2006

New British Columbia Legislation: The Court Jurisdiction and Proceedings Transfer Act; The Enforcement of Canadian Judgments and Decrees Act

Elizabeth Edinger
Allard School of Law at the University of British Columbia, edinger@allard.ubc.ca

LEGISLATION COMMENT

NEW BRITISH COLUMBIA LEGISLATION: *THE COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT*; *THE ENFORCEMENT OF CANADIAN JUDGMENTS AND DECREES ACT*

ELIZABETH EDINGER[†]

I. INTRODUCTION

Enacted in 2003, *The Court Jurisdiction and Proceedings Transfer Act*[1] and *The Enforcement of Canadian Judgments and Decrees Act*[2] were finally proclaimed in force as of 4 May 2006.[3] Both are modelled closely on statutes drafted by the Uniform Law Conference of Canada (ULCC); the commentary that accompanies the uniform statutes will undoubtedly prove very useful in interpreting and applying the British Columbia statutes.[4] Some other provinces have also enacted one or both of these statutes and the case law generated in those jurisdictions will also be of assistance.[5] The ULCC intended the statutes to be complementary. The generous recognition provisions of the *Enforcement Act* are premised on the rationalization of

---

[†] Faculty of Law, University of British Columbia.

[1] S.B.C. 2003, c. 28 [*Court Jurisdiction Act*].

[2] S.B.C. 2003, c. 29 [*Enforcement Act*].

[3] B.C. Reg.117/2006 and B.C. Reg. 121/2006 respectively.

[4] *Uniform Court Jurisdiction and Proceedings Transfer Act*, online: ULCC <http://www.ulcc.ca/en/us>; *Uniform Enforcement of Canadian Judgments and Decrees Act*, online: ULCC <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e4>. All references in this article to the ULCC will be to the uniform statutes and commentary on the ULCC website. The commentary is contained throughout the text of the uniform statutes.

[5] The *Uniform Enforcement of Canadian Judgments and Decrees Act* has been enacted as the *Enforcement of Canadian Judgments and Decrees Act* in Saskatchewan (S.S. 1997, c. C-41), Nova Scotia (S.N.S. 2001, c. 30), and Manitoba (*sub nom. Enforcement of Canadian Judgments Act*, C.C.S.M. c. E116). It is in force in Saskatchewan and Nova Scotia. The *Uniform Court Jurisdiction and Proceedings Transfer Act* has been enacted as the *Court Jurisdiction and Proceedings Transfer Act* in Saskatchewan (S.S. 1997, c. C-41.1) and Yukon (S.Y. 2000, c. 7). It is in force in Saskatchewan.

jurisdiction to be attained through national adoption of the *Court Jurisdiction Act*.

The *Enforcement Act*[6] is the shorter and apparently the simpler of the two new statutes, but it actually makes quite significant changes to the common law rules. It remains to be seen whether the *Court Jurisdiction Act*[7] will be effective in simplifying jurisdictional issues and facilitating the easy, economical, and efficient relocation of actions to more appropriate fora. Both statutes are intended to incorporate and implement the constitutional principles enunciated in *Morguard Investments v. De Savoye*[8] and subsequent Supreme Court of Canada decisions.[9]

II. *THE ENFORCEMENT OF CANADIAN JUDGMENTS AND DECREES ACT*

Persons wishing to enforce a Canadian judgment or order in British Columbia now have choices. They may bring a common law action on the judgment, may register it either under Part 2 of the *Court Order Enforcement Act*[10] (provided it is not a Quebec judgment) or under the *Enforcement Act*, or may even bring an action on the original cause of action.[11] Registration under the *Enforcement Act* will likely be the preferred option.

Like Part 2 of the *Court Order Enforcement Act*, the *Enforcement Act* authorizes conversion of a foreign judgment by means of registration instead of action. However, the latter has three very significant new elements that will appeal to enforcing parties: It extends recognition and enforcement to non-

---

[6] *Supra* note 2.

[7] *Supra* note 1.

[8] [1990] 3 S.C.R. 1077, (1990), 76 D.L.R. (4th) 256 [*Morguard*].

