widely accepted. At the same time that the Canadian legal community was beginning to explore this new approach, the Hague Conference on Private International Law was initiating a project to develop a multilateral judgments convention. The Hague Conference delegates considered whether they should negotiate a simple convention that would deal only with the recognition and enforcement of judgments; a double convention, with standards both for jurisdiction and for judgments; or a mixed convention that included further jurisdictional grounds that did not give rise to an obligation to enforce. Ultimately,

146. *Morguard*, *supra* note 15 at 1100. This coordination was demonstrated in the *Morguard* analysis itself, in which judgments enforcement was the driver, as was the case in the United States in which Full Faith and Credit prompted review of the law of judicial jurisdiction, and in the European Union in which the provision requiring the member states to negotiate a judgments enforcement regime prompted the development of a “double convention,” *i.e.*, one that included a regime for jurisdiction as well.

147. *In re Flightlease (Ireland) Ltd*, [2012] IESC 12, [2012] 1 IR 722; *Rubin v Eurofinance SA*, [2012] UKSC 46, [2013] 1 AC 236.

the Hague Conference delegates decided that they needed to negotiate a double convention that regulated jurisdictional standards in the courts of countries that adopted it and also imposed an obligation on those courts to enforce judgments from other courts that had adopted the convention.

This approach had a clear track record in the European Union in the *Brussels I Regulation*.¹⁴⁸ The member states of the European Union had been instructed in the original Treaty of Rome to develop a regime for the mutual recognition of judgments and it had seemed convenient to them to achieve this result by also establishing harmonized rules for jurisdiction.¹⁴⁹

As Joost Blom explained in his paper, the Hague Conference delegates pursued this approach until it became clear in 2002 that they would be unable to agree on the regime for jurisdiction.¹⁵⁰ The Special Commission (of the Hague Conference) reviewed the progress and decided to re-group and pursue, through an informal Working Group, a much narrower convention—one that was limited to business-to-business disputes in which the parties had complied with a forum selection clause. That convention was completed in 2005 and was called the *Choice of Court Convention*.¹⁵¹ It has been adopted in a number of countries and has begun to be adopted in some Canadian provinces.

Useful though this *Choice of Court Convention* may be, it covers only a small range of the kinds of cross-border cases that arise. Accordingly, the Hague Conference has continued to pursue the possibility of a convention of broader application through the work of an Experts' Group. Against this background, Professor Blom was asked to consider, "How might the *CJPTA* function in light of the current Hague Conference multilateral judgments convention project and, ultimately, one harmonizing judicial jurisdiction?"

One of the most striking features of the current work of the Hague Conference is that the Experts' Group abandoned the aspiration to produce a *double* convention and, instead sought to draft a *single* convention. As Professor Blom noted, a convention harmonizing jurisdiction may well gain momentum in time, but that is likely to be a number of years away. In contrast, a single convention is one in which there is an obligation to recognize and enforce

148. The European Union originally published the *Brussels Convention* in 1968, followed by the *Brussels I Regulation* in 2001, which was revised in 2012. See *1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, [1968] OJ, L 299 [*Brussels Convention*]; *Brussels I Regulation*, *supra* note 91; *Recast Brussels I*, *supra* note 91.

149. P. Jennard, "Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968)" [1968] OJ, C 59/01.

150. See Blom, *supra* note 13.

151. *Choice of Court Convention*, *supra* note 62.

judgments from the courts of other member states where the courts have exercised jurisdiction on specified bases. It does not purport to regulate direct jurisdiction. It does not specify which jurisdictional grounds a court may or may not rely upon in exercising jurisdiction. It merely provides that where a court has exercised jurisdiction on one of the specified grounds, there is an obligation to enforce the resulting judgment. Where a court has exercised jurisdiction on another ground, another court may decide to enforce the judgment in any event, but there is no obligation to do so.

This kind of regime is familiar to common law courts. It is the basis on which they have operated for over a century, and it is the basis on which Canadian common law courts operated until the *Morguard* decision was interpreted as requiring them to do otherwise. Moreover, to promote wide adoption of the convention, the Experts' Group has established a range of jurisdictional grounds that feature in most common law systems. As Professor Blom notes, an assessment of the *CJPTA* in light of this convention could become a point of considerable practical importance. Chief among the reasons for this is that the proposed Hague judgments convention may come to be adopted by Canada's trading partners. Should this occur, it would be desirable for Canada also to adopt it and gain the benefit of the opportunities for the recognition of Canadian judgments that membership would bring.

