RULE 17 SERVICE OUTSIDE ONTARIO

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SYNOPSIS

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TEXT OF RULE

DEFINITION

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

SERVICE OUTSIDE ONTARIO WITHOUT LEAVE

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

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

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

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

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

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

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

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

Tort Committed in Ontario

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

Damage Sustained in Ontario

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

Injunctions

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

Support

(j) for support;

Custody or Access

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

Invalidity of Marriage

(l) to declare the invalidity of a marriage;

Judgment of Court Outside Ontario

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

Authorized by Statute

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

Necessary for Proper Party

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

Person Resident or Carrying on Business in Ontario

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

Counterclaim, Crossclaim or Third Party Claim

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

Taxes

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

SERVICE OUTSIDE ONTARIO WITH LEAVE

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

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

ADDITIONAL REQUIREMENTS FOR SERVICE OUTSIDE ONTARIO

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

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

MANNER OF SERVICE OUTSIDE ONTARIO

Definitions

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

General Manner of Service

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

Manner of Service in Convention States

(3) An originating process or other document to be served outside Ontario in a contracting state shall be served,

(a) through the central authority in the contracting state; or

(b) in a manner that is permitted by Article 10 of the Convention and that would be permitted by these rules if the document were being served in Ontario. *Amended 1992.*

Proof of Service

(4) Service may be proved,

(a) in the manner provided by these rules for proof of service in Ontario;

(b) in the manner provided by the law of the jurisdiction where service is made; or

(c) in accordance with the Convention, if service is made in a contracting state (Forms 17A to 17C).

MOTION TO SET ASIDE SERVICE OUTSIDE ONTARIO

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

(a) for an order setting aside the service and any order that authorized the service; or

(b) for an order staying the proceeding.

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

(a) service outside Ontario is not authorized by these rules;

(b) an order granting leave to serve outside Ontario should be set aside; or

(c) Ontario is not a convenient forum for the hearing of the proceeding.

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

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

§4 THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS

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

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

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

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

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

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

(a) *Presence-based jurisdiction*

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

(b) *Consent-based jurisdiction*

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

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

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

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

(c) *Assumed jurisdiction*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> . . . the business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.
>
> . . . what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.

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

> The considerations underlying the rules of comity apply with much greater force between the units of a federal state.
>
> . . . the English rules seem to me to fly in the face of the obvious intention of the *Constitution* to create a single country.
>
> . . . various constitutional and sub-constitutional arrangements and practices make unnecessary a "full faith and credit" clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation.

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

(f) *The Morguard principles are constitutional imperatives*

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

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

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

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

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

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

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

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

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

> I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure.
>
> . . .
>
> [T]he historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

[2] *Literature*

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§5 PERSONAL JURISDICTION

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

(a) *The Morguard decision and personal jurisdiction*

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

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

> a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit. . . .
>
> . . . when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of the accepted grounds traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments — in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.
>
> The difficulty, of course, arises where, as here, the defendant was outside the jurisdiction of that court and he was served *ex juris*. To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service *ex juris* in all the provinces are broad, in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.
>
> . . . It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties.

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

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

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

> it has a "real and substantial connection" (a term not yet fully defined) with the subject-matter of the litigation.
>
> . . .
>
> In *Morguard*, a more accommodating approach to recognition and enforcement was premised on there being a "real and substantial connection" to the forum that assumed jurisdiction and gave judgment. *Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction . . .*
>
> The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. More than this was left to depend on the gradual accumulation of connections defined in accordance with the broad principles of order and fairness. . .
>
> Since the matter has been the subject of considerable commentary, I should note parenthetically that *I need not, for the purposes of this case, consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of forum non conveniens. . . Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.*
> (emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) *Jurisdiction simpliciter and forum non conveniens*

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

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

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

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

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

(d) *Access to justice*

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

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

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

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

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

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

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

> **3136.** Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.

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

(e) *Multiplicity*

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

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

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

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

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

[2] *Literature*

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

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

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

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

§6 DECLINING JURISDICTION: *FORUM NON CONVENIENS*

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

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

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

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

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

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

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

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

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

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

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

(b) *The doctrine of forum non conveniens*

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

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

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

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

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

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

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

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