[9] See especially *Hunt v. T & N plc*, [1993] 4 S.C.R. 289, 109 D.L.R. (4th) 16 [*Hunt*]; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289 [*Tolofson*]; *Unifund Assurance Co. of Canada v. Insurance Corporation of British Columbia*, [2003] 2 S.C.R. 63, 227 D.L.R. (4th) 402, 2003 SCC 40; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 257 D.L.R. (4th) 193, 2005 SCC 49; and the dissent in *Castillo v. Castillo*, [2005] 3 S.C.R 870, 260 D.L.R.(4th) 439, 2005 SCC 83. *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 220 D.L.R. (4th) 54, 2002 SCC 78 has not had the influence on jurisdiction that it promised.

[10] R.S.B.C. 1996, c. 78.

[11] A right to bring an action on the judgment or on the original cause of action is expressly preserved by s. 9 of the *Enforcement of Canadian Judgments and Decrees Act* and by s. 38 of the *Court Order Enforcement Act*. That right will, of course, depend on the non-expiration of the relevant limitation period. The *Enforcement of Canadian Judgments and Decrees Act*, by s. 11, eliminates a possible further choice by repealing an earlier enactment, which had never been proclaimed, the *Enforcement of Canadian Judgments Act*, R.S.B.C. 1996, c. 115.

pecuniary Canadian judgments and orders;[12] it operates on the basis of blind full faith and credit;[13] and it changes the limitation period applicable to recognition enforcement of extra-provincial judgments and brings it into line with the limitation period for domestic judgments.[14] Each will be discussed below.

In extending recognition and enforcement to non-pecuniary judgments, the statute anticipated and now parallels recent common law developments in Canada,[15] but the statutory prohibition of any evaluation by the recognizing court of either the jurisdiction or the fairness of process in the originating court goes far beyond the concept of full faith and credit outlined in *Morguard*.[16] *Morguard* made interprovincial recognition and enforcement conditional on the existence of a real and substantial connection between the action and the originating court and left the recognizing court to decide whether that condition had been satisfied. *Morguard* set minimum, not maximum, standards, and also left the common law defences intact and available interprovincially.

The first new element, the extension of recognition to non-pecuniary judgments, is accomplished by the definition of a Canadian judgment. That critical definition is found in section 1. A Canadian judgment is one arising from any civil proceeding in any province or territory that requires a person to pay money, requires a person "to do or not do an act or thing", or "declares rights, obligations or status in relation to a person or thing".[17] In other words, a Canadian judgment consists of pecuniary judgments, injunctions, orders for specific performance, and declarations. Pecuniary judgments include orders from tribunals performing judicial functions that are "enforceable as judgments" and compensation and restitution orders made under the *Criminal Code*,[18] which have become enforceable like civil judgments by filing in the

---

[12] See s. 1.

[13] See s. 6.

[14] This change applies to all foreign judgments, not just those which are registrable under the *Enforcement Act*, *supra* note 2, ss. 5, 12, 16.

[15] In *Pro-Swing Inc. v. ELTA Golf Inc.* (2004), 71 O.R. (3d) 566, [2004] O.J. No. 2801 (QL) (C.A.), leave to appeal to S.C.C. granted (2005), 206 O.A.C. 398, 339 N.R. 193, [2004] S.C.C.A. No. 420, the Ontario courts held that, in principle, foreign (not just Canadian) injunctions could be recognized at common law. The injunction in question was refused recognition because it was held not to be sufficiently precise. The Supreme Court granted leave to appeal and the appeal was heard in December 2005 but no judgment has yet been released.

[16] *Morguard*, *supra* note 8.

[17] *Supra* note 2.

[18] R.S.C. 1985, c. C-46 [*Code*].

civil court pursuant to section 741 of the *Code*. Pecuniary judgments must still be final, as defined by the common law, but non-pecuniary judgments may be interlocutory.[19]

The definition in section 1 also contains exclusions. Family orders, fines and penalties, orders related to the care and control of minors, non-pecuniary tribunal orders, and orders relating to probate or administration of estates are expressly excluded. Their exclusion from the benefit of registration under the *Act* does not necessarily mean that they are all unrecognizable interprovincially within Canada. As stated by the ULCC, some of the orders are already "the subject of existing machinery for interprovincial enforcement."[20] Family orders, for example, have long had their own statutory regime because they so rarely qualified as final orders within the meaning of the common law.[21] Even though one-stop shopping for a legislative regime to convert an extra-provincial order to a British Columbia order might seem to be the ultimate in efficiency, blind full faith and credit simply is not appropriate for some types of orders.