To gain the benefit of membership in the convention, it would be very helpful if there were means of demonstrating clearly which judgments issued by Canadian courts would be eligible for enforcement. To be clear, it is the judgment in question that is reviewed on enforcement, and not the judgments regime as a whole. However, the prospect of conducting individual reviews of the jurisdictional basis of each judgment sought to be enforced could become cumbersome where no jurisdictional analysis is undertaken by the issuing court. Where that court is in a common law province that has not adopted the *CJPTA*, the basis on which the court exercises jurisdiction is not generally reviewed unless it is challenged.

In courts of provinces that have adopted the *CJPTA*, it would be helpful to clarify any grounds that may seem to depart from the eligible grounds listed in the convention. Professor Blom conducted just such a review in his article, and evaluated the extent to which each of the *CJPTA* jurisdictional bases are "Hague compliant."¹⁵² He also suggested that the fact that the *CJPTA* is not entirely "Hague compliant" is not necessarily a reason to revise the bases of jurisdiction

152. Blom, *supra* note 13 at 272.

found in the *CJPTA*. It is clarity as to which bases meet the standards of the Hague convention that is most useful.

This, in many respects, is one of the features of the convention that represents its greatest promise for success. As a single convention, it does not impose a jurisdictional regime on the legal systems of member states. It does not contain a “black list” of grounds that a member state’s court may not use, such as was contained in the judgments convention proposal that failed some fifteen years ago,¹⁵³ and such as has been sought to be achieved piecemeal by Canadian courts since *Morguard*. The proposed Hague convention deals only with the question of whether, in the case of the judgment sought to be enforced, the court exercised jurisdiction on one of the permitted bases. The effect of the currently proposed convention on member states’ legal systems is limited to that necessary for the required result—the increased recognition and enforcement of judgments.

V. THE *CJPTA* IN THE DECADE AHEAD

The change in approach at the Hague Conference has other less immediate, but potentially more significant, implications. These relate to the intellectual inspiration that it might provide for the law in the years ahead.

The last twenty-five years of legal analysis in the field of judicial jurisdiction has been preoccupied with the challenges of tailoring the grounds of jurisdiction exercised by courts in Canada to meet a standard perceived to be a well-accepted basis for a judgment that should be granted recognition and enforcement in other courts. This unrelenting focus on correlating the two jurisdictional standards has created new restrictions on jurisdiction that seem to serve no other purpose. Whether justified as constitutional imperatives or comity, these restrictions have produced hard cases and bad law.

While many of the grounds of jurisdiction exercised by Canadian courts have passed muster, this has been little comfort for litigants with meritorious claims that have been dismissed due to the elimination of grounds that have regarded inconsistent with the perceived dictates of the Supreme Court in *Morguard*. Long established jurisdictional bases that were once relatively uncontroversial came under fire. This was despite the fact that an exercise of these grounds of jurisdiction would in any event have been subject to the discretion of the court to decline jurisdiction where it was a *forum non conveniens*, and that the exercise of jurisdiction would not have been relied upon to produce an internationally

153. Negotiations on the Judgments Project, *supra* note 93.

enforceable judgment. To those committed to the goal of correlating direct and indirect jurisdiction, exercising jurisdiction beyond a real and substantial connection¹⁵⁴ was inconceivable.

And yet there have been occasions when the courts have declined to be governed by this imperative. Two notable examples are worth mention. First, in a regime based on correlativity, there is no justification for refusing to enforce a judgment from a court exercising jurisdiction on the basis of a real and substantial connection other than for extraordinary reasons, such as public policy. Parallel proceedings produce a “race to judgment.” The race to judgment cannot be avoided in any systematic way without imposing a strict rule that the judgment of the court first seised of the matter alone is entitled to recognition and enforcement. The only alternative is for one of the courts to take action to eliminate the multiplicity by granting a stay of its own proceeding or issuing an injunction restraining the continuation of the other proceeding.

However, as was illustrated in a situation in one case that came before the Supreme Court of Canada in 2009,¹⁵⁵ sometimes, neither of these options are appropriate. Proceedings had been commenced on the same day in Canada and in the United States, and there was good reason for the proceeding commenced in Canada to continue—and no justification for issuing an injunction to restrain the foreign proceeding. A decision to let the parallel proceedings continue seemed to fly in the face of the dictates of a regime inspired by the ideals of a double convention on which Canadian jurisdictional law had implicitly been based. Such a regime, as exists under the *Brussels I Regulation*, requires the elimination of a multiplicity of proceedings and the potential for inconsistent results. And yet the Supreme Court stood its ground and declined to impose a ruling that was unsuitable under the circumstances.

Second, in *Chevron*, the SCC held that a real and substantial connection between the matter and the forum was not required for a court to exercise jurisdiction to decide whether a foreign judgment was enforceable in Canada.¹⁵⁶ The Court reasoned that such an action did not involve the adjudication of the merits of the claim or the aspiration that the results would have more than local effect. The Court disagreed with some commentators (e.g., Pitel) who said that the need for a separate jurisdictional basis was established by *Morguard*.¹⁵⁷ Together

154. As proposed in Walker, “*Muscutt Quintet*,” *supra* note 29.

155. *Teck Cominco*, *supra* note 115.

156. *Chevron*, *supra* note 43.

157. See Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 159-160 cited in *ibid* at paras 66-67.

with “damages sustained in the province” and “necessary and proper parties”, this reflected a third situation in which the courts’ jurisdiction over foreign non-consenting parties was not limited to cases having a real and substantial connection to the forum.

These two decisions, together with the leading decisions on jurisdiction in cases of service *ex juris*, have highlighted both the strength and the weakness of the common law as a means of creating a jurisdictional regime. On the one hand, attempting to create a complete jurisdictional regime out of the *obiter* in discrete cases has produced many anomalies. These anomalies have in turn given rise to some significant jurisprudence that has been, at best, confusing and, at worst, unhelpful. On the other hand, there have been occasions when leading courts have been confronted with the logical implications of the emerging doctrine and, realizing that the results would be undesirable, have refused to be governed by it.

The conclusions to be drawn from the individual papers presented at the symposium are too many and too varied to summarize here, but some common themes emerge. First among these is that “a statutory codification would make the law more available and more knowable, not just to lawyers but to the general public.”¹⁵⁸ Second, even if the differences between the *CJPTA* and the common law are not significant, their existence exacerbates the confusion and uncertainty within this area of law. Third, while the *CJPTA* may need some updating, the provisions that require attention and the attention that they require are relatively clear. Fourth, the international community is pressing forward with the development of new regimes for the recognition and enforcement of judgments, regimes in which it would be beneficial for Canada to participate. While these regimes do not appear to require significant changes to the current law of jurisdiction in Canada, they highlight the importance of aspiring to make our law more available and more knowable to lawyers and to the general public, both in Canada and elsewhere.

The adoption of the *CJPTA* by the remaining common law provinces might not be a complete solution to the challenges that we face with the law of jurisdiction. However, as a regime, the *CJPTA* could provide a sound starting point for the development—perhaps by the ULCC—of a revised model statute that would serve Canadians well in the decade ahead. Some drafting suggestions for such a revised model statute on court jurisdiction are contained in the Appendix that follows.

158. Pitel, *supra* note 5 at 78.

VI. APPENDIX: COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT—SUGGESTED DRAFTING AMENDMENTS

PART 2: JUDICIAL JURISDICTION¹⁵⁹

Application of this Part

2.(1) In this Part, “court” means a court of [enacting province or territory].

(2) The jurisdiction of a court in civil and commercial matters is to be determined solely by reference to this Part.

(3) For greater certainty, except as provided in this Part, this Part does not apply to family law matters, including divorce, custody, support, or matrimonial property.¹⁶⁰

Proceedings in personam

3.(1) A court has jurisdiction in a proceeding that is brought against a person only if

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

(b) during the course of the proceeding that person submits to the court’s jurisdiction by defending the merits of the proceeding,¹⁶¹

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

(d) that person is ordinarily resident in [enacting province or territory] at the time of the commencement of the proceeding, or

(e) there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based.

3.(2) However, a court of [enacting province or territory] has no jurisdiction where the parties, by valid agreement, have chosen to submit all existing or future

159. The term “judicial jurisdiction” is the prevailing term internationally.

160. Clarifying the scope of the statute to exclude family members avoids the confusion in this area arising from considering whether jurisdiction is conferred differently in another statute.

This approach to family law matters is consistent with the approach elsewhere in both civil and common law. See CCQ, *supra* note 19; Recast Brussels I, *supra* note 91, art 1; Lawrence Collins, ed, Dicey, Morris & Collins on The Conflict of Laws, 15th ed (London: Sweet & Maxwell, 2017) at ch 17-21.