On the other hand, one might well ask why the ULCC and the legislature excluded fines and non-pecuniary tribunal orders from the benefit of a statute that purports to implement (and, indeed, in some respects exceeds) the constitutional requirement of full faith and credit. The common law confined itself to recognition of pecuniary judgments and prohibited recognition and enforcement of judgments applying penal and revenue laws. But *Morguard*[22] (and *Hunt v. T & N plc*[23]) enunciated a constitutional principle and, although *Morguard* involved a pecuniary judgment, neither case suggested that the only part of the common law rule to be jettisoned for purposes of recognition and enforcement within Canada was the definition of jurisdiction. And *Hunt* itself involved an interlocutory non-pecuniary order for discovery of documents issued by the British Columbia Supreme Court. Once one abandons some parts of the common law rule, there is no logical stopping place. Why should the common law prohibition on recognition and enforcement of penal and revenue laws be maintained interprovincially within Canada? And if a tribunal decision is afforded the status of *res judicata* within a province, why should

---

[19] See s. 2. The common law definition of a final judgment is still governed by *Nouvion v. Freeman* (1889), 15 App. Cas. 1 (H.L.).

[20] *Supra* note 3.

[21] See *Interjurisdictional Support Orders Act*, S.B.C. 2002, c. 29.

[22] *Supra* note 8.

[23] *Supra* note 9. The two cases must be read together for constitutional purposes. *Morguard* (*supra* note 8) only hinted that the concerns were constitutional and *Hunt* confirmed and applied that characterization. Nevertheless, *Morguard* is now treated as if it decided the constitutional issue.

that decision not be accorded full faith and credit throughout Canada, whether or not the decision has been filed in a superior court?[24]

Nevertheless, even if the constitutional principle of full faith and credit requires broader recognition of judgments and orders interprovincially than is accorded by the *Enforcement Act*,[25] the provisions of the statute excluding certain categories of judgments and orders are probably not *ultra vires*. The statute does not deal with recognition within the province generally. Like the *Court Order Enforcement Act*,[26] which more or less codifies the pre-*Morguard*[27] common law rules[28] and has never been amended to incorporate *Morguard*, the *Enforcement Act* merely provides an alterative process for converting a judgment or order originating in another province into a local judgment. *Morguard* did not hold that Canadian judgments are constitutionally entitled to the benefit of the registration process. A party may still bring a common law action on an extra-provincial judgment or order that does not fall within the *Enforcement Act*.

Attempts to register the authorized tribunal decisions may generate some litigation. Registration is subject to three cumulative conditions set out in section 1(a)(i). First, the tribunal decision must be "enforceable as a judgment of the superior court" of the originating province. That phrase traditionally requires filing of the administrative decision in the court. Secondly, the award must be pecuniary. And thirdly, only awards issued by tribunals performing judicial functions will be registrable. The ULCC commentary says that the third limitation is intended to exclude recognition and enforcement of mere administrative orders. Presumably, the ULCC considers administrative orders to be equivalent to fines, which are expressly excluded from recognition under

---

[24] As occurred in *Bourdon v. Stelco Inc.*, [2005] 3 S.C.R. 279, 259 D.L.R. (4th) 34, 2005 SCC 64, where the Supreme Court of Canada held that Quebec courts should recognize an unconfirmed (unhomologated) Ontario tribunal decision concerning the entitlement of Quebec employees of Stelco Inc. to retirement benefits under the Stelco pension plan. The Court did not mention *Morguard* (*supra* note 8), but the result in the case amounts to direct recognition of a tribunal decision which had not been filed so as to become enforceable as a judgment of the superior court.

[25] *Supra* note 2.

[26] *Supra* note 10.

[27] *Supra* note 8.

[28] At common law, recognition and enforcement was available for foreign pecuniary judgments provided that they were final and conclusive and that the originating court had jurisdiction. The originating court was considered to have had jurisdiction if the defendant was present in the foreign jurisdiction when the action was commenced or if the defendant somehow submitted to its jurisdiction. *Morguard* (*supra* note 8) supplemented the common law definition of jurisdiction by holding that the foreign court would be considered to have had jurisdiction if there had been a real and substantial connection between the action and the forum.

the *Enforcement Act*.[29] The question of whether the tribunal was acting judicially may prove to be debatable. Classification of the decision-making function arises in connection, for example, with the allocation of matters to provincially (and probably federally) created courts and tribunals and judges differ in their conclusions on the proper characterization of the function.[30]

The second new element, the blinding of the courts in the exercise of recognizing a Canadian judgment, is embedded in section 6. That section is of critical importance for that reason and also because it bestows on the receiving court the discretion that will be needed for enforcement of non-pecuniary judgments. Subsections (1), (2), and (4) bestow discretion, while subsection (3) imposes the blindfold.

Section 6(1) authorizes either party to the proceedings to apply to the British Columbia Supreme Court for directions in connection with the local enforcement of the extra-provincial order. Section 6(4) requires a party to apply for directions if the originating court imposed any conditions on enforcement or if the judgment was obtained "without notice to the persons bound by it." Section 6(2) gives the court discretion to fine-tune the order in a variety of ways or to stay it on terms and for any period. A stay may be granted, for example, if the defendant has made an application in the originating jurisdiction to set aside or vary the order. A stay may also be granted if the judgment is contrary to the public policy of British Columbia.

Subsection (3) imposes the blindfold by prohibiting the receiving British Columbia court from scrutinizing the jurisdiction of the originating court and from considering traditional common law defences to recognition and enforcement. This is a significant departure from both the common law, as modified by *Morguard*,[31] and the registration process contained in the *Court Order Enforcement Act*.[32]

Section 6(3)(a) prohibits scrutiny of the jurisdiction of the originating court. A court must not issue a stay "solely on the grounds" that the originating court or tribunal lacked jurisdiction over "the subject matter of the proceeding that led to the judgment, or over the party against whom enforcement is sought" under either the rules of private international law or the domestic rules of the originating province. The receiving court need not and must not determine for itself whether there was a real and substantial connection between the action and the originating court.

---

[29] *Supra* note 2.

[30] See *e.g. Sobey's Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238, 57 D.L.R. (4th) 1. This case is one of a long line of cases dealing with what is commonly known in constitutional jargon as the s. 96 problem.

[31] *Supra* note 8.

[32] *Supra* note 10.

Subsections (b) and (c) deal with common law defences. Unsurprisingly (because it is not a common law defence[33]), subsection (3)(b) prohibits the issuance of a stay on the basis of an error of law in the originating court. But section 6(3)(c) prohibits issuance of a stay based on "a defect ... in the process or proceeding leading to the judgment."[34] The ULCC commentary indicates that this subsection is intended to eliminate the common law defences of breach of natural justice and fraud and asserts that "[t]he [c]ommon law approach cannot co-exist with the full faith and credit concept." This is not self evident. While it is true that the all Canadian courts maintain high standards in the dispensation of justice, the same confidence cannot be placed in all parties to Canadian proceedings. They are the ones usually responsible for the alleged fraud and breaches of natural justice and such incidents occur despite the high standards of justice ordinarily dispensed. As Binnie J. held in *Beals v. Saldanha*,[35] it is the particular proceeding that is in issue, not the foreign legal system as a whole.

Blind full faith and credit is premised on adoption by all provinces and territories of the common jurisdictional approach contained in the *Uniform Court Jurisdiction and Proceedings Transfer Act*.[36] That statute, now in force in British Columbia and discussed below, has been enacted by only a tiny minority of other Canadian jurisdictions. British Columbia residents who find themselves defendants in a proceeding in another Canadian jurisdiction may find themselves disadvantaged by their home province's new generous recognition rules. Despite the fact that *Morguard*[37] imposed constitutional due process jurisdictional standards, Canadian courts still do not evaluate the propriety of their own jurisdiction of their own motion, in the absence of a challenge.

The only recourse for a party objecting to recognition on grounds of lack of jurisdiction, fraud, or breach of natural justice is to apply for relief to the courts in the originating province and to seek a stay of enforcement locally pursuant to section 6(2)(c)(ii) pending determination of the application in the originating jurisdiction.

The third significant element of the *Enforcement Act* is the new limitation period it creates for both Canadian judgments and, by its consequential

---

[33] See *Godard v. Grey* (1870), L.R. 6 Q.B. 139.

[34] *Enforcement Act*, *supra* note 2.

[35] [2003] 3 S.C.R. 416 at para. 91, 234 D.L.R. (4th) 1, 2003 SCC 72 [*Beals*]. Binnie J, with Iacobucci J., in dissent, held that there had been a breach of natural justice in the Florida proceedings.