161. This phrase clarifies the basis for determining “submission” or “attornment.”

disputes between themselves relating to a specified legal relationship exclusively to a foreign court or to an arbitrator,¹⁶² unless

(a) the defendant submits to the jurisdiction of the court of [enacting province or territory] or

(b) the jurisdiction agreement purports to serve as a waiver of the territorial competence of the courts of [enacting province or territory] by a consumer or worker or insured party ordinarily resident in [enacting province or territory].¹⁶³

[Section 4 is omitted]¹⁶⁴

Proceedings in rem

4. A court has jurisdiction in a proceeding that is brought against a vessel if the vessel is served or arrested in [enacting province or territory].

Ordinary residence – legal persons¹⁶⁵

5. A legal person is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if

(a) it is incorporated in [enacting province or territory] or

(b) it has its principal place of business in [enacting province or territory] or

(c) its central management is exercised in [enacting province or territory].¹⁶⁶

Real and substantial connection

6. 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

162. This provision establishes a negative jurisdiction provision for exclusive jurisdiction agreements nominating other fora such as exists in Quebec (see CCQ, *supra* note 19, art 3148, para 2) and the European Union (see Recast Brussels I, *supra* note 91, art 11). See also discussion in Saumier, *supra* note 7 and accompanying text.

163. This provision clarifies that the negative jurisdiction provision applies only to commercial agreements. See discussion of Saumier, *supra* note 7 and surrounding text.

164. Section 4 (“proceedings with no nominate defendant”) has been omitted as having never been proven to be of use.

165. Separate provisions for partnerships and unincorporated associations are replaced by a single provision for “legal persons.”

166. The provision for jurisdiction over legal persons having or required by law to have a registered office or agent in the enacting province is omitted as confusing service with judicial jurisdiction.

- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in [enacting province or territory],
- (b) concerns the administration of the estate of a deceased person in relation to
 - (i) immovable property of the deceased person in [enacting province or territory], or
 - (ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in [enacting province or territory],
- (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
 - (i) immovable or movable property in [enacting province or territory], or
 - (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [enacting province or territory],
- (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
 - (i) the trust assets include immovable or movable property in [enacting province or territory] and the relief claimed is only as to that property;
 - (ii) that trustee is ordinarily resident in [enacting province or territory];
 - (iii) the administration of the trust is principally carried on in [enacting province or territory];
 - (iv) by the express terms of a trust document, the trust is governed by the law of [enacting province or territory],
- (e) concerns contractual obligations, and
 - (i) the contractual obligations, to a substantial extent, were to be performed in [enacting province or territory],
 - (ii) by its express terms, the contract is governed by the law of [enacting province or territory];
- (f) concerns
 - (i) the purchase of goods, services or both, for use other than in the course of the purchaser's trade or profession, and resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller;
 - (ii) the employment of a worker whose ordinary residence is in [enacting province or territory]; or
 - (iii) insurance where the holder, the insured or the beneficiary is ordinarily resident in [enacting province or territory], the contract is related to [enacting province or territory] or the loss occurred in [enacting province or territory].¹⁶⁷

167. The provision securing access to the courts of a consumer's province residence is extended to workers and insured persons. See discussion of Saumier, *supra* note 7 and surrounding text.

- (g) concerns restitutionary obligations that, to a substantial extent, arose in [enacting province or territory],¹⁶⁸
- (h) concerns a tort committed in [enacting province or territory],
- (i) is a claim for an injunction ordering a party to do or refrain from doing anything
- (i) in [enacting province or territory], or
- (ii) in relation to immovable or movable property in [enacting province or territory],
- (j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [enacting province or territory],
- (k) is for enforcement of a judgment of a court made in or outside [enacting province or territory] or an arbitral award made in or outside [enacting province or territory], or
- (l) is for the recovery of taxes or other indebtedness and is brought by the Crown [of the enacting province or territory] or by a local authority [of the enacting province or territory].

Discretion as to the exercise of jurisdiction:

Residual jurisdiction

- 7.(1) A court that under section 3 lacks judicial jurisdiction in a proceeding may in exceptional circumstances exercise discretion to¹⁶⁹ hear the proceeding despite that section if it considers that
- (a) there is no court outside [enacting province or territory] in which the plaintiff can commence the proceeding, or
 - (b) the commencement of the proceeding in a court outside [enacting province or territory] cannot reasonably be required, or
 - (c) it is necessary to exercise jurisdiction over the claim or the party in order to decide a closely related matter over which the court has judicial jurisdiction pursuant to section 3(a), (b), (c) or (d).¹⁷⁰

168. The provision for jurisdiction over “business carried on in the province” is omitted as either redundant or exorbitant. See Walsh, *supra* note 7 and accompanying text.