[36] *Supra* note 4.

[37] *Supra* note 8.

amendments of the *Limitation Act*[38] and the *Court Order Enforcement Act*,[39] for non-Canadian judgments.[40] Section 5 provides that the new limitation period, either for registration or for a common law action to enforce Canadian and non-Canadian judgments, is the earlier of the limitation period in force in the originating jurisdiction or ten years. This replaces the six year limitation period, which was premised on the characterization of an action to enforce a foreign judgment as an action in debt.[41] This probably surprised at least some judgment creditors who assumed that the limitation period for enforcement of a foreign judgment would be the same as that for enforcement of a domestic judgment in British Columbia (ten years).[42]

Curiously, the *Act* omits the boilerplate provision found in the uniform statute[43] bestowing regulation-making power on the Lieutenant Governor in Council in relation to various matters such as, for example, fees and forms. The actual registration procedure, set out in section 3, directs the enforcing party to file in the registry of the Supreme Court "by paying the fee prescribed by regulation" and by providing a certified copy of the judgment and such other information as is required by the *Supreme Court Rules*.[44] Registration converts the judgment to a British Columbia judgment and enforcement may proceed utilizing local collection law.[45] Post-judgment interest will be payable following registration and, according to section 7, will be calculated on the total of the judgment and any pre- and post-judgment interest that has accrued to the date of registration in British Columbia.

Changes to the law made by legislature are not automatically retroactive, unlike those made by the judiciary. Therefore, for the time being, one of the more important provisions will be the transitional provision, section 10. That section states the obvious and the not so obvious. The Act will apply to judgments resulting from all Canadian proceedings commenced after 4 May 2006 and it will also apply to all proceedings commenced before 4 May 2006,

---

[38] R.S.B.C. 1996, c. 266.

[39] *Supra* note 10.

[40] See *Enforcement Act*, *supra* note 2, at ss. 16 and 12, respectively.

[41] See *Limitation Act*, *supra* note 38, s. 3(5); *Court Order Enforcement Act*, *supra* note 10, s. 29(1).

[42] *Limitation Act*, *ibid.*, s. 3(3)(f).

[43] See s. 10.

[44] British Columbia, *Supreme Court Rules* [Rules of Court]. Rule 54 of the British Columbia Rules of Court deals with foreign judgments.

[45] *Supra* note 3, s. 4: "[A] registered Canadian judgment may be enforced ... as if it were an order or judgment of ... the Supreme Court."

provided that the defendant "took part" in those proceedings. The ULCC commentary does not elaborate on the meaning of the phrase "took part". How much participation is intended? Do any defendants in Canadian actions now dare to walk away after losing a jurisdictional challenge and risk a default judgment? This may not prove to be an issue in the vast majority of cases but the fact that the *Enforcement Act*[46] extends full faith and credit to non-pecuniary judgments suggests that there may be some interesting application issues before section 10 is spent. Section 6(4)(b), discussed above, clearly anticipates recognition of orders obtained ex parte: It requires the enforcing party to apply for directions before taking any steps to enforce such orders.

III. *THE COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT*

The *Court Jurisdiction Act*[47] has three parts and two functions. Part 1 is the definition section. Part 2 deals with the territorial competence of British Columbia courts. Part 3 deals with transfers of proceedings to and from British Columbia superior courts to courts anywhere else in the world. Part 2 applies immediately to all actions. The use of Part 3 will depend on interstate judicial capacity to transfer and receive as well as on judicial co-operation. Both may be slow to develop.

A. PARTS 1 AND 2

The *Act* provides that "[t]he territorial competence of a court is to be determined solely by reference to this Part."[48] Sections 3 to 6, therefore, now represent an exhaustive statement of the circumstances in which a British Columbia court will have jurisdiction *simpliciter*. The statutory rules thus replace both the common law rule that presence in the province at the time of commencement of the proceedings gives the court jurisdiction *simpliciter* as of right and the rules for service *ex juris* formerly found in Rule 13(1) of the Rules of Court. However, except for subsection (d), section 3 tracks the current common law rules as modified, of course, by *Morguard*.[49]

A British Columbia court has territorial jurisdiction if the defendant consents, if the defendant is ordinarily resident in the province, or if there is a real and substantial connection between British Columbia and the facts on which the proceeding is based.

---

[46] *Supra* note 2.

[47] *Supra* note 1.

[48] See s. 2(2). The *Court Jurisdiction Act* does not touch on subject matter jurisdiction: *Courcelles Estate v. Rogers*, 2006 BCSC 882.

[49] *Supra* note 8.

The defendant may consent to the court's jurisdiction in one of three ways: by commencing an action in the province "to which the proceeding in question is a counterclaim";[50] by submitting during the proceeding;[51] or by having entered into an agreement with the other party.[52] These are all methods of consent well known to the common law.

The common law rule that a court has jurisdiction as of right if the defendant is present at the time the action is commenced has been replaced by ordinary residence "at the time of commencement of the proceeding".[53] Because section 3 now makes ordinary residence a basis for territorial jurisdiction, sections 7, 8, and 9 provide definitions of ordinary residence for corporations, partnerships, and unincorporated associations, respectively. These definitions govern for the purpose of determining territorial jurisdiction under the *Act*, but since they are essentially codifications of the common law rules defining ordinary residence, the transition should be easy. No definition of ordinary residence for natural persons is included and that will be governed by unadulterated common law.

The last basis for territorial competence, derived directly from *Morguard*,[54] is the existence of "a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based."[55] How close the nexus must be for a real and substantial connection for purposes of jurisdiction *simpliciter* is still not settled,[56] but section 10 of the *Court Jurisdiction Act*, discussed below, is helpful in this respect. It provides an extended definition of a real and substantial connection by setting out a variety of circumstances "presumed" to constitute a real and substantial

---

[50] See *supra* note 1, s. 3(a).

[51] See s. 3(b).

[52] See s. 3(c). Typically, this is a jurisdiction selection clause in a contract. Such clauses are given great weight but are not treated as absolutely binding on the court: *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, 224 D.L.R. (4th) 577, 2003 SCC 27.

[53] See s. 3(d). *Morguard* (*supra* note 8) expressly preserved the common law bases but whether mere presence survived *Beals* (*supra* note 35) is debatable. The majority in *Beals* seemed to suggest that the only basis for measuring territorial competence is a real and substantial connection. It remains unclear how close the nexus must be to satisfy the real and substantial connection test for jurisdiction *simpliciter* but it is probable that ordinary residence will be sufficient.

[54] *Supra* note 8.

[55] See s. 3(e).

[56] See *e.g.* Joost Blom & Elizabeth Edinger, "The Chimera of the Real and Substantial Connection Test" (2005) 38 U.B.C. L. Rev. 373; *Coutu v. Gauthier (Estate)* (2006), 296 N.B.R. (2d) 34, 264 D.L.R. (4th) 319 (N.B.C.A.), disagreeing with the Ontario approach set out in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, 213 D.L.R. (4th) 577 (C.A.).

connection. What evidence it will take to rebut the presumption and how often that will be accomplished is speculative. What is needed in this area is a bit more of the pre-*Morguard*[57] certainty about jurisdiction *simpliciter*, so it is to be hoped that the presumption will prove to be rarely, if ever, rebuttable.

Sections 4 and 5 deal respectively with unnamed defendants (there must be a real and substantial connection between the facts and the province) and actions *in rem* against vessels, for which presence is still sufficient.

Section 6 provides that a British Columbia court may assume jurisdiction even though the court lacks territorial competence if there is no other court available or if commencement of an action elsewhere "cannot reasonably be required." The section may be fragile from a constitutional point of view but it is undoubtedly very practical and very desirable from a litigation point of view.

The fragility arises from the fact that territorial competence has been defined so as to satisfy constitutional principles. How can a British Columbia court validly assume jurisdiction under section 6 of the *Court Jurisdiction Act*,[58] when the constitutional principle has not been satisfied? And when jurisdiction is assumed pursuant to section 6, will British Columbia judgments be recognized by other Canadian courts that are not subject to the *Enforcement Act* and which, therefore, still require there to have been a real and substantial connection between the action and British Columbia?

Section 10 of the *Court Jurisdiction Act* sets out a variety of circumstances in which a real and substantial connection will be presumed to exist. The new Rule 13(1)[59] authorizes service of process outside British Columbia without leave in any of the circumstances listed in section 10 of the *Court Jurisdiction Act*. But section 10 is not an exhaustive statement of the circumstances in which process may be served outside the province. Rule 13(3) still authorizes a plaintiff to seek leave to serve process outside the province if some other circumstance can be said to constitute a real and substantial connection. The case law interpreting the pre-*Court Jurisdiction Act* Rule 13(3)[60] should all still be relevant and applicable to such applications for leave.[61]

It is beyond the scope of this article to discuss each of the circumstances set out in section 10 in detail, but a few comments are warranted.