169. This phrase clarifies the high threshold for the exercise of residual jurisdiction. See discussion of Sobkin, *supra* note 9 and accompanying text.

170. This phrase re-introduces the traditional provision for the exercise of jurisdiction over necessary and proper parties such as continues to exist in Quebec, but clarifies that it is subject to the same high threshold as the exercise of residual jurisdiction more generally. See CCQ, *supra* note 19, art 3136 at para 2; Recast Brussels I, *supra* note 91, art 8; Sobkin, *supra* note 9 and accompanying text.

7.(2) In exercising residual jurisdiction under this section, the court must consider the interests of the parties to the proceeding and the ends of justice.¹⁷¹

Discretion as to the exercise of jurisdiction:

Declining jurisdiction

8.(1) In proceedings in which the exercise of territorial jurisdiction is based on section 3.(1)(c),

(a) and the jurisdiction of the courts of [the enacting province] is agreed to be exclusive, a court may decline to exercise jurisdiction only where the agreement is null and void, inoperative or incapable of being performed, or where giving effect to the agreement would be manifestly unjust or contrary to public policy;

(b) and the jurisdiction of the court chosen is agreed to be non-exclusive, the court will base its exercise of discretion to accept or to decline jurisdiction on a presumption in favour of the forum selected by the parties.¹⁷²

8.(2) In proceedings in which the exercise of territorial jurisdiction is based on section 3(d) or on section 3(e), or on section 3(c) where the agreement does not grant exclusive jurisdiction to the courts of [enacting province or territory],¹⁷³

a court may decline to exercise jurisdiction on such terms as are just where there is a clearly more appropriate forum elsewhere that is available and adequate,¹⁷⁴ where it is in the interests of justice to do so, based on:

(a) the participation of the applicant in the proceedings,

(b) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in an alternative forum,

(b) the accessibility of evidence required in the proceeding in the courts of [enacting province or territory] or in an alternative forum.¹⁷⁵

171. This provision clarifies the need to consider the effect of exercising residual jurisdiction on both parties and the broad ranging consideration of factors necessary to the appropriately restrained exercise of residual jurisdiction. See discussion of Sobkin, *supra* note 9 and accompanying text.

172. This clarifies the standard to be applied in cases in which jurisdiction is based on a non-exclusive jurisdiction agreement.

173. The exercise of discretion to decline jurisdiction is eliminated for cases in which jurisdiction is exercised on the basis of a valid exclusive jurisdiction agreement.

174. The addition of this phrase clarifies the test for “more appropriate” in a manner consistent with prevailing international standards.

175. This provision incorporates the commonly used factor relating to the accessibility of relevant evidence.

- (d) the law to be applied to issues in the proceeding or¹⁷⁶
- (e) the desirability of avoiding a multiplicity of legal proceedings and the potential for¹⁷⁷ conflicting decisions in different courts.

8.(3) In proceedings in which the exercise of jurisdiction is based on section 3(1) (e), the court shall not presume that it is the more appropriate forum.¹⁷⁸

8.(4) The court may refuse to decline to exercise jurisdiction where this would deprive the plaintiff of a legitimate juridical or personal benefit of proceeding in the courts of [enacting province or territory].¹⁷⁹

Conflicts or inconsistencies with other Acts

9. If there is a conflict or inconsistency between this Part and another Act of [enacting province or territory] or of Canada that expressly

- (a) confers jurisdiction on a court, or
- (b) denies jurisdiction to a court,

that other Act prevails.¹⁸⁰

176. This provision clarifies that the factors justifying the exercise of discretion to decline jurisdiction are disjunctive and not conjunctive.

177. This phrase combines two typically coinciding factors.

178. This provision clarifies the standard to be applied in cases in which jurisdiction is based on a real and substantial connection to the forum.

179. This provision codifies the prevailing standard for refusing to decline jurisdiction in favour of a forum otherwise determined to be clearly more appropriate.

180. Part 3 concerning Transfers of Proceedings is not addressed here; see discussion of Black, *supra* note 11 and accompanying text.