---

[57] *Supra* note 8.

[58] *Supra* note 1.

[59] Rules of Court, *supra* note 44, B.C. Reg. 119/2006. amending B.C. Reg. 221/90.

[60] B.C. Reg. 221/90.

[61] See *e.g. Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213, 31 B.C.L.R. (3d) 24 (C.A.); *Strukoff v. Syncrude Canada Ltd.* (2000), 80 B.C.L.R. (3d) 294, 47 C.P.C. (4th) 32, 2000 BCCA 537.

Property is now referred to throughout as movable and immovable instead of as real and personal. That change reflects the terminology in common law choice of law rules and should pose no difficulty. The common law rule that characterization of property as movable or immovable is governed by the law of the *situs* will, one assumes, still apply.[62] On the other hand, terminology in the Rules of Court[63] that used to couple territorial jurisdiction with domicile, which was the connecting factor in the choice of law rules for succession to movable property and questions of status, has been abandoned. A British Columbia court will be presumed to have territorial jurisdiction to deal with movable property or make a declaration as to status or capacity of a person who was at the time of death or now is (respectively) ordinarily resident in British Columbia. The connecting factor for the relevant choice of law rules is still domicile. However, ordinary residence makes practical and legal sense as a basis for territorial jurisdiction because it is never technical, is likely to be easier to establish than domicile and, of course, may often actually coincide with domicile.

The circumstances connecting both trust[64] and contract[65] actions to the province have been significantly expanded. A connecting circumstance has been added for restitutionary actions.[66] Another circumstance, new to the *Act* and thus to British Columbia, consists of an action (any juridical category) that "concerns a business carried on in British Columbia".[67] This is probably redundant if the defendant is a corporation because a corporate defendant carrying on business in the province is likely ordinarily resident here. By section 3(d), ordinary residence gives the court territorial jurisdiction under the *Court Jurisdiction Act*, but there may be some cases that will require the extended definition of a real and substantial connection found in section 10.

Oddly, a real and substantial connection is presumed to exist for all actions to enforce judgments and arbitral awards per se. Neither the ordinary residence of the judgment debtor nor the location of the judgment debtor's assets is made a relevant additional factor. Like section 6, this is, arguably, a constitutionally fragile provision. Either assets in the province against which the converted judgment could be enforced or the ordinary residence of the judgment debtor must surely be required for a real and substantial connection.

---

[62] See *e.g. Hogg v. Provincial Tax Commissioner*, [1941] 4 D.L.R. 501, 3 W.W.R. 605 (Sask. C.A.).

[63] *Supra* note 44.

[64] *Court Jurisdiction Act*, *supra* note 1, s. 10(d).

[65] *Ibid.*, s. 10(e).

[66] *Ibid.*, s. 10(f).

[67] *Ibid.*, s. 10(h).

The fact that most judgment creditors are practical and will be unlikely to commence an action to enforce a judgment unless there are exigible assets locally cannot cure the constitutional invalidity of a provision that fails to describe a real and substantial connection. A statute that describes connections, each of which constitutes a real and substantial connection per se, would have reintroduced certainty to jurisdictional decisions and permitted litigants to focus on the *forum non conveniens* issue without repeating their arguments and so blurring the issues.

Finally, there is a potentially significant omission from the old Rule 13(1)[68] list of connections that were considered sufficient to authorize service of process without leave. Necessary and proper parties have been excluded. The ULCC commentary explains that "such a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction."[69] Addition of necessary and proper parties is still possible but it will require an application for leave under Rule 13(3).[70]

The *Court Jurisdiction Act* preserves judicial discretion to stay local proceedings on the grounds that British Columbia is *forum non conveniens*. Unless a defendant over whom a British Columbia court has territorial jurisdiction under section 3 has attorned,[71] that defendant may object to the exercise of jurisdiction by the court pursuant to section 11 of the *Court Jurisdiction Act* and Rule 14 of the Rules of Court. Section 11(2) sets out a non-exhaustive list of circumstances that must be considered by the court.[72] Most are on the lists of factors found in judgments from courts in all provinces and are uncontroversial.[73] Only one, section 11(2)(e), could prove problematical.

Section 11(2)(e) directs the court to consider "the enforcement of an eventual judgment". The difficulty is that there are two levels on which this factor may play out, one pragmatic and one legal, and the *Court Jurisdiction Act* does not indicate which level it intends the court to consider. On a pragmatic level, the location of the defendant's assets is often considered by the courts already, and makes practical sense. However, if the eventual

---

[68] *Supra* note 59.

[69] *Supra* note 3.

[70] Rules of Court, *supra* note 44.

[71] See *Coulson Aircrane Ltd. v. Pacific Helicopter Tours Inc.*, 2006 BCSC 961.

[72] See *Cresbury Screen Entertainment Ltd. v. Canadian Imperial Bank of Commerce*, 2006 BCCA 270 at para. 43.

[73] See *e.g. Muscutt v. Courcelles*, *supra* note 37; *Leisure Time Distributors v. Calzaturificio S.C.A.R.P.A.-S.P.A.* (1996), 5 C.P.C. (4th) 320, 65 A.C.W.S. (3d) 576 (B.C.S.C.).

enforcement is considered at the legal level, there could be an inconclusive war of affidavits from experts hypothesizing about a judgment that does not yet exist and so cannot be evaluated properly.

B. PART 3

If the court decides that it is not *forum conveniens*, and if it is a superior court, it now has a new option. Until the *Act* was proclaimed, the only options were to stay the local action, temporarily or indefinitely, or to stay it subject to conditions.[74] Part 3 of the *Court Jurisdiction Act*[75] provides another option new to Canada. It sets out mechanisms for the transfer of actions or parts of actions to courts outside the province and for the reception of actions from such courts. The order to transfer an action may be made at the instance of a party[76] but, like letters rogatory, it is a court-to-court request.

Whether sending an action[77] or refusing to receive an action,[78] the court must give reasons for its decision. A British Columbia court may receive a transfer only if it has both territorial and subject matter jurisdiction and it is "just" to do so.[79]

"[F]or all purposes of the law of British Columbia", transfers from British Columbia take effect when the order accepting the transfer is filed in the receiving court,[80] and thereafter there is no jurisdiction remaining in the British Columbia court except in the very limited circumstances set out in section 18(2)-(3).[81] Section 19 makes mirror image provisions for the reception of actions in British Columbia.

Any orders made in the proceedings, except the transfer order itself, are appealable in British Columbia.[82] Ordinarily, the British Columbia court will

---

[74] See *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, [1986] 3 W.L.R. 972 (H.L.) for a discussion of the possibilities of attaching conditions to stays.

[75] *Supra* note 1.

[76] See s. 15(2).

[77] See s. 15(1).

[78] See s. 16(2).

[79] See s. 15(1)-(2), 22.

[80] See s. 17.

[81] If an order was pending at the time of the transfer, a British Columbia court may make an order after the transfer takes effect only if it is "impracticable" for a party to apply to the receiving court and the "order is necessary for the fair and proper conduct of the proceeding" there. An order may be discharged in British Columbia after the transfer takes effect only if the receiving court lacks territorial competence: *supra* note 1.

[82] See s. 21.

implement any terms imposed by the transferring court but section 22 authorizes departure from those terms "if it is just and reasonable to do so."[83] Section 23 requires the British Columbia courts to respect any limitation periods that would have been applied by the transferring court. In light of the fact that *Tolofson*[84] requires courts to apply the limitation period of the *lex causae* and that most provinces apply the same common law choice of law rules to select the *lex causae*, there should not often be disagreements within Canada about the appropriate limitation period, but non-Canadian jurisdictions may still characterize limitation periods as procedural or have different choice of law rules.

Part 3 constitutes legislative facilitation of increased judicial comity to achieve both fairness and efficiency. However, until more jurisdictions set themselves up to transfer and receive, Part 3 will be admired in principle but not in practice.

IV. CONCLUSION

It is likely that there will be no immediate reduction in litigation in the areas covered by these two statutes. The *Court Jurisdiction Act*[85] leaves the uncertainties in that area more or less intact and the *Enforcement Act*[86] opens up new issues that will require resolution.

---

[83] *Supra* note 1.

[84] *Supra* note 9.

[85] *Supra* note 1.

[86] *Supra* note 